Dominion Law Reports

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

VOL. 6

EDITED BY
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TORONTO:
CANADA LAW BOOK CO., LIMITED
32-34 TORONTO STREET
1912

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IN THIS VOLUME

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STEWART v. STEELE.

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1912

Sept. 9.

Saskatchewan Supreme Court, Lamont, J. September 9, 1912.

1. AUTOMOBILES (§ I—2)—NEGLIGENCE IN THE USE OF—CONTINUING TO DRIVE CAR WHEN APPROACHING HORSE SHEWS SIGNS OF FRIGHT—LIABILITY OF DRIVER.

A driver of an automobile who continues to advance towards horses which, by their actions, indicate that they are frightened by his car, is guilty of negligence, and is liable to the owner of the horses for injuries sustained by him while trying to hold them.

2. HIGHWAYS (§ II B—35)—RESPECTIVE RIGHTS OF DRIVERS OF AUTOMOBILES AND DRIVERS OF HORSES TO USE OF HIGHWAY—STATUTORY REQUIREMENTS.

Both drivers of automobiles and drivers of horses have a perfect right to use the highway, but the right of each is subject to the qualification that he must use it in conformity with any statutory requirements, and not so as to make its use by the other dangerous.

[*Marshall* v. *Gowans*, 24 O.L.R. 522, referred to.]

3. EVIDENCE (§ II H—270)—PRESUMPTION THAT AUTOMOBILE DRIVER KNOWS OF THE TENDENCY TO FRIGHTEN HORSES.

The driver of an automobile must be held to be aware of the tendency of automobiles to frighten horses, especially in places where automobiles are so little used as to be strange objects to horses.

[See David's Law of Motor Vehicles at p. 104.]

4. AUTOMOBILES (§ I—1)—LIABILITY OF DRIVERS OF AUTOMOBILES FOR NON-OBSERVANCE OF A STATUTORY DUTY.

The non-observance by the driver of an automobile of a duty imposed upon him by statute is in itself evidence of negligence.

[See Halsbury's Laws of England, vol. 9, p. 571.]

5. NEGLIGENCE (§ I A—4*a*)—AS BASIS OF ACTION—BREACH OF STATUTORY DUTY.

Every one for whose benefit a duty is imposed by statute upon any person has a right to have that duty performed, and, if he suffer by reason of its non-performance, he has a right of action against the person guilty of such non-performance.

[*David* v. *Britannic Merthyr Coal Co.*, [1909] 2 K.B. 146, referred to.]

6. AUTOMOBILES (§ I—1)—PUBLIC REGULATION—NON-OBSERVANCE OF STATUTE—R.S.S. 1909, CH. 132.

The Saskatchewan Act to regulate the Speed and Operation of Motor Cars, R.S.S. 1909, ch. 132, is passed to insure the safety and protection of persons riding or driving upon the highway, and gives a right of action to any such person who is injured by reason of the non-observance of the requirements of the statute.

[*Butler* v. *The Fife Coal Company*, [1912] A.C. 149, referred to.]

Statement

THIS is an action for damages for injuries received by the plaintiff as a result of his horses becoming frightened at the defendant's automobile.

Judgment was given for the plaintiff for $400 and costs.

E. R. Wylie, for plaintiff.

C. E. D. Wood, for defendant.

SASK.

S. C.
1912

STEWART
v.
STEELE.

Lamont, J.

LAMONT, J.:—The action came on for trial before me with a jury at Arcola, where it was the last jury case on the list. When the jury was empanelled, counsel for both parties requested me to discharge the other jurymen on the panel, and agreed that should the jury not be able to agree as to a verdict they would ask me to determine the rights of the parties on the evidence as if the matter had been tried before me without a jury. The jury failed to agree on a verdict, and the parties requested me to determine their rights on the evidence put in. The facts are as follows:—

The plaintiff had driven into Creelman, which is an incorporated village, with his team and wagon, and had left them standing in front of a store on Railway street while he went into the store to make some purchases. While he was in there, the defendant drove along Railway street in his automobile, coming from the direction in which the horses were facing. He drove along the street at a rate of speed not less than fifteen miles per hour until he came to Main street crossing, which was 130 feet from where the plaintiff's horses were standing, when he slowed down to ten miles per hour. After going over the crossing, the defendant removed the clutch and allowed his car to proceed simply with its own momentum. The car gradually slowed down until the defendant was 40 or 50 feet distant from the horses, when he put it into low gear and approached the team at a speed of not more than six miles per hour. Before the defendant had reached Main street crossing, someone called to the plaintiff that an automobile was coming. He ran out and grabbed his horses by their heads. They were then backing and prancing and crowding from side to side, and otherwise acting as if frightened. The defendant noticed the horses just after he passed Main street crossing. He admits they were then prancing, and that the plaintiff was at their heads. He also admits that when he put his car on low gear they were standing with their heads up and ears up, looking at him, and that as he approached they were prancing. He went past them at a rate of not more than six miles per hour. Just as he got about opposite the horses they sprang forward, carrying the plaintiff against a telegraph pole with such force that his arm was broken. For this injury the plaintiff now claims damages. He bases his claim to recover on the ground that the defendant was guilty of negligence, and in the alternative that he was guilty of a breach of the duty imposed upon him by the Act to regulate the Speed and Operation of Motor-Cars, being R.S.S. 1909, ch. 132. That Act in part is as follows:—

> 6. No motor vehicle shall be run upon any public highway or place within any city, town or incorporated village at a greater rate of speed than ten miles an hour or upon any public highway or place outside of any city, town or incorporated village at a greater speed than twenty miles an hour.

8. Every person having control or charge of a motor vehicle shall whenever upon any public street or place approaching any vehicle drawn by a horse or horses or any horse upon which any person is riding, operate, manage and control such motor vehicle in such manner as to exercise every reasonable precaution to prevent the frightening of any such horse or horses and to insure the safety and protection of any person riding or driving the same and shall not approach such vehicle or horse within one hundred yards or pass the same going in the same or opposite direction at a greater speed than six miles per hour; and if any such horse or horses appear frightened the person in control of such motor vehicle shall reduce its speed and shall not proceed further towards such animal unless such movement be necessary to avoid accident or injury or until such animal appears to be under control of its rider or driver.

12. Any person violating any of the provisions of this Act shall upon summary conviction before a justice of the peace be liable to a penalty not exceeding fifty dollars and in default of payment one month's imprisonment.

The defendant's own evidence shews that he ran his motor-car on the public highway within the incorporated village of Creelman at a greater rate of speed than ten miles per hour, and that he approached the plaintiff's team within 100 yards at a greater speed than six miles per hour. Both these were breaches of the provisions of the statute. It was also contended by the plaintiff that he failed to stop when he saw that the horses were frightened and that he proceeded before the horses were under control. The evidence shews that when he saw the horses were frightened he reduced the speed but did not stop the car. The plaintiff says, and I find as a fact, that as the defendant's car approached the horses they were jumping and crowding from side to side. He also says that he did not have them under control until after he was injured. The defendant says the horses had their heads up and ears up and were looking at him when he put his car into low gear, and that they were prancing as he approached. Horses acting as these animals were doing cannot, in my opinion, be said either to be or to appear to be under control. I therefore find that the defendant, by proceeding before the horses appeared to be under control, committed a further breach of the statute.

In the light of these facts, was the defendant guilty of negligence which led to the plaintiff's injuries? I am of opinion that he was. Apart altogether from the requirements of the statute, it seems to me that for the driver of a motor-car to continue to advance towards horses that are prancing and crowding from side to side, thus indicating a frightened condition on their part, is clear negligence. It is true that a man has just as much right to travel the public highway with his motor-car as another has to travel it with a team of horses. Both have a perfect right to use the highway. The right of each, however, is subject to

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this, that neither must use it in such a way as to make its use by the other dangerous, and also, that each must use it in conformity with the requirements prescribed by statute: *Marshall* v. *Gowans*, 24 O.L.R. 522, at p. 531. In the discharge of his duty not to make the use of the highway dangerous for vehicles drawn by horses, the driver of a motor-car must be held to be aware of the tendency of motors to frighten horses, especially in localities where motor-cars are so little used as to be strange objects to horses: David's Law of Motor Vehicles, at p. 104. And when he sees that horses which he is approaching are frightened, it is only prudent that he should stop his car and, if necessary, close down his engine until they are under control or have passed or until the danger of accident has been overcome. To continue to advance towards horses giving indications of being in a frightened condition, even if their owner is at their heads (unless the owner signals the car to approach) is not exercising that care which a cautious and prudent man should exercise under the circumstances. Futhermore, the non-observance of a duty imposed by statute is in itself evidence of negligence. The precaution which the Legislature has directed to be taken is evidence of the standard of cars which should be maintained under the circumstances. The non-observance by a motor driver of that which the Legislature has prescribed as a suitable precaution is failure to observe that care which an ordinary prudent man would observe and if damage results from such non-observance, he must be held responsible therefor. See Encyclopædia of the Laws of England, vol. 9, p. 571.

It was strongly contended by counsel for the defendant that no right of action accrued to the plaintiff by reason of the defendant's failure to observe the precautions prescribed by statute. He argued that the statute in question in this action was one passed for the benefit of the public generally, and that therefore, an individual had no right of action for breach of its provisions, but that the only remedy for such breach lay in the imposition of the penalty provided in section 12. I cannot agree with this contention. In my opinion section 8 of the Act was passed to ensure the safety and protection of persons riding or driving horses upon the highway. To this class the plaintiff belonged. He was therefore a person for whose benefit the statute was passed. The right of such an one to bring an action for damages for injuries received on account of the non-observance of the statute was laid down by Lord Kinnear in the very recent case of *Butler* v. *The Fife Coal Company*, [1912] A.C. 149, as follows:—

> I agree that if an absolute duty is imposed upon mine-owners by statute they must be liable absolutely to those for whose benefit it is imposed.

This statement merely lays down what had previously been held to be the law, namely that if by a statute a duty is laid on any person, everyone for whose benefit the duty was imposed has a right to have it performed, and if it is not performed, and damage results to a person from its non-performance, he has a right of action against the person guilty of the breach of the duty. See *David* v. *Britannic Merthyr Coal Company*, [1909] 2 K.B. 146. In the present case the statute imposed upon the defendant the absolute duty of not approaching within one hundred yards of the plaintiff's team at a rate of speed exceeding six miles per hour, and of not proceeding further when he saw that the horses were frightened until they appeared to be under control. This duty the defendant did not observe. That the horses became frightened at the defendant's car is beyond question. Had he not approached within 100 yards at a speed exceeding six miles per hour, the horses might not have been frightened, and had he not continued to approach when he saw they were frightened, but had stopped the car, the accident undoubtedly would not have happened, for in that case the horses would not have sprung forward. The defendant was therefore guilty of negligence causing the injury to the plaintiff for which the plaintiff is entitled to recover. I assess the damages as follows:—

Loss of time, and expenses	$200.00
General damages	200.00
Total	$400.00

There will, therefore, be judgment for the plaintiff for $400.00 and District Court costs.

Judgment for plaintiff.

WATTS v. TOLMAN.

Manitoba King's Bench. Trial before Mathers, C.J.K.B. October 2, 1912.

1. USURY (§ II—25)—RECOVERY OF EXCESS—MONEY LENDERS ACT, R.S.C. 1906, CH. 122.

Any remedy provided for the relief of borrowers against usury by the Money Lenders Act, R.S.C. 1906, ch. 122, is cumulative of and not in substitution for the common law right to recover the excess.

[Money Lenders Act, R.S.C. 1906, ch. 122, considered.]

2. USURY (§ II—25)—RECOVERY OF EXCESS—COMMON LAW RIGHT.

A borrower who has paid interest in excess of the maximum rate for which a contract may legally be made under the provisions of the Money Lenders Act, R.S.C. 1906, ch. 122, has a right of action at common law to recover such excess.

[*Browning* v. *Morris*, 2 Cowp. 790, 98 Eng. Rep. 1364, and *Smith* v. *Bromley*, 2 Doug. 696, 99 Eng. Rep. 441, applied; *Barnhart* v. *Robertson*, 6 Q.B.O.S. (Ont.) 542, specially referred to.]

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Statement

THE defendant is a money lender residing in the city of New York, in the United States, but who during the years 1906, 1907, and 1908, carried on a money lending business in this city. During that time he loaned money to a large number of people at a rate of interest in excess of that permitted by section 6 of the Money Lenders Act, ch. 122, R.S.C. 1906. Twenty-six of these borrowers who paid to the defendant interest in excess of the legal rate to the aggregate amount of $3,397.08, assigned their claims to the plaintiff, who now sues the defendant to recover the excess of interest so paid.

The defendant demurs to the whole statement of claim on the ground that the plaintiff has no right of action.

Judgment was given on the demurrer for the plaintiff with costs.

J. F. Davidson, for the plaintiff.
H. F. Tench, for the defendant.

Mathers, C.J.

MATHERS, C.J.K.B.:—At common law a borrower who had paid interest in excess of the legal rate fixed by the usury laws had a right of action to recover such excess. The law was so declared by Lord Mansfield in *Browning* v. *Morris*, 2 Cowp. 790, 98 Eng. Rep. 1364. He said, at p. 792:—

> These statutes were made to protect needy and necessitous persons from the oppression of usurers and monied men who are eager to take advantage of the distress of others, whilst they, on the other hand, from the pressure of their distress are ready to come into any terms, and with their eyes open not only to break the law but to complete their ruin. Therefore, the party injured may bring an action for the excess of interest.

He reiterated that statement of the law in *Smith* v. *Bromley*, 2 Doug. 696, 99 Eng. Rep. 441, where he, at the same time, disapproved of *Tomkins* v. *Bernet*, 1 Salk. 22, which appeared to have decided the contrary.

To the same effect are *Clarke* v. *Shee*, 1 Cowp. 197, and *Bosanquett* v. *Dashwood*, Tempe Talbot 38. In *Barnhart* v. *Robertson*, 6 Q.B. (O.S.) 542, an action to recover interest paid in excess of usury laws was sustained in Ontario. See also 39 Cyc. 1030, and 29 Am. & Eng. Encyc. 543.

By section 6 of the Act a money lender is prohibited from stipulating or exacting upon a loan of money the principal of which is under $500, a rate of interest in excess of twelve per cent. The loans in respect of which this action is brought were all under $500.

By section 11 every money lender is guilty of an indictable offence and liable to imprisonment for a term not exceeding one year or a penalty not exceeding $1,000 who lends money at a rate of interest greater than that authorized by the Act.

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It was argued that section 7 provides a remedy where a suit, action or other proceeding concerning a loan of money has been brought by the money lender, but does not provide for any action at the suit of the borrower. I doubt very much if that is the correct interpretation of section 7; but I do not find it necessary to decide the point, as I am clearly of opinion that the statute does not supplant the common law right but the remedy under the statute is cumulative.

The only point argued was as to whether an action lies for interest exacted in excess of the rate fixed by the Money Lenders Act. In my opinion it does.

There will, therefore, be judgment on the demurrer for the plaintiff with costs.

Judgment for plaintiff.

WILLIAMS v. B. C. ELECTRIC R. CO.

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Sept. 5.

British Columbia Supreme Court, Murphy, J. September 5, 1912.

1. JURY (§ I B 1—11)—RIGHT TO SERVE JURY NOTICE—JUDICIAL DISCRETION —B.C. SUPREME COURT RULES 430, 967.

British Columbia Supreme Court Rule 967, 1906, empowering the Court or Judge, save as otherwise provided by the rules or any Act, to enlarge or abridge the time appointed by these rules for doing any act or taking any proceeding upon such terms (if any) as the justice of the case may require and permitting any enlargement to be ordered though the application for the same is not made until after the expiration of the time appointed or allowed, gives a Judge the power to extend the time for serving a jury notice under British Columbia Supreme Court Rule 430, 1906, as amended 1908, which provides that in any other cause or matter than those in which the Court or Judge might direct the trial without a jury, upon the application within four days after notice has been given to any party thereto for a trial with a jury an order shall be made accordingly.

[*Moore* v. *Deakin* (1886), 53 L.T.N.S. 858, and *Clarke* v. *Ford McConnell*, 16 B.C.R. 344, referred to.]

Statement

AN application by the plaintiff for an order extending the time for serving a jury notice.

The application was granted.

M. A. McDonald, for plaintiff.
Wood, for defendant.

Murphy, J.

MURPHY, J.:—There seems no doubt that a Judge has power to extend the time under rule 430 by virtue of rule 967: *Moore* v. *Deakin* (1886), 53 L.T.N.S. 858.

This being a negligence case is one peculiarly within the province of a jury to try and in view of the decision in *Clarke* v. *Ford McConnell*, 16 B.C.R. 344, is one, I think, in which I should exercise my discretion in favour of the plaintiff.

The application is granted.

Application granted.

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Sept. 20.

Re HOBBS AND CITY OF TORONTO.

Ontario High Court, Boyd, C., in Chambers. September 20, 1912.

1. BUILDINGS (§ I A—7)—BUILDING PERMITS—WHEN ISSUABLE FOR A STORAGE BUILDING WITHOUT CONTRAVENING BY-LAW AGAINST "STORES" IN RESIDENTIAL DISTRICTS.

A permit to erect a building for the mere purpose of storage or safekeeping of furniture or machinery or implements does not fall within the classes of buildings for "laundries, butcher-shops, *stores*, and manufactories," which may be prohibited by city by-law under the Municipal Act, 1903 (Ont.), sec. 541*a*, as amended in 1904 by 4 Edw. VII. ch. 22, sec. 19.

2. BUILDINGS (§ II A—7)—BUILDING PERMITS—PURPOSE OF BY-LAW PROHIBITING AND REGULATING—MEANING OF "STORE" COMPARED WITH "SHOP."

The purpose of a city by-law under the Municipal Act, 1903 (Ont.), sec. 541*a*, as amended by 4 Edw. VII. ch. 22, sec. 19, is to protect residential districts in cities from being disturbed by proximity of buildings, in which general business is actively carried on and goods kept for sale, or wares are bought and sold, or machinery or other commodities are manufactured, repaired, or otherwise generally dealt in.

[*City of Toronto* v. *Foss*, 5 D.L.R. 447, 3 O.W.N. 1426, Century and English Imperial Dictionaries *sub voce* "store," and Hall on North American Vocabularies, referred to.]

3. BUILDINGS (§ II A—7)—BUILDING PERMITS—WHEN ISSUED FOR STORAGE BUILDING—RESTRICTIONS IN RELATION TO THE COMMODITIES STORED.

Under a by-law based on the Municipal Act, 1903 (Ont.), sec. 541*a*, as amended by 4 Edw. VII. ch. 22, sec. 19, a city corporation may properly issue a permit for a building as a place for the storage of commodities, providing that machinery or other articles which may be stored therein shall not be repaired, refurbished, painted, traded in, bought or sold, as would ordinarily be done in a repair shop, salesroom, or factory.

Statement

MOTION by Hobbs for a peremptory order in the nature of a mandamus requiring the city corporation and the city architect to issue to the applicant a permit for the erection of a building.

The application was granted.

W. C. Chisholm, K.C., for the applicant.
C. M. Colquhoun, for the respondents.

Boyd, C.

BOYD, C.:—In the application for a permit to build, it is stated that the building to be erected is for the "purpose of storage." It is proposed to store therein such things as (second-hand) machinery, furniture, or printing presses, for safe-keeping until removed. If the use of the bulding is thus defined and limited as a mere place of deposit, I do not think it falls within the classes of buildings prohibited by the by-law. The by-law is based on the Municipal Act, 1903, sec. 541a, as added in 1904 by 4 Edw. VII. ch. 22, sec. 19, relating to the regulation and control in cities of the location, erection, and use of buildings

for "laundries, butcher-shops, stores, and manufacturies." The one pertinent word in this connection is "stores." In *City of Toronto* v. *Foss*, 5 D.L.R. 447, 3 O.W.N. 1426, it was conceded by counsel that the word "stores" in this context meant "shops." I think that is so. Probably, for the sake of euphony, after saying "butcher-shops," the further idea as to "shops" generally was carried out by using its equivalent, "stores." The dictionaries tell us that, in the United States and the British colonies adjoining, "store" is used to denote a place where goods are kept for sale, and quote Captain Basil Hall, writing about his travels in North America, where he says, "'Stores,' as the shops are called." See Century Dictionary and English Imperial Dictionary *sub voce* "store."

The legislation gives power to forbid the residential districts in cities being disturbed by the near locality of places where business is actively carried on, places to which the public is invited to come for purposes of traffic (buying and selling) or where anything like manufacturing work is being done. The broad meaning of "shop" is: (1) a building appropriated to the selling of wares at retail; and (2) a building in which making or repairing of an article is carried on or in which any industry is pursued; e.g., machine-shop, repair-shop, barber's shop: see Century Dictionary *sub voce* "shop."

I think the permit may properly issue in this case to erect this building as a place of storage only, so that whatever engines or machines may be deposited there for safe-keeping are not to be repaired, refurbished, painted or otherwise dealt with, as might be in a repair-shop or place of manufacture.

With these restrictions, I grant the application, but it is not a case for costs; the city authorities have not acted capriciously, and have had cause to fear that the building might be improperly used, were a broad permit given.

Application granted.

ELLIOT v. HATZIC PRAIRIE Limited.

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British Columbia Supreme Court, Murphy, J. July 29, 1912.

1. INJUNCTION (§ I G—62)—WHEN GRANTED—ILLEGAL RESOLUTION—NECESSITY OF MAKING APPLICATION TO COMPANY BEFORE APPLYING FOR INJUNCTION.

In an action to restrain a company from acting upon a resolution said to have been illegally passed at a shareholders' meeting, it need not be shewn that application was first made to the company to begin proceedings, if it appear that such an application would have been futile.

[*Rose* v. *British Columbia Refinery Co.*, 16 B.C.R. 215, referred to.]

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2. INJUNCTION (§ I A—2)—RIGHT TO REMEDY GENERALLY—DUTY OF COURT —INTERLOCUTORY INJUNCTION.

Where a right at law is clearly or fairly made out it is the duty of the court to interfere by interlocutory injunction to prevent effect being given to an illegal vote at a meeting of company shareholders.

[See Kerr on Injunctions, 4th ed., p. 357.]

3. CORPORATIONS AND COMPANIES (§ V G1—293)—DIRECTORS KNOWINGLY ALLOWING TRUST SHARES TO BE VOTED ILLEGALLY—RIGHT TO INJUNCTION.

Where the directors of a company knowingly allow trust shares to be voted upon at a shareholders' meeting contrary to the wishes of the *cestui qui trust*, and it is fairly shewn that such voting is illegal, a shareholder, whose voting power is thereby designedly made useless, is entitled to an interlocutory injunction restraining the company from acting upon a resolution passed at such meeting.

Statement

MOTION for an interim injunction to restrain the defendants from acting on a resolution passed at a meeting of the shareholders of the defendant company, upon the ground that certain trust shares were voted illegally.

The interim injunction was granted.

Davis, K.C., and *Craig*, for the plaintiff.

A. D. Taylor, K.C., for the defendant J. H. Senkler.

R. L. Reid, K.C., for the defendant Harold Senkler.

S. S. Taylor, K.C., for the defendant Cora Kenworthy.

Murphy, J.

MURPHY, J.:—As to the preliminary objection, that this action is not maintainable because application was not first made to the company to begin proceedings, I think it is answered by the case cited in support, viz., *Rose* v. *British Columbia Refinery Co.*, 16 B.C.R. 215. If I read that decision aright, it is, that such application is unnecessary where to make it would be utterly futile, as where the cause of action is of the nature of this litigation. In view of the proceedings at the meeting of the 20th June, 1912, it is clear to my mind that any such application would be a mere waste of time. Likewise, I think the objection untenable in the face of the principle cited by Martin, J.A., in the same decision, based on *Cannon* v. *Trask* (1875), L.R. 20 Eq. 669.

It is true that the directors or the company are not here attempting to prevent the plaintiff from voting on his shares, but they are (assuming for the moment the correctness of the plaintiff's contentions), by allowing trust shares to be voted on against the wish of the *cestui que trust*, knowingly and designedly making the exercise of such voting power utterly useless.

I agree also with the plaintiff's contention that, if a right at law is clearly or fairly made out, it is the duty of the Court to interfere by interlocutory injunction: Kerr on Injunctions, 4th ed., p. 357.

Though the material is voluminous, a careful perusal convinces me that the only point to be considered is, has it been

clearly or fairly made out that the shares standing in the names of Messrs. Senkler, Spinks, and Jayne are in reality shares held in trust for the plaintiff and the defendant Harold Kenworthy, each having an undivided half interest therein? In my opinion, they are fairly shewn to be so held. Harold Kenworthy, as late as the 27th June, 1912, directly asserts that they are trust shares. (See his letters of that date to the plaintiff's solicitor, and see also p. 4 of his cross-examination on his affidavit filed herein.) His testimony, both on examination for discovery and in chief at the trial, in the recent action of *Kenworthy* v. *Kenworthy*, points, I think, irresistibly to the same conclusion. The same testimony likewise convinces me that, when the sale to the plaintiff was made, an undivided half interest in these trust shares passed to the plaintiff until such time as formal transfers were carried out.

Question 98 of the examination for discovery and answer are clear that what the plaintiff was getting was a half interest in the company. He would be very far from getting that, as these proceedings shew, if he were merely given 2½ additional shares from any other source than these trust shares. This is confirmed by what actually happened. He or his nominees got 2,500 of the shares held or controlled by Harold Kenworthy. In paragraph 8 of his affidavit filed in these proceedings, Harold Kenworthy admits that the plaintiff is entitled to 2½ shares additional, and alleges an agreement whereby this deficiency was to be made up.

As further proving the trust character of the shares issued to the signers of the memorandum of association, it is to be noted that he proposes to transfer one of them, that held by Watkins, in part satisfaction of such deficiency. It may be necessary to state that I hold that the agreement therein alleged is not proven; but, despite that, weight, I think, ought to be attached to the admission therein contained.

Again, it is to be observed that John Kenworthy and his wife, by agreement with the plaintiff and Harold Kenworthy, subsequent to the plaintiff making his purchase, were taken into the company on the basis of a quarter interest, to be made up by equal contributions of shares from the plaintiff and Harold Kenworthy. Accordingly, 625 shares of the plaintiff and 625 shares of the defendant Harold Kenworthy were transferred to them; and, in addition, they were given the surrendered share of Edgar Bloomfield, another signer of the memorandum of association, thereby shewing joint control by the plaintiff and Harold Kenworthy over such share.

I think, then, that both Harold Kenworthy's own sworn statements and the actual course of events fairly make out the plaintiff's contentions. This being so, what happened?

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On the defendant Harold Kenworthy becoming aware that a combination of a majority of the shares adverse to him has taken place, and a demand for a meeting has been duly made with a view to ousting him from control, he consults his solicitor, and is advised of a method to defeat the majority-will, based on the attendance at the proposed meeting of some of the holders of the trust shares. He then goes to Mr. Senkler and procures his attendance at such meeting. The result was control of the meeting in his interest. I think the voting of the trust shares is fairly shewn to have been illegal; and the injunction is granted, the usual undertaking as to damages being given. It is due to Messrs. Senkler, Spinks, and Jayne to say that they acted in perfect good faith and had no knowledge of the trust, which, I hold, is fairly made out. It was only when cross-examined on his affidavit that Mr. Harold Kenworthy's statements above referred to were brought to Mr. Senkler's attention, and it is doubtful if he is even yet aware of the course of events, which, I hold, may be said fairly to emphasise the truth of the said statements. So far as appears on the record, Messrs. Spinks and Jayne have even yet no knowledge of such trust. Nor do I intend to impute any moral turpitude to Mr. Harold Kenworthy. He has, I think, misconceived the legal effect of what has occurred.

It is objected that, inasmuch as the trustees had no knowledge of the trust, therefore this motion must fail. If it were directed primarily against them for past actions, there might be something in the contention; but it cannot, I think, be contended that a party who procures the commission of an act which he must in law be held to have known to be a breach of trust, can profit thereby. Costs will be reserved for consideration by the trial Judge.

Interim injunction ordered.

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ROYAL GUARDIANS v. CLARKE.

Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Lavergne, Cross, and Carroll, JJ. June 15, 1912.

1. BENEVOLENT SOCIETIES (§ IV—19)—SUSPENSION FOR FAILURE TO PAY ASSESSMENT ON TIME—WAIVER BY ACCEPTANCE OF ASSESSMENT BY SUBORDINATE OFFICER—CUSTOM.

That portion of a rule of a beneficial association which provided that a member failing for thirty days after the same was due, to pay an assessment which was by another part of the rule made payable on the first day of every month, should *ipso facto* be deemed suspended from all the privileges of the order and his benefit certificate thereby avoided, is waived by the association where it appears that to the actual though not "official" knowledge of the executive officer of the grand lodge, the officer of a subordinate lodge who was charged with the duty of preparing a statement of collection of assessments

and the money collected and delivering the same to another officer of the lodge so that it could be sent to the grand lodge and reach it on or before the 15th of each month, had followed the custom for years of making the return himself to the grand lodge on the 15th of the month and, before making it, of receiving from the members payment of their assessments shortly before the 15th so that it became the custom of the greater number of the members of the lodge to pay their assessments after the expiration of the thirty days, that is to say, in the first half of the month following that in which the assessments were payable.

2. BENEVOLENT SOCIETIES (§ IV—18)—LIABILITY ON CERTIFICATE—FORFEITURE FOR NON-PAYMENT OF ASSESSMENT—WAIVER.

A benevolent association is liable upon the certificate of a member though he died when in arrears for an assessment, where it appeared that that portion of a rule of the order providing that a member failing for thirty days after the same was due to pay an assessment which was by another part of the rule made payable on the first day of every month, should *ipso facto* be deemed suspended from all the privileges of the order and his benefit certificate thereby avoided, was waived by the grand lodge of the association by permitting for years a custom on the part of the greater number of the members of a subordinate lodge to pay their assessments after the expiration of the thirty days within which it was required to be paid by the rule so long as they paid it before the fifteenth of each month, and the member whose certificate was in suit having followed this practice of paying his assessments and died suddenly on the seventh day of a certain month without having paid the assessment due on the first day of the preceding month and the assessment was paid by a friend the day after his death, and the officer of the subordinate lodge who made returns to the grand lodge, tendered the assessment with his money return and other collections to the grand lodge as if the deceased member had continued in good standing, though the grand recorder refused to receive the return in that shape and the subordinate officer, for that reason, sent in his return afterwards with an entry that the deceased member was suspended opposite his name.

3. BENEVOLENT SOCIETIES (§ IV—19)—SUSPENSION—PAYMENT OF ASSESSMENT WHEN IN ARREARS AFTER DEATH OF DEFAULTING MEMBER—PRACTICE OF SUBORDINATE OFFICER TO KNOWLEDGE OF GRAND LODGE OFFICERS.

Where the officer of a subordinate lodge of a beneficial association whose duty it was to prepare statements to be forwarded to the grand lodge of collections of assessments which were due upon the first day of every month and the non-payment of which within thirty days thereafter caused the suspension of the defaulting member and the avoidance of his certificate in accordance with the rule of the order, had for years to the knowledge of the grand lodge followed the custom of receiving from members the assessments due on the first of every month up to the 15th of the following month thus permitting them to pay at a time when by a strict application of the rule they were suspended, a member who had followed such practice of paying his assessments and who had died suddenly on the seventh day of a certain month without paying his assessment due on the first day of the month preceding, it being paid on the day after his death by a friend, should not be deemed to have been a suspended member who had forfeited all his rights within the meaning of another rule of the order providing that "any suspended member who has forfeited all his right by reason of non-payment of assessments" might be reinstated, if alive, at any time within a certain period from the date of the suspension upon certain conditions, so that a member during the first month of his suspension had an absolute right to be reinstated by the payment of all assessments and of all dues to date, and further providing that the death of a member while so suspended should debar him from being reinstated by the payment of any assessments and

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that his beneficiary could not claim any rights if the member should die before being reinstated and that the payment or tender by his personal representative in no case should be held to restore the suspended member to good standing in the order.

4. INSURANCE (§ III H—157)—PREMIUMS AND ASSESSMENTS—PAYMENT AT INSURER'S OFFICE—COLLECTOR SENT TO INSURED'S DOMICILE.

The rule of law established in the province of Quebec that notwithstanding a covenant in a policy of insurance whereby premiums were made payable at the insurer's office a practice of sending for them to the insured's domicile would constitute such a recognized mode of the contract as would import abandonment of the covenant to pay at the insurer's office, with the result that the insured would not be in default to pay unless called upon at his domicile, applies to policies issued by benevolent societies as well as to those of old line insurance companies, though the insured in such society are themselves insurers and the debtors in a sense themselves the creditors.

Statement

APPEAL from a judgment of the Superior Court, Dunlop, J., rendered on March 28th, 1911, maintaining the respondents action on a life policy for $2,000.

The appeal was dismissed with costs.

The judgment appealed from was as follows:—

Dunlop, J.

March 28, 1911. DUNLOP, J.:—The whole question in this case is whether the dues and assessments due on the policy or certificate of insurance were duly paid for the month of August, 1908.

The insured, Joseph P. Clarke, died at Montreal without having in any way revoked or altered the directions contained in the beneficiary certificate. As a matter of fact, the dues were paid on the 8th of September, 1908, the day after the death of the said Clarke. It has been shewn by the evidence in this case, that there was an established usage and course of dealing between the deceased Clarke and the grand financier of his lodge, that, if any dues or assessments were paid for any particular month before the 15th of the following month, the date when the treasurer or financier made his returns, they were considered to be paid in due time and the deceased was reported as a member in good standing.

It is beyond question that if Clarke had been alive at the time of the last payment, the payment would have been considered legally and duly made. Plaintiffs strongly contend that a long established course of dealing and usage has been established between the parties and it cannot now be repudiated to the detriment and damage of the plaintiffs, the heirs of the deceased.

After a very careful examination of the evidence of Alexander Thompson Patterson, the secretary of the Supreme Lodge of Royal Guardians, I am convinced that he was cognizant of this course of dealing and usage respecting payments of the said dues, and it was not reprobated by him, and that it received either express approval or that approval which should be implied by silence. On this point I might refer to what was said

and laid down in a case reported in the South Western Reporter, *Burke* v. *Grand Lodge, A.O.U.W. of Missouri*, 118 S.W.R. 493:—

> (3) Where a custom of a subordinate lodge of allowing members to remain delinquent in the payment of dues in violation of the general by-law or in advancing such dues from the lodge funds, is brought to the notice of the officers of the grand lodge and receives approval, either express or implied, the general by-law must be regarded as waived or modified by the recognized custom.

and Mr. Justice Johnson is reported at page 495 to have stated:—

> Since the laws of the defendant order did not permit subordinate lodges or their officers to alter or waive any of the general laws, especially those of the essence of its insurance contracts, we agree with defendant that the custom of the subordinate lodge, of which Burke was a member, of permitting the members to remain delinquent in the payment of their dues, and of preventing their suspension and the forfeiture of their insurance by paying their grand lodge assessments out of the funds in their own treasury, could not of itself and without the knowledge and approbation, expressed or implied, of the grand lodge, operate as a waiver of the provisions for the forfeiture of the insurance and the suspension of the member appearing in general law 197. But we think if this custom was brought to the notice of the managing officers of the grand lodge, and, instead of being reprobated, received their express approval or that approval which should be implied from silence, the general law must be regarded as modified by recognized custom. Such is the view expressed by the Supreme Court in *McMahon* v. *Maccabees*, 151 Mo. 552, S.W. 384, where it is said: A fraternal society doing a limited life insurance business as the law permits, may waive the provisions of its own laws in regard to forfeiture of the insurance on account of failure to pay premiums within the strict requirement. The general rules of waiver and forfeiture are the same in association insurance as in ordinary insurance. A member of such society is presumed to know its laws and the contract of insurance is to be construed as having been made under the limitations of these laws. But a member has a right to look to the general conduct of the society itself in respect to the observance of these laws, particularly those relating to its own duties, and, if the society by its conduct has induced him to fall into a habit of non-observance of some of its requirements, it cannot, without warning to him of a change of purpose, inflict the penalty of failure of strict observance. A member dealing with a subordinate officer of the society knowing his duties to be prescribed by law, has no right to rely upon the act of that officer, if he should attempt to waive a requirement which under the law he has no right to waive. But when he has dealings of that kind with such an officer, and those dealings are of such a nature that they must pass under the observation of those who have in charge the ultimate management of the company's affairs to such an extent as to justly induce the member to believe that the practice is approved by the company itself, the company is estopped to take advantage of the situation."

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And further on it is said, at p. 496:—

> But the duty of guarding against such misfortune is primarily on the officers who are entrusted with its management at the head, and, if they permit lax dealing of their subordinate officers to the degree of misleading a member, the responsibility must rest upon the society.

In the present case, as I view the matter, the conduct of the defendant and its officers, more particularly Patterson, the treasurer, led the said Joseph P. Clarke to believe, as he was entitled to believe, that he was at all times a member in good standing of the said Order, and this conclusion I have arrived at after a very careful consideration of the evidence and documents produced in the present case. On the question of waiver, I might refer to the case of *Blanchet* v. *Bessette*, 37 Que., S.C. 92, recently decided in the Court of Review in Quebec. J. Leroux, of the subordinate lodge Columbus 26, of which the late J. P. Clarke was a member, was the authorized agent of the order and it cannot now repudiate his acts, especially as these acts as to the payment of the instalments in question were not reprobated by the treasurer Patterson, and Thomas Larkin, hereinafter referred to, who was past master of Columbus Lodge at the time of the death of Clarke. See on this point Mechem, Agency,§ 84, which was quoted in Ewart on Estoppel, edition 1900, page 482, as approved in *Johnson* v. *Hurley*, 115 Mo. page 513, and 22 S.W.R., page 492. See also 3 Am. & Eng. Encyc. of Law, 2nd edition, page 1102—Benevolent or Beneficial Associations:—

> Waiver—But such provisions may be waived by the company by prescribing or allowing a different mode of payment if no substantial rights of the association are thereby lost or impaired.
>
> Custom, Estoppel—Similarly, the association may be estopped to take advantage of the non-compliance with such rules by habitually accepting payment in a different mode; but an express waiver as a matter of grace or favour, does not constitute such a custom. A member may be excused from payment of assessments only when such payment is rendered impossible by the act of God or of the state. But insanity, sickness, or absence from the country do not in themselves constitute such an impossibility.

But forfeitures are not indispensable to secure the payment of assessments. They are simply convenient and perhaps more efficacious than any other mode that can be devised; nor is a temporary delay in the payment of the assessment necessarily subversive in principle of the purposes of the incorporation. While, therefore, it may not have been competent for the appellant's officer and agent to have relieved the assured from the payment of any assessment properly made against him, we are of opinion that it was competent for them to mitigate the terms upon which his policy would, otherwise, have been declared forfeited.

The same authority, Am. & Eng. Encyc., 2nd ed., vol. 16, p. 934:—

Waiver and Estoppel (a) General statement—Since the conditions of a policy a breach of which by the assured will give rise to the forfeiture are inserted for the benefit of the insurance companies, they may be waived either pending the negotiations for the insurance or after such negotiations have been completed and during the currency of the policy, and this either before or after the forfeiture is incurred. And since forfeitures are not favoured in the law, the courts are always prompt to seize hold of any circumstances that indicate an election to waive.

Acts after the issuance of the policy and prior to forfeiture, where the conduct of the insurer before the forfeiture occurs is such as fairly to induce the assured to believe that a requirement or condition of the policy will not be insisted upon, such requirement or condition will be regarded as waived: Am. & Eng. Encyc., 2nd ed., vol. 16, p. 937.

In *Cairncross* v. *Lorimer*, 3 Macqueen H.L. 827, the Lord Chancellor, at page 830, says:—

I am of opinion that, generally speaking, if a party having an interest to prevent the act from being done has full knowledge of its having been done and acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by giving credit to his sincerity, he has no more right to challenge the act to their prejudice than if it had been done by his previous license.

A very important witness in this case was Thomas Larkin, who testifies that he was a member of Columbus Lodge No. 26 of the Royal Guardians, formerly the Ancient Order of United Workmen, for about 18 years, and that he held office in it, and that he was past master of Columbus Lodge, the highest office in the gift of the lodge, and that he was past master at the time of Mr. Clarke's death in September, 1908. He says that a Mr. Gilbert told him that he had received payment of Mr. Clarke's last dues and assessments; that he received it after his death; and when asked if he approved of Gilbert's action in doing so, said, "Certainly." He said members paid their assessments to the financier and the financier turned them into the grand lodge or grand recorder. He said further that a member was always considered in good standing if he paid his dues in time—before the financier made his report to the grand lodge; that in 1908 that was in time before the 15th of the subsequent month. So here again we see clearly what the usage and course of dealing was between the defendant and the late Mr. Clarke and this course of dealing was known to the officers of the defendant and no exception was taken to it.

In the present case, Mr. Clarke died quite suddenly, and the payment of his dues was made before the report was sent in, and it certainly seems to me to be a pretty hard case if all the rights under the policy were forfeited, especially when the dues had been paid in the manner in which they had always been paid for the long period of years previous to the death of Mr. Clarke.

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In a case of *Ewing* v. *The Dominion Bank*, reported in 35 Can. S.C.R. 133, at p. 153, the learned Judge concisely put the rule as follows:—

> Where a man has kept silent when he ought to have spoken, he will not be permitted to speak when he ought to keep silent.

Plaintiffs, in their factum, contend strongly that, in any event, the late J. P. Clarke had to be put in default to pay the assessments and dues for the month of August, 1908, before the defendant could pretend that his beneficiary certificate had lapsed; that article 1067 C.C. applies, and not article 1069, inasmuch as mutual insurance is not a contract of a commercial nature. It may be noted that there is no provision in the alleged constitution fixing a place of payment by the beneficiary of the dues and assessments, and therefore, under the terms of article 1152, they would be payable at his domicile. It is proved that the practice had always been for the financier of his lodge to send a messenger to Clarke's place of business, about the 14th or 15th of each month to collect from him dues and assessments for the previous month. No attempt was made to collect the assessment and dues for the month of August in 1908, and Clarke died before the date at which this collection had been regularly made. Even where the place for payment of the premium was fixed by the contract of insurance, the jurisprudence is well established that the mere delay by the assured to pay his premium does not *ipso facto* put him in default, especially where the company has made a practice of collecting the premiums at the domicile of the assured, as has been done in the present case.

I might refer to the following authorities cited in plaintiff's factum: Sirey, Cour de Cassation, 1852, 1, 558; *Ibid.*, 1852, 11, 408 (Le Sauveur); *Ibid.*, Arrêt de la Cour.

After a most careful consideration of this case, I am of opinion that plaintiffs have proved the material allegations of their declaration and of their answer to defendant's plea, and that defendants's plea is unfounded, and that plaintiffs are entitled to obtain judgment against the defendant for the sum of $2,000.00 with interest from the 17th of September, 1908, with costs and judgment is given accordingly.

The defendants appealed.

T. P. Butler, K.C., for appellant, and with him *S. A. Labourveau*, counsel.

R. C. McMichael, K.C., for respondent.

Montreal, June 15, 1912.

The appeal was dismissed, the following opinion by Mr. Justice Cross being handed down.

CROSS, J.:—The appellant is a benevolent association which provides benefits to its members resembling life insurance.

The present action was taken by the children of Joseph P. Clarke to recover $2,000.00, the amount of a membership certificate wherein the appellant (formerly known as the Ancient Order of United Workmen) agreed that upon the death of Clarke that sum would be paid to his nominees.

Clarke died on the 7th September, 1908. The defence is in substance that Clarke at the date of his death was not a member of the Association in good standing, and that the insurance contract had lapsed because of his having failed to pay his dues or assessments.

It appears that a sum of $4.17 became payable by Clarke on the 1st August, 1908, that, according to the letter of the constitution, Clarke had until the 31st August, 1908, to pay the sum in question and that in fact it was not paid within that period but was paid on the 8th September, 1908, that is to say a day after Clarke had died. It does not appear that the assessment which became payable on the 1st September was paid but no question was raised about it in the action. The defence is based solely upon non-payment of the August assessment in August and before Clarke's death.

In answer to the objection of non-payment of the August dues the respondents pleaded that the defendant had given Clarke reason to consider himself in good standing because of a long established usage and course of dealing. It is not specifically stated in the defence what this usage and course of dealing was, but it is said that Clarke was never in default to pay the August dues "according to the system in vogue in the said Order."

The principal question for decision thus comes to be whether the non-payment of the $4.17 assessed on the 1st August, 1908, within thirty days after that date destroyed the appellant's liability to pay the $2,000.00 notwithstanding what the appellant may have done or tolerated to create a right in Clarke to delay payment of the assessment until the 8th September, even if he happened to die—as he did—in the meantime.

To answer that question, it is appropriate to see what legal consequences are decreed by the constitution from non-payment of an assessment and then to see what, if anything, has happened to prevent those legal consequences from being accomplished in Clarke's case.

The written instrument declared upon by the plaintiffs (respondents) purports to be a certificate of admission of Clarke into membership in the Order and couples herewith a grant of right "to designate beneficiary to whom the sum of two thou-

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sand dollars (without use or interest) of the beneficiary fund of the Order shall at his death be paid."

The condition attached is that Clarke shall in every particular comply with all the laws, rules and requirements.

The principal relation is that of membership in a benevolent society. The sum of $2,000.00 is not referred to as insurance but as being a sum payable out of a beneficiary fund. The contractual relation is not that of insurance in a certain sum for a stated period in consideration of a specified premium. In these respects the relation is unlike that which obtains in commercial life insurance contracts.

Clarke as a member was subject to be called upon to pay assessments by the grand lodge. The assessment would vary in amount according to the age of the member but was a fixed sum for members of the same age. The amount could be seen in a table of rates printed in the rules. The grand lodge might make an assessment as often as it pleased.

In practice, it does not appear that assessments were made by express resolution of the grand lodge. Instead of that rule No. 98 was acted upon. That rule is as follows:—

> 98. Unless otherwise announced by the grand recorder, either in the official organ of grand lodge, or by special notice, it is understood that an assessment is levied and it is hereby declared that an assessment is due and payable to the financier of this lodge by each member of the Order on the first day of each month unless he be notified to the contrary, and any member making default for thirty days to pay the same, shall *ipso facto* be deemed suspended from all privileges of the Order, and his beneficiary certificate shall thereby lapse and become void.

It is that automatically operating suspension of membership which is relied upon by the appellant as having been accomplished in the case of Clarke on the 1st September, 1908, rendering his certificate thenceforward lapsed and void.

The plaintiffs, on the other hand, say that, as a consequence of the way in which the defendant conducted its affairs for some years, that automatic sort of suspension did not take place and Clarke's certificate had not lapsed before he died.

The facts relied upon by the plaintiffs as having prevented the suspension and perfection decreed in rule 98 are as follows:—

Clarke's subordinate lodge was known as Columbus Lodge No. 26. Joseph Leroux had been what is called "financier" of that lodge since January, 1903, and it was his duty as such to make up and deliver to the registrar of that lodge a statement of collection of assessments and the money collected in the first half of each month so that it could be sent on to the grand lodge and reach the latter on or before the 15th of each month.

These statements were made up by Leroux, the financier

of the lodge, on sheets or lists of members sent out to him by the secretary of the grand lodge in the latter half of the month before that in which they would be returned. Now if rule 98 meant what it said and had been acted upon, Leroux would have made his collections before the first day of the month and the brethren who had not paid before that day would have stood suspended and the right of their beneficiaries would be null. In fact, he was requested by rule 166 (*i*) to "furnish the recorder on the day following the last day of the month with the names of all members who failed to pay their assessments on or before the last day of each month in which the assessment was made." In the year 1908, Columbus Lodge No. 26 had no recorder to whom Leroux could make his return and deliver the intromission.

Leroux's procedure was to himself make the return to the grand lodge on the 15th of the month. His practice was to call or have a messenger call in person on the brethren for payment of the assessment shortly before—sometimes the day before the 15th. The greater number of members paid after expiring of the thirty days, that is to say, in the first half of the month following that for which the assessment was payable, that had been the practice for five years before the date of Clarke's death. The practice was not confined to Columbus Lodge. The defendant says that that was the work of the branch lodge and that the grand lodge did not know of it. It is true that Leroux did not enter the dates on which the brethren paid. The sheet for the August assessment does not shew that the brethren paid in September and it is the same with the sheets for the other months. Had the dates of payment been entered, there could have been no question about the grand lodge having knowledge of the way things were being done. The execution officer—called supreme secretary—of the grand lodge had testified that he did not know of this practice of collecting assessments from persons after the date on which they would have passed under suspension. What he meant was that he did not know of it "officially." It is absurd to suppose that the mode and time of collection alone described could have gone on for years without being known to the grand lodge. I agree with the learned Judge who gave judgment in the Superior Court that the grand lodge did know of the way in which Leroux and their financiers had long been taking payment of dues after the end of the month.

The supreme secretary had heard of the sudden death of Clarke on the 7th September and that it was proposed to pay his August assessment, and on the following day sent Leroux a letter worded as follows:—

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J. Leroux, Esq.,

Financier, Columbus Lodge No. 26.

Dear Sir and Bro.,—Be good enough to give me date of last payment made by late Bro. J. P. Clarke and amount of same. Please be particular to give this exact as you may be called upon to attest same under oath. I beg to warn you not to accept any money on his behalf for assessments. Kindly reply at once.

Yours fraternally,

A. T. PATTERSON,
Grand Recorder.

On the same day, however, Clarke's August assessment had been paid by Clarke's late partner to a member who occasionally made collections for Leroux. The sum was handed over to Leroux on the 11th September and on the 15th Leroux tendered it with his money return and other collections to the grand lodge as if Clarke had continued in good standing. The grand recorder refused to receive the return in that shape. The branch lodge was exposed to a fine if the return were not made and three days later Leroux sent it in with the entry "susp.," meaning "suspended" opposite Clarke's name.

Upon this state of facts, it is argued for the defendant that the grand lodge cannot be said to have waived the suspension and lapse provided for by rule 98. On behalf of the defendant a large number of judicial decisions and opinions of treatise writers in the United States have been cited to us to establish that in societies like the defendant the action of subordinate lodges in accepting payment of assessments from persons who had gone under suspension before paying does not involve waiver or tacit renunciation of the rights of the body acquired under the suspension or forfeiture rule, even if the practice has attained a measure of continuity.

On behalf of the plaintiff judicial decisions of Courts in the United States and of text-writers have been cited in the opposite sense. The effect appears to me to be to leave the matter in uncertainty so far as opinion in the United States is concerned. That, perhaps, is not surprising if it be considered that facts or acts which may amount to a waiver in one set of circumstances may fall short of doing so in another.

It is said in McGillivray, Insurance Laws (1912), p. 266:—

> Similarly an agent has not, *primâ facie*, authority to waive forfeitures and revive lapsed policies unless he be a general agent with authority to contract in behalf of the company; but authority to waive forfeitures may be implied from a course of previous dealing recognized by the company.

The writer proceeds to refer to the effect of an expressed condition that agents are not authorized to waive forfeitures and after citing an opinion of the Supreme Court of the United States to the effect that such a condition may itself be waived

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by the company in whose favour it was stipulated, concludes by saying:—

> Conditions, therefore, may be waived by an agent, notwithstanding the provisions of the policy if subsequent to the granting of the policy, the words or conduct of the agent known to and acquiesced in by the company have been such as to induce the assured to believe that a forfeiture will not be insisted on or that other conditions in the policy will be waived (p. 267).

The matter falls to be decided according to our own law and in the notes of Mr. Justice Dunlop there are reproduced citations made on the plaintiff's behalf from Sirey 1852-1-558, and in 2-408 which go to establish that, notwithstanding a policy covenant whereby premiums were made payable at the insurer's office, a practice of sending for them to the insured's domicile would constitute such a recognized mode of the contract as would import abandonment of the covenant to pay at the company's office with the result that the insured would not be in default to pay unless called upon at his domicile. That is a conclusion which harmonizes with our law. With us it is not for the debtor to seek out his creditor as in English law. The doubt and choice of alternative are in favour of the debtor: art. 1019 C.C. The creditor must seek out his debtor—saving the effect of exceptional rules in commercial matters—and must put him in default by proper demand at his domicile.

The defendant argues that that civil law rule is inapplicable and unsuitable to the case of friendly mutual insurance societies wherein the insured are themselves insurers and the debtors in a sense themselves the creditors. I consider that the distinction is not founded in principle and there should be nothing in the organization of a benefit society to make it less capable of extending civility to its members than a trading company.

But according to the defendant, the matter is not yet exhausted, and it is further argued that even if the grand lodge or the body at large had known that assessments had been continuously collected from persons who had gone under suspension, after suspension it nevertheless could not be said to have waived its rule for the reason that such collections were sums properly payable to it upon an altered footing and sums which it could not refuse to receive.

It is said in substance that the carrying out of one rule of the constitution cannot be an abandonment of another rule.

In support of this reasoning, reliance is placed upon rule 107 which reads as follows; art. 107 of the Constitution of the Order says:—

> 107. Any suspended member who has forfeited all his rights by reason of non-payment of assessments for the beneficiary or other funds, may be reinstated, if he be living, at any time within a period

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of three months from the date of such suspension, upon the following conditions, and none other, that is to say: He shall pay all assessments that have been made during that time, including the one or more for the non-payment of which he had become suspended, together with his dues to date, and if thirty days have passed since such non-payment, he shall at the same time furnish a certificate, by a duly qualified medical practitioner, that he is in good health. The financier shall report the same to the lodge at its next stated meeting and the fact of the reinstatement shall be entered on the minutes; such report, however, is not to be a condition precedent to the reinstatement. But it is hereby expressly declared that the death of a member while so suspended, and during the said three months, shall debar him from being restored into good standing or from being reinstated, by payment of any assessments, either of the one or more for the non-payment of which he became suspended, or those that shall have been made against him during the said period; it being an absolute condition that all membership rights are forfeited by such non-payment, and the beneficiary cannot claim any rights in case the member should die before complying with all the above conditions and before being reinstated as provided in this constitution; and payment or tender by his personal representative or representatives during said period, shall in no case be held to restore the said member into good standing in the Order.

It is pointed out for the defendant, that within the first thirty days of suspension the right of reinstatement on payment of accrued assessments is absolute and that it is only in the second two of the three months that there has to be a medical certificate before reinstatement. It is pointed out that the grand lodge therefore could not refuse to take assessments from suspended persons within the fifteen days after commencement of suspension as Leroux's practice was but even within thirty days.

I consider that the inference which the defendant grants is founded upon a misappreciation of fact. Payments for reinstatement under rule 107 were to be not only of "the one or more for the non-payment of which he had become suspended" but of these "together with his dues to date." Now, what Leroux and others had been doing for years was to collect the monthly assessment in respect of which the thirty days of grace had elapsed but not to collect the "dues to date." The "dues to date" were similarly left unpaid till the succeeding month. That is made quite clear by the testimony of the manager or supreme secretary himself, at p. 32:—

> Q. Now, if the assessment and dues of the late Mr. Clarke, for the month of August, nineteen hundred and eight, had been paid to the financier of his lodge at any time before his death even though such payment was made after the end of August, nineteen hundred and eight, would you have refused to pay this claim?
>
> A. No, certainly not, if he had paid his assessment for August before he died, we would have paid the claim willingly.

And at p. 42:—

> If a man pays before his death, we pay the claim, and that is all there is about it. There is no trouble about that.

It is clear then that rule 107 was not being acted upon in respect of the assessments collected by Leroux from persons presumably under suspension, they were not being paid as for reinstatement, but were paid for years by persons who had been given reason to believe that they were in good standing when they were so paying.

The application sought to be made of rule 107 is that it shall be read to mean one thing for living persons but another thing for beneficiaries of persons who are dead.

It would be made to mean that the membership would be in good standing to yield assessment to the Order, but worthless to yield anything to the beneficiaries.

We consider that a law Court should not give effect to such a tortuous process as that.

The heirs or successors of a man stand in his shoes and are seized of his rights. Then it is conceded that Clarke would have been in good standing if he had lived and it is an abnormal and distasteful contention to say that he must be considered not to have been in good standing as regards his beneficiaries.

At the time of his death it follows that Clarke was not "a suspended member who had forfeited all his rights" so as to come under the operation of rule 107.

Upon the whole, we conclude that Clarke had until the 15th September, 1908, to pay the August assessment and was not in default when he died and, that being so, that his beneficiaries are themselves not in default but should receive the $2,000.00. Clarke was for over eleven years one of the brethren of this Order, and, however true it may be to say that the brethren who paid their dues promptly and in time ought not to suffer because of the laggards, it is at the same time to be said that the claim of Clarke's children must not be lightly set aside. The grand lodge always has it in its power to make it clear to the brethren that though it is a benevolent society they must not disorganize its resources by tardiness in paying assessments, but let it not encourage the tardiness and then profit by it to the detriment of beneficiaries.

It was subsidiarily argued that there was more in the judgment in that interest was adjudged to be paid from the 17th September, 1908, whereas the action was served only on the 26th August, 1909.

It was admitted at the trial that the plaintiffs had duly made time proofs of title to recover this benefit maintained in the certificate. Taking that fact and the purport of the grand

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recorder's letter of the 8th September, 1908, followed up by the denial of liability we consider that there was ground upon which the Superior Court could hold that the defendant was in default to pay on the 17th September, 1908.

Upon the whole, the appeal is dismissed.

Appeal dismissed.

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COUSINS v. BROTHERHOOD OF LOCOMOTIVE ENGINEERS.

Quebec Superior Court, Greenshields, J. April 2, 1912.

1. BENEVOLENT SOCIETIES (§ III—11)—EFFECT OF STATUTORY CONDITIONS IMPOSED AFTER ISSUANCE OF CERTIFICATE—PAYMENT OF ASSESSMENT—"RENEWED"—R.S.Q. 1909, ART. 7028, SUB-SEC. (1).

A payment of monthly assessments due on the certificates of a mutual benefit and benevolent brotherhood is not a renewal of the contract under which the members joined it within the meaning of the word "renewed" as used in those provisions of sec. 197, 8 Edw. VII. (Que.) ch. 69, now contained in sub-sec. (1) of art. 7028 R.S.Q. 1909, and, therefore, as far as concerns those who became members of the society and received their certificates of membership before the section aforesaid was passed there can be no application of the provisions thereof that if an insurance contract made by any company or association is evidenced by a written instrument, the company shall set out all terms and conditions of the contract in full on the face or back of the instrument forming or evidencing the contract, and, unless so set out, no term or condition, stipulation or proviso, modifying or impairing the effect of any such contract made or "renewed" after the coming into force of this Act, shall be good and valid or admissible in evidence to the prejudice of the assured or beneficiary.

[*Carter* v. *Brooklyn Life Ins. Co.*, 110 N.Y. 15, not followed. See also *Cousins* v. *Moore*, 6 D.L.R. 35.]

2. INSURANCE (§ III D2—72)—CONSTRUCTION OF POLICY—STATUTORY CONDITIONS—CERTIFICATE HOLDER CONTRACTING HIMSELF OUT OF THE STATUTE—R.S.Q. 1909, ART. 7028, SUB-SEC. (1) AND (3).

The parties to a certificate of life and accident insurance issued by a mutual benefit and benevolent brotherhood may, by special agreement, contract themselves out of those provisions of sec. 197, of 8 Edw. VII. (Que.) ch. 69, now contained in sub-secs. (1) and (3) of art. 7028, R.S.Q. 1909, requiring insurance companies under certain conditions that where an insurance contract made by any company or association is evidenced by a written instrument to set out all the terms or conditions of the contract in full on the face or back of the instrument forming or evidencing the contract, and directing that, unless so set out, no term or condition, stipulation or proviso modifying or impairing the effect of any such contract made or renewed after the coming into force of this Act, shall be good and valid or admissible in evidence to the prejudice of the assured or beneficiary, and giving the privilege to mutual benefit or charitable associations however, instead of following the above provision to indicate therein, by particular references, those articles or provisions of the constitution, by-laws or rules which contain all the material terms of the contract not inserted in the instrument of contract itself, at or before the delivery of such instrument of contract to deliver also to the assured a copy of the constitution, by-laws and rules therein referred to.

[*Noel* v. *Laverdière*, 4 Q.L.R. 247; *Renaud* v. *Arcand*, 14 L.C.J. 102; *Saint-Roch Society* v. *Moisan*, 7 Que. Q.B. 128; *Beaudry* v. *Janes*, 15 L.C.J. 118; *Hargrove* v. *Royal Templars*, 2 O.L.R. 79, specially referred to. See *Cousins* v. *Moore*, 6 D.L.R. 35.]

3. INSURANCE (§ III H—157)—PAYMENT OF DUES—MUTUAL BENEFIT ASSOCIATION—EXISTING CONTRACT.

Payments of dues upon previous existing contracts at most only keep them alive and subject to all their conditions and therefore are not renewals of such contracts.

[*Carter* v. *Brooklyn Life Ins. Co.*, 110 N.Y. 15, not followed. See *Cousins* v. *Moore*, 6 D.L.R. 35.]

4. BENEVOLENT SOCIETIES (§IV—17*a*)—WITHDRAWAL FROM MEMBERSHIP—PAYMENT OF DUES TO END OF YEAR—EFFECT OF DEATH OF WITHDRAWING MEMBER BEFORE END OF YEAR.

A member of a mutual benefit and benevolent brotherhood issuing life accident insurance certificates though he paid his dues to the last day of the year is not a member for the period before that date extending from the time when he voluntarily withdrew in accordance with the provisions of the brotherhood's constitution on withdrawal of members, though he met with an accident resulting in his death after his withdrawal from the order and before the last day of the year.

5. INSURANCE (§ III D2—70)—CONSTRUCTION OF CERTIFICATE—ALTERATION OR AMENDMENT—EFFECT OF.

An agreement of a member of a mutual benefit and benevolent brotherhood issuing life and accident insurance certificates that his contract should be governed by the constitution either as it existed when his certificate was issued or as subsequently altered or amended, is neither contrary to public order nor against good morals and it must be enforced and given full effect unless some valid reason is found for not so doing.

Statement

ACTION on a mutual benefit certificate the facts of which are sufficiently stated in the judgment below.

The action was dismissed.

Baker & Chauvin, for the plaintiff.

Atwater, Duclos & Bond, for the defendant.

Greenshields, J.

GREENSHIELDS, J.:—The facts from which the present litigation arises may be briefly stated.

The plaintiff is the widow of the late William E. Walker. The defendant is a mutual benefit and benevolent association, or brotherhood as it is called, authorized to carry on business of life insurance. Previous to the 3rd of January, 1908, the late William E. Walker made an application for membership in the said brotherhood, passed the required medical examination, was accepted, and initiated into full membership. On the 3rd of January, 1908, a beneficiary certificate was issued to the said William E. Walker, wherein it was declared that:—

Being a member of Challenge Lodge No. 66 of the brotherhood, he was entitled to all the rights, privileges and benefits of membership, and, in the event of his becoming afflicted, or sustaining one, or more, of the physical injuries, or bodily ailments for which payment is provided in the constitution of the brotherhood, in force and effect at the time, a liability against the brotherhood may arise for such physical injury or bodily ailments, the brotherhood being furnished with such proofs of physical injury or bodily ailment, as may be required by the constitution, rules or regulations of such brotherhood, then he shall be entitled to participate in the beneficiary fund of the brotherhood to the extent of $1,500, and, in the event of his death, satisfactory proof

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thereof having been furnished as required by the constitution, rules and regulations of the brotherhood, and his claim for any physical injury or bodily ailment described in the constitution not having been previously paid, his wife, designated as the beneficiary, shall be entitled to receive from the beneficiary fund of the brotherhood the sum of $1,500.

It was further provided, in the certificate, or contract, that it was issued and based upon the written statements and representations made by the late William E. Walker, in his application for membership, and that the answers and representations made by him in the same, and to the medical examiner, formed part of the contract and were warranted to be true by the applicant.

It was further stipulated in the contract or certificate that the same was issued upon the express condition that the constitution of the defendant brotherhood

> might be altered or amended at any time hereafter; that the member should keep himself in good standing in the said brotherhood, pay his dues and assessments, and perform all other duties of membership which may be required by the constitution of the brotherhood, and that the constitution now in force, or as may be hereafter altered or amended, is and shall be a part of this contract, in the same manner and to the same extent, as if said constitution, or alterations, or amendments thereto were written in the same.

The late William E. Walker accepted his contract; agreed to its terms and conditions, and remained a member in good standing until on, or about, the 13th day of November, 1910.

By the constitution of the brotherhood defendant, certain assessments were made and collected by the brotherhood defendant from its members. These assessments were known under the names, "beneficiary assessments," "general fund assessments," "protective fund assessment," "local monthly assessments," and "special assessments," the purpose of which, apparently, was to meet particular contingencies arising.

On or about 1st October, 1910, the late William E. Walker paid to the brotherhood, in part anticipation, $8.45, being it is stated, all assessments due by him and necessary to maintain his position, as a member in good standing, up to, and including, the 31st day of December, 1910. This amount was received by the defendant, so far as the record shews, without objection or protest. By sec. 184 of the constitution of the defendant, in force during the months of November and December, 1910, it was provided, that any member desiring a final withdrawal card, should make application in writing to the lodge, except when he was present at a meeting thereof and made the application in person, and a final withdrawal card should be granted, provided the applicant therefor was in good standing; and any member who took a final withdrawal card, thereby forfeited his insurance at once, and such forfeiture should operate at once, notwithstanding the

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fact that the applicant had paid his assessments up to the end of the month, etc. Sometime previous to the 13th of November, 1910 (the date not clearly established), the late William E. Walker made an application in writing for a final withdrawal card, this application was handed by him in person to the financial secretary of the defendant, who, in turn, delivered it to the recording secretary. A regular meeting of the brotherhood was held in Belleville, province of Ontario, the home of Challenge Lodge No. 66, at which the application of the late William E. Walker was read and, after consideration, it was accepted, and upon motion, it was resolved that a final withdrawal card should be granted to him, in accordance with sec. 181 of the constitution. This was done, and a final withdrawal card, reading in part as follows:—

> Brother.....Lodge No.....has announced his intention of withdrawing from the order, and this card is given him as substantial evidence that he has paid all assessments in his lodge and the grand lodge, that he is required by law to pay, and he leaves the brotherhood honourably.

This card was delivered in person to the late William E. Walker, some time about the 13th of November (the date again is not clear), and was accepted by him without objection or protest. On the 10th of December, William E. Walker met with an accident resulting in his death, and the present action is brought by his wife, the beneficiary mentioned in the beneficiary certificate of insurance.

The plaintiff alleges, that on the date of her husband's death, he was a member of the brotherhood defendant, in good standing, and the beneficiary certificate was in full force and effect, all assessments and dues having been paid up to the 31st of December, 1910, and having made proper proofs of his death, she is entitled to the benefits. The defendant denies all liability, and contents itself with traversing generally the plaintiff's statement of fact, that her late husband was a member in good standing at the date of his death, having paid all assessments and dues up to the 31st of December, 1910.

With respect to the receipt dated October, 1910, for $8.45 filed in Court by the plaintiff with the return of her action, as well as with respect to the beneficiary certificate, also filed with the return of the action, the defendant is satisfied with the statement, "that they speak for themselves." I refer to this particularly in view of the attempt made by the defendant to prove affirmatively, that other assessments than those mentioned in the receipt filed with the return of the action, were due and unpaid. This attempt was vigorously resisted by the plaintiff, urging that no affirmative proof of this nature could be made in the absence of an allegation, by way of defence, to that effect. I was of opinion at the trial, that the plaintiff having filed with the return

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of the action a receipt, alleged to be in full payment of dues and assessments up to the 31st December, 1910, if the defendant wished to establish that other amounts had been levied and were due and unpaid, an affirmative allegation to that effect should have been found in the plea. Instead of this there is the mere general denial of the plaintiff's allegation, coupled with the statement, that the receipt and certificate speak for themselves. I am still of the same opinion for the reasons given at the hearing; but, in view of the conclusion at which I have arrived, the point, so far as my judgment is concerned, would be of only abstract interest.

The serious part of the defendant's plea is to be found in paragraph 12 and following. The defendant says: By the contract of insurance issued to and accepted by the late William E. Walker, it was expressly stipulated, that the constitution of the brotherhood then in force, or as might be thereafter altered or amended, should form a part of the contract between the parties. Then follows a recital of sec. 184 of the constitution which I have already quoted, followed in turn by the clear statement, that the late William E. Walker made application in writing for a final withdrawal card; that the same was granted on the 13th November, and accepted by them, and from and after that date, he ceased to be a member in good standing in the brotherhood, and by the acceptance of his withdrawal card, forfeited all benefits of insurance provided for in the contract, and that no liability exists in favour of the plaintiff.

Meeting this plea, the plaintiff says, that the stipulation or condition alleged in the plea, is illegal, null and void, that it was obligatory upon the brotherhood defendant to insert in the contract of insurance, or on the back thereof, all the terms or conditions of the contract, or to indicate the same by particular reference to those articles or provisions of its constitution, by-laws, or rules, which contained the material terms of the contract, and which were not inserted in the instrument itself; that, moreover, and in any event, the stipulation became null and void when the contract was first renewed after the coming into force of the Quebec Insurance Act, 8 Edw. VII. ch. 69; that the contract between the parties was renewable, and was renewed from month to month, from the 3rd of January, 1908, up to the 31st day of December, 1910, that, moreover, the by-law referred to in the defendant's plea, was not in force and effect, when the contract was issued, and was never made a part of the contract, and is not valid or binding. The defendant answers this generally.

At the outset, a clear determination must be made as to what the real contract between the parties was, and for that purpose the contract may, and, I think, must be treated as an ordinary contract of life insurance.

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Such contracts are based upon the application of the person desiring insurance, who is called upon, in answer to questions, to make certain statements and representations and these statements and representations are communicated to the assurer, and, upon the strength of the same, the contract of insurance follows. In the present case, application was duly made, and was accepted, and a contract was made between the parties, and is evidenced by the document called "beneficiary certificate," relied upon by the plaintiff in her action, and which is the contract between the parties. In the contract, the late William E. Walker renewed his declaration, that the representations and statements made in the application were true, and that the contract was based thereon and by the contract itself these representations were made a part of the contract.

Moreover, by the certificate, the assured agreed, in clear and unmistakable terms, that the constitution of the brotherhood from which he was seeking to obtain insurance, as it then existed, might be altered or amended at any time thereafter, and it was upon this agreement that the contract issued and was accepted. I find nothing to invalidate such an agreement. It is not contrary to public order, nor is it against good morals. If the late Mr. Walker had sufficient confidence in the brotherhood, of which he was a member, to make such an agreement, I see no reason to have less or to refuse its enforcement. Going further, the late Mr. Walker agreed again, in no uncertain way, but in clear and definite terms, that the constitution then in force, or as it might be thereafter altered or amended, was and should be a part of the contract, in the same manner and to the same extent as if the constitution, or alterations, or amendments thereto, had been written therein.

All this means, that the late Mr. Walker agreed that alterations should, or could, be made, and that, when made, they should form part of his contract and his contract should be governed by the constitution, either as it existed at the time the contract was made, or as subsequently altered or amended, for which alterations and amendments he had given his free consent. Again, I can find no valid objection to this contractual stipulation. It is not contrary to public order, nor against good morals, and, unless I find some valid reason, it must be enforced and given full effect. Probably realizing this, the plaintiff seeks to escape by a statutory enactment of the Legislature of the Province of Quebec, known as the Quebec Insurance Act, 8 Edw. VII. ch. 69, and, particularly, reference is made to sec. 197, Paragraph 1 of this section enacts that where an insurance contract made by any company or association is evidenced by a written instrument, the company or association shall get out all the terms or conditions of the contract in full on the face or back

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of the instrument forming or evidencing the contract, and, unless so set out, no term or condition, stipulation or proviso modifying or impairing the effect of such contract, made or renewed after the coming into force of this Act, shall be good and valid or admissible in evidence, to the prejudice of the insured or beneficiary. Sub-section 2 provides, however, that nothing in the foregoing shall exclude the proposal or "application of the assured from being 'considered with the contract' "; and would indicate that the Court should consider the application with a view of ascertaining how far the insurance was affected by misrepresentations contained in the application.

Sub-section 3, of section 197, contains a slight modification in favour of mutual benefit or charitable associations, and it is admitted that the defendant is one of these. The modification is to the effect, that, instead of setting out the complete contract in the certificate or other instrument of contract, it may indicate therein, by particular reference, those articles or provisions of the constitution, by-laws or rules which contain all the material terms of the contract, not inserted in the instrument or contract itself, and the association shall, at, or before, the delivery of the contract, deliver a copy of such constitution, by-laws and rules to the assured. The plaintiff urges that this statute applies to the present case, and that, by its provisions, the contract must stand or fall by itself, and no part of the constitution or by-laws can be read into the contract, or considered, or offered in evidence to defeat the contract or be considered an interpretation or enforcement of the contract. This statute came into force on the 30th of December, 1908, about a year after the contract of insurance in the present case was completed. The statute is not retroactive. It is unnecessary to dwell upon this, there being nothing whatever in the statute itself giving it any retroactive effect. But, says the plaintiff, the statute provides that its legislative provisions shall affect all contracts made, or renewed, after the coming in force of the Act.

And, adds the plaintiff, by the payment of the monthly assessments and dues, this contract was, from month to month, renewed and was particularly renewed by the payment of the assessments and dues on the first of October, 1910, and, being so renewed, the statute applies, and the failure by the defendant to comply with the provisions of the statute bars it from pleading its constitution and by-laws. I do not accept the plaintiff's view on this point. I do not consider that the monthly payments of the assessments and dues was a renewal of the contract, as contemplated by the statute. It might be termed a "keeping alive" of the contract, but the same contract existed, and has never ceased to exist, and the payment of the dues or assessments was merely carrying out of the terms of the contract as

entered into. It is true the assured might have refused to pay the assessments, and, in that case, his contract might have lapsed and he might, by taking the necessary steps, revive his contract, or create the existence of a contract.

The insured is not bound to pay his premium, but the assurer can be compelled to accept it. As has been said by the Courts of the United States, the word "renewal" is not appropriate to describe the making of a new contract, or the creation of a new existence. It has no legal or technical signification. In the present case it would be difficult to say that the payment of the monthly assessments in any way changed the contractual relations between the deceased and the defendant. At most, such payment only kept alive a previously existing contract and subject to all its conditions.

I am aware that the Court of Appeals of the State of New York, *Carter* v. *Brooklyn Life Ins. Co.*, 110 N.Y. 15, pp. 20, 21,* has held, that the expression in a statute as follows:—

> No life insurance, doing business in the State of New York, shall have power to declare forfeited or lapsed, any policy thereafter issued or renewed, by reason of non-payment of the premium, unless a notice containing certain particulars specified shall have been addressed and mailed by the company, etc.

applies to all policies issued after the passing of the statute and to all policies upon which payments of premiums are subsequently made. In that case, the statute imposed the obligation of sending a notice to each policy holder as the premium became due. If the statute invoked by the plaintiff applied to all policies upon which premiums were paid, subsequent to the statute coming into force, a compliance by the defendant with the statute would involve the physical possession, at some time, of all outstanding policies for the purpose of endorsement. I greatly doubt if this was the intention of the Legislature. But even if the statute did apply, have not the parties contracted themselves out of its operation?

The deceased gave his formal submission to the constitution as it existed; gave his consent to its amendment, and his formal submission to such amendments or alterations was part of his contract. To hold that an alteration or amendment to the constitution did not apply or could not be offered by way of relief to a claim made under the contract, would be, at once, to render null and void an agreement legally and formally entered into between the parties.

The statute in question is not new. It was taken almost textually from the revised statutes of the Province of Ontario of

*This case also specifically held that the payment to the insurance company "of each annual premium constituted a renewal of the policy within the meaning of the term 'renewed' as used in the Act."

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1897, ch. 203, sec. 144, which is found in 55 Vict. (Ont.) ch. 39, sec. 33. A case somewhat in point was decided in 1901, in Ontario, by the Court of Appeal of that province: *Hargrove* v. *The Royal Templars of Temperance*, 2 O.L.R. 79. In this case, in the certificate or contract, it was stated that the laws governing the fund "should apply as fixing the remuneration or compensation of the assured in the case of the happening of events mentioned in the contract."

The laws of the fund were not set forth in the contract, and section 144 of the statute, similar to the statute under consideration, was invoked. Nevertheless, the Court held that the parties were bound by the contract made, and the rights of the assured were to be determined by the laws of the fund, according to his agreement. I am of opinion, that the contract, as evidenced by the beneficiary certificate, must be given full force and effect. I am of opinion, that the provision in the contract, whereby the assured submitted to the constitution as it existed, or as it might be altered, is valid and binding. I am of opinion that it was competent for the parties to contract themselves out of the operation of the statute. See *Noel* v. *Laverdière and The British American Land Company*, 4 Q.L.R. 247. It was there held by the Court of Review, composed of Meredith, C.J., Stuart and Caron, JJ. [Quebec, 1878], that the following stipulation, in the contract or promise of sale:—

> The possession to be given to the purchaser in pursuance of this contract, shall not have the effect of making this promise of sale equivalent to a sale, it being expressly agreed that this contract shall only have the effect of a personal covenant,

was valid, notwithstanding article 1478, C.C., to the effect that a promise of sale, with tradition and actual possession, is equivalent to a sale.

Chief Justice Meredith [Quebec, 1878], among other things, said: "This is a perfectly legitimate clause": *Beaudry* v. *Janes*, 15 L.C.J. 118. Therein it was held, that a stipulation against article 1478, where both parties write down their intention, was valid. Reference is made to Troplong, De la vente, No. 130, in *Renaud* v. *Arcand*, 14 L.C.J. 102. In this case, the late Mr. Justice McKay said, that it was competent for the parties to make a law unto themselves.

In the present case, the parties made a contract between themselves, which was, in my opinion, a law unto themselves, and that was, notwithstanding any law to the contrary, that the constitution at any time in force, should govern the contract. I am pleased to follow the late Mr. Justice Hall in his remarks in the case of *The Saint-Roch Society & Moisan*, 7 Que. Q.B. 128, and look with disfavour upon forfeitures established in the cases of benevolent or friendly societies, but, in the case at bar, the forfeiture was not brought about by the arbitrary act of the

brotherhood defendant; it was due to the voluntary, and presumably, well considered act of the assured himself. It was his wish to cease to be a member at all of the association or brotherhood, and having taken the proper steps to bring that about, the consequences of his act must be borne by his representative or beneficiary, the plaintiff in the present case, and one consequence, so far as my judgment is concerned, is the dismissal of her action.

Action dismissed.

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Quebec Superior Court, Archibald, J. June 8, 1912.

1. BENEVOLENT SOCIETIES (§ III—13)—REASONABLENESS OF REGULATIONS —PAYMENT OF ONE-HALF OF BENEFIT CERTIFICATE IF ACTION FOR DAMAGES INSTITUTED.

It is a reasonable regulation, and not contrary to good morals and public order, for an association organized to insure the employees of a designated railway company against injury or death, to provide by by-law that it will pay but one-half of the amount due on the death or injury of a member caused by the default of the railway company, unless any action brought therefor against such railway company shall first be formally dismissed or withdrawn.

2. BENEVOLENT SOCIETIES (§ III—13)—BY-LAW—CONTRIBUTION BY EMPLOYER—CONDITION PRECEDENT TO PAYMENT OF CLAIM—RELEASE.

It is not contrary to good morals or public order, but is a reasonable regulation, for an association organized to insure the employees of a designated railway company against injury or death, to require by by-law that, in consideration of a subscription of such company to the association, there shall, before payment will be made for the death or injury of a member, be presented to the secretary of the association a valid and sufficient release executed by all persons who may legally claim thereunder, of all their demands against such railway company arising from or growing out of the death or injury of a member.

3. BENEVOLENT SOCIETIES (§ V—21)—REFERENCE TO BY-LAWS AND CONSTITUTION IN CERTIFICATE—STATUTORY CONDITIONS—WAIVER—R.S.Q. 1909, ART. 7028.

Those provisions of sec. 197 of ch. 69, 8 Edw. VII. (Que.), now contained in sub-sec. (3), art. 7028, R.S.Q. 1909, that, instead of all of the terms or conditions of a contract of insurance issued by a mutual association being set out in full in the certificate of membership or other instrument of contract, as required by the provision in sec. 197, now contained in sub-sec. (1) of art. 7028 aforesaid, they may be indicated by particular reference to those articles or provisions of the constitution, by-laws, or rules which contain all of the material terms of the contract not inserted in the instrument of insurance itself, and that a copy of the constitution, by-laws, and rules referred to in such contract shall, at the time of the delivery of the certificate, be delivered to the assured, are of the nature of matters of public order and security, and as such, cannot be waived by special agreement between an assured and such an association.

[*Hargrove* v. *Royal Templars*, 2 O.L.R. 79, specially referred to; *Cousins* v. *Brotherhood of Locomotive Engineers*, 6 D.L.R. 26, not followed.]

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4. INSURANCE (§ III D 2—72)—POLICY—CONSTRUCTION—STATUTORY PROVISIONS AS TO CONDITIONS—VARIATION—EFFECT OF NON-COMPLIANCE WITH STATUTE—MEANING OF "RENEWED."

In those provisions of sec. 197 of 8 Edw. VII. (Que.) ch. 69, now contained in sub-sec. (1) of art. 7028, R.S.Q. 1909, providing that if an insurance contract made by any company or association is evidenced by a written instrument, the company shall set out all terms and conditions of the contract in full on the face or back of the instrument, forming or evidencing the contract, and, unless so set out, no term or condition, stipulation, or proviso, modifying or impairing the effect of any such contract made or "renewed" after the coming into force of this Act, shall be good and valid or admissible in evidence to the prejudice of the assured or beneficiary, the word "renewed" refers to such renewals as are made by the payment of the premiums from time to time due on policies issued before the passage of the section.

[*Carter* v. *Brooklyn Life Ins. Co.*, 110 N.Y. 15, at pp. 20, 21, specially referred to; *Cousins* v. *Brotherhood of Locomotive Engineers*, 6 D.L.R. 26, not followed.]

5. BENEVOLENT SOCIETIES (§ III—2)—EFFECT OF BY-LAW ADOPTED SUBSEQUENT TO CERTIFICATE OR POLICY—ABSENCE OF NOTICE—BREACH OF STATUTORY CONDITIONS—R.S.Q. 1909, ARTS. 7027, 7028.

A member of a mutual life and accident insurance association is not bound by a by-law of the association adopted after the issuance to him of his certificate and of which he had no notice, in view of section 196, 8 Edw. VII. (Que.) ch. 69, now art. 7027, R.S.Q. 1909, providing that any insurance contract if signed, countersigned, issued or delivered in the Province of Quebec, or committed to the post office or to any carrier, messenger or agent to be delivered to the assured or his agent in the Province, shall be deemed to evidence a contract made in the Province and in view of those provisions of sec. 197, of 8 Edw. VII. (Que.) ch. 69, now contained in sub-sec. (1) of art. 7028, R.S.Q. 1909, providing that if an insurance contract made by any company or association is evidenced by a written instrument, the company shall set out all terms and conditions of the contract in full on the face or back of the instrument, forming or evidencing the contract, and, unless so set out, no term or condition, stipulation or proviso, modifying or impairing the effect of any such contract made or renewed after the coming into force of this Act, shall be good and valid or admissible in evidence to the prejudice of the assured or beneficiary.

6. BENEVOLENT SOCIETIES (§ III—2)—HOW A BY-LAW CHANGING THE CONSTITUTION MAY BE MADE BINDING ON HOLDER OF CERTIFICATE ISSUED WITHOUT NOTICE OF THE CHANGE—R.S.Q. 1909, ART. 7028, SUB-SEC. (1).

It is practicable to make binding upon a member of a mutual life and accident insurance association, who had no knowledge of an adoption of a by-law, which was passed by the association after the issue of a certificate, but not referred to on the face or back thereof as required by those provisions of sec. 197 of 8 Edw. VII. (Que.) ch. 69, now contained in sub-sec. (1), art. 7028, R.S.Q. 1909, by attaching a notice of the passing of such by-law, and its contents to receipts of payments of premiums or by issuing a duplicate certificate with this information upon it or if need be by requiring the assured to produce his receipts for the proper indorsement, when such a by-law has been passed.

7. PAYMENT (§ V—41)—SUFFICIENCY OF DEMAND—PRODUCTION OF BENEFIT CERTIFICATE TO SECRETARY-TREASURER OF SOCIETY—CONDITIONAL OFFER.

The exhibition of a certificate of membership in a mutual association organized to insure the employees of a railway company against death or injury, to the secretary-treasurer of the association, and an offer by the latter to pay the amount due thereon, if, as required by

a by-law of the association, a release was furnished of all claim against the railway company for causing the death of a member, and the giving by that officer of a printed receipt to that effect constitute a sufficient demand of payment.

8. TENDER (§ I—2)—SUFFICIENCY OF—AMOUNT OF CLAIM WITHOUT COSTS PAID INTO COURT.

Payment into court by a mutual life insurance association of the amount claimed to be due on a certificate of membership, is insufficient as a tender if the costs of the action already begun for recovery of the amount were not offered therewith.

ACTION on a benefit certificate the facts of which are sufficiently set out in the judgment below. Statement

Sections 196 and 197, 8 Edw. VII. (Que.) ch. 69, referred to in the judgment below, are now arts. 7027 and 7028, R.S.Q. 1909.

Judgment was given for the plaintiff for $1,000 and costs.

H. N. Chauvin, for plaintiff.

A. E. Beckett, K.C., for defendant.

Montreal, June 8, 1912. ARCHIBALD, J.:—The plaintiff alleges that, by an Act of the Parliament of Canada, the defendant was erected into a corporation for the purpose, among other things, of insuring the lives of its members, being employees of the Grand Trunk Railway System; that, on the 12th December, 1902, one William Edward Walker, then of Belleville, in Ontario, became a member of the society and had his life insured by said society, under class "C," in the sum of $1,000, and on the 12th day of December, 1902, the defendant society issued a beneficiary certificate and contract of insurance to said Walker, who was then employed by the Grand Trunk Railway Company as a fireman, certifying that said Walker was a member of the society defendant and entitled upon his death, being still a member, to have the assessment or death levy paid, distributed or applied as in the by-laws, rules and regulations of the society defendant provided; that it was provided by such by-laws, rules and regulations that, at the death of any member in the class "C," his widow, legal representative or named beneficiary should receive from the said society the sum of $1,000; that said Walker, about the 10th December, 1910, came to his death in consequence of a collision on the line of the Grand Trunk Railway whilst still a member in good standing; that said Walker, previous to his death, had assigned the said certificate in favour of the plaintiff as the beneficiary under the said contract; that due notice and proofs of death of said Walker were furnished to the society defendant; that plaintiff complied with all the terms and conditions of the aforesaid certificate of insurance; that the defendant offered to pay the amount due thereunder to the plaintiff provided the plaintiff would sign and execute a discharge in favour of the Grand Trunk Railway Company of Canada of all liability in connection with the death of the plaintiff's said hus- Archibald, J.

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band, which the plaintiff refused to do, and plaintiff prayed for judgment in the said sum of $1,000.

The defendant pleaded, denying some and admitting others of the allegations of the declaration; alleging that the defendant had never been legally put in default to pay the insurance on said Walker's life, nor had plaintiff ever produced to defendant the certificate of insurance held by said Walker, and also denying that plaintiff had ever offered proof of the endorsation upon the back of said certificate. Defendant further pleaded that the defendant had always been ready to pay the amount due under the rules and regulations and by-laws of the society; that, when the said Walker became a member of the defendant's society, a certificate was issued and delivered to him, providing for the payment of said sum at the death of said Walker if he was still a member, but which certificate was issued upon the condition "that the said member, his widow, children, next of kin, legal representatives, and all the rights and benefits arising from said membership, are to be subject to the provisions of the by-laws, rules and regulations of this society from time to time in force"; that prior to the death of the said Walker a by-law had been duly passed by the defendant society, which by-law was, at the date of Walker's death, in full force, and which provided among other things, that if any action at law were instituted against the Grand Trunk Railway Company of Canada by any person representing the said Walker for the purpose of claiming damages on the allegation that said Walker had come to his death by reason of the fault of the said Grand Trunk Railway Company, then no sum beyond the one-half of the amount insured be paid to the representative of the said Walker on account of said injury or death, unless and until such action at law had been formally withdrawn or dismissed; and further provided, that, in consideration of the subscription of the Grand Trunk Railway Company of Canada to the defendant society, no moneys shall be payable to a member, or, in case of his death, to any person claiming, through or under him, by reason or as a result of the injury or death of such member, until valid and sufficient releases of all claims against the Grand Trunk Railway Company of Canada as well as the society, arising from or growing out of such injury or death, duly executed by all persons who might legally present such claims, shall have been delivered to the secretary of the society. Defendant further alleges that, on the 19th May, 1911, the present plaintiff had issued an action against the Grand Trunk Railway of Canada to recover damages for the death of the said W. E. Walker, alleging that the same was the result of injuries received by the deceased in an accident which happened upon the railway of the said company and for which the employees of the said company were wholly responsible, and the said action was since pending; that, in consequence of the

pendency of such action, no sum above the one-half of the amount of $1,000 in question was payable or recoverable until said action against the said railway had been formally withdrawn or dismissed, and this sum the defendant has always been ready to pay, and defendant brings the said sum of $500 into Court and tenders it and prays that the tender be declared sufficient and that the plaintiff's action otherwise should be dismissed with costs.

Plaintiff answered the plea, denying its essential allegations; alleging that demand was actually made and payment would have been made by the defendant if plaintiff had agreed to give a discharge from any claim which she might have against the Grand Trunk Railway Company.

Plaintiff further claims that the by-law which the defendant set up was illegal and void; that the tender made by the defendant was insufficient, and she prays for the dismissal of said plea.

The certificate of membership of the plaintiff's husband in the defendant's society does contain the matter set out in the plea—that the benefits of such certificate are to be received by the holder thereof subject to the by-laws, rules and regulations thereof from time to time in force; and also that, upon the death of a member, the beneficiaries are entitled to have the assessment or death levy paid, distributed or applied as in or by said by-laws, rules and regulations for the time being provided; and further—that the certificate is issued upon condition that the said member, his widow, children, next of kin and legal representatives, and all the rights and benefits arising from such membership, are to be subject to the provisions of the by-laws, rules and regulations of the society from time to time in force.

This certificate was issued on the 12th December, 1902, and Walker remained a member of the society until his death on the 10th December, 1910.

Previous to the death of said Walker and after the date of his membership in the society, the by-law set up by the defendant, which is numbered "14," was passed, or is alleged to have been passed, and purports to deprive any member of the right to recover more than one-half of the amount insured in the event of the representatives of such member, after his death, instituting any action at law against the Grand Trunk Railway Company of Canada for damages on the ground that the death of said member had been caused by the fault and negligence of the said company; and the consideration of that by-law was the fact that the Grand Trunk Railway of Canada was a liberal subscriber to the funds out of which said insurances were paid and the cost of running the defendant's association was met.

The portion of this fund which is paid by the Grand Trunk Railway Company of Canada, either by direct subscription or

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by payment of the cost of running the defendant's association, is proved to amount to at least 40 per cent.

I may say that that by-law appears a reasonable one, inasmuch as, if the Grand Trunk Railway Company is to be obliged to pay the whole damages resulting from the death of any member on a suit for that purpose, it would seem unjust that the representatives of the deceased should also benefit from the subscription of the Grand Trunk Railway Company to the funds of the defendant.

But serious questions of law are raised by the plaintiff as against the application of the by-law in question.

In the first place, it is alleged that said by-law was never legally passed.

In proof of the passing of the by-law there is produced an extract from the proceedings of the 23rd annual general meeting of the members of the Grand Trunk Insurance and Provident Society, held at the general office of the said society on March 25th, 1908. These proceedings, so far as they refer to the by-law in question, are as follows:—

In the first place, there is produced a printed copy of the notice which was sent to the members, in which notice appears proposals for the amendment of several of the rules of the company, and also on the notice appears: "By-law No. 14 to be cancelled and the following substituted," and then follows the by-law as cited by the defendant in his plea. At the meeting in question on the date mentioned in the notice, it appears that the notice was read, entry being as follows:—

"Notice of meeting with proposed amendment marked 'A.'"

Then we find the following extract from the minutes:—

> On motion of Mr. Laidley, seconded by Mr. Williams, it was resolved that the following alterations and amendments in the rules and regulations of the society to be adopted subject to the approval of the directors of the Grand Trunk Railway Company.

Then it says: "See preceding page."

It will be noticed that this motion does not mention by-laws, but only "rules and regulations." In the printed copy of the rules and by-laws of the defendant, the rules run up to No. 66, and then there is a heading called "By-laws for the Administration of the Society," and No. 14 is the one in question. In the last of the rules of the society, which is No. 66, it is provided:—

> The Grand Trunk Railway Company will, each half year, contribute out of the revenues of the company a sum in aid of the sick benefits and allowances of the society and in aid of provisions for insurance against accident or death, whether resulting from accident or otherwise, of the employees of the company, and in consideration thereof these rules and all alterations which may be made in them shall be subject to the approval of the directors of the Grand Trunk Railway Company.

There is no such clause making the by-laws subject to the approval of the directors of the Grand Trunk Railway Company. It is remembered that the motion which is relied upon for the purpose of the enactment of the by-law in question does not mention any by-law, and it does mention that the amendments made are to be subject to the approval of the Grand Trunk Railway Company. It would seem difficult to say that, so far as the words used in the motion in question go, they could be held to apply to the by-law in question. On the other hand, it seems to me that the by-law was really out of harmony with the other by-laws, and was rather a matter which would be more properly placed among the rules of the defendant, and I would also be of opinion that a great deal of latitude must be allowed in cases where, among societies of workmen, motions are drawn which are perhaps not verbally accurate. I would hesitate to say that the meeting in question did not really intend to adopt the by-law No. 14. But from the view which I take of the case, it probably will be unnecessary to decide that point.

The plaintiff makes this other attack upon the by-law—that it is in any event illegal, and that the plaintiff was not under the sway of it. She contents herself with saying merely that the by-law is illegal, in her plea, and she gives no particular ground for that illegality except that it is contrary to good morals and public order.

I would be against the plaintiff with respect to that. It seems to me that it is a very natural provision to make, as I have above pointed out. But in the argument of the case a very much more serious attack was made upon it so far as its influence upon this case can go, and as that arises out of the terms of the public law, I am obliged to take it into consideration, although it is not mentioned in the plea.

The defendant society was incorporated under the terms of the Federal charter, but I think it is not now doubtful that the Local Legislature has authority to make—under its authority to legislate upon civil rights within the Province—provisions concerning contracts of insurance made as well by local as by Federal companies.

Sec. 196 of ch. 69 of 8 Edw. VII. provides:—

> When the subject matter of any insurance contract is property, or an insurable interest within the jurisdiction of the Province of Quebec, or is in connection with a person domiciled or resident therein, any policy, certificate, interim receipt, or writing evidencing the contract shall, if signed, countersigned, issued or delivered in the Province of Quebec, or committed to the post office or to any carrier, messenger or agent to be delivered or handed over to the assured, his representative or agent in the Province, be deemed to evidence a contract made in the Province, and the contract shall be construed according to the law of this Province, and all moneys payable under the contract shall be paid at

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the office of the chief officer or agent of the company or association effecting the insurance in this Province. This article shall have effect notwithstanding any agreement, condition or stipulation to the contrary.

By sec. 197, it is provided that:—

Where an insurance contract made by any company or association is evidenced by a written instrument, the company shall set out all the terms or conditions of the contract in full on the face or back of the instrument forming or evidencing the contract, and, unless so set out, no term or condition, stipulation or proviso modifying or impairing the effect of any such contract made or renewed after the coming into force of this Act, shall be good and valid or admissible in evidence to the prejudice of the assured or beneficiary.

The third sub-section of that same clause says:—

A mutual benefit or charitable association may, however, instead of setting out the complete contract in the certificate or other instrument of contract, indicate therein, by particular references, those articles or provisions of the constitution, by-laws or rules which contain all the material terms of the contract not inserted in the instrument of contract itself, and the association shall, at or before the delivery over of such instrument or contract, deliver also to the assured a copy of the constitution, by-laws and rules therein referred to.

In this instance, as I said, the by-law, the effect of which is to reduce the right of the plaintiff by one-half, was passed after the insurance certificate, upon which the said suit is based, was issued. The certificate sued upon contains no reference to the by-law in question, and naturally could contain no such reference, as it was only passed afterwards. It is not alleged or proved that any communication of such by-law was ever given to the late William Walker, or that he was present at the time the by-law was passed, or that he had any knowledge whatever of the by-law.

But it is pretended that, by the terms of the certificate accepted by said Walker, he agreed to be bound as well by the by-laws then existing as by those which might be subsequently passed, and that, in virtue of such agreement, he must be held to have waived the section of the statute above cited.

It has been recently held in a case, *Cousins* v. *Brotherhood of Locomotive Engineers*, 6 D.L.R. 26, in which the present plaintiff was also plaintiff and another mutual benefit association of the Grand Trunk Railway was defendant, but in which the terms of Walker's contract varied considerably from those used in the present case, that the section of the statute in question was not one relating to public order, and that the persons receiving benefits in virtue of said certificates of insurance could contract themselves out of the application of the statute, and that the terms used, in that case, constituted a waiver of the statutory clause in question.

In the present case it does not seem to me that the language

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of the certificate which I have above cited is sufficient to constitute a waiver of the execution of the statute. It is merely the usual clause by which members of any association undertake that they are bound, so long as they remain members of the society, by its by-laws, rules and regulations, and there is no doubt that all persons are so bound by any legal rules, regulations or by-laws of the societies to which they belong. They either do or may take part in the enactment of them, and they would be presumed, having received notice of the meeting, to be aware of all that was done.

But it is exceedingly difficult to see what meaning can be given to the clause which I have quoted above, what effect it could have at all upon the rights of the members of the society, unless it be interpreted in the manner in which the plaintiff contends that it ought to be.

With regard to this matter of insurance, the statute seems to enact a clause which limits the binding effect of the by-laws upon the members. It seems to me that the motive of the clause in question was, that the men belonging to these workmen's societies, inexperienced in affairs, are not likely to duly appreciate the contracts into which they enter, and that the clause was passed for the protection of the men and to prevent them being surprised by matters which have not been called to their attention. The clause 196 expressly provides that contracts such as that in issue were to be construed according to the law of this Province, and that notwithstanding any agreement, condition or stipulation to the contrary. This question was considered by the Court in a case of *Hargrove* v. *The Royal Templars*, reported in 2 O.L.R., at p. 79. At page 94 Mr. Justice Osler remarked:—

> Whatever be the sum to be recovered, it is to be paid (or adjudged) "in accordance with the laws governing the total disability benefit fund," and as these are the terms on which the only contractual obligation of the defendants is expressed, we have to resort to these rules to ascertain the measure of the plaintiff's rights, and thus there is nothing on which sec. 153 can operate, and the insurance contract does not offend against the provisions of sec. 144 above noted, because there is no term, condition, stipulation, warranty or proviso "modifying or impairing" the effect of the insurance contract which is not set out therein. We are driven, it is true, to the rules to find out what is the whole contract, but there is nothing in them which "modifies or impairs" any contract set forth in the certificate, for without them we cannot find any contract at all. They simply complete the contract by shewing in what manner and out of what fund the amount is to be paid.

This would seem to admit that, if there had been anything not declared in the contract which modified or impaired the contract, that it would have required to have been set out in the certificate itself upon a clause in the Ontario statute practically similar to that which exists in Quebec statute.

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I am strongly drawn to the opinion that these provisions of the Insurance Act are of the nature of matters of public order and security, and such as are not capable of being waived by special agreement. But in this instance it appears to me that there is no waiver proved. The terms of the certificate do not constitute, in my judgment, a waiver, and the obligation of the plaintiff in this case is to submit to the rules, regulations and by-laws of the defendant society, and these rules are to be determined conclusively by the terms of the statute, which provides that no rule which has not either been inserted on the front or back of the writing evidencing the contract, or at least pointed out specifically by number in such writing and a copy of the by-laws and rules given to the defendant, shall be . . . admissible in evidence; that is to say, that a rule which has not been so dealt with, so far as the case in question may be concerned, is not provable and must be considered by the Court not to exist.

But the difficulty arises that this rule did not, as a matter of fact, exist when the certificate was granted, and it is said: How can the terms of the law be complied with in reference to this particular rule?

Now, the section which I have quoted refers to contracts "made or renewed." What is the meaning of this word "renewed" in connection with such a matter? Of course we all know that insurance contracts, especially life insurance contracts, are made and a policy issued, and, from time to time, as premiums fall due and are paid, renewal receipts are given, but no special renewal of such policies is ever made except such as may result from keeping them alive by the payment of the premiums from time to time. The same thing is the case with regard to benefit assurances.

This particular one was in force from 1902 until 1910, when the beneficiary was killed. I can only conclude that the word "renewed" in the section in question means such renewals as made by the payment of the premium from time to time.

The same rule was adopted by the Court of Appeal of the State of New York in *Carter* v. *Brooklyn Life Ins. Co.*, 110 N.Y. 15, at pp. 20, 21.

We have also everywhere the expression "renewed" as applied to receipts of premiums used in connection with such matters, and I think there can be no doubt that the word "renewed" in the section in question was meant to indicate the keeping alive of the insurance by receipts for premiums.

Now, it is said, how would it be practicable to indicate any new rules or by-laws upon the face or back of certificates which had been already issued? It seems to me it would be quite practicable. In such a case as this, notice of the passing of the by-law and of its contents could be attached to the receipts, or a

duplicate certificate could be issued with this information upon it, or, if need be, the assured could be required to produce his receipts for the proper endorsement when such a by-law should be passed.

Now, it is alleged besides that no demand was made for payment before action brought. The proof shews that one of the plaintiff's counsel visited the defendant and saw the secretary-treasurer, shewed him the certificate in question evidencing the insurance of the said Walker, and was offered payment provided discharge should be given for all claims against the Grand Trunk Railway, and a blank printed form of the required receipt was given by the said secretary-treasurer to plaintiff's counsel, which contained the following:—

> In consideration of the receipt by me of the said sum of..... I do hereby release and for ever discharge the Grand Trunk Railway Company of Canada from all claims for damages or other form of compensation on account of said.....

No other difficulty was raised at the time, and, moreover, the defendant brings into Court the sum of $500 and tenders it to the plaintiff, but without costs.

This matter is of little importance at the moment, inasmuch as in the opinion at which I have arrived the defendant *es qual.* is responsible towards the plaintiff for the whole of the said sum of $1,000. In any event, if such were not the case, the tender would still be insufficient, inasmuch as no costs were offered in connection therewith. I can not at all take the view that the defendant is excused from offering costs by the allegation that no good demand was made for payment.

My judgment will be against the defendant in the sum claimed of $1,000, with costs. As it appears by the proof that the said sum has already been assessed upon the members, the subsidiary conclusions demanded with regard to the levy of the said sum upon the members need not be referred to.

Judgment for plaintiff.

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MOON v. MOON.

Saskatchewan Supreme Court, Parker, M.C., in Chambers. October 2, 1912.

1. DIVORCE AND SEPARATION (§ V B—50)—INTERIM ALIMONY.

A *prima facie* case is made out for an order directing payment of interim alimony in an alimony action, by proving the marriage.

[*Karch* v. *Karch*, 3 D.L.R. 658, applied.]

2. DIVORCE AND SEPARATION (§ V B—53)—ALIMONY ACTION—GROUNDS FOR REFUSING INTERIM ALIMONY.

An application for interim alimony may be refused in an alimony action if the defendant satisfies the court or judge that the plaintiff has ample means of support without any allowance by way of interim alimony or that he, the defendant husband, has neither property nor earning power wherewith to provide interim alimony.

[*Pherrill* v. *Pherrill*, 6 O.L.R. 642; *Smith* v. *Smith*, 6 P.R. (Ont.) 51; and *Cunningham* v. *Cunningham*, 5 W.L.R. 514, specially referred to.]

3. DIVORCE AND SEPARATION (§ V B—50)—ALIMONY ACTION BY WIFE—HUSBAND'S OFFER OF RECONCILIATION.

The fact that the wife has left the husband and refuses to return to him although he is willing to take her back to live with him, is no answer, in an alimony action, to her application for an order directing the husband to pay her interim alimony until the trial.

[*Wilson* v. *Wilson*, 6 P.R. (Ont.) 129, approved.]

Statement

THIS is an application for interim alimony.

The application was granted.

P. H. Gordon, for the plaintiff.

W. H. McEwen, for the defendant.

Parker, M.C.

PARKER, M.C.:—There is plenty of authority for the principle that a plaintiff makes out a *primâ facie* case for interim alimony by proof of the marriage. In the case of *Karch* v. *Karch*, 3 D.L.R. 658, 21 O.W.R. 883, Mr. Justice Riddell states, 3 D.L.R., at p. 660:—

> It has been laid down from the earliest times in our Courts that upon an application for interim alimony proof of the marriage is all that is necessary: *Nolan* v. *Nolan*, 1 Ch. Ch. 368. In the same case it is held that the Court is not entitled to consider the merits of the case. In *Lovell* v. *Lovell*, 5 O.W.R. 640, Chief Justice Falconbridge says: "The financial circumstances of the parties, and particularly of the husband, seem to be practically the only subjects of consideration, the marriage being proved or admitted.

In *Cunningham* v. *Cunningham*, 5 W.L.R. 514, the application for interim alimony was refused because it was shewn that the plaintiff was practically living in adultery with another man and was being supported by him, and had therefore means of support independent of her husband. In *Pherrill* v. *Pherrill*, 6 O.L.R. 642, the application was refused because it was shewn that the husband had practically no property at all and there was no evidence as to his earning power. In

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Smith v. *Smith*, 6 P.R. (Ont.) 51, it was held that if the defendant oppose the application on the ground that the plaintiff has "ample" means of support, unless she can shew the contrary to be the case her application will be refused.

In the case before me it is alleged that the plaintiff has separate property, but there is no satisfactory evidence that she is deriving any income from it, much less the "ample" means of support mentioned in *Smith* v. *Smith*, 6 P.R. (Ont.) 51.

The defendant also admits that he has a homestead and that he is in receipt of an income of $300.00 per year from all sources. I can scarcely believe that an able-bodied farmer in this country who, besides having a homestead, does threshing and working out with his team, is only able to earn such a small income.

I am, therefore, quite satisfied that there is nothing in the material before me to warrant the refusal of the application. The fact that she has left the defendant and refuses to return to him, although he is willing to take her back to live with him, is no answer to an application for interim alimony. See *Wilson* v. *Wilson*, 6 P.R. (Ont.) 129.

I will allow the plaintiff $20.00 per month commencing from the date of the service of the notice of motion herein, the said sum to be paid to the local registrar in each and every month until the action is determined. I will also allow interim disbursements, and there will be a reference to the clerk in Chambers to fix the amount.

Order granted.

REX v. LAUGHTON.

MAN.

Manitoba Court of Appeal, Howell, C.J., Richards, Perdue, Cameron, and Haggart, JJ.A. October 7, 1912.

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Oct. 7.

1. CONSTITUTIONAL LAW (§ II 8—283)—MUNICIPAL BY-LAW OR REGULATION SUPERSEDED BY CRIMINAL LAW STATUTE.

To rescue cattle from the custody of a poundkeeper while he is taking the cattle to the pound is a criminal offence in Manitoba by virtue of the Imperial statute 6 & 7 Vict. ch. 30 there in force (Cr. Code of Canada 1906, sec. 12), and the provisions of that statute supersede the provisions of any municipal by-law purporting to impose penalties for the like offence.

2. MUNICIPAL CORPORATIONS (II A—32)—LEGISLATIVE POWERS—BY-LAW AS TO OFFENCE ALREADY MADE CRIMINAL.

A municipal by-law is *ultra vires* where it purports to provide a penalty for the identical offence which is already subject to penalty under a provision of the criminal law.

3. POUNDS (§ II—20)—POUND BREACH—RESCUE OF ANIMALS BEING IMPOUNDED.

The Imperial statute 6 & 7 Vict. ch. 30, making it a criminal offence to rescue from a poundkeeper cattle which are in his lawful custody

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is a part of the criminal law in force in Manitoba by virtue of section 12 of the Criminal Code of Canada 1906, declaring that the criminal law of England as of 15 July, 1870, shall be the criminal law of Manitoba in so far as such English law is applicable and in so far as it has not been repealed, modified, or affected by English or Canadian legislation.

APPLICATION to quash a conviction.

The defendant, Clifford Laughton, was fined $27.50 by a justice of the peace of the municipality of Assiniboia for unlawfully rescuing thirty head of cattle from the pound master of the municipality while the cattle were in the lawful custody of such pound keeper of the municipality and being conveyed by him to No. 5 pound as provided by the by-laws of the municipality of Assiniboia.

An application was made to quash the conviction on the ground that the charge was not laid before two justices of the peace and was not heard before two justices of the peace as required by 6 & 7 Vict. (Imp.) ch. 30, one justice of the peace having no jurisdiction respecting the charge; that the by-law was *ultra vires* of the municipality of Assiniboia inasmuch as it contained a clause imposing and providing a penalty for rescuing animals from a pound, or while being conveyed to a pound, and the statute did not grant the municipality power to pass any such by-law in respect of the offence; which, being a criminal matter, the province had no power to give the municipality jurisdiction to deal with.

The conviction was quashed.

H. F. Tench, for the applicant.

J. E. O'Connor, K.C., and *C. Isbister*, for the magistrate and pound keeper.

THE COURT:—The Court quashed the conviction, holding that the charge and conviction were of a criminal nature, and that under the Imperial statute of 6 & 7 Vict. ch. 30, which makes it a criminal offence to rescue cattle being taken to a pound, the charge could not be dealt with by one justice sitting alone.

Conviction quashed.

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HENN v. SMITH.

Nova Scotia Supreme Court, Graham, E.J. March 1, 1912.

1. LIBEL AND SLANDER (§ II E 3—74*a*)—PRIVILEGED COMMUNICATIONS—LANDLORD DEMANDING RENT—SERVING TENANT WITH NOTICE TO QUIT.

Where it appeared in a proceeding permitted by sec. 5 of the Collection Act, R.S.N.S. 1902, ch. 182, to be instituted by a judgment creditor for an examination of the financial condition, etc., of the judgment debtor, the debtor being in this case one against whom judgment had been rendered in an action of slander, that the debtor had called at a house owned by him for the purpose of collecting the rent

then due and of giving the tenant notice to quit because he had heard that the conduct of the inmates was giving the house a bad name and he told the tenant what he had heard and demanded an explanation and in the altercation that followed between the parties in the presence of the tenant's wife and daughters, the debtor uttered the slander for which the judgment was entered against him against one of the tenant's daughters, but in all the discussion, he made no statement irrelevant to the subject he demanded to be explained, the occasion is a privileged one, and if no ill-will or malice in fact on the part of the debtor is shewn and no issue as to privilege or malice was raised in the action in which the judgment was recovered, an order for the committal of the debtor is not warranted as for a wilful and malicious tort under sub-sec. 1(*f*) of sec. 27 of the Collection Act, R.S.N.S. 1900, ch. 182, enacting that if in cases of tort it appears to the officer charged with the examination of the judgment debtor that the tort was wilful, he may commit the debtor to jail.

2. FRAUDULENT CONVEYANCES (§ VI—30)—DEED FROM JUDGMENT DEBTOR TO WIFE—WITHDRAWAL OF FUNDS FROM BANK—THE COLLECTION ACT, R.S.N.S. 1900, CH. 182, SEC. 5.

Where it appeared in a proceeding permitted by sec. 5 of the Collection Act, R.S.N.S. 1900, ch. 182, to be instituted by a judgment creditor for an examination of the financial condition, etc., of a debtor, the debtor in this case being one against whom judgment had been rendered in an action for slander, that a deed from the debtor executed to his wife was proved and recorded after he had received a letter calling for redress for the slander and that the debtor, after the action for slander had been brought, withdrew from the bank a fund over $600 deposited in the joint names of himself and wife, in which he had an interest of his own, and replaced the fund on the same day in his wife's name alone, these transactions bring the debtor within sub-sec. 1(*c*) of sec. 27 of the Collection Act, R.S.N.S. 1900, ch. 182, providing that if it appears to the officer conducting the examination of a judgment debtor that the latter has made a fraudulent disposition of his property, the officer may commit him to jail.

3. EXECUTION (§ II—16)—SUPPLEMENTARY PROCEEDINGS—COMMITMENT OF DEBTOR—N.S. COLLECTION ACT—APPEAL.

The Nova Scotia Supreme Court, on an appeal by a judgment debtor from the decision of the officer charged with the duty of examining such debtor as to his financial condition, etc., in the proceedings under sec. 5, Collection Act, R.S.N.S. 1900, ch. 182, has the power, upon the application of the judgment creditor, to make the same adjudication as such officer might have made under sec. 27(*c*) of the Act aforesaid, providing that, if it appears to such officer that the debtor had made a fraudulent disposition of his property, the officer may commit him to jail, though the officer stated in his decision that, while a good deal of evidence was given as to the debtor's dealing and transactions as to real and personal property owned by him, he had decided not to make any order under sec. 27 (*c*) aforesaid, on the ground that he was not asked so to do, and the Court may exercise such power, though there had been an election before the examining officer by the judgment creditor to proceed under another clause of sec. 27 aforesaid, thus making him not strictly entitled to raise the question on the appeal.

Statement

THIS is an appeal from the decision of a Commissioner of the Supreme Court committing the defendant to prison under the Collection Act, because the "liability arose in consequence of the said judgment debtor's wilful and malicious tort." The Commissioner decided that it was wilful and malicious and the defendant gave notice of appeal. Then, because the defendant although having given notice of appeal did not give an assign-

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ment of all his assets to the creditor, this was taken into consideration and the term was fixed at four months.

The appeal was allowed with costs, and judgment in favour of the plaintiff for costs incidental to part of appeal, the defendant to be committed for two months for a fraudulent disposition of his property.

H. Mellish, K.C., and *W. B. MacCoy*, for the appellant, defendant.

J. J. Power, K.C., for the respondent, plaintiff.

Graham, E.J.

GRAHAM, E.J.:—The provision under the Collection Act enabled a commitment

> for a term not exceeding 12 months if it appears to the examiner in cases of tort that such tort was wilful and malicious.

In my opinion, the tort in this case was not wilful and malicious within the meaning of that provision.

It was in form an action of slander. The defendant had let a house to Maurice Henn, who had a wife and three daughters, one of them being the plaintiff. The defendant had heard of conduct on the part of the inmates which I think clearly justified him in terminating the tenancy. In fact he had heard (I think it was called out on the street to him) that it was known as "Smith's whore house."

The monthly rent was due and he went then to collect it and to give notice to quit, which he in fact did deliver, although he was promised the rent that afternoon. No one can doubt it that he had a qualified privilege for the communication which he had to make. Of course, he was foolish to undergo such a task; he should have gone to a solicitor and had the tenancy terminated as quickly and expeditiously as possible. But if he expected to let his house on good terms again it was necessary for him to get rid of this tenant; anyone would say that on reading the evidence. He appears to have said something to this effect, that this house is getting a bad name, it is called on the street "Smith's whore house," and he asked for an explanation. The defendant says when he did this that Maurice Henn called out at the top of his voice "Smith's whore house," and the wife and daughters came in. There was a general demand of who were the whores and the defendant apparently had to argue the matter out, and in the argument into which he was drawn they swear that he selected this plaintiff and he denies it or that he called her a whore. Her conduct which led to the house being commented on, certainly was discussed, but of course nothing was proved to establish the extreme statement the plaintiff's witnesses swear to.

I am of opinion that the whole occasion was privileged, and that no malice in fact is proved. To be definite, no ill-will or

anything of that kind was shewn, nor was anything shewn from which actual malice could reasonably be inferred. In the whole discussion the defendant ventured no observation that was irrelevant to the subject-matter of the theme that he went there to demand an explanation about. Of course he did not convince them and he did not prove what they challenged him to prove. In *Wilcox* v. *Stewart*, 38 N.S.R. 409, Stewart acting for a company finding a shortage in the accounts of one Meany, an employee, made a charge against Wilcox, another employee, which imputed he was a thief. I read from the headnote:—

> The trial Judge instructed the jury that the occasion upon which the words complained of were uttered, was privileged and that the words were not the subject of an action unless the jury found out defendant, in uttering the words, was actuated by ill-will or by some indirect motive other than a sense of duty and that the burden of proving this was on the plaintiff.
>
> Held, that the instructions given were correct and that in the absence of such evidence such as that indicated, the verdict of the jury in favour of the plaintiff was wrong and must be set aside and the action dismissed.

In a case then cited, *Wright* v. *Woodgate*, 2 C. M. & R. 573, at p. 577, Parke, B., says:—

> The proper meaning of a privileged communication is only this, that the occasion on which the communication was made rebuts the inference *primâ facie* arising from a statement prejudicial to the character of the plaintiff and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal ill-will or spite, independent of the occasion on which the communication was made.

That other members of the family were present in this case did not destroy the privilege.

The question of whether it was a privileged occasion is a question for a Judge, and, as I said, I think the whole occasion was privileged. Of course, the different utterances which the defendant used during the discussion must all be considered in considering the question of whether there was malice in fact.

Now as to the finding of the jury, they were, in the way in which the case was put to them, determining a very different set of facts from that which I have to decide. As to the charge that was personal to this plaintiff they were simply trying an ordinary action of slander without the question of privilege or malice in fact being before them. They were restricted to the imputation against the house, and the jury simply were reduced to deciding between plaintiff's witnesses and defendant.

But I have to determine as a matter of law whether the occasion was privileged there, whether there was malice or not on the defendant's part.

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I refer to Odgers on Slander, 5th ed., pp. 343 and 361, on the subject of actual malice.

I think that none has been proved. The defendant was exercising his rights to complain about the action of the inmates of the house, he had an interest and a duty and the burden is on them to shew that the defendant acted maliciously and I think they have failed to shew it.

The tort was not in my opinion wilful and malicious.

For this reason, I think the appeal must be allowed and the warrant of imprisonment set aside with costs before me and before the examiner.

The plaintiff's counsel upon the appeal asked me to take into consideration another matter under the Act, namely, the disposition of the debtor's property. In respect to this the Commissioner says in his decision:—

> A good deal of evidence was given as to the defendant's dealings and transactions as to real and personal property, but as I am not asked to make any order under sec. 27 "E." of the Act. I am dealing only with the question of tort under sec. 27 "F." of the Act.

I think that there has been an election before the Commissioner and the plaintiff is not strictly entitled to raise another question now.

However, I have power to make such adjudication as the Commissioner might have made.

There was a sum of money, some $628.20, drawn out of the Bank of Montreal on September 5th, 1911, after notice of the action dated the 16th of August. This sum was deposited in the joint names of the defendant and his wife to be drawn by either or the survivor. I quite believe that this sum was given by the daughter for the purpose mentioned, namely, to permit of the defendant who is 82 years of age and has an illness of which he is likely to drop off at any time, being returned for burial in his native country, the United States, and for his decent burial there.

If it had not been drawn out at this time, I might have inferred that there was some trust or that it was not a complete gift. But I think I have to hold that he had an interest in that fund.

In respect to the real property, which was also in their joint names, he gave a deed of this to his wife. Certainly the solicitor was instructed to make this deed before the defendant got into this trouble. He did this as he was about to go away and was liable to heart failure, and thought it better to have it in her name.

The solicitor is under the impression that it was executed the second week in August which would be before the plaintiff's cause of action arose, but as the deed was not proven for registry

until the 21st August, after the event, it is possible that the solicitor is mistaken in the time of the execution.

It is quite possible that there has been no active circumvention on the defendant's part, but if the provision is in effect the same as the statute 13 Elizabeth, ch. 5, I think that the defendant is within its terms. The plaintiff will have the costs incident to this part of the appeal. The defendant will be committed for two months.

Appeal allowed.

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British Columbia Court of Appeal, Martin, J.A., in Chambers, September 12, 1912.

1. APPEAL (§ VIII—387)—DISCRETIONARY JUDGMENT REFUSING A STAY OF EXECUTION.

Where a trial judge, in the exercise of his discretion, refused a stay of execution, a second application to the Court of Appeal having concurrent jurisdiction to grant a stay, will be dismissed unless some special circumstances are shewn.

[*The Annot Lyle* (1886), 11 P.D. 114; *Barker* v. *Lavery*, 14 Q.B.D. 769, followed; B.C. order 58, rule 16, specially referred to.]

2. EXECUTION (§ I—11)—STAY—LEAVE TO FILE FURTHER MATERIAL.

On an application for the stay of execution, leave will not be granted to file further material.

[*Barker* v. *Lavery*, 14 Q.B.D. 769, followed.]

Statement

THE plaintiff appealed from the judgment of Grant, Co.J., awarding the defendant $438.60 and costs on his counterclaim, and applied for stay of execution, which was refused. The plaintiff then applied to Martin, J.A., under order 58, rule 16, for stay of execution, which was heard at Chambers at Vancouver, on the 12th of September, 1912.

The application was dismissed.

Argument

W. A. Macdonald, K.C., for plaintiff, in support of application, after stating the facts, cited Annual Practice, 1912, page 1062: *Merry* v. *Nickalls* (1873), L.R. 8 Ch. 205; *Morgan* v. *Elford* (1876), 4 Ch. D. 352; *Cooper* v. *Cooper* (1876), 2 Ch. D. 492.

E. J. Grant, for defendant, contra:—There are not sufficient circumstances shewn on the material filed that the respondent will be unable to repay the amount levied by execution if the appeal is successful: *The Annot Lyle* (1886), 11 P.D. 114; *Barker* v. *Lavery* (1885), 14 Q.B.D. 769; *Attorney-General* v. *Emerson* (1889), 24 Q.B.D. 56; *Reynolds* v. *McPhail*, 13 B.C.R. 159. Paragraph 4 of the affidavit in support of the application, which is as follows,

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I verily believe that in order to properly safeguard the interests of the plaintiff an order should be made allowing payment in Court of the amount of the judgment recovered by the defendant upon his counterclaim,

does not shew any special circumstances which will entitle applicant to an order staying execution. Application has been already made to the Court below (which was cognizant of all the facts) and had been refused, and unless special circumstances are shewn to the Court now applied to, it will not interfere to suspend the operation of the judgment: *Tuck* v. *Southern Counties Deposit Bank* (1889), 42 Ch. D. 471, 478. The defendant's solicitors are quite willing to give the usual undertaking for return of costs, but should not be obliged to give undertaking for return of the amount of the judgment.

Martin, J.A.

MARTIN, J.A.:—The affidavit produced on this application does not go far enough to entitle this Court to interfere in suspending the remedies of the defendant, or to deprive him of the right to the immediate benefit of the judgment in his favour. I am satisfied that the Judge below properly exercised his discretion. In the face of the decisions of the Court of Appeal in *The Annot Lyle* (1886), 11 P.D. 114; and in *Barker* v. *Lavery* (1885), 14 Q.B.D. 769, *supra*, unless some special circumstances are shewn as set forth therein, the Court has no right to interfere with the course of the proceedings. The latter case shews that leave will not be given to file further material, the Court laying it down that "those who apply for a stay of execution must come before us prepared with all necessary materials." This application will, therefore, be dismissed with costs.

Application dismissed.

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HORNE v. JENKYN.

Alberta Supreme Court, Walsh, J. September 28, 1912.

1. MECHANICS' LIENS (§ VIII—64)—DEFECTIVE STATEMENT OF CLAIM—IRREGULAR CERTIFICATE OF LIS PENDENS.

It is a ground for vacating the registration of a certificate of *lis pendens* issued pursuant to sec. 35 of the Alberta Mechanics' Lien Act, by the clerk of the court, certifying that an action had been commenced for the realization of a lien, that the statement of claim filed with the said clerk was defective and irregular in not containing the necessary statutory allegations, and not claiming to have the rights to a lien declared, or a sale of the land ordered, and that no other relief incidental to the rights of the lien holder was claimed thereby, notwithstanding that an amended statement of claim was afterwards delivered, without the requisite leave, in which a claim to realize on the lien was made.

2. LIS PENDENS (§ I—2)—CERTIFICATE WRONGFULLY ISSUED—AMENDED STATEMENT OF CLAIM—VALIDITY—ALBERTA MECHANICS' LIEN ACT, SEC. 35.

The delivery of an amended statement of claim will not validate a certificate of *lis pendens* wrongfully issued by a clerk of the court,

pursuant to sec. 35 of the Alberta Mechanics' Lien Act when the original statement of claim filed with him as a condition to the issuing of the certificate, was defective in not setting out the statutory allegations and claims for relief.

[25 Cyc. 1473 applied.]

3. LIS PENDENS (§ I—2)—CERTIFICATE—IRREGULARITY.

The filing of an amended statement of claim in an action wherein the original statement of claim did not authorize the registration of a *lis pendens* certificate will not validate such certificate.

[25 Cyc. 1473 approved.]

4. PLEADING (§ I N—124)—DISALLOWING THE DELIVERY OF AN AMENDED STATEMENT OF CLAIM—ALBERTA RULES 179, 181.

Where a plaintiff without leave files and serves an amended statement of claim pursuant to Alberta Rule 179, the defendant if dissatisfied should move to disallow the same under Alberta rule 181.

Statement

THIS is an application on behalf of the defendant to set aside a certificate issued pursuant to the Alberta Mechanics' Lien Act, and for an order vacating the registration of the said certificate.

The application was granted.

K. G. Craig, for plaintiff.

H. P. O. Savary, for defendant.

Walsh, J.

WALSH, J.:—The plaintiff intending to bring his action to enforce a lien under the Mechanics' Lien Act issued his writ on the 29th of July last. His statement of claim alleges an indebtedness by the defendant to him for work done and materials provided in the construction of a house upon the defendant's lands, describing them, and claims payment of the amount of the indebtedness. It does not contain any of the allegations essential to a good statement of claim in a mechanics' lien action, neither does it ask to have his right to a lien declared or a sale of the lands ordered, or any other relief incidental to the plaintiff's rights as a lienholder. In short, under the statement of claim as originally filed, nothing but a personal judgment could be awarded against the defendant. Notwithstanding this the clerk on the same day, which was the last day upon which the proceedings necessary to preserve the lien could be instituted, issued a certificate under sec. 35 of the Act stating that the plaintiff had commenced an action to realize his lien and this certificate was on that day filed in the land titles office. The defendant moves to set aside this certificate and vacate its registration on the ground that it was improperly issued inasmuch as no proceeding had at its date been instituted "to realize his lien."

The certificate was improperly issued, for the facts which alone would have warranted the clerk in issuing it did not exist at its date. It must be cancelled and its registration vacated unless it has been made good by the amendments of the statement of claim which have been subsequently made and those amendments are allowed to stand.

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On the 16th day of September, the day before the summons, which I am now disposing of, was taken out, the plaintiff filed and served an amended statement of claim which makes his action what he always intended that it should be, one "to realize his lien." The amendments thus made were made without leave in the exercise of the right given to the plaintiff by rule 179. The argument before me was entirely upon the question as to whether or not these amendments were such as should be allowed to stand. Properly speaking, the defendant, if dissatisfied with them, should have applied under rule 181 to disallow them, but in view of the manner in which the question was argued before me I am treating the application as being made under that rule as well as for the purpose set out in the summons.

Upon the argument the solicitor for the plaintiff contended that, inasmuch as under the authorities the amendments so made relate back to the date of the writ the defects in his statement of claim are thereby cured. The solicitor for the defendant on the other hand submitted that the amendments should not be allowed to stand, inasmuch as the right which he had acquired to hold his land free from the plaintiff's claim of lien would thereby be defeated, something which under the authorities should not be permitted.

If, by simply allowing the amendments to stand, the plaintiff could be relieved from the difficulty with which he is now faced, I would not hesitate to allow them. Although the authorities are very strong against permitting amendments which prejudice the rights of the other party as they exist at their date, I think that this is a case to which the words of Lord Esher, M.R., in *Weldon* v. *Neal*, 19 Q.B.D. 394, at 395, apply, namely:—

> Under very peculiar circumstances the Court might perhaps have power to allow such an amendment.

Here the plaintiff plainly intended that his action should be and he thought that it was brought to realize his lien, else he would not have issued and registered the certificate of *lis pendens* practically at the very instant that he issued his writ. Everything was done that should have been done to preserve his lien, except in the one essential of setting out in his statement of claim the allegations and the claim for relief necessary to entitle him to the usual judgment in a mechanics' lien action. For such a case as this I would prefer to adopt what is said in Cyc., vol. 31, p. 408:—

> The Statute of Limitations presents no impediment to an amendment to a declaration or complaint which merely enlarges and presents fully the case and cause of action which was undertaken to be stated in the original pleading. In fact, in some jurisdictions it is regarded as a strong reason for allowing an amendment to perfect the statement of the cause of action that the plaintiff is barred by the

Statute of Limitations from commencing another action on the cause of action defectively stated in the original pleading.

I am of the opinion, however, that the amendments made to the statement of claim do not validate what was in its origin an admittedly invalid certificate of *lis pendens*. This point was not argued before me, it being apparently taken for granted that if the amendments are allowed to stand, the certificate would thereby be made good. It has, however, suggested itself to my mind, and I have therefore considered it my duty to deal with it. The certificate is that of the Court acting through its clerk and I do not think that such an act, so absolutely without authority, can be validated by something which a party to the action of his own motion does at some subsequent time. The only authority that I have been able to find upon the question either one way or the other is in Cyc., vol. 25, at page 1473:—

> If the cause of action is changed by the amendment or a new cause added, the *lis pendens* does not relate back but dates from the filing of the amended complaint. Where the original bill is so defective that it could not operate as a *lis pendens* the amended bill will not relate back so as to defeat the rights acquired since the commencement of the action. So the filing of an amended complaint in an action wherein the original complaint did not authorize the filing of a notice will not create a *lis pendens* from the time of filing the original complaint but only from the filing of the amended complaint.

The authorities cited in support of these propositions are all American, but in the absence of any English or Canadian authorities to the contrary I have no hesitation in acting on them.

The certificate of *lis pendens* will, therefore, be cancelled and its registration vacated, and the plaintiff must pay to the defendant his costs of the motion including the costs of registering this order.

Application granted.

INKSTER v. MINITONKA SCHOOL DISTRICT.

Manitoba King's Bench. Trial before Mathers, C.J.K.B. October 2, 1912.

1. SCHOOLS (§ I B—12)—RIGHT TO ATTEND—CHILD OF RESIDENT HAVING PERMANENT RESIDENCE IN DISTRICT—MANITOBA PUBLIC SCHOOLS ACT—"NON-RESIDENT PUPIL"—PAYMENT OF FEES.

Where both parent and child have their permanent and principal place of residence within the limits of a school district, the child is not to be deemed a "non-resident pupil" and the trustees of the school district have no right to claim the payment of non-resident pupil's fees as a condition of such child being allowed to attend school.

[Manitoba Public Schools Act, R.S.M. 1902, ch. 148, sec. 48, sub-sec. (*n*) and R.S.M. 1902, ch. 148, sec. 2, sub-sec. (*m*) as re-enacted by 10 Edw. VII. (Man.) ch. 51, sec. 1, and amended by 2 Geo. V. (Man.) ch. 65, sec. 2, construed.]

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2. MANDAMUS (§ I G—65)—TO SCHOOL TRUSTEES—CHILD ATTENDING SCHOOL WITHOUT PAYMENT OF FEES.

A mandamus will lie to compel the trustees of a school district to allow the children of a parent whose permanent and principal place of residence is within the school district, to attend the school without the payment of a fee.

3. INJUNCTION (§ I J—85)—RESTRAINING SCHOOL TRUSTEES FROM PREVENTING CHILD FROM ATTENDING SCHOOL WITHOUT PAYMENT OF A FEE.

An injunction will be granted restraining the trustees of a school district from preventing the child of a parent whose permanent and principal place of residence is within the school district, from attending the school without the payment of a fee chargeable only against "non-resident" pupils.

Statement

THIS is an action, tried at Portage la Prairie, to restrain the defendants from excluding the children of the plaintiff from attending school in default of paying a fee of 50c per month each.

Judgment was given for a mandamus compelling defendants to permit plaintiff's children to attend school without payment of the fee and an injunction was granted restraining defendants from preventing the children from so attending.

W. J. Cooper, K.C., and *A. Meighen*, for the plaintiff.

A. C. Williams and *D. M. Ormond*, for the defendants.

Mathers, C.J.

MATHERS, C.J.K.B.:—The facts were admitted. The plaintiff and his children have their permanent and principal place of residence in the district, but he neither pays nor is liable to pay a school tax equal to the average school tax paid by the actual taxpayers of the district. The contention of the school trustees is that the plaintiff's children are non-resident pupils as that expression is defined by the Public Schools Act.

By sub-sec. (*n*) of section 48 of the Public Schools Act, R.S.M. 1902, ch. 148, the trustees have a discretion to collect a fee not exceeding $1.00 per month for each "non-resident pupil" and from pupils whose parents reside on land exempt from taxation.

Sub-sec. (*m*) of section 2, as re-enacted by sec. 1, ch. 51, 10 Edw. VII., and amended by sec. 2 of ch. 65, 2 Geo. V. says: "The expression 'non-resident pupils' includes all pupils except where the parents or one of them or the legal guardian or guardians of such pupils have or has their or his permanent and principal place of residence in such school district, and except when such pupils or their father or mother or legal guardian, whether resident in the said district or not, pays or is liable to pay a school tax in such district at least equal to the average school tax paid by the actual taxpayers of such district."

By the plain reading of the section all pupils are to be regarded as non-resident, with exceptions of two classes: first, those whose parents, or one of them, or whose legal guardian has his permanent and principal place of residence in the district; and secondly, those who, or whose parents or legal guardians, pay

or are liable to pay the average school tax, whether they reside in or out of the district. Those who come within either exception are not to be classed as non-residents. The plaintiff's children come within the first exception, and therefore the trustees have no right to insist on payment of a fee as a condition of their being allowed to attend the school.

A mandamus will go compelling the defendants to permit the plaintiff's children to attend school without payment of a fee, and an injunction to restrain them from preventing the children from so attending.

The plaintiff is entitled to the costs of the action.

Judgment for plaintiff.

William F. CARSTAIRS (petitioner) v. **Charles W. CROSS** (respondent).
Re Edmonton Election.
(Decision No. 1.)

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Alberta Supreme Court, Scott, J. September 14, 1912.

1. EVIDENCE (§ II I—299)—ONUS OF PROVING REGULARITY OF PROCEEDINGS UNDER ALBERTA CONTROVERTED ELECTIONS ACT—PRELIMINARY OBJECTIONS.

The *onus probandi* is upon the petitioner in proceedings under the Controverted Elections Act, 7 Edw. VII. (Alta.) ch. 2 to support the regularity of his proceedings necessary to the maintenance of a petition when attacked by a motion to quash the petition, as regards the statutory grounds for setting aside election petitions under section 10 of that statute.

[*Stanstead Election Case*, 20 Can. S.C.R. 12, followed.]

2. EVIDENCE (§ II I—299)—ONUS OF PROVING ACTS OF RETURNING OFFICER—STATUTORY NOTICE—7 EDW. VII. (ALTA.) CH. 2.

On an application by way of preliminary objection to the filing of an election petition under the provisions of the Controverted Elections Act, 7 Edw. VII. (Alta.) ch. 2, that the returning officer has not returned the respondent as duly elected, and that the notice prescribed by sec. 119 of the Territories Election Ordinance had not been given, the onus of proof is upon the respondent raising that objection.

3. EVIDENCE (§ II I—299)—ONUS OF PROVING THAT PETITIONER UNDER CONTROVERTED ELECTIONS ACT (ALTA.) KNOWS CONTENTS OF PETITION.

In the absence of evidence to the contrary, a petitioner who has signed an election petition under the Controverted Elections Act, 7 Edw. VII. (Alta.) ch. 2, is presumed to know its contents; and the onus of supporting by proof the respondent's preliminary objection that the petitioner was not aware of the contents of the petition and therefore was not a petitioner in fact, is upon the respondent who raises it.

Statement

THIS is an application by the respondent to set aside the petition filed herein.

The application was refused.

C. C. McCaul, K.C., and *C. F. Newell*, for the petitioner.
O. M. Biggar and *A. G. McKay*, K.C., for the respondent.

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SCOTT, J.:—The grounds of the application which are raised by way of preliminary objections are nine in number, the first five being those specified in sec. 10 of the Controverted Elections Act (Alta.) ch. 2 of 1907.* The remaining grounds are:—

6. That the petitioner was guilty of corrupt practices at the election. This ground has, however, been abandoned by the respondent.

7. That the returning officer has not returned the respondent as duly elected.

8. That the notice prescribed by sec. 119 of the Territories Election Ordinance has not been complied with.

9. That when the petitioner affixed his signature to the petition he was not aware of its contents and is not, therefore, in fact a petitioner.

It is contended by counsel for the respondent that, upon an application under sec. 10, the onus is upon the petitioner to shew affirmatively that he is qualified to file it, that, in so far as they are questioned upon this application, the proceedings relating to the filing and service of the petition and the making of the prescribed deposit have been properly taken, that the returning officer has returned the respondent as member and that the clerk of the Executive Council has published the notice of such return.

In the *Stanstead Election Case*, 20 Can. S.C.R. 12, the Judges of that Court upon a similar application under a section of the Dominion Controverted Elections Act corresponding with sec. 10 of our Act unanimously held that the onus was on the petitioner to establish his status as such. I see no reason why, in so far as the onus of proof is concerned, any distinction should be drawn between the establishment of the petitioner's status and that of the proceedings taken by him which are necessary for the maintenance of his petition. Patterson, J., in his judgment in that case at p. 25, appears to me to intimate that there is no such distinction.

*Section 10 of the Controverted Elections Act, 7 Edw. VII. (Alta.) ch. 2 is as follows:—

10. The respondent may at any time within twenty days after the service upon him of the petition apply to the judge to set such petition aside and have it removed from the files of the court on any of the following grounds:—

(*a*) That the petitioner is not qualified to file a petition;

(*b*) That the petition was not filed within the prescribed time;

(*c*) That the deposit has not been made as provided in section 5 hereof;

(*d*) That the petition does not on its face disclose sufficient grounds or facts to have the election set aside or declared void;

(*e*) That service of a copy of such petition has not been made on him as herein prescribed;

and the judge may (if satisfied that the application is well founded) order the petition to be set aside and removed from the files of the court with or without costs as he may direct; or (if not so satisfied) may dismiss the application with or without costs as aforesaid.

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I entertain some doubt as to the onus of proof of the return of the respondent, and the publication of the notice thereof. These are not proceedings taken by the petitioner and they are matters as much within the knowledge of the respondent as that of the petitioner. Such being the case I think the most reasonable view to take is that a respondent seeking to set aside a petition on either of those grounds should adduce evidence to support them.

I am also of the opinion that the petitioner should not be called upon to shew that he was aware of the contents of the petition. It is admitted that he signed it and I think that, in the absence of evidence to the contrary, it should be presumed that he knew its contents.

I hold that as to the matters referred to in the first, second, third and fifth objections the *onus probandi* is upon the petitioner and that as to those referred to in the seventh, eighth and ninth objections, such onus is on the respondent.

Judgment accordingly.

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Nova Scotia Supreme Court, Graham, E.J., and Meagher, Russell, Drysdale and Ritchie, JJ. May 10, 1912.

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1. TRUSTS (§ I B—10)—MAINTENANCE DEED—INTENTION.

Where the widow and children of the deceased owner by various deeds granted to one of the children for a nominal consideration, the lands which had devolved upon them, and the grant in terms stated that the grantee was to support and maintain his mother and an invalid brother and that they should have certain rooms reserved in the dwelling-house for their use for life, such term is binding upon a subsequent encumbrancer from the grantee whether considered as an express condition or a trust, or as a charge on the land.

[*Ringrose* v. *Ringrose*, 170 Pa. 593, approved; *Cunningham* v. *Moore*, 1 Trueman N.B. Eq. 116, and *Dugnay* v. *Lanteigne*, 3 Trueman N.B. Eq. 132, specially referred to.]

2. DEEDS (§II A—19)—CONSTRUCTION—INTENTION—TRUST—SURROUNDING CIRCUMSTANCES.

In arriving at the construction which is to be placed on the words of a deed relied upon as creating a trust the same rule of interpretation applies upon the question of intention to be gathered from the deed and the circumstances surrounding the making of such deed, as would apply in the case of a will. (*Per* Ritchie, J.)

[*Pratt* v. *Balcom*, 45 N.S.R. 123; *Nysseu* v. *Gretton*, 2 Y. & C. 222, specially referred to.]

Statement

APPEAL from the judgment of Laurence, J., in favour of plaintiff in an action to recover possession of land which the defendants were alleged to be wrongfully withholding. The land in question was conveyed by the parties entitled thereto to Binney Croft,

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be to support and maintain Mary Croft and Foster Croft, his mother and brother respectively, and to have one room and bedroom reserved for their own use during their natural life, etc.

Subsequently to the making of this conveyance Binney Croft mortgaged the land to the plaintiff. He continued in possession for a time, paying interest to the plaintiff and then removed from the province. During all the time that Binney Croft remained in possession of the land his mother, Mary Croft, and his brother, Foster Croft, also remained, occupying the rooms reserved for their use.

After the removal of Binney Croft the interest on the mortgage being in arrears plaintiff foreclosed and having become the purchaser at the sheriff's sale brought this action, claiming possession of the property and a declaration of the rights of plaintiff and defendants, who continued in possession.

The cause was tried before Laurence, J., who gave judgment in favour of plaintiff on the ground that the stipulation for the support of Mary Croft and Foster Croft, so far as the other grantors were concerned, was at most a covenant by the grantee, and that the deed from Foster Croft, and the stipulation therein for the grantor's support and maintenance, if enforceable, was only a personal obligation upon the grantee and no charge or lien upon the premises granted, and imposed no liability upon plaintiff as assignee.

The appeal was allowed with costs and further directions reserved.

Argument

V. J. Paton, K.C., in support of appeal relied upon the following authorities: *Rogers* v. *Hosegood*, [1900] 2 Ch. 388; *McLean* v. *McKay*, L.R. 5 P.C. 327; Halsbury's Laws of England, vol. 10, p. 374; *Austerberry* v. *Oldham*, 29 Ch. D. 781, 12 Annotated Cases 898, 901; *Morrison* v. *McLeod*, 1 E.L.R. 112; *Power* v. *Power*, 43 N.S.R. 412; *Duguay* v. *Lanteigne*, 3 N.B. Eq. 132; *Ward* v. *Wilbur*, 25 O.A.R. 262; *Cunningham* v. *Moore*, 1 N.B. Eq. 116; *Millette* v. *Sabourin*, 12 O.R. 248; *Wilkinson* v. *Wilson*, 12 O.R. 213; *Pratt* v. *Balcom*, 45 N.S.R. 123.

A. Roberts, contra, referred to Washburn's Real Property, 6th ed., vol. 1, pp. 256, 257, vol. 2, sec. 938, and vol. 3, sec. 2353; *Goodwin* v. *Gilbert*, 9 Mass. 510; *Labaree* v. *Carleton*, 53 Me. 211; *Rawson* v. *Inhabitants of Uxbridge*, 7 Allen (Mass.) 125; *Ayer* v. *Emery*, 14 Allen 67, 70; *Skinner* v. *Shepard*, 130 Mass. 180; Am. & Eng. Encye., 2nd ed., vol. 9, p. 142, vol. 6, pp. 515, 516, vol. 10, p. 146; Story's Eq. Jur., sec. 1233; *Clark* v. *Royal*, 3 Symons 499; Cameron on Dower, pp. 297, 298; *Allen* v. *Rever*, 4 O.L.R. 309; *Croade* v. *Ingraham*, 30 Mass. 33.

Russell, J.

RUSSELL, J.:—The question presented in this case relates to the construction of certain deeds by which it was apparently intended that the widow and five of the children of the late

Martin Croft should convey all their interests in the property of Martin Croft to Binney Croft, one of the sons, in consideration of his supporting his mother and Foster Croft, one of the sons who was a cripple. The widow had a right of dower which had not and has not been assigned, and there was no will. The deed from Foster Croft is dated February 26th, 1895. It recites the good will and affection he has for his brother Binney, and conveys to Binney, his heirs, executors and administrators, all his goods and chattels and all his share of the estate of his father.

> he, the said Binney Croft, to become the sole and only possessor of the said house, barn and property at my death. He, the said Binney Croft, to maintain and support the said Foster Croft in good clothing and medicinal aid in sickness if necessary . . reserved, however, one room and bedroom for my use during my natural life. . . To have and to hold . . from henceforth as his and their proper goods and property absolutely without any manner of condition.

The deed from the widow, of the same date, is exactly in the same form with the same reservation and the same statement that it is absolute and without any manner of condition.

On the 12th of March all the other children of the deceased made a deed to Binney Croft of all their interest in the several lots of land therein enumerated, the deed being, according to its recitals, confirmatory of a previous deed of February 26th,

> he to support and maintain Mary Croft and Foster Croft, his mother and his brother respectively, and to have one room and bedroom reserved for their own use during their natural life, etc.

On the same day that this deed was made Binney Croft mortgaged the property to plaintiff, who has foreclosed the mortgage and seeks to recover possession from the widow and son.

The learned trial Judge has held that at the most the provision in favour of Foster Croft and his mother for maintenance is a covenant by the grantee and that as to the rooms Foster Croft being the part owner of an undivided interest could not reserve any specific part of the property to himself, and the other grantors could not reserve anything to any one other than themselves.

It will be observed that the provisions in favour of the widow and son appear in this case on the face of all the deeds to Binney Croft and are not merely embodied in a bond or agreement separate from the deeds. Even in a case where they did not appear in the deed to the grantee, but were in the form of a separate agreement it was held by Barker, C.J., in *Cunningham* v. *Moore*, 1 Trueman's N.B. Eq. 116, that the beneficiaries had a lien on the land for the performance of the agreement and a declaration to that effect was made, although the agreement could not be specifically enforced or the conveyance set aside for fraud. The decision is founded on English cases. The principle applied in those cases was simply an extension of the prin-

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ciple of an unpaid vendor's lien for the consideration of the deed. In *Duguay* v. *Lanteigne*, 3 Trueman's N.B. Eq. 132, the land was conveyed in consideration of a bond for maintenance and Barker, C.J., said:—

> The true consideration for the conveyance does not appear on its face and I think they (the plaintiffs) are entitled to a decree declaring the true consideration and the lien which when registered would be a notice to subsequent purchasers.

In the present case the nature and purpose of the transactions fully appear on the deeds and I do not think that any subsequent purchaser could take under those deeds otherwise than subject to the rights created by the grantors in favour of the persons provided for in the deeds. If the deed from Foster Croft is to be read as taking effect only after his death he is a tenant in common until his death. If it is a conveyance that takes immediate effect it does so subject to his right of maintenance. It becomes, therefore, unnecessary to furbish up our real estate law as to the impossibility of a conveyance to take effect *in futuro*. It may be that there is some technical difficulty about the deeds from the other children reserving rights in favour of Foster, but I do not see why there should be any difficulty about the existence of a right which, if it cannot be technically spoken of as a vendor's lien because, among other things, of the unliquidated nature of the demand, is nevertheless something in the nature of an equitable lien for the performance of what was the obvious consideration of the conveyance.

The nominal consideration is one dollar. The real consideration is that the grantee will undertake to support their mother and brother. That would be a perfectly good consideration even at common law, and I can see no reason why the vendors may not have an interest in the nature of a lien on the land conveyed for the performance of this consideration in which they were interested.

The same result may be arrived at by construing the provisions in question here as the creation of a trust in favour of the widow and son. They are to have a room and bedroom on this very property conveyed. Their maintenance is, therefore, to be on the very land conveyed.

In *Ringrose* v. *Ringrose*, 170 Pa. 593, not cited at the argument, but to which my attention has been called by my brother Graham, there was a similar provision to that in the present case. The grantors were to have the use and occupancy of the dwelling in which they then resided which was part of the property conveyed, and it was held that as these words imported the retention of possession for the purpose of receiving the support and maintenance, provided for, an estate in the land was thereby reserved in the grantors which affected the title through all subsequent mutations. The rationale of this decision is that the pro-

vision as to the occupancy of the dwelling house with an obligation on the part of the grantee to perform a variety of personal services to the grantor created a charge on the land as to all the provisions of the deed.

It does not seem to me to make much difference whether the obligation devolving upon the grantee constitutes a right in the nature of a lien on the land for its performance, or a charge on the land, or a trust in favour of the widow and her son. The essence of the matter is that the grantee, because of the grant and as the consideration for the grant, agreed to perform a variety of personal services for the widow and Foster Croft while they are in the occupancy of two of the rooms in the house which they were to have the right to occupy during their lives. The plaintiff took his mortgage with notice of these rights and, I think, subject to them, and he cannot be allowed to dispossess either the widow or the son of the property so conveyed.

The widow, I think, never parted with her dower, and it has not been assigned to her. It seems that she could be ejected by the heir after the expiration of her quarantine—a very barbarous condition of the law which has been changed in New Jersey and several other States of the American Union (see 4 Kent's Commentaries, 14th ed., p. 66), and ought to be changed here if this has not already been done, as I am not aware that it has been. But the widow is not depending on her right as doweress. She has her right to maintenance under the conveyances in question.

I think, therefore, that the appeal should be allowed with costs and a declaration made that the plaintiff holds the land subject to the charge for maintenance and to the right of possession by the widow and son of the rooms reserved to them.

RITCHIE, J.:—This case depends upon whether or not on the true construction of the deeds a trust or charge is created for Mary Croft and Foster Croft, and this is a question of intention to be gathered from the deeds and surrounding circumstances. In getting at the intention there is no distinction between cases founded upon wills and cases founded upon deeds. See *Pratt* v. *Balcom*, 45 N.S.R. 123; *Nyssen* v. *Gretton*, 2 Y. & C. 222. No particular form of words is necessary to create this trust and the sole question is, are the words and reservations in the deeds, in the light of the situation, condition and relationship of the parties sufficiently clear to impose the equitable obligation upon the land. In other words, does the intention appear?

Ritchie, J.

The words in the deeds: "He, the said Binnie Croft, to support and maintain, etc.," are words of condition annexed to the grant, and while they are not construed as imposing a legal forfeiture on breach, so as to give a right of entry, they are, in my opinion, to be regarded as creating a trust binding upon the conscience of Binney Croft and the plaintiff, who takes under him with notice.

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Looking at these deeds and the situation, condition and relationship of the parties and the nature and object of the transaction, all of which I think are material matters for consideration in getting at the intention of the parties, I have no difficulty in construing the words "he to support, etc.," as having the same effect as words of express condition. In both cases there is an implied trust.

I refer to the following authorities: Lewin on Trusts, 12th ed., p. 160; *Wright* v. *Wilkin*, 2 B. & S. 232; *Re Skingley*, 3 M. & G. 221; *Gregg* v. *Coates*, 23 Beav. 33; *Re Williames*, 54 L.T.N.S. 105.

In correctly construing these conveyances and arriving at the conclusion that an equitable obligation is imposed on the land the reservation of the rooms in the house is a most important factor.

Ringrose v. *Ringrose*, 170 Pa. 593, referred to by my brother Graham on the argument, is directly in point. This case is a well-reasoned one and worthy of being followed. It is not important whether the conclusion which I have arrived at is reached by holding that a charge on the land or a trust is created. In either case the equitable obligation is imposed on the land.

I allow the appeal with costs. There should be a declaration that the plaintiff took the lands subject to the trusts before mentioned and subject to the right of possession of Mary and Foster Croft as to the rooms. There will be an accounting in respect of the trusts and further directions are hereby reserved.

Graham, E.J. GRAHAM, E.J., and DRYSDALE, J., concurred.

Meagher, J. MEAGHER, J., read a concurring opinion except as to costs of trial.

Appeal allowed.

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WAKURYK v. McARTHUR.

Alberta Supreme Court. Trial before Beck, J. April 15, 1912.

1. MASTER AND SERVANT (§ I B—7)—TERMINATION OF EMPLOYMENT—TEMPORARY CESSATION OF WORK.

That a gang of labourers working on the construction of an irrigation ditch early in the winter season should lay off work during an extremely cold day by reason of their not yet having prepared themselves with suitable clothing for severe weather does not *ipso facto* constitute an abandonment of the employment nor terminate their status as employees.

Statement ACTION by the assignee of the wages of labourers employed in the construction of an irrigation ditch for the unpaid wages, bonus and transportation charges.

Judgment was given for the plaintiffs.

The defendant had a contract for the construction of an irrigation ditch and employed the plaintiff and others as labourers, at wages amounting to twenty cents per hour, together with a bonus of five cents per hour conditioned that in the event of any of the workmen leaving the employ prior to the completion of the work, which was estimated to last until the end of the year 1911, no bonus should be paid. During the course of the employment on July 6, 1911, a new arrangement was entered into between the contractor and the workmen employed by him. By this new arrangement the bonus of five cents per hour was, from and after July 6, 1911, to be due and payable the workmen without any condition as to their remaining in the defendant's employ until the work was completed.

The defendant or his servants during November, 1911, requested the plaintiff and his assignors to resume work, all the labourers having remained in for two days owing to the intense cold, the plaintiff and his assignors owing to the fact that their clothing was unsuitable for work in the extremely cold weather did not comply with this request and the defendant's officials misunderstanding the plaintiff's objections to working, discharged him.

The plaintiff sues for the amount of unpaid wages, bonus, and transportation charges due him and as assignee of the claims of several of his co-workers.

M. B. Peacock, for plaintiffs.

C. C. McCaul, K.C., and *J. B. Roberts*, for defendant.

Beck, J.

BECK, J.:—My decision depends upon two questions of fact. First, as to what took place on the 6th July: I find that it was then agreed that the bonus of 5 cents an hour should be paid unconditionally for the succeeding months, instead of being withheld so as to depend upon the plaintiff and the other workmen in the same position (all of whom I call the plaintiffs), continuing to work for the full period for which they were engaged. I find, too, that there was no change in the agreement as to the period of engagement. The witnesses for the defendant were not quite in agreement as to what was said in this regard. It was an obligation upon their part to make quite clear to the plaintiffs—who, they knew, understood very little English—any proposed change; and I find as a fact that they did not do so, and that the plaintiffs never assented to any change in that respect.

Secondly, as to what happened on the 10th or 11th November: I find the facts to be that the weather was then very cold; that for the day or two preceding none of the labourers had worked; that on the day in question the labourers were asked to work, and the majority went to work; that the plaintiffs said it was too cold to work, owing to their not having suit-

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able clothes for such cold weather; that they were acting *bonâ fide* in objecting on this particular day to work, under the circumstances; that the defendant's officials misunderstood the plaintiffs, and understood them to say that they were taking the position that the "season" for which they were engaged was ended, and consequently their engagement ended, and that they had therefore finally "quit work;" whereas, in reality, the plaintiffs were only objecting to work on the particular day on account of the great cold and the insufficiency of their clothing; that, if the defendant's officials had understood the plaintiffs—that their objection was only to working on that day and that they were ready and willing to continue work immediately the weather moderated—they would have recognized that the plaintiffs' position was not unreasonable; that the defendant's officials discharged the plaintiffs, not on the ground of wilful disobedience to a lawful and reasonable command, but on the ground—which was a mistake on their part—that the plaintiffs were taking the position that the term of the engagement had arrived.

The latter—that the plaintiffs left the defendant's employment—is in substance the only ground set up in the defence; the former—that the plaintiffs wilfully disobeyed a lawful and reasonable command—is not set up. Had it been, the onus of proving this ground for discharge would have been upon the defendant; and, had I to decide it upon the present evidence, I should not have been satisfied that the onus had been sustained.

In this view of the facts, I think the plaintiffs are entitled to judgment substantially for the amounts claimed.

It was agreed that I should not inquire into the precise amounts; there will be, therefore, a reference to fix the amounts, if they cannot be agreed upon. The defendant will give, within ten days, a statement of the account of each of the plaintiffs, shewing the amount arrived at which he is ready to pay. The reference shall not be proceeded with until five days after the delivery of this statement. The costs of the reference are reserved. The costs of the action will go to the plaintiffs.

Judgment for plaintiffs with direction for a reference as to amount.

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Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith and Magee, JJ.A. June 28, 1912.

1. DEATH (§ III—20)—UNPROTECTED HATCH ON SHIP—LIABILITY OF OWNER—DUTY TO LICENSEE OR TRESPASSER.

A navigation company is not liable in an action under the Ontario Fatal Accidents Act brought by the plaintiff on behalf of herself and her infant children, to recover damages for the death of her husband, whose body was found in the hold of one of the defendant's vessels which was laid up alongside of a wharf, for the winter, where, from the evidence, it is clear that the deceased had met his death by falling through an open hatch but was not upon the boat in which his remains were found by reason of any business which concerned the defendants nor upon any invitation express or implied of the defendants but merely out of curiosity or interest he had by reason of having formerly been employed upon the vessel and of his anticipation of being employed there at a later date, where the defendants were not guilty of any act of active negligence and had not deceived the deceased by means of a trap, whether the deceased was to be considered as a bare licensee or as a trespasser upon the boat.

[*King* v. *Northern Navigation Co.*, 24 O.L.R. 643, affirmed on appeal; *Perdue* v. *Canadian Pacific R. Co.*, 1 O.W.N. 665, specially referred to. See annotation to this case.]

2. DEATH (§ III—20)—EMPLOYEE TO COMMENCE SERVICE AT FUTURE DATE—WORK SUSPENDED—PAYMENT OF WAGES TO EMPLOYEE WHILE UNEMPLOYED.

In an action under the Fatal Accidents Act (Ont.) setting up that deceased was an employee, an invitee, or a licensee, it is quite immaterial (in so far as the law of master and servant is concerned) to determine whether or not the contract of employment of deceased was still in effect covering the time of the accident if the master had directed a suspension of the work covering the date in question, and if the employee had been directed not to report for service until a future date. (*Per* Garrow, J.A.)

3. EVIDENCE (§ II E 1—149)—BURDEN OF PROOF—FATAL ACCIDENT—RIGHT OF DECEASED TO BE ON PREMISES—LICENSEE—INVITEE.

The burden of proof rests upon the plaintiff in an action brought under the provisions of the Workmen's Compensation for Injuries Act (Ont.) and the Fatal Accidents Act (Ont.) for the recovery of damages for the death of her husband who had fallen into the hold of a vessel moored to a dock for the winter, while such vessel was lying between the dock and another vessel upon which the deceased had worked as an engineer during the previous navigation season and upon which he had been re-engaged for the ensuing season not yet commenced, to prove the right of the deceased to be where he was when he was killed.

4. MASTER AND SERVANT (§ I B—7)—LIABILITY OF MASTER TO SERVANT WHEN NOT ON MASTER'S WORK.

A chief engineer of a vessel, even though in receipt of regular wages during the off season, and prior to the date fixed for his actively commencing work, under the terms of his hiring and while not engaged in work, for his employer, is in the same position in respect to injuries sustained by him by reason of the defective condition of his employer's premises upon which he went voluntarily for his own purposes as a stranger would be, and an action based upon the relationship of master and servant and of the Workmen's Compensation Act utterly fails.

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5. MASTER AND SERVANT (§ II A4—67)—NEGLIGENCE—COMMON LAW AND STATUTE SAFEGUARDS—PROTECTION ONLY WHILE ACTUALLY WORKING—FATAL ACCIDENTS ACT.

Although at common law and by statute the servant is entitled to certain safeguards for his safety and protection such as a safe place to work, safe tools and appliances and care in selecting overseers it is for the master to say just when the servant shall work, and if the master suspends or postpones the work, but continues to pay, the servant cannot complain nor can a damage claim be sustained upon the relation of master and servant in respect of personal injuries sustained by the latter when on the master's premises wholly at his own instance and for his own purposes during a period for which his work was suspended although the employee's wages were being paid in the interim. (*Per* Garrow, J.A.)

6. NEGLIGENCE (§ I C—50)—PERSONAL INJURY—LICENSEE—DUTY OF OWNER OF PREMISES.

In a negligence action under Lord Campbell's Act for personal injury resulting in death brought by the next of kin setting up that deceased was an employee, an invitee, a licensee, and a victim of a system, the only duty, in so far as the claim as to the deceased being a licensee is concerned, which an owner of premises owes such a person, is not to deceive him by means of a trap or to be guilty of any active negligence, and the licensee must otherwise take the premises as he finds them, and the fact that a gangway (across a steamboat belonging to the same owner leading to another of such owner's boats moored side by side at the dock) was opened for the first time on the morning of the accident to carry lumber across it, and that the hatchway was open for necessary ventilation and left unprotected other than by some boards which had covered the hatch being left on edge over it, is not evidence of neglect of duty by the owner. (*Per* Garrow, J.A.)

[*Perdue* v. *C.P.R. Co.*, 1 O.W.N. 665, specially referred to.]

Statement

APPEAL by the plaintiff from the judgment of a Divisional Court, *King* v. *Northern Navigation Co.*, 24 O.L.R. 643.

The appeal was dismissed.

A. Weir, for the plaintiff.

R. J. Towers, for the defendants.

Garrow, J.A.

June 28, 1912. GARROW, J.A.:—Appeal by the plaintiff from the judgment of a Divisional Court, reversing the judgment, in favour of the plaintiff, at the trial, before Clute, J., and a jury.

The action was brought under the provisions of the Fatal Accidents Act, by the plaintiff, on behalf of herself and her infant children, to recover damages caused by the death of her late husband, William King, on the 6th March, 1911, under circumstances of alleged negligence on the part of the defendants.

The deceased had been in the employment of the defendants as chief engineer on the steamship "Ionic" during the sailing season of 1910. The ship was laid up for the winter, with other ships of the defendants, at the port of Sarnia; and it was, it is said, in an attempt to go on board that the deceased lost his life, by falling down an open hatchway on the ship "Huronic."

The statement of claim alleges that the deceased was, in his lifetime and at the time of his death, employed by the defendants as chief engineer of the steamboat "Ionic," and that, on the 6th March, he had occasion, on the business of the de-

fendants, in their employ and for their benefit, to go to the steamboat "Ionic," and in order to do so had to cross the "Saronic" and the "Huronic;" that he went, as aforesaid, with the leave and license of the defendants and upon their invitation; that he went to the "Ionic" properly and lawfully, upon business which entitled him to go and be upon the "Ionic;" that the defendants had, in pursuance of a system which was defective and grossly negligent, left a hatchway open and unguarded on the main deck of the "Huronic," upon the route which persons going from the dock to the steamboat "Ionic" would naturally take, thereby placing a dangerous trap in the pathway across the "Huronic," which was only dimly lighted, and the main deck of the "Huronic" had been recently oiled; and that the open and unguarded hatchway was a defect in the condition or arrangement of the ways, plant, or premises connected with or intended to be used in the business of the defendants, and the leaving it open and unguarded constituted negligence on the part of the defendants' employees who had superintendence intrusted to them, while in the exercise of such superintendence, within the meaning of the Workmen's Compensation for Injuries Act.

It is not very easy from this kind of pleading quite to understand or arrive at the exact ground upon which the plaintiff intends to rely, since practically every ground at common law or under the statute is apparently invoked. The deceased is said to have been an employee, also an invitee and a licensee and the victim of a system. But, if there is mystery in the pleading, there is really none in the facts, which, in their essential features, are absolutely simple and uncontradicted. And, at the risk of repeating in my own way what is already very fully reported of the case in the Divisional Court, in 24 O.L.R. 643, I propose as briefly as possible to re-state them here.

The deceased had been in the employment of the defendants during the previous season, and had been engaged for the following season, to begin on the 1st April. On the 12th December, Mr. Gildersleeve, the defendants' manager, sent him the following letter, upon which much stress was laid at the trial:—

"Northern Navigation Company Limited.

"H. H. Gildersleeve, Manager. Manager's Office.

"Sarnia, Canada, Dec. 12th, 1910.

"To the Engineers of the Steamers Hamonic, Huronic, Saronic and Ionic.

"Outfitting of Steamers.

"Dear Sir:—

"You will please take notice that it is the intention of the company this year to outfit the engine on your steamer as soon as the vessels are laid up.

"With the close of your contract for this year, you will be allowed regular wages until such time as your boat is outfitted.

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"It will be necessary for you to practise the strictest economy, and no supplies are to be purchased nor are you to take any of your machinery to a shop without an order from the company's chief engineer, Mr. Samuel Brisbin, who will have charge of all the steamers at this port.

"Yours truly,
"H. H. Gildersleeve,
"Manager."

Mr. Brisbin named in the letter is, in summer, chief engineer of the steamboat "Huronic," but, in winter, has general superintendence over all the defendants' ships at Sarnia.

There is no evidence that the deceased replied to the letter. About New Year's, he saw Mr. Brisbin, who asked him if he wanted to come back, and he said he did—that is, for the following season. Mr. Brisbin then told him "to lay the boat up and then start to fit her out at the same rate of pay per day as you are getting per month." The deceased, accordingly, after laying the boat up, commenced the work of fitting out, and continued at it until the 17th February following, when Mr. Brisbin again spoke to him and said: "I think you are about done now. . . . You will start on the 1st April again to fit out—to do the rest of the work." The deceased, accordingly, quitted work and was entirely idle from then until his death, on the 6th March. He had working with him, in the work of fitting, the second engineer, Mr. Duff, an oiler, and one or two firemen, over whom he had oversight. All these quitted work by his direction at the same time as he did, and the second engineer was told by the deceased to return on the 1st April to resume work. There is no evidence of any direction or communication of any kind between the deceased and the defendants or any one on their behalf after the 17th February. Some time before that date, the new agreement for the season of 1911 was entered into between the deceased and the defendants, the service to begin on the 1st April following. When he quitted work on the 17th February, he left his tools on the ship, in the engineer's room which he had occupied during the previous season, of which he carried a key. On the morning of his death, he asked his wife, the plaintiff, for a little tin in which to bring back from the boat a little white lead wanted for painting purposes at his house, which he was to ask "Mike" for, and said to her, either then or a day or two earlier, that he was going to the boat to see how the boiler-makers were getting on. This was the last thing actually known of him until his dead body was found in the hold of the "Huronic" the next day, although a sailor said he saw him in the street apparently going towards where the boats were.

The gangway across the "Huronic" to the "Ionic" was opened for the first time on the morning of the 6th March, to

enable lumber to be carried in to the "Ionic" for the purpose of repairs then being made. When the deceased had last been there, there was no such access through the "Huronic." There was some, but not perfect, light along the gangway on the "Huronic," and it, when opened, formed the most direct and convenient mode of access to the "Ionic." The hatchway had been opened for purposes of necessary ventilation. It lay in the line of the gangway across the "Huronic," and a person using the gangway would be very apt, if not observing it, to fall into it.

There was evidence that on the 6th March there were carpenters and other workmen engaged at work upon the "Ionic," but there was no evidence that the deceased had any charge or superintendence over them or any of them, or that in going upon or towards the boat on the occasion in question he did so at the request, express or implied, of the defendants or in the discharge of any duty which he owed to the defendants, or that such act was otherwise than wholly voluntary on his part.

At the trial Clute, J., appeared to be of the opinion that there was some discrepancy, to be solved by the jury, between Mr. Gildersleeve's letter, obviously only a circular letter, addressed not to the deceased alone, and the subsequent somewhat limiting orders and directions given by Mr. Brisbin. I am, with deference, quite unable to adopt that view. It is, I think, quite immaterial to determine whether or not the deceased's employment at the work of fitting was, as the letter says, to be until that work was completed, for at the utmost it was quite open to the defendant to direct a suspension of the work at any time. The real engagement clearly was that subsequently made with Mr. Brisbin, under which the deceased went to work, was paid, and also, quite willingly apparently, quitted work as directed.

The law, both at common law and under the statute, has wisely surrounded the servant with certain safeguards for his safety and protection. He may, for instance, claim a safe place to work in, safe tools, materials, and appliances with which to carry on his master's operations, care in the selection of competent overseers and foremen, etc.; but all these only when and so far as may be necessary for his protection while actually working. It is for the master to say when he shall work. And, if the master provides no work, but continues to pay, the servant cannot complain. All he need do is to be ready and willing when called on. When the servant is not engaged in work for the master, he has no more right to complain of the defective conditions of his master's premises than has any other stranger.

It is clear, therefore, upon the admitted facts, that, in so far as the action is based upon the relation of master and servant, it utterly fails.

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The Divisional Court was apparently of the opinion that the deceased was, under the circumstances, in the position of a trespasser. I do not, with deference, consider it necessary to go quite so far. My inclination, rather, is to regard the unfortunate man, upon the evidence, as in the position of a bare licensee, although the result, so far as the action is concerned, would not, I think, in law be different. His past and future employment on the boat, the key which he carried, and all the other circumstances might not unreasonably lead him at least to think that he was at liberty to go upon the boat upon the occasion in question without the special leave of the owners. This, however, would not place him in the position of an invitee, or, indeed, in any higher position than the one which I have indicated. And the only duty which an owner of premises owes to such a person is not to deceive him by means of a trap, or to be guilty of any act of active negligence, of which on the occasion in question there is no reasonable evidence. See *Perdue* v. *Canadian Pacific R.W. Co.* (1910), 1 O.W.N. 665. The licensee must otherwise take the premises as he finds them.

The plaintiff's action, therefore, seems to me, upon the undisputed facts, wholly to fail.

I would, for these reasons, dismiss the appeal with costs.

Meredith, J.A.

MEREDITH, J.A.:—I am unable to say that the Divisional Court was wrong in holding that the plaintiff's husband was, at the time of his death, a trespasser upon the defendants' vessel—the "Huronic." The onus of proof of his right to be upon that vessel, at that time, rested upon the plaintiff; and I am unable to say that she has satisfactorily proved any such right. It is quite plain that he was not there for the purpose of performing any services under the terms of any employment by the defendants. Such services had some time before ended; and were not to be renewed until nearly a month later. It is quite plain, too, that one purpose of his going to the vessel was to procure some paint for his own use; the "tin" in which it was to be brought back was taken by him when he set out from his own house, and was found near his body after the accident. It may be, and indeed it is very likely, that, had he asked leave to take the paint from the vessel, it would have been granted: but there is no evidence of any such request made or intended to be made. So, too, if he had desired to go for the purpose of merely seeing how things were going on on the vessel, no doubt consent would have been given, but only at his own risk; if the risk were sought to be put on the defendants, leave would not be given. And so I am unable to say that the Divisional Court erred in any respect in its conclusions.

But in any case, in any circumstances reasonably imaginable upon the evidence adduced at the trial, I am unable to consider

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that the plaintiff has proved any good cause of action against the defendants.

The unfortunate man fell through a hatchway of the vessel "Huronic:" the hatchway was covered with planks set in it; but two of these planks had been turned up on edge for the purpose of ventilation; and this was proved to be a thing necessary for the proper care and preservation of the vessel when laid up, as the "Huronic" was, for the winter. There was, therefore, nothing wrong in having that opening in the hatchway; an opening which was protected to the height of the width of the planks so set, and firmly held in place, on edge.

But it is said that the hatchway was, at the time, provided by the defendants as a way for the deceased, and others, to go to the defendants' vessel the "Ionic;" and, with the opening made by the upturned planks, and the obstruction which the planks so placed caused, was, in the dim light, a dangerous way; and so they are answerable in damages to the plaintiff by reason of the death of her husband, caused, without fault on his part, by such dangerous obstruction and opening in a place insufficiently lighted to make the danger plain.

But I am unable to find any evidence of any kind of invitation, to the deceased, to make use of the hatchway as a way across the "Huronic" to the "Ionic," or as a way for any purpose. The mere opening of some of the ways into the vessels for the purpose of permitting some work, with which the deceased was in no way connected, to be done, was no sort of invitation to him; and he was a man quite familiar with the vessels and their construction, and indeed with all things connected with them.

It is also quite evident that the planks on edge were not the cause of the deceased stumbling: he apparently stumbled and fell forward at the raised edge of the hatchway, some little distance away; and then, coming in contact with the upturned planks, in some extraordinary manner went over one of them and down between them; a thing which no one would have anticipated.

The case seems to me to have been one of a pure accident, for which no one can fairly be blamed; and certainly not one for which the defendants can be held to be liable in damages to the plaintiff.

I would dismiss the appeal.

MOSS, C.J.O., MACLAREN and MAGEE, JJ.A., agreed in dismissing the appeal.

Appeal dismissed with costs.

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Negligence—Trespassers and Invitees.

Annotation—Negligence (§ 1 C 2—50)—Defective premises—Liability of owner or occupant—Invitee, licensee or trespasser.

The decision of the Court of Appeal for Ontario in the above case affirming the judgment of the Divisional Court, *King* v. *Northern Navigation Co.*, 24 O.L.R. 643, brings the question of the liability of an owner of property to persons who are injured owing to defects in the premises once again to the attention of the profession.

Few questions more frequently present themselves to a practising lawyer than the one involved in this note, the true questions which arise in cases of this kind being, under what circumstances is there a duty imposed upon the owner of premises to take precaution for the safety of those coming upon the premises, and what in each case is the limit of such duty.

This duty is founded not on ownership but on possession; Pollock, Law of Torts, 9th ed., 522, says:—

> "This duty is founded on the structure being maintained under the control and for the purposes of the person held answerable. It goes beyond the common doctrines of responsibility for servants, for the occupier cannot discharge himself by employing an independent contractor for the maintenance and repair of the structure, however careful he may be in the choice of that contractor. Thus the duty is described as being impersonal rather than personal. Personal diligence on the part of the occupier and his servants is immaterial. The structure has to be in a reasonably safe condition so far as the exercise of reasonable care and skill can make it so. To that extent there is a limited duty of insurance, though not a strict duty of insurance such as exists in cases governed by *Fletcher* v. *Rylands*, L.R. 1 Ex. 277."

The above statement from Pollock has been approved by Bingham, J., in *Marney* v. *Scott*, [1899] 1 Q.B. 986. See also on this point, *Pickard* v. *Smith*, 10 C.B.N.S. 470; *John* v. *Bacon*, L.R. 5 C.P. 437; *Daniels* v. *Potter*, 4 Car. & P. 262; *Procter* v. *Harris*, 4 Car. & P. 337.

The law is now fairly well settled, although its application to particular states of facts is often difficult. In *Indermaur* v. *Dames*, L.R. 1 C.P. 274, affirmed *Indermaur* v. *Dames*, L.R. 2 C.P. 311, the law on this subject is laid down and the decision has been regarded as a leading authority on both sides of the Atlantic. This was an action for damages for injuries received under the following circumstances. Upon the defendant's premises was a trap-door on the level of the floor used for raising and lowering bags of sugar from one floor to another. It was not necessary that it should be unfenced when not in use. The plaintiff, a journeyman gasfitter, employed by persons who had fixed a gas regulator upon the defendant's premises, came to test the apparatus. Whilst so engaged he fell through the trap-door and was injured. The trap-door at the time was not in use and was not fenced. There was no negligence on his part. It was held that he was on the premises on business in which the defendant was interested, and that the defendant was liable as the danger was an unusual danger, and the defendant had neglected his duty to take reasonable care by fencing it or warning the plaintiff.

The term "invitee" is applied to persons (other than mere volunteers, or bare licensees, guests, servants, or persons whose employment is of such a kind that danger may be taken to have been actually bargained

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for) who go on to premises, upon business which concern the occupier, and upon his invitation, either express or implied": 21 Halsbury's Laws of England, 385, *Indermaur* v. *Dames*, L.R. 1 C.P. 274, L.R. 2 C.P. 311.

The duties imposed by law upon the owners or occupiers of buildings or premises or persons having control of other structures intended for human use or occupation, in respect to their safe condition has been summarized in Underhill on Torts, 9th English edition, 171, 3rd Canadian edition, as follows:—

1. An occupier of land, building, or structures owes to persons resorting thereto in the course of business upon his invitation, express or implied, a duty to use reasonable care to prevent damage from unusual danger of which he knows or ought to know.

2. An occupier of land or buildings owes to bare licensees and guests a duty not to set a trap, *i.e.*, not to put any unexpected danger there without warning the licensee or guest: *Indermaur* v. *Dames*, L.R. 1 C.P. 274, affirmed, L.R. 2 C.P. 311; *Gautret* v. *Egerton*, L.R. 2 C.P. 371.

The duties of occupiers of property may be considered under the following four heads:—

1. As to trespassers;

2. As to the use of premises, by bare licensees or volunteers;

3. As to the use of premises by invitees, those resorting to them upon business which concerns the occupier, upon his invitation, express or implied.

4. As to the duty owed by a landlord to his tenant.

1. *Duty to Trespassers.*

It may be laid down as a general principle that the occupier of premises owes no duty to trespassers except that of refraining from wantonly or wilfully injuring them: See *Petrie* v. *Rostrevor*, [1898] 2 Ir. 556; *Lygo* v. *Newbold*, 9 Exch. 302; *Great Northern R. Co.* v. *Harrison*, 10 Exch. 376; *Stone* v. *Jackson*, 16 C.B. 199; *Harrison* v. *North E.R. Co.*, 29 L.T. 844; *McCabe* v. *Guiness*, 10 Ir. R. C.L. 21; *Murley* v. *Grove*, 46 J.P. 360; *Stiefshon* v. *Brooke*, 5 T.L.R. 684; *French* v. *Hills Plymouth Co.*, 24 Times L.R. 614; *Bist* v. *London and S.W. R. Co.*, [1907] A.C. 209.

An occupier of premises must not encourage or attract trespassers to a place where they are exposed, whether intentionally or not, to some specific danger of which he is cognizant, nor may he when aware of the presence of a trespasser on his premises do any act which endangers his safety: 21 Halsbury's Laws of England 394.

A trespasser cannot maintain an action unless he has a right to complain of the act causing the injury and to complain thereof against the party made defendant, an action cannot be maintained by a trespasser against a railway company for the negligence of its servants in carrying him.

In *Grand Trunk R. Co.* v. *Barnett*, [1911] A.C. 361, which was an action against the appellant railroad company for damages for personal injuries resulting from collision caused by the negligence of the appellants' servants, it appeared that the collision took place on the property of the

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appellant railway company to which the train which was carrying the respondent and which belonged to another company, had access by the leave and license of the appellant. It further appeared that the plaintiff was a trespasser on the appellants' property and also on the said train, which, to his knowledge, was not at the time in use as a passenger train, and in which he had taken up a precarious position on the platform and step of a carriage in disobedience of a by-law of both companies; it was held that the appellants were not liable, for no breach of duty had been shewn. At p. 370 of this case the general principle is laid down by the Judicial Committee of the Privy Council, as follows:—

"The general rule is that a man trespasses at his own risk."

The same principle applies in the case of animals trespassing: *Jordin* v. *Crump*, 8 M. & W. 782; *Stanfield* v. *Bolling*, 22 L.T. 799; *Ponting* v. *Noakes*, [1894] 2 Q.B. 281.

In *Jewson* v. *Gatti*, 2 T.L.R. 441, it is held that there is no duty upon the occupier of premises to render them secure for persons using them without invitation for their own gratification.

The case of *King* v. *Northern Navigation Company*, under consideration, is interesting in regard to the general principle involved. It may be compared with the spring gun cases, where the opinions of the Courts in England seemed to have fluctuated as to what was the common law as to the liability of the owner of the premises to persons injured by such concealed engines.

The use of man traps, spring guns, and other engines calculated to destroy human life or inflict grievous bodily harm, is a criminal offence both in England and in Canada: see Tremeear's Criminal Code, 2nd ed., 223; Crim. Code of Canada, 1906, sec. 281.

In *Ilott* v. *Wilkes*, 3 B. & Ald. 304, presenting the same question as is considered in *Deane* v. *Clayton*, 7 Taunt. 489, in which there was a division of opinion, it was held that a trespasser could not maintain an action for damages caused by a spring gun, spikes or spears fixed by defendant, killing the plaintiff's dog, but that case turned on the fact that notice was given of the existence of the spring guns.

In *Bird* v. *Holbrook*, 4 Bing. 628, it was held that where the plaintiff had gone into the defendant's premises in search of a strayed fowl, and was injured by a spring gun, of the existence of which there was no notice, the defendant was liable. This principle has been stated as follows: That if a person sets a spring gun on his land with the intention that it shall go off and cause injury to a trespasser he is liable for the intentional wrong so done, what he does really amounts to an assault.

In a later case of *Wooton* v. *Dawkins*, 2 C.B.N.S. 112, the Court held such an action would not lie; and in *Jordin* v. *Crump*, 8 M. & W. 782, the placing of dog spears in the defendant's own premises to protect his game was held to give no cause of action to the plaintiff, whose dog was injured thereby; but in *Townsend* v. *Wathen*, 9 East 277, a contrary decision was arrived at, and in *Deane* v. *Clayton*, 7 Taunt. 489, 18 R.R. 553, the Court of Common Pleas was equally divided whether such an action would lie or not.

In *Blithe* v. *Topham*, 1 Ro. Abr. 88, it was held that a man digging a

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pit on a waste land 36 feet from a highway, was not liable to the plaintiff whose horse escaped into the waste and fell into the pit and was killed, because it was the plaintiff's fault that the horse escaped. In a case before Lord Kenyon, *Brock* v. *Copeland*, 1 Esp. 203, that learned Judge held that a defendant who kept a mischievous bull in his close, which injured the plaintiff, who was crossing the close with the license of the defendant, was liable in damages. This decision is practically the same as in *Lowery* v. *Walker*, [1911] A.C. 10.

But there are some expressions of the learned Lords in the case of *Lowery* v. *Walker*, [1911] A.C. 10, which rather lead to the conclusion that a person may not, without notice to the public, maintain, even on his own premises, an animal likely to be dangerous to persons entering thereon, even though they do so without rights, and if that proposition be sound, then it would seem to follow, neither can a man maintain dangerous engines, or pitfalls, about his premises liable to cause injury to persons likely to come innocently thereon.

In *Townsend* v. *Wathen*, 9 East 277, it was held that if a man places dangerous traps, baited with flesh, in his own grounds, so near a highway, or to the premises of another that dogs passing along the highway or kept in his neighbour's premises, must probably be attracted by their instinct, into the traps, and in consequence of such act his neighbour's dogs be so attracted and thereby injured, an action lies. This case was referred to in *Ponting* v. *Nookes*, [1894] 2 Q.B. 286; *Lowery* v. *Walker*, [1910] 1 K.B. 190.

In the case of *Cawte* v. *Olyett and Francis*, 5 Times L.R. 56, the action was brought by a lighterman against barge owners for injuries caused by the hatch of the defendants' barges being open through which the plaintiff fell in the dark, Manisty, J., had refused to leave the case to the jury and on appeal Lord Esher said: "It is clear from the evidence that there has been no such want of care as to render the defendants liable. The hatch has been properly fastened with a bar which was removed without the defendants' knowledge."

Would the case have been left to the jury had the defendants purposely opened the hatch for purposes of ventilating the hold?

When an owner of land makes upon it an excavation adjoining a public way so that a person walking upon it might by making a false step, or being affected with a sudden giddiness, or by the sudden starting of a horse, be thrown into the excavation, the party making the excavation is liable for the consequences; but it is otherwise when the excavation is made at some distance from the highway and the person falling into it would be a trespasser upon the land of the party making the excavation before he reached it: *Hardcastle* v. *South Yorkshire R. Co.*, 4 H. & N. 67, 28 L.J. Ex. 139.

A person who excavates a hole in his own ground abutting on an immemorial public highway so that the use of such a way is rendered unsafe to the public, even when using ordinary care, is responsible for an injury to a person accidentally falling into such hole while passing with ordinary caution along the highway: *Barnes* v. *Ward*, 2 Car. & K. 661, 9 C.B. 392, 19 L.J.C.P. 195.

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If an excavation has been made so near to a highway since its dedication and adoption as to create or increase danger to the public and an accident happens thereby the person making the excavation is not absolved from liability by reason that a statutory obligation to fence the highway is imposed upon other parties, who have neglected to do so: *Wettor* v. *Dunk*, 4 F. & F. 298.

Trespassers are at any rate in no better position than bare licensees, and, as no permission is given, there can be no duty to give warning of danger. But even a trespasser has a right of action if he is injured, whilst trespassing, by some wrongful act of the occupier, as, for instance, if he is assaulted, or is injured by something which the occupier of the land has put there for the purpose of injuring him: *Bird* v. *Holbrook*, 4 Bing. 628.

Dixon v. *Bell*, 5 M. & S. 198, held that if a person leaves dangerous things like guns about he must take proper precautions to prevent their doing damage; and *a fortiori* he is liable if he contrives that they shall do damage.

2. Duty to Bare Licensees.

A licensee is a person who has permission to do an act without which such permission would be unlawful. "Bare" or "mere" licensees is used to describe a person who has merely the permission without any invitation express or implied. A visitor other than one who pays for the accommodation is a bare licensee, so also is a servant. A licensee must accept the permission with its concomitant conditions and perils. 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 negligence of the grantor, if the danger is increased the licensee may recover if injured: *Gallagher* v. *Humphrey*, 6 L.T. 684, per Cockburn, C.J., 21 Halsbury's Laws of England 392 *et seq.*

In *Gautret* v. *Egerton*, L.R. 2 C.P. 371, it was said that bare licensees, *i.e.*, persons who come not for any business in which the occupier is interested, but merely by permission for their own purposes, and guests, are in a somewhat different position. Their position is analogous to that of a person who receives a gift. He is only entitled to use the place as he finds it, and cannot complain, unless there is some design to injure him or the occupier has done some wrongful act, such as digging a trench on the land or misrepresenting its condition or anything equivalent to laying a trap for the unwary. A giver of a gift is not responsible for the insecurity of the gift unless he knows its evil character at the time and omits to caution the donee. So, too, in the case of a person to whom permission to go on land is given, he cannot complain unless there is something like fraud in the gift. In the same case workmen were allowed to cross a piece of vacant land to get to some docks. On this land were canals and bridges. One of the bridges was out of repair, and a workman when crossing by it fell into a canal and was drowned. In an action brought by his widow it was held that as the workman was a bare licensee he must take the place as he found it, and as there was no trap the defendant was not liable.

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Corby v. *Hill*, 4 C.B.N.S. 556, is a case in which an occupier was held liable for a "trap." The plaintiff was permitted to use a private road belonging to the defendant. One night a heap of slates was left in the road unlighted, and the plaintiff coming along in the dark fell over it, and was hurt. The permission to use the road was an implied intimation that it was safe for use, and the leaving the heap of slates on it in the dark amounted to setting a trap. See *Bolch* v. *Smith*, 7 H. & N. 736, where the distinction between a bare licensee and an invitee is discussed and the decision in *Corby* v. *Hill*, 4 C.B.N.S. 556, was distinguished.

In *Hounsell* v. *Smyth*, 7 C.B.N.S. 731, it was held that a person who, whilst crossing waste land by mere permission of the owner, fell into an unfenced quarry, had no cause of action. Willes, J., in this case states the law as follows: "No higher duty is imposed on the defendant than that he should not set a trap," that is to say, guests and licensees can only claim if they are injured by hidden dangers, dangers which the defendant by his conduct has led them to suppose do not exist. Thus, in *Southcote* v. *Stanley*, 1 H. & N. 247, the plaintiff was a guest of the defendant, and when leaving the house a loose pane of glass fell from the door as he was pushing it open and cut him. It was held that the plaintiff, being a guest, was for the time being one of the family and could not recover for an accident, the liability to suffer which he shared in common with the rest of the family.

Batchelor v. *Fortescue*, 11 Q.B.D. 474, was a case where a contractor was engaged in making an excavation with a steam crane, and a person came and looked on idly, and, in consequence of a defect in the crane, he was killed, it was held that there was no evidence to sustain an action by his widow. As Lord Esher, M.R., put it: "There was no evidence to shew that the defendant's workmen had reason to expect the deceased to be at the spot where he met his death. There was no contract between the defendant and the deceased; the defendant did not undertake with the deceased that his servants should not be guilty of negligence; no duty was cast upon the defendant to take care that the deceased should not go to a dangerous place."

In *Gallagher* v. *Humphrey*, 6 L.T.N.S. 684, Cockburn, C.J., says: "A person who merely gives permission to pass or re-pass along his close is not bound to do more than allow the enjoyment of such permissive right under circumstances in which the way exists. . . . The grantee must use the permission as the thing exists."

The distinction between *Corby* v. *Hill*, 4 C.B.N.S. 556, and *Bolch* v. *Smith*, 7 H. & N. 736, is pointed out in the judgment above. See also *Castle* v. *Parker*, 18 L.T.N.S. 367, and compare *Watkins* v. *G.W.R. Co.*, 46 L.J.C.P. 817.

If a person knows that others are in the habit of trespassing or are likely to trespass, he may be liable if he leaves about dangerous things which will act as allurements and so induce people to trespass, and does not take proper means to prevent consequent damage: *Cooke* v. *Midland Great Western Railway*, [1909] A.C. 229. Lord Atkinson, in this case says, at p. 238: "The duty the owner of premises owes to the persons to

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whom he gives permission to enter upon them must . . . be measured by the knowledge, actual or imputed, of the habits, capacities, and propensities of those persons."

Underhill, on Torts, 9th ed., p. 176, referring to this decision, says: "The defendants had a turntable on land adjoining a highway, and to which there was easy access by a gap in the hedge. They knew children were in the habit of trespassing. Children got through the gap and were injured whilst playing with the turntable, which was left in a dangerous condition. Even if the children were to be regarded as trespassers the company were liable, for they left an allurement near a highway by which the children were allured into trespassing and playing with the dangerous machine. Probably they would not have been liable if they had not left the gap so as to make trespassing easy and left an allurement to induce the children to trespass. This almost amounted to an invitation."

Cooke v. *Midland and G.N. R. Co.*, [1909] A.C. 229, is distinguished in the recent case of *Jenkins* v. *Great Western R. Co.*, [1912] 1 K.B. 525, which holds that the leave or license to play on a pile of railway ties on the railway right-of-way (if any such leave or license existed) was confined to the particular spot where the ties were piled, and did not extend to the main line of the railway some short distance away, no duty being on the railway company to fence off the ties from the rest of their right-of-way. In this case *Schofield* v. *Bolton Corporation*, 26 Times L.R. 230, is also distinguished because in the latter case there was no act of omission and no negligence, the sandpit in question and the railway line belonging to different owners.

Thatcher v. *Great Western R. Co.*, 10 Times L.R. 13, is authority for the proposition that where a railway company permits persons to cross its line at a particular spot, there is a duty on the company to take reasonable care in moving over that portion of their line; and in *Barrett* v. *Midland R. Co.*, 1 F. & F. 361, it was held that where persons are in the habit of crossing a railway at a particular place, though there is no right-of-way there, the company are under liability to take reasonable precautions in their use of such place.

In *Harris* v. *Perry and Co.*, [1903] 2 K.B. 219, it is said that where a person undertakes to provide for the conveyance of another although he does it gratuitously, he is bound to use due and reasonable care, and the standard of reasonableness naturally must vary according to the circumstances of the case, the trust reposed, the skill and appliances at the disposal of the person to whom another confides a duty, *per* Collins, M.R., at p. 226.

The master of a house must not lay traps for either visitors or servants but he need not take more care of them than he may reasonably be expected to take of himself: *Southcote* v. *Stanley*, 1 H. & N. 247. In this case it is decided that the term "guest" is equivalent to visitor and applies only to a person who does not pay for his accommodation, such a person is a bare licensee with the added disability of being in the same position as a servant. Servants, however, are not in this same category as invitees and licensees at common law. See *Priestly* v. *Fowler*, 3 M. & W. 1, and

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the judgment of Garrow, J.A., in the above case of *King* v. *Northern Navigation Co.*

A distinction is to be drawn between cases of mere tacit acquiescence in persons coming on premises without leave, and cases where there is some inducement or encouragement which may amount to permission to use the premises.

In *Lowery* v. *Walker*, [1911] A.C. 10, reversing *Lowery* v. *Walker*, [1910] 1 K.B. 173, the appellant, while passing through a field belonging to the respondent, was attacked and injured by a horse belonging to the respondent. The respondent knew that the field was habitually used by the public as a short cut, and that the horse which he had put there was ferocious. In an action by the appellant to recover damages from the respondent in respect of his injuries, it was decided that the respondent owed a duty to the public crossing the field to give notice of probable danger from the horse, and that as he had failed to give such notice he was liable for the injuries caused to the appellant. What he did was in effect the setting of a trap.

In *Lowery* v. *Walker*, [1911] A.C. 10, it was decided that habitual user of a particular way across private property may amount to user by permission in a particular case. Compare *Barrett* v. *Midland R. Co.*, 1 F. & F. 361.

A company was possessed of a canal and the land between it and a sluice; an ancient public footpath passed through the land close to the sluice; there was a towing-path, nine feet wide, by the side of the canal, and an intervening space of twelve feet of grass between the towing-path and the footpath. By permission of the company, the intervening space had been recently used for carting, and ruts having been caused, the whole space between the sluice and the canal had been covered with cinders, and thus all distinction between the path and the rest of the land had been obliterated. A person using the path at night missed his way and fell into the canal and was drowned. It was held, that the canal was not so near the footpath as to be adjoining to it, so as to throw upon the company the duty of fencing the canal off; and that the other facts did not render the company liable for the accident: *Binks* v. *South Yorkshire Railway*, 3 B. & S. 244, 350, 32 L.J.Q.B. 26, 7 L.T. 350, 11 W.R. 66.

The law is succinctly summed up by Pigot, C.B., in *Sullivan* v. *Waters*, 14 Ir. C.L.R. 475: "A mere license given by the owner to enter and use premises which the licensee has full opportunity of inspecting which contain no concealed cause of mischief, and in which any existing source of danger is apparent creates no obligation," in the owner to guard the licensee against danger.

In *White* v. *France*, 2 C.P.D. 308, the plaintiff was a licensed waterman, who having complained to the person in charge that a barge of the defendants was being navigated unlawfully, was referred to the defendants' foreman. While seeking the foreman, he was injured by the falling of a bale of goods so placed as to be dangerous, and yet to give no warning of danger; the defendants were liable.

In the case of *Heaven* v. *Pender*, 11 Q.B.D. 503, the defendant, a dock owner, had erected a staging round a ship, under a contract with the ship-

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owner. The plaintiff was a workman in the employ of a painter who had contracted with the shipowner for the painting of the ship. In order to do this the plaintiff had to use the staging. Owing to the defendant's negligence the staging fell, and the plaintiff was injured; Held, reversing the Court below, that the plaintiff being engaged on work in the performance of which the defendant as dock owner was interested, the defendant was under an obligation to him to take reasonable care that the staging was safe, and that for neglect of that duty the defendant was liable. That case is explained in *La Lievre* v. *Gould*, [1893] 1 Q.B. 491, 497.

Where a dock-master or wharfinger invites a vessel to a particular place to unload, and, owing to an inequality in the bottom of the dock, the vessel is injured, the dock company or wharfinger is liable. For the dock-master or wharfinger either knew, or ought to have known, of the danger; and in either view was negligent: *Owners of "Apollo"* v. *Port Talbot Co.*, [1891] A.C. 499.

3. *Duty to Invitees.*

An invitee differs from a bare licensee in that the latter has merely permission to be on the premises and is not there by invitation or on lawful business of interest to both parties.

The following classes of persons are held to be invitees:—

1. Customers in shops or offices during business hours;
2. Passengers at railway stations or in trains;
3. Passengers on piers;
4. Persons having business on the premises;
5. Persons paying to come on the premises.

See also 21 Halsbury's Laws of England, 387.

The liability of an occupier may be limited with regard to the character of the acts of the invitees as in *Wilkinson* v. *Fairrie*, 1 H. & C. 633, where the plaintiff chose to go wandering about in the dark, he ceases to be an invitee and becomes a licensee. See *Paddock* v. *North E. R. Co.*, 18 L.T. 60.

In *Fleming* v. *Eadie and Son*, 35 Sc. L.R. 422, a sanitary inspector who asked to inspect drains in a house being reconstructed, went down into the cellar without a light, and was injured owing to the fact that the lower step was cut away, it was held that the darkness should have been a warning. Compare *Cairns* v. *Boyd*, 6 R. 1044.

In *Lewis* v. *Ronald*, 26 Times L.R. 30, tradesmen delivering goods to tenants in a flat, the landlord having covenanted to light the stairways, wandered into a part of the stairway which was unlit and was injured, it was held that the landlord was not liable.

In *Schofield* v. *Bolton Corporation*, 26 Times L.R. 230, where a child strayed through a gate in a field, where the defendants allowed it to play, and eventually was injured on a railway line, the defendants were held not to be liable as there was no duty on them to keep the gate shut, and no evidence that any child had strayed there before: See *Jenkins* v. *Great Western R. Co.*, [1912] 1 K.B. 525.

The duty of the occupier of premises upon which an invitee comes is to take reasonable care to prevent injury from unusual dangers which

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are more or less hidden, of whose existence he is aware or ought to be aware; if this duty is neglected the invitee is entitled to recover damages in respect to any injuries he may have sustained: *Shoebottom* v. *Egerton*, 18 L.T. 889, a canal company charging tolls; *Brazier* v. *Polytechnic Institution*, 1 F. & F. 507; *Pike* v. *Polytechnic Institution*, 1 F. & F. 712; *Welch* v. *Canterbury and Paragon, Ltd.*, 10 Times L.R. 478; *Greenlees* v. *Royal Hotel*, 42 Sc. L.R. 317, visitors going to an exhibition; *Axford* v. *Prior*, 14 W.R. 611; *Sandys* v. *Florence*, 47 L.J.Q.B. 598, guest for reward at an hotel; *Francis* v. *Cockrell*, L.R. 5 Q.B. 501; *Duncan* v. *Perthshire Cricket Club*, 42 Sc. L.R. 317, person paying for place on a grand stand; *Winch* v. *Thames Conservators*, payment to go on towing-path; *Philipps* v. *Humber*, 41 Sc. L.R. 626, shooting gallery; *Morris* v. *Carnarvon County Council*, [1910] 1 K.B. 840, a spring door dangerous to children; *King* v. *Great Western R. Co.*, 24 L.T. 583, a defective crane used by consignees at a railway yard; *Elliott* v. *Hall*, 15 Q.B.D. 315, a railway waggon out of repair; *Sturges* v. *Great W. R. Co.*, 8 Times L.R. 231, an obstruction on a railway platform: *Marney* v. *Scott*, [1899] 1 Q.B. 986, a dangerous ship's ladder (compare with *Redgrave* v. *Belsey*, 13 Times L.R. 484), a trap-door left open by a fellow-servant, but premises not unsafe otherwise; *Thatcher* v. *Great W. R. Co.*, 10 Times L.R. 13, a passenger on a railway platform struck by the open door of a guard's van.

The fact that more modern steps might have been provided does not constitute negligence: *Crafter* v. *Metropolitan R. Co.*, L.R. 1 C.P. 301, distinguishing *Longmore* v. *Great W. R. Co.*, 19 C.B.N.S. 183.

In *Chapman* v. *Rothwell*, E. B. & E. 168, referred to in *Indermaur* v. *Dames*, L.R. 2 C.P. 311, Erle, J., says: "If you invite a customer to your shop and leave a pitfall open, or a large iron peg in the part of the floor over which the customer is likely to tread, is not that a duty, and a breach, if an accident ensues? In this case a distinction is made between a customer and a guest: *Southcote* v. *Stanley*, 1 H. & N. 247, being distinguished.

Parnaby v. *Lancaster Canal Co.*, 11 Ad. & El. 223, 3 P. & D. 162, affirming the judgment of the Queen's Bench, lays down the principle that where the owners of a canal take tolls for the navigation, they are bound to use reasonable care in making the navigation secure.

This case is referred to in *Johnson* v. *Midland R. Co.*, 6 Ry. Cas. 63; *The "Beam,"* [1906] P. 63; *Bede S.S. Co.* v. *Weir Commissioners*, [1907] 1 K.B. 320, approved of in *Mersey Docks Trustees* v. *Gibbs*, L.R. 1 H.L. 93, 11 H.L.C. 686; followed in *Winch* v. *Thames Conservators*, L.R. 9 C.P. 382, distinguished, *Gallin* v. *London and N.W. R.*, L.R. 10 Q.B. 215; *Forbes* v. *Lee Conservancy Board*, 4 Ex. D. 122; *R.* v. *Great W. R.*, 62 L.J.Q.B. 575, applied; *Fleming* v. *Manchester Corporation*, 44 L.T. 519; *R.* v. *Williams*, 9 App. Cas. 415; *Lowther* v. *Curwen*, 58 L.T. 168, 172.

In *Patterson* v. *Kidd's Trustees*, 34 Sc. L.R. 69, the decision in *Dolan* v. *Burnett*, 33 Sc. L.R. 399, was distinguished on the ground that the occupier of the premises had, two years prior to the accident, employed a thoroughly competent tradesman to overhaul the building, and was held not to be liable to the plaintiff as he had used reasonable precautions to make his premises safe. Compare *O'Sullivan* v. *O'Connor*, 22 L.R. Ir. 467.

In *Mason* v. *Langford*, 4 Times L.R. 407, the plaintiff went to a shop after business hours, the shutters were up but the door was ajar, on push-

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ing the door further open he fell down a flight of stairs. The jury were directed to enquire whether the facts disclosed an invitation or not.

In *Francis* v. *Cockrell*, L.R. 5 Q.B. 184, the defendant engaged a contractor to erect a grand stand for viewing races. The plaintiff paid for a seat on the grand stand. Owing to the negligence of the contractor the stand was defective, and it fell and the plaintiff was injured. The defendant was liable, although neither he nor his servants were personally negligent. It was their duty to see that the stand was reasonably safe.

In *Potter* v. *Faulkner*, 1 B. & S. 800, it was held that a stranger by volunteering his assistance cannot impose upon the master a greater liability than that in which he stands to his own servants and describes a volunteer as one who without being under a paid contract of service associates himself with the servant of another in the performance of that servant's work.

Wright v. *L. and N.W. R. Co.*, L.R. 10 Q.B. 298 (affirmed 1 Q.B.D. 252) followed *Holmes* v. *N.E. R. Co.*, L.R. 4 Exch. 254, L.R. 6 Exch. 123, which decided that the plaintiff was not a mere licensee but was engaged with the consent and invitation of the defendants in a transaction of common interest to both parties, and was therefore entitled to require that the defendants' premises should be in a reasonably secure condition.

The *Wright* case is also authority for the statement that when the servant of a master gives assistance to the defendant to expedite delivery of his master's goods he is not a volunteer, the reason being that there is a common interest. See *Wyllie* v. *Caledonian R. Co.*, 9 Macph. 463, holding that a person who assists the servants of another with the master's consent, can recover against the master for injuries caused by the negligence of the servants.

Abraham v. *Reynolds*, 5 H. & N. 143, held that it is not in every case where a party works with the servants of another for a common purpose, that he becomes a volunteer, so as to prevent his maintaining an action against the party for an injury accruing from the negligence of his servants while working for the common purpose.

Degg v. *Midland R. Co.*, 1 H. & N. 773, lays down the principle that a master is not generally responsible to a person who while voluntarily assisting a servant in his work is injured.

One who puts himself under the control of an employer to act in the capacity of a servant is a volunteer: *Johnson* v. *Lindsay and Co.*, [1891] A.C. 371, 377, disapproving *Woodhead* v. *Garness*, 4 R. (Ct. of Sessions) 469.

In *Cleveland* v. *Spier*, 16 C.B.N.S. 399, it was decided that a passer-by who is casually appealed to by a workman for information respecting a thing which the latter is doing in a public thoroughfare, is not to be considered a volunteer assistant, so as to exonerate the workman's master from responsibility for an injury resulting to the former from the workman's negligent mode of doing the work.

In *Lax* v. *Darlington Corporation*, 5 Ex.D. 28, it was held that the owners of a market-place were under an obligation to keep the same free from danger to those who lawfully frequented it and where by erecting the railing of insufficient height they had been guilty of a misfeasance resulting in damages to plaintiff who was not a mere licensee of a particular site but entitled to use the whole of the market-place subject to

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the regulations of the owners, the plaintiff was entitled to recover damages where his cow was killed by jumping over the railing.

In *Tarry* v. *Ashton*, 1 Q.B.D. 314, it was held that where a person maintains a lamp projecting over the highway for his own purpose it is his duty to maintain it so as not to be dangerous to the passengers: and if it causes injury owing to want of repair, it is no answer on his part that he had employed a competent person to repair it. *Per* Blackburn, J., on the ground that under the circumstances of the case it was shewn that the defendant knew that the lamp wanted repair in August and it was his duty therefore, to put it in reasonable repair and the person he employed having failed to do so he was liable for the consequences of the breach of duty.

Blackburn, J., in this case, says, at p. 319: "It was the defendant's duty to make the lamp reasonably safe; the contractor failed to do that, and the defendant having the duty, has trusted the fulfilment of that duty to another, who has not done it. Therefore the defendant has not done his duty and he is liable to the plaintiff for the consequences."

On this point, see also *Mancry* v. *Scott*, [1899] 1 Q.B. 986, and compare the decisions in Canadian Courts, *Grant* v. *Acadia Coal Co.*, 32 Can. S.C.R. 427; *McKelvey* v. *La Roi*, 32 Can. S.C.R. 664, and *Canada Woollen Mills* v. *Traplin*, 35 Can. S.C.R. 424.

In *Bolch* v. *Smith*, 7 H. & N. 736, the respective positions of bare licensees and invitees are discussed.

In *Burchell* v. *Hickisson*, 50 L.J.Q.B. 101, the plaintiff, a child, accompanied his sister who went on business to the defendant's house, and owing to a rail being out of the railing of the steps, the plaintiff fell through and was injured, there was no invitation to the plaintiff, and he could not recover; it would seem, however, that if the sister who was on business had fallen through, the defendant would have been liable.

In *Smith* v. *London and Saint Katherine Docks Company*, L.R. 3 C.P. 326, the plaintiff went on board a ship lying at the defendants' docks at the invitation of the ship's officers, and while he was on board, the defendants' servants for the purposes of the business of the dock, moved the gangway so that it was to their knowledge insecure, the plaintiff, in ignorance, returned along it to the shore, the gangway gave way, and he was injured; it was held that the defendants owed a duty to the plaintiff to keep the gangway safe, and he was entitled to recover damages for the injuries received.

In *Butts* v. *Goddard*, 4 Times L.R. 193, the plaintiff recovered where calling upon a firm of auctioneers and estate agents, she entered by a door, not the usual one of entrance, and proceeding, pushed open a folding door and fell down a set of steps and was injured.

In *Griffith* v. *L. and N.W. R. Co.*, 14 L.T.N.S. 797, where a mere licensee got under a crane from which a package fell and injured him, it was said that a railway company must be allowed to carry on their business on their own premises in such a way as they think fit.

The effect of placing a notice warning persons using premises notwithstanding such notice is considered in *Anderson* v. *Coutts*, 58 J.P. 369, when notice was posted warning persons against going near the edge of

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a cliff and to keep inside of a bank. This case should be compared with *Winch* v. *Thames Conservators*, L.R. 9 C.P. 378, when the Exchequer Chamber thought that the defendants would not be liable if they issued a warning to invitees paying tolls, that they were to take the premises as they found them.

In *Watkins* v. *Great W. R. Co.*, 46 L.J.Q.B. 817, Lopes, J., at p. 822, said that he recognized no distinction between that which has been called a "trap" and ordinary actionable negligence, except so far as the word "trap" might be used to designate a negligent act which is calculated to mislead a person using ordinary care.

4. Liability of Owner to Tenant.

As between the owner of premises and his tenant apart from some special agreement, an owner who lets premises in a dangerous condition and who is under no obligation to repair is not liable for injuries sustained either by the tenant, his family, his servants, guests or customers which are due to the defective condition of the premises.

In *Cavalier* v. *Pope*, [1906] A.C. 428, approving *Robbins* v. *Jones* (1863), 15 C.B.N.S. 221, where a landlord contracted with his tenant to repair a defective house, but failed to do so, and the wife of the tenant was injured by reason of the defective state of the house, it was held that she had no cause of action, as she was a stranger to the contract.

See also *Norris* v. *Catmur*, Cob. & El. 576; *Hart* v. *Windsor*, 12 M. & W. 68; *Keates* v. *Earl of Cadogan*, 10 C.B. 591; see *Malone* v. *Laskey*, [1907] 2 K.B. 141; compare *Kennedy* v. *Bruce*, [1907] S.C. 845, where *Cavalier* v. *Pope*, [1906] A.C. 428, was distinguished apparently because of the difference between English and Scottish law.

In *Cameron* v. *Young*, [1908] A.C. 176, the plaintiff was held not to be entitled to recover on the ground that he was a stranger to the contract following *Cavalier* v. *Pope*, [1906] A.C. 428.

Huggett v. *Miers*, [1908] 2 K.B. 278; and compare *Ivay* v. *Hedges*, 9 Q.B.D. 80. It is difficult to reconcile *Hargroves, Aronson and Co.* v. *Hartopp*, [1905] 1 K.B. 472, with these cases; where an owner of a building let out in flats or separate tenements keeps possession of the common staircase, he owes no duty to his tenants (apart from contract) with regard to lighting and repairing the staircase, and the guests of his tenants or persons coming on business with them have not better rights than the tenants themselves. Accordingly, if such a person is injured in consequence of the dangerous condition of the staircase he has no cause of action against the landlord.

In *Malone* v. *Laskey*, [1907] 2 K.B. 141, there was a decision similar to *Cavalier* v. *Pope*, [1906] A.C. 428, and *Cameron* v. *Young*, [1908] A.C. 176, where a licensee of the tenant, the landlord not being under any covenant to repair, voluntarily made repairs, the execution of which was negligent.

Where the owner of the premises has retained control over that part of the premises where the accident occurred it would seem that he is liable for injuries sustained through the defect: *Miller* v. *Hancock*, [1893] 2 Q.B. 177. It is difficult to distinguish this case from *Cavalier* v. *Pope*,

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[1906] A.C. 428, and to see why if the wife in *Cavalier* v. *Pope* could not take the benefit of her husband's contract, the guest of the tenant in this case could take advantage of the tenant's contract with his landlord. In *Cavalier* v. *Pope*, the landlord must have contemplated that the house would be used by the wife. Underhill, on Torts, 9th ed., 173*n*, suggests that perhaps *Miller* v. *Hancock* is bad law (see *Huggett* v. *Miers*, [1908] 2 K.B. 278).

In *Miller* v. *Hancock*, it was decided that unless the landlord has taken upon himself, by contract with the tenant, the obligation of repairing, in which event, as he must contemplate that the staircase will be used by persons having business with the tenants, he owes them a duty to keep it in a reasonably safe condition.

Where there is a contract to repair and the tenant is injured because of the landlord's neglect to perform it the tenant's remedy is upon the contract; *per* Erle, C.J., in *Robbins* v. *Jones*, 15 C.B.N.S. 221; *Hart* v. *Windsor*, 12 M. & W. 68.

The owner of premises is not liable even though he has covenanted to make repairs and fails to do so by reason of which the tenant is injured where he was ignorant of the defect complained of or where the tenant knew of the danger and elected to run the risk: *Treadway* v. *Machin* (1904), 20 Times L.R. 726. Compare *Broggi* v. *Robins* (1899), 15 Times L.R. 244; *Mathieson's Tutor* v. *Aikman's Trustees*, 47 Sc. L.R. 36; *Cavalier* v. *Pope*, [1906] A.C. 428.

In support of the same principle as laid down in *Miller* v. *Hancock*, [1893] 2 Q.B. 177, see *McManus* v. *Armour* (1901), 38 Sc. L.R. 791; compare it with *Mills* v. *Temple West* (1885), 1 Times L.R. 503; *Powell* v. *Thorndyke* (1910), 102 L.T.N.S. 600; *Grant* v. *McClafferty* (1906), 44 Sc. L.R. 179; *McMartin* v. *Hannay*, 10 MacPh. 411.

It may be noted that the control of premises is *primâ facie* in the tenant or occupier: *Russell* v. *Shenton*, 3 Q.B. 449; *Hadley* v. *Taylor*, L.R. 1 C.P. 33, and see 18 Halsbury's Laws of England, 505; and where a stranger is injured by reason of defective premises leased to a tenant, the tenant and not the owner is *primâ facie* liable; see *Cheetham* v. *Hampson*, 4 Times Rep. 318, followed in *Russell* v. *Shenton*, *supra*; *R.* v. *Watts*, 1 Salk. 357; *Payne* v. *Rogers*, 2 Hy. Black. 349; compare *Sly* v. *Edgley*, 6 Esp. 6; *Coupland* v. *Hardingham*, 3 Camp. 398; *De Boos* v. *Collard*, 8 Times L.R. 338.

It is sometimes a question of considerable doubt as to whether the landlord has reserved possession of the premises or not: *Jarvis* v. *Dean*, 3 Bing. 447; *Page* v. *Hatchett*, 8 Q.B. 187, 593.

In *Bishop* v. *Bedford Charity Trustees*, 1 E. & E. 697, a child was injured by falling through a grating over an area. The building had been leased by the defendants and the lessee had sub-let the premises in separate holdings but had retained possession of the area. The lessees became bankrupt and the defendants called upon the sub-tenant to pay rent direct to them, it was held, that the defendants had not by so doing exercised their power of re-entry, and until they did so they were not in occupation of the area and consequently were not liable.

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In *Bowen* v. *Anderson*, [1894] 1 Q.B. 164, the question of the liability of a tenancy from week to week is considered. See 18 Halsbury's Laws of England, 439, 505.

Where a landlord is guilty of a misfeasance in consequence of which injury is caused to some one to whom a duty to take care is owed by the owner, he is liable, such a duty is owed to a neighbour and also to a person on the abutting highway. See *Todd* v. *Flight*, 9 C.B.N.S. 377; *Gandy* v. *Jubber*, 5 B. & S. 78 (reversed on another point in 9 B. & S. 15); *Bowen* v. *Anderson*, [1894] 1 Q.B. 164; *Mills* v. *Temple West*, 1 Times L.R. 503; see 16 Halsbury's Laws of England, p. 153, 18 *ibid.* 504, 505.

As to the implied warranty in the case of a letting of a furnished house, see *Smith* v. *Marrable*, 11 M. & W. 5; and *Wilson* v. *Finch Hatton*, 2 Ex.D. 336.

As between landlord and tenant the duty to repair the demised premises depends entirely on the contract between the parties, and apart from contract the landlord owes the tenant no duty to repair or not to let the premises in a dangerous condition. Hence, if a landlord lets a house in a dangerous condition, he is not liable to the tenant or to a person using the premises by invitation of the tenant for any injuries happening during the term due owing to the defective state of the house: *Lane* v. *Cox*, [1897] 1 Q.B. 415, *per* Lord Esher, M.R., at 417.

In *Nelson* v. *Liverpool Brewery Co.* (1877), 2 C.P.D. 311, it was stated that liability can be created "in the case of misfeasance by the landlord, as, for instance, where he lets premises in a ruinous condition." This dictum was unnecessary for the decision of the case and is not in accordance with earlier decisions such as *Pretty* v. *Bickmore*, L.R. 8 C.P. 401, approved of in *Gwinnell* v. *Eamer*, L.R. 10 C.P. 658; *Copp* v. *Aldridge and Co.*, 11 T.L.R. 411, and *Lane* v. *Cox*, [1897] 1 Q.B. 415.

5. Canadian Cases.

For a consideration of the decisions in Canada see annotation to *Gunn* v. *C.P.R.*, 1 D.L.R. 232. In addition to the cases there noted the following cases may be referred to: *Deyo* v. *Kingston and Pembroke R. Co.*, 8 O.L.R. 588, which case was distinguished in *Muma* v. *C.P.R.*, 14 O.L.R. 147; *Grand Trunk R. Co.*, v. *Birkett*, 35 Can. S.C.R. 296; *Markle* v. *Simpson Brick Co.*, 10 O.W.R. 9; *D'Aoust* v. *Bissett*, 13 O.W.R. 1115; *Bondy* v. *Sandwich, Windsor and A. R. Co.*, 24 O.L.R. 409; *Breen* v. *City of Toronto*, 2 O.W.N. 87, 690.

Perdue v. *Canadian Pacific Ry. Co.*, 1 O.W.N. 665, referred to by Garrow, J.A., in his judgment in *King* v. *Northern Navigation Co.*, *supra*, is summarized as follows:—

The plaintiff was a labourer in the employment of contractors for the grading of a portion of a railway being constructed by the defendants, and was in charge of a machine which was being carried by the defendants on a flat car forming part of a train used in grading operations. At a station the plaintiff got down from the car and stood upon the platform, the train standing still. When it started again, he attempted to jump on, the train being in motion, but came in contact with a baggage truck on the platform, and was injured. He was not invited to alight, nor to jump

Annotation (*continued*)—Negligence (§ 1 C 2—50)—Defective premises—Liability of owner or occupant—Invitee, licensee or trespasser.

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Annotation

Negligence—Trespassers and Invitees.

on again: Held, in an action to recover damages for the plaintiff's injuries, that the rule of evidence *res ipsa loquitur* did not apply; the plaintiff was bound to give reasonable evidence of the nature and extent of the duty owed to him by the defendants and the facts which constituted the breach of such duty; the position of the plaintiff was that of a mere licensee; the duty of the owner of the premises toward him was confined to two things, that he should not be exposed to a trap or other concealed danger, and that the owner should not be guilty of acts of active negligence; in other respects the licensee must at his own risk use the premises as he finds them; and in this case there was no trap—the accident happening in broad daylight—and no active negligence; and a nonsuit was affirmed.

Schmidt v. *Berlin*, 26 O.R. 54, holds that a municipal corporation, owners of a public park, are not liable to a mere licensee for personal injuries sustained owing to the want of repair of a building erected therein, at all events where knowledge of the want of repair is not shewn.

Moore v. *Toronto*, 26 O.R. 59*a*, is a case where a park lake having been deepened, into which a child fell, the mother went to its rescue and was drowned, the Chancery Divisional Court affirmed the judgment of the trial Judge allowing a nonsuit.

The cases of *Headford* v. *McClary*, 24 Can. S.C.R. 291, the case of falling into the well of an elevator; and of *Hawley* v. *Wright*, 32 Can. S.C.R. 40, where the plaintiff was entirely at fault in trying to get out of an elevator, are also of interest in this connection.

In the *Headford* case, 24 Can. S.C.R. 291, a workman in a factory, to get to the room where he worked, had to pass through a narrow passage and at a certain point to turn to the left while the passage was continued in a straight line to an elevator. In going to his work at an early hour one morning he inadvertently walked straight along the passage and fell into the well of the elevator which was undergoing repairs. Workmen engaged in making such repairs were present at the time with one of whom the workman collided at the opening but a bar usually placed across the opening was down at the time. In an action against his employers in consequence of such accident, it was held, affirming the decision of the Court of Appeal, 21 A.R. (Ont.) 164 (Strong, C.J., *hæsitante*, and Taschereau, J., dissenting), that there was no evidence of negligence of the defendants to which the accident could be attributed and that the plaintiff was properly nonsuited at the trial. Strong, C.J., that though the case might properly have been left to the jury, and that as the judgment of nonsuit was affirmed by two Courts it should not be interfered with.

In *Nightingale* v. *Union Colliery*, 35 Can. S.C.R. 65, affirming judgment in *Nightingale* v. *Union Colliery*, 9 B.C.R. 453, following *Moffat* v. *Bateman*, L.R. 3 P.C. 115, it was decided that in the absence of evidence of gross negligence a carrier is not liable for injuries sustained by a gratuitous passenger. In this case *Harris* v. *Perry and Co.*, [1903] 2 K.B. 219, was distinguished.

Referring to the judgment of the Divisional Court in *King* v. *Northern Navigation Co.*, 24 O.L.R. 643, the result of which is affirmed in the case now reported above without any express affirmance of the opinions below, a recent article in the Canada Law Journal, vol. 48, p. 41, says:—

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Negligence—Trespassers and Invitees.

Annotation (*continued*)—Negligence (§ 1 C 2—50)—Defective premises—Liability of owner or occupant—Invitee, licensee or trespasser.

"The decision does not seem to be quite satisfactory for two reasons; first, the Divisional Court assumed the functions of the jury in finding the deceased to have been a trespasser, and it is open to question whether it drew the proper inference from the facts proved. The deceased's recent employment on the 'Ionic' raised a not unreasonable presumption that he was visiting that vessel on business, or in circumstances that would make it perfectly lawful for him to be on the 'Huronic,' and that fact not having been submitted to the jury, we are inclined to think the case ought to have been sent back for a new trial."

The article referred to is concluded with the following statement:—

"It seems to us that such a question is eminently one on which the opinion of a jury might be asked under proper directions and having due regard to the character of the deceased and the surrounding circumstances; and that when a case has been tried by a jury who have not passed on the question, an appellate Court should not usurp the functions of the jury, unless, upon the evidence adduced, it is reasonably clear that no other conclusion can possibly be drawn than that which the appellate Court adopts."

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LA COMPAGNIE ELECTRIQUE DE GRAND'MÈRE v. PUBLIC UTILITIES COMMISSION.

Quebec Court of King's Bench (appeal side), Trenholme, Lavergne, Cross, Carroll, and Gervais, JJ. June 17, 1912.

1. PUBLIC IMPROVEMENTS (§ II—11)—CONDITIONS PRECEDENT TO PAYMENT—PERFORMANCE OF WORK FOR PUBLIC UTILITIES COMMISSION.

A person ordered by the Public Utilities Commission to execute certain work is entitled to be paid therefor only if he has complied with the terms of the order ordering such work done after his account, properly proved, has been approved by the Lieutenant-Governor in council on the recommendation of the commission; and there is no right to payment for work done under orders of the commission (*a*) if such work has exceeded the scope of the order given, (*b*) if the value thereof has not been established by legal proof, (*c*) if the account has not been submitted to the Lieutenant-Governor in council.

2. EVIDENCE (§ II C—119)—PAYMENT FOR WORK ORDERED DONE BY THE PUBLIC UTILITIES COMMISSION, QUEBEC—DENIAL OF RIGHT TO CONTRADICT VALUE OF WORK DONE.

The party called upon to pay an account for work ordered done by the Public Utilities Commission has the right to have the value thereof established upon a hearing of the evidence *pro and con*, and if such right is denied him the order to pay is illegal.

3. DESTRUCTION OF PROPERTY (§ I—5)—VALIDITY OF ORDER UNDER QUEBEC PUBLIC UTILITIES ACT—ABSENCE OF NOTICE.

No order for destruction of property under the Public Utilities Act is valid unless the interested party has been notified of the application and has been afforded an opportunity of making a defence.

Statement

THIS was an appeal from an order of the Quebec Public Utilities Commission rendered at Quebec, on November 28th,

1911, ordering the appellant to pay to one Ricard $508.75 cost of demolition of appellants' property by Ricard.

The appeal was allowed and the province recommended to pay the costs.

J. A. Gagné, for appellant.

The respondent did not appear before the Court of King's Bench.

The unanimous judgment of the Court was delivered by

LAVERGNE, J. (translated):—This is an appeal from a judgment rendered by the respondent on November 28th, 1911, condemning the appellant to pay the sum of $508.75.

The facts may be summarized as follows:—

The appellant was the proprietor of an electric light system at Grand'Mère. One Dr. Ricard had also established some time previously an electric light system which he operated by virtue of an alleged privilege granted him by the town of Grand'-Mère for a period of 10 years with preferential right of renewal at the expiry of this period.

In 1906, Ricard petitioned the Superior Court for an injunction to restrain the appellant from operating its system and carrying on any works.

An interlocutory injunction was issued ordering the appellant to cease using its electric wires and poles for purposes of lighting, heating and otherwise.

The appellant pleaded to the merits alleging that Ricard's privilege is null and void.

Final judgment has not been rendered yet and the interlocutory injunction is still in force. Consequently the entire system and plant of the appellant has remained in *statu quo* owing to this injunction.

In February, 1911, a complaint was lodged against the Ricard system before the commission respondent by Mr. Naud, member for Champlain.

An enquiry was held at Grand'Mère and the respondent ordered different companies operating electric systems in that town to do certain work on their properties.

The portion of the order, dated March 10th, 1911, relating to the appellant reads as follows:—

> Quant à la Compagnie Electrique de Grand'Mère, il appert que cette compagnie a commencé la pose de ses poteaux et fils en décembre 1906, ou en janvier 1907, mais que cet ouvrage fût arrêté par une injonction de la Cour Supérieure. Sans porter atteinte en aucune façon à l'autorité de la Cour Supérieure, je suis d'opinion, sur l'avis du docteur Herdt, que les améliorations suivantes devraient être ordonnées et mises à effet dans le seul but d'assurer la sûreté publique, à savoir: les fils non utilisés de cette compagnie, partout où il y a

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possibilité de contact avec les fils du docteur Ricard devraient être détachés et enlevés. Là où cette compagnie n'a pas de fils mais où ses poteaux s'élèvent entre les fils du système Ricard, elle devrait les munir de traverses (cross arms) à ses propres frais afin que le docteur Ricard puisse y poser ses fils. Il est aussi à noter que la ligne de transmission de la Compagnie Electrique de Grand'Mère croise celle du docteur Ricard à deux endroits près de Shawinigan Falls, d'où ils obtiennent tous deux leur pouvoir. Ces croisements ne devraient être faits que là où il se trouve un ou des poteaux pour supporter les deux lignes ou près de ces poteaux, et jamais dans la partie libre de la travée des fils, comme c'est le cas dans l'installation qui nous occupe actuellement.

The appellant did not believe it could undertake such works without disobeying the injunction order. So the respondent then authorized Ricard, the proprietor of the rival concern, to have these works carried out. This was by an order of September 29th, 1911.

This order repeats the portion of the report above cited, takes notice of the appellants' default to comply therewith, and concludes as follows:—

> Wherefore, Doctor J. O. H. Ricard is hereby authorized and directed to take down, remove and store such poles, wires and other apparatus belonging to the said company as are required to be removed by the orders above cited, and generally to do all things necessary for the proper compliance with the orders; and shall take such possession of the company's works, property and undertaking as is necessary therefor. The said Doctor Ricard shall be responsible for any damages to person or property caused in the carrying out of such work, and shall be remunerated according to the provisions of art. 738 R.S.Q.

Art. 738 R.S.Q. 1909 declares that persons entrusted with works or operations by the commission are to be paid by the Lieutenant-Governor in council such sums as he may deem advisable on the recommendation of the commission.

Instead of doing the work ordered by the commission Ricard removed all the wires and poles belonging to the appellant and stored them in his place, entirely destroying at one stroke the appellants' property.

Ricard then sent his account of $508.75 for work done to the commission which called on the appellant to shew cause why it should not be condemned to pay this amount.

The appellant appeared before the commission and gave its reasons. Nevertheless, judgment was rendered against it on November 28th, 1911, for the said sum of $508.75. It is from this judgment that appeal is entered.

What strikes one immediately as being strange is the fact that the execution of such a work was entrusted to Ricard who had every interest to cause the disappearance of a rival company.

Ricard did not content himself with removing the poles and wires which were in contact with his system, but he removed as well all those situated on streets free from any other electric installation and even on private property.

From the orders hereinbefore cited it appears, and the judgment itself admits this, that Ricard did not follow the orders of the commission.

These orders specified in the clearest manner what work was to be done, and this work was not considerable, and would evidently have cost but a trifling amount; but Ricard instead of simply doing this destroyed the entire system of the appellant by removing all of its poles and wires. No order to this effect was ever served on the company, appellant, and it could not have been served without the giving of a prior notice in accordance with the terms of article 761 (*a*).

The judgment of the commission communicated to the appellant seems to be based on a report of Dr. Herdt, the expert in the case, suggesting that everything be removed, but the commission never served this report on the appellant, and never issued any order to this effect. Ricard was never ordered to follow Dr. Herdt's suggestions but simply to carry out the orders above-mentioned.

The respondent claims that if Ricard exceeded his powers that is a matter to be discussed between Ricard and itself as Ricard was only its agent.

It seems very strange that the appellant could thus be left out of the discussion and that its property could be destroyed without notice and that it should then be compelled to pay the cost of such demolition!

Surely the appellant could not be condemned to pay for work other than that specified in the orders served upon it.

Moreover, Ricard's claim has not even been sworn to nor proven in any manner whatsoever. The appellant offered to prove that the account was exorbitant, but again he was told: that is a question to be discussed between the commission and its agent.

This might be all right if the commission were paying but when it seeks reimbursement from the appellant the latter has the right of demanding that the value of the work be proven and the right of contradicting such proof. Such a principle appears to me indisputable.

To compel parties to pay for work done by the commission's agents without any right of checking the amounts claimed would be arbitrary in the extreme.

Article 738 R.S.Q. 1909, enacts that these works are to be paid for by the government of the Province of Quebec after the

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amount shall have been determined by the Lieutenant-Governor in council on the recommendation of the commission.

Yet it is in virtue of art. 759 that the appellant was ordered to pay this sum of $508.75. This art. 759 has no bearing at all on the works, the cost of which the appellant is called upon to pay.

In any event art. 738 required that Ricard's account be approved by the Lieutenant-Governor in council, and this was not done.

This seems sufficient justification to quash the order complained of.

Article 761 (*a*) declares as follows:—

> No order involving any outlay, loss or deprivation to any public utility, municipality or person, shall be made without due notice and full opportunity to all parties concerned to make proof and be heard at a public sitting of the commission, except in case of urgency, and in such case as soon as practicable thereafter.

An order to destroy the appellant's property without previous notice is therefore null and the appellant's property has therefore been destroyed without notice and without even an order sanctioning such destruction.

This case appears so clear to me that I deem it unnecessary to enter into fuller discussion. The commission exceeded its powers and has erred in law.

The commission has not appeared on this appeal and no one has intervened to defend its judgment. The facts alleged by the appellant appear to be admitted in the judgment appealed from.

For these reasons I conclude that the appeal should be maintained and the judgment rendered by the respondent on November 28th, 1911, quashed.

I further recommend that the appellant's costs be paid by the Province of Quebec, and that the respondent recommend such payment.

Appeal allowed and the province recommended to pay costs.

STAPLEY v. CANADIAN PACIFIC R. CO.

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Alberta Supreme Court, Beck, J. September 10, 1912.

1. DISCOVERY AND INSPECTION (§IV—34)—PRODUCTION OF DOCUMENTS ON EXAMINATION—RAILWAY ACCIDENT REPORTS—PRIVILEGE.

In an action for damages in a railway accident, reports made by officials of defendant railway company relative to the accident admitted by a district superintendent of the company upon his examination for discovery to be in its custody or power, such reports being made in regular routine as in all such accidents and not for the purpose of the defence of the action at bar nor with reference to any particular action, though perhaps in anticipation of possible future actions, must be produced for inspection upon an examination for discovery, under Alberta rules 207, 212 and 215, and Eng. O. 31, rule 19a (2) of 1893 in force in Alberta.

[*Cook* v. *North Metropolitan Tramway Co.*, 6 Times L.R. 22, followed; *R.* v. *Greenaway*, 7 Q.B. 126; Phipson on Evidence, 4th ed., p. 413, referred to.]

2. DISCOVERY AND INSPECTION (§ IV—20)—EXAMINATION FOR DISCOVERY AS TO DOCUMENTS NOT PRODUCED.

The opposite party may, upon an examination for discovery be asked as to what relevant documents are in his custody or power notwithstanding that his affidavit of documents already filed contains no reference to the documents forming the object of the examination.

[*MacMahon* v. *Railway Passenger Ins. Co.* (No. 3), 5 D.L.R. 423, approved.]

Statement

APPLICATION by plaintiffs for a further and better affidavit on production.

The application was granted.

H. H. Parlee, for plaintiff.

H. H. Hyndman, for defendant.

Beck, J.

BECK, J.:—This is an application on behalf of the plaintiffs for a better affidavit on production. I allow the summons to be amended so that the deposition of C. S. Maharg, a superintendent of the defendant company, as well as the affidavit on production made by the chief clerk of the general superintendent, together with the pleadings, may be read, and also to be amended so as to ask for an order that the documents in question should be produced upon the continuance of the examination for discovery of the chief clerk or upon his further examination to be ordered or for inspection. Our rules relating to examinations for discovery make considerable difference between the English practice and ours in such applications as the present. In England examination for discovery is by interrogatories which can be delivered only by leave after the proposed interrogatories are submitted to the Court or Judge, and the answers are by way of affidavit (English O. 31, Rules 2-8). With regard to documents the affidavit answering interrogatories is, it appears, in the same position as an affidavit of documents made pursuant to an order for discovery of documents.

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Under our Rule 207 a party or person to be examined may be notified to produce documents which he would be ordered to produce at the trial under a *subpœna duces tecum*.

"Under subpœna or order a witness must, whether possession be held for himself or another (*e.g.*, solicitor for client) attend with the document and submit the question of production (by which I think is meant inspection) to the Judge:" *R.* v. *Greenaway*, 7 Q.B. 126; Phipson on Evidence, 4th ed., p. 413.

Rule 212 provides that a party who admits possession of a relevant document shall, if required, produce it unless it is privileged or protected from production.

Rule 215 provides for the decision of a Judge being had upon any demurrer or objection to a question, which includes in my opinion a question asking for the production and inspection of a document. Probably upon an application to compel an answer respecting the inspection of a document the rule applicable to affidavits of documents would be applied to the answers made by a party or person upon his examination for discovery, but it seems to me that our practice is more favourable than the English practice to the party seeking discovery because as, I think, the opposite party may upon an examination for discovery be asked as to what relevant documents are in his custody or power (leaving, if necessary, the question of their production and inspection to the determination of a Judge) notwithstanding he may previously have made an affidavit of documents in which no reference is made to the document forming the object of the examination. This has long been my view, and I find that its correctness is shewn and a very great amount of light is thrown upon the whole question by Riddell, J., in *MacMahon* v. *Railway Passengers Ins. Co.* (No. 3), 5 D.L.R. 423, 22 O.W.R. 196.

Furthermore, the earlier English practice which so strictly maintained the conclusiveness of a party's claim to privilege against production has been considerably broken in upon by English O. 31, Rule 19 A. (2), which having been passed in 1893 is in force in this jurisdiction. That provides that where on an application for an order for inspection privilege is claimed for any document it shall be lawful for the Court or Judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

In the result I am of opinion that although the affidavit of documents setting up a claim of privilege may be conclusive generally speaking as against an application for a further or better affidavit of documents, that question does not arise here. I am entitled and bound to look at the case as it stands upon the deposition taken upon the examination for discovery.

The action is for damages sustained in a railway "accident."

The documents in question are certain reports made by officials of the defendant company regarding the occurrence.

Turning to the deposition of Maharg, who describes himself as "superintendent of the second district of the Alberta division of the Canadian Pacific Railway," I find that he admits on his examination that the defendant company has in its custody or power a number of documents relating to the matters in question (see our Rule 212). They consist of reports relating to the occurrence in question in the action made by some officials of the defendant company to other officials of the company. They were made as a matter of regular custom or routine, as in the case of all similar occurrences. Following the case of *Cook* v. *North Metropolitan Tramway Co.*, 6 Times L.R. 22, I hold that these reports not having been made for the purpose of the defence of this action nor with reference to any particular action, though perhaps in anticipation of possible future actions, are not privileged from production or inspection.

I, therefore, order that by the 27th instant the defendant company do produce for inspection the several documents referred to in Mr. Maharg's deposition taken on his examination for discovery.

As I anticipate an appeal from my order, I extend the time for the filing of the appeal books and factums to the 17th instant.

Application granted.

THE KING v. COULOMBE.

Court of Sessions of the Peace for Quebec City, the Honourable C. Langelier, J.S.P. September 14, 1912.

1. TRADEMARK (§ IV—20)—BEVERAGE TRADE-MARK—RE-LABELLING OF BOTTLES—CRIM. CODE 1906, SEC. 655.

Section 655 of the Crim. Code, 1906, does not make it obligatory upon the magistrate to hear witnesses before issuing a warrant or summons for an infraction of Crim. Code, sec. 490, as to the unlawful use of beverage trademarks and trade-names, if, after having issued a search warrant, the return of the constable shews that a large quantity of bottles, bearing the trademark of an opposition company, had been seized in defendant's possession with his own label added.

2. CRIMINAL LAW (§ II C—52)—MAGISTRATE HEARING WITNESSES PRIOR TO ISSUING A WARRANT—CRIM. CODE 1906, SEC. 655.

The magistrate may, under Crim. Code, sec. 655, hear witnesses for his own information upon the application for a warrant.

[*Ex parte Coffon*, 11 Can. Cr. Cas. 48, specially referred to.]

3. INDICTMENT, INFORMATION AND COMPLAINT (§ II D—22)—MORE THAN ONE PARTICULAR ACT INCLUDED IN STATEMENT OF THE OFFENCE—VALIDITY OF SUMMONS—CRIM. CODE 1906, SEC. 490.

The particular acts referred to in the sub-secs of sec. 490 of the Crim. Code 1906, are the ingredients of the single offence of the unlawful use of a beverage trade-mark and the fact that more than one of such particular acts is included in the statement of the offence as contained in an information or summons, does not invalidate such information or summons.

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4. TRADEMARK (§ IV—20)—UNLAWFUL USE OF A BEVERAGE TRADE-MARK ON BOTTLES—MENS REA.

Some offences require a criminal intent, *mens rea*, but that rule does not apply to all criminal offences and in particular does not apply to the offence under sec. 490 of the Crim. Code, of unlawfully using a beverage trade-mark on bottles.

[*R.* v. *Beckwith*, 7 Can. Cr. Cas. 450, specially referred to.]

Statement

TRIAL of a charge of using the trade-mark of another upon bottles contrary to sec. 490 of the Crim. Code 1906.

The facts of the case were as follows: Coulombe is a ginger ale manufacturer; he used in his trade, bottles upon which the names of other firms were blown and permanently affixed, filled the said bottles with his own ginger ale, labelled the same with his label and placed them upon the market for the purpose of sale.

It was admitted by the defence that the trade-mark upon the bottles was duly registered. The defendant admitted having used those bottles, but he had received them through his driver in exchange for his own bottles in the course of his trade.

A. Galipeault, K.C., for complainant.

A. Corriveau, K.C., for defendant.

Langelier, J.

LANGELIER, J.:—The defendant is sued in virtue of sec. 490 of the Crim. Code, sub-secs. (*a*) and (*b*). Before pleading to the merits, his attorney made two motions to have the summons dismissed, in which it was alleged:—

Firstly, that before issuing the summons the magistrate should have heard witnesses to ascertain the truth of the complaint;

Secondly, that the summons contained several different offences.

As to the first objection, before issuing the summons, the magistrate had issued a search warrant and the return of the constable shewed that one hundred dozen bottles, with the label of other manufacturers, were found in the possession of the defendant, which was a sufficient justification to issue even a warrant.

In the case of a summons, the magistrate is not obliged to hear witnesses before issuing it. The doctrine on this point is clearly laid down in Daly's Criminal Procedure, p. 114:—

> It is the duty of a justice before issuing a warrant to examine upon oath the complainant or his witnesses as to the facts upon which suspicion and belief are founded and to exercise his own judgment thereon.
>
> An information stating in general terms that the informant has reason to believe and did suspect and believe that the party charged had committed an offence without stating the grounds of his information, and apparently without making them known to the magistrate, will not authorize a justice to issue a warrant in the first instance.

That question of the distinction between a summons and a warrant has been dealt with by the Supreme Court of New Brunswick in the case of *Ex parte Coffon*, 11 Can. Cr. Cas. 48.

Chief Justice Tuck, in delivering the decision of the Court, expressed as their opinion, what had been decided in *Ex parte Boyce*, 24 N.B.R. 347, namely:—

> A sworn information that the complainant has just cause to suspect and believe that the party has committed a specified offence will not authorize a justice to issue his warrant to arrest in the first instance. It is the duty of the justice, before issuing a warrant, to examine on oath the complainant or his witnesses as to the facts upon which suspicion and belief are founded, and to exercise his own judgment thereon.

The distinction is easy to understand: the magistrate must take his precautions before ordering to arrest a person. The English law protects the liberty of the subject and he cannot be deprived of it except upon serious grounds.

The second objection complained that the summons contained several different offences.

In criminal procedure the summons or indictment is equivalent to the action in civil law: the offence must be indicated in such a manner as to shew to the defendant clearly the offence he is accused of having committed, and which he is called upon to answer. Upon that point I will quote Daly's Criminal Procedure, p. 130:—

> An indictment should describe the offence charged with such particularity as will inform the accused of the specific acts for which he is called upon to answer. An indictment which merely stated the offence in the language of the statute and did not set out the particular facts constituting the offence, was quashed: *Rex* v. *Beckwith*, 7 Can. Cr. Cas. 450.

See also the same author, at p. 128, about information.

> In the information the charge must be set out in such distinct terms that the accused may know exactly what he has to answer: see *R.* v. *Beckwith*, 7 Can. Cr. Cas. 450.

Finally, our own Court of Queen's Bench, in *Regina* v. *France*, 1 Can. Cr. Cas. 321, has affirmed the same principle:—

> An information should give a concise and legal description of the offence charged and should contain the same certainty as an indictment, and the description of the charge must include every ingredient required by the statute to constitute the offence.

I will also refer to sec. 723, sub-sec. 3, of our Crim. Code which says:—

> The description of any offence in the words of the Act, or any order, by-law, regulation or other document creating the offence, or, any similar words, shall be sufficient in law.

See also sec. 854 of the Crim. Code.

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Langelier, J.

What was the offence in the present case? It was the use of the trade-mark of another firm to sell his own products. The information discloses only one offence with the ingredients which constitute it in law, and the summons concludes to one offence and one penalty. The two motions are dismissed.

Now let us come to the merits of the case. The offence has been clearly proved; but the learned counsel for the defence invoked the good faith of his client; he says that he had no guilty mind, *mens rea*.

In general, to constitute a crime, the criminal intent must exist; however, the rule is not inflexible. In many cases the law makes criminal the commission of acts although the accused had no intention to violate the law, so if one breaks a law or a by-law concerning public health or the protection of the trade, the infraction constitutes a criminal offence, whatever might have been the intent of the offender.

The doctrine is well explained in Hardcastle on the Construction and Effect of Statute Law, 3rd ed., p. 459.

In certain offences the Code says "voluntarily and maliciously," while in some others it does not. In the former the criminal intent, *mens rea*, is needed, not in the other.

> There are enactments, said Brett, J., in *R.* v. *Prince* (1875), L.R. 2 C. C.R. 154, which by their form seem to constitute the prohibited acts into crimes, and by virtue of these enactments persons charged with the committal of the prohibited acts may be convicted in the absence of the knowledge or intention supposed necessary to constitute a *mens rea*. Such are enactments relating to the sale of intoxicating liquors, food, drugs, weights and measures, etc. And the reason why it is not necessary to prove the existence of a *mens rea* in persons charged with committing offences against these enactments is because they do not really constitute the prohibited acts into crimes, but only prohibit them for the purpose of protecting individual interests of individual persons.

That is exactly the case here. In fact, sec. 490 of our Crim. Code reads: "Everyone is guilty of an indictable offence, who, etc."

In the section, the words, "voluntarily and maliciously," have been omitted, although the offence is indictable; it is complete by the committal of the prohibited art. even without the guilty mind.

The defendant is fined $15.00 and the costs, and in default of payment, three months' imprisonment.

Defendant convicted.

COREY & CARMICHAEL v. AMERICAN-ABELL CO.

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Alberta Supreme Court. Trial before Simmons, J. July 17, 1912.

1. DAMAGES (§ III A 4—76)—CONDITIONAL SALE—RE-TAKING AND RE-SALE —MEASURE OF DAMAGES.

In an action by the seller under a conditional sale contract, after the re-taking and re-sale of the goods, the measure of damages for which the conditional purchaser is liable in respect of his breach of contract where there is an available market for the goods, is, *primâ facie*, the difference between the contract price and the price realized on the re-sale.

[Section 48 of the Sale of Goods Ordinance, N.W.T. Ord. (Alta. Consol. 1911), ch. 39, referred to.]

2. DAMAGES (§ III A 4—76)—CONDITIONAL SALE—SELLER RE-TAKING AND RE-SELLING—MEASURE OF DAMAGES.

Where the seller under a conditional sale lien for the balance of the purchase-price of personal property re-takes and re-sells the goods, and on the trial of his action for damages against the original purchaser for neglect and refusal to accept and pay for the goods, introduces no evidence as to the amount of the purchase-price upon the re-sale, it will be presumed against him that they brought the same price on re-sale as at the original sale.

Statement

THIS is an action by the plaintiffs for the return of a guarantee deposit of $500 on the ground that they had performed the conditions imposed by the agreement referred to in the judgment. The defendants counterclaimed for damages.

Judgment was given, after allowing defendants to amend their counterclaim, for the plaintiff for $265.

O. H. Clark, K.C., for the plaintiffs.

H. P. O. Savary, for the defendants.

Simmons, J.

SIMMONS, J.:—The plaintiffs had the Calgary agency for the sale of the Warren Motor Company's automobiles at Calgary; and, pursuant to their agency contract, the plaintiffs had deposited with the Warren Motor Company the sum of $500. Subsequently the defendants obtained from the Warren Motor Company a general agency, and it was mutually agreed between the plaintiffs and defendants that the plaintiffs should sell these motor cars in Calgary and vicinity under an agency contract with the defendants. In pursuance of this arrangement, the defendants ordered three cars from the Warren Motor Company. A day or two after these cars were ordered, the plaintiffs and defendants incorporated this agreement in writing (exhibit 1), the material terms of which are:—

> 1st. In consideration of an order for .....motor car..... placed by the party hereto of the second part with the party of the first part, the said party of the first part grants to the party of the second part the right to sell Warren motor cars in the following territory, namely, Calgary and vicinity.

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2nd. It is agreed that all motor cars shipped by the said party of the first part as ordered by the said party of the second part, shall be paid for by the said second party as follows:—

(*a*) All automobiles to be sold f.o.b. Winnipeg.

(*b*) A deposit of ten per cent. of the purchase-price of each motor car to be made at the time the order for the same is placed, and a sight draft for the balance of the purchase-price to be attached to the bill of lading and paid for by the said party of the second part upon presentation. . . .

9th. In consideration of the foregoing agreements, the party of the first part agrees to sell to the party of the second part Warren Detroit cars as ordered during the term of this contract, provided the said party of the first part has such cars in stock or can procure them from the factory; and the said party of the first part agrees to give the said party of the second part discount on cars purchased in accordance with the following schedule:—

On 2 cars 15%, on 3 to 5 cars 17%, on 6 to 9 cars 20%.

It is understood the above discounts are to be figured on the Detroit list prices. . . .

11th. It is expressly agreed and understood by and between the parties hereto that the party hereto of the second part is not in any way the representative or agent of the party of the first part, and has no right or authority from the said party of the first part to assume any obligations of any kind, express or implied, on behalf of the said first party or to bind the said first party thereby. . . .

14th. It is agreed and understood by and between the parties hereto that this agreement expires on the 1st day of August, 1911, and may be terminated by either party for any violation whatsoever of the agreements above stated, by immediate notice being served from one to the other.

On the left margin of the agreement is the following endorsement in writing:—

This contract is for at least 6 cars;" and on the right margin is the endorsement: "The $500 deposited with us is to be returned at the expiration of this contract, if your accounts are all paid in full.

Contemporaneously with the execution of this agreement, the plaintiffs gave a written order, addressed to the defendants at Winnipeg, for three motor cars to be shipped on or about the 1st April. This order provided that

a draft for $500 order on Warren Motor Car Co., which is 10% of the purchase-price of the cars ordered above, is attached hereto, and I hereby agree to accept the shipment of the above ordered cars, and to pay freight on same from Winnipeg, and to pay the balance of the purchase-price, amounting to $, on presentation of a sight draft for that amount, with the bill of lading attached to it. Sight draft is to be presented through name of bank at ; above cars to be stored by American-Abell Co. at Calgary, and to be paid for at time of delivery. . . . I agree that your responsibility for the delivery of the above ordered goods ceases when the goods are delivered to the initial transportation company and receipted for by them in good order; and, should any loss or damage occur in transit,

I agree to make my claim against the transportation company and not to hold you in any way responsible.

Pursuant to this order, three motor cars were shipped by the defendants to Calgary. The plaintiffs' business was conducted by Corey, and he says that no drafts were presented with bills of lading when the cars arrived, but the defendants agreed to postpone payment till the plaintiffs could sell the cars. Stinson, the defendants' manager, corroborates this, with the modification that the plaintiffs were to pay for one car, and the defendants would store the other two cars till the plaintiffs could sell them. The defendants' conduct subsequently strongly corroborates the plaintiffs' statement. Both the plaintiffs and defendants used the cars for demonstration to prospective purchasers, and both the plaintiffs and defendants also admit that they used the cars in their business other than the business relating to the sale of Warren cars. Corey says he made a complaint to Stinson that the defendants were improperly using the cars, and Stinson told him that the cars belonged to the defendants, and they would do as they pleased with them. I accept this as correct, and it is quite borne out by the defendants' subsequent conduct, as they offered them for sale in Calgary and used them, and finally shipped the cars to Regina without notice to the plaintiffs.

The plaintiffs, subsequent to the 1st August, 1911, demanded the return of the $500, which was refused; and they brought this action to recover the $500, alleging that they had performed all the terms of the written contract and paid all moneys due thereunder, and were entitled to the return of the $500, pursuant to the said contract. The defendants say that the $500 was a part payment of the purchase-price, and that the plaintiffs have neglected and refused to pay the balance and accept the cars, and have committed a breach of the said contract; and, in the alternative, that the defendants are entitled to a set-off for freight and storage. The defendants also counterclaim for $4,995, the balance of the purchase-price, and for $500 damages for breach by the plaintiffs of their covenant to push sales of the said cars and advise the defendants of prospective purchasers.

The original agreement, as to the deposit of $500 as a guarantee of the due performance by the plaintiffs of the contract of agency, was mutually modified by the written order for cars, which stipulated that the $500 was to be applied on the three cars ordered. It seems quite clear that the effect of the contract in writing and the order given thereunder was to vest the property in the cars in the plaintiffs, subject to the defendants' lien for the balance of the purchase-price and their consequent right of possession, under their lien, till payment.

The conduct of both the plaintiffs and defendants, subse-

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quent to the arrival of the cars, is quite inconsistent with any appreciation of their respective rights and duties under the written contract. On the pleadings, as the parties went to trial, I fail to see how the plaintiffs can succeed in their claim, or how the defendants can succeed on their counterclaim.

The plaintiffs allege that they have performed a certain agreement in writing, and, in pursuance thereof, are entitled to a return of a guarantee deposit of $500, whereas they have failed to perform the principal part of the agreement, namely, to accept and pay for specific goods ordered by them. The defendants claim damages for breach of the covenant to push sales, whereas this is the only part of the agreement which the plaintiffs did perform. They used their best efforts to sell, but were unsuccessful; and I am unable to find any lack of proper effort on their part in this regard. The defendants also counterclaim for the balance of the purchase-price, but admit that they removed the cars to another province for the purpose of sale, without any notice to the plaintiffs.

I also find on the evidence that they treated both the property and right of possession in the cars as having revested in them, apparently because neither the plaintiffs nor the defendants could sell the goods in Calgary. They do not say whether the cars have been subsequently sold or not. I cannot see how the defendants can maintain an action for the purchase-price. Section 27 of the Sales of Goods Ordinance, N.W.T. Ord. (Alta., consol. 1911), ch. 39* gives them this right if the buyer wrongfully neglects or refuses to pay the purchase-price. The defendants, in the first instance, waived their right to cash payment, and agreed to a conditional credit.

Then they assumed full control over the property and used the property in their private and general business, and then shipped the property to Regina. They had, prior to this, entered into an arrangement with the plaintiffs to assist the plaintiffs in selling the cars and to share commissions for sales.

I find, on the facts, that neither the plaintiffs nor the defendants were able to sell the cars at Calgary; and that the defendants, on their own initiative and without consulting or notifying the plaintiffs, decided that there was a better market for the cars at Regina than at Calgary, and shipped them to Regina for the purposes of sale.

I am unable to deduce from the evidence the intention of the

*Section 27 of the Sale of Goods Ordinance, being ch. 39 of the N.W.T. Ordinances (Alta.) 1911, is as follows:—

27. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

defendants in relation to their rights against the plaintiffs for non-acceptance and non-payment further than can be inferred from their acts of waiver of cash payment, of declaring themselves the owners of the goods, and re-shipping the goods to Regina for the purpose of sale. It seems to me that the legal right of the defendants under sec. 48 of the Sales of Goods Ordinance, N.W.T. Ord. (Alta. consol. 1911), ch. 39,* was not waived by them.

The defendants, as owners, had a right of resale, with the right to recover any deficiency in the amount realized from the sale, after allowing for any sum paid by the purchaser on account of the purchase-price. See Benjamin on Sales, 5th ed., p. 960. I propose, therefore, to allow an amendment to the defendants' counterclaim, allowing them to claim damages for the plaintiffs neglecting to accept and pay for the goods, and an amendment to the plaintiffs' claim allowing them to claim for the sum of $500 paid on account of the purchase-price.

There is no evidence as to the amount realized on resale; and the presumption is, that the goods brought the price for which they were originally sold. There is then the claim for freight from Winnipeg to Calgary, $195, and storage, $40, paid by the defendants, which is the measure of their damages. The plaintiffs are entitled to judgment for the difference between these and $500, namely $265, and costs of claim and counterclaim to off-set each other.

Judgment for plaintiff.

*Section 48 of the Sale of Goods Ordinance, being ch. 39 of the N.W.T. Ordinances (Alta.) 1911, is as follows:—

48. Where the buyer wrongfully neglects or refuses to accept and pay for the goods the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the buyer's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or if no time was fixed for acceptance then at the time of the refusal to accept.

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HOUGHTON v. NICOLL.

Manitoba King's Bench. Trial before Mathers, C.J.K.B. October 2, 1912.

1. VENDOR AND PURCHASER (§ I F—28)—SALE OF LANDS—INSTALMENTS—DEFAULT STIPULATION.

Where, under a written agreement, lands are sold, the purchase-price being payable one-fourth in cash and the balance in three equal consecutive annual instalments, with a stipulation that upon default in the payment of principal, interest, taxes, or premiums of insurance, or any part thereof, the whole purchase-money shall become due and payable; and where the purchaser punctually made the cash payment upon the execution of the agreement, but upon the maturity of the first annual instalment makes default in its payment; and an action is brought by the vendor, under such acceleration clause the vendor is entitled to have a time fixed within which the purchaser must pay the full amount of the purchase-money and interest, and, in default of payment within the time limited to a declaration that the agreement has been forfeited, and is null and void, and at an end, and that all payments made thereunder and the improvements on the land are the property of the vendor in terms of a forfeiture clause contained in the contract.

[*Vosper* v. *Aubert*, 18 Man. R. 17; *Wallingford* v. *Mutual*, 5 A.C. 685, 705; *McFadden* v. *Brandon*, 8 O.L.R. 610, referred to.]

2. VENDOR AND PURCHASER (§ I F—28)—SALE OF LANDS—INSTALMENTS—ACCELERATION CLAUSE—RELIEF AGAINST DEFAULT.

Where lands are sold under an agreement for payment by annual instalments with an acceleration clause making the entire purchase-money due and payable upon default in the payment of any of the instalments, such clause is to be construed literally and cannot be relieved against.

[*McFadden* v. *Brandon*, 8 O.L.R. 610, referred to.]

Statement

THIS is an action by the vendor against the purchaser of land for the purchase money, and in default of payment, cancellation of the agreement and forfeiture of the moneys already paid thereunder.

Judgment was given for the plaintiff for the amount claimed with interest.

A. E. Hoskin, K.C., and *P. J. Montague*, for the plaintiff.
A. B. Hudson and *E. A. Deacon*, for the defendant.

Mathers, C.J.

MATHERS, C.J.K.B.:—The agreement is dated the 12th day of April, 1911, and the whole consideration is $58,834.25. Of this sum $16,152.31 was paid in cash, and the balance was to fall due as follows: $14,227.31 on the 12th day of April, 1912, and a like amount on the 12th of April in each of the years 1913 and 1914. The purchaser did not make the payment which fell due on the 12th day of April, 1912.

The agreement provides that in the event of default being made in payment of principal, interest, taxes or premiums of insurance or any part thereof, the whole purchase money shall become due and payable. Under that provision the plaintiffs now sue for the recovery of the whole balance payable under the agreement, amounting to $45,242.86, together with interest at

6 per cent. from the 12th day of April, 1912, to the date of payment.

Such cases as *Vosper* v. *Aubert*, 18 M.R. 17; *Wallingford* v. *Mutual*, 5 A.C. 685, and *McFadden* v. *Brandon*, 8 O.L.R. 610, make it clear that an acceleration clause of this kind cannot be relieved against.

The plaintiffs are therefore entitled to judgment for the amount claimed and interest thereon from the 12th April, 1912, to judgment at 6 per cent.

They are also entitled to have a time fixed within which the defendant must pay the unpaid balance of principal and interest and costs, and in default, to a declaration that the agreement has been forfeited and is null and void and at an end, and that all payments made thereunder and improvements on the land are the property of the plaintiffs; for which purpose there will be a reference to the Master.

The plaintiffs are entitled to the costs of the action.

Judgment for plaintiff.

SILLERS v. THE OVERSEERS OF THE POOR, SEC. 26.

Nova Scotia Supreme Court, Graham, E.J., and Meagher, Russell, Drysdale and Ritchie, JJ. March 28, 1912.

1. POOR AND POOR LAWS (§ I—1)—POOR RELIEF ACT (N.S.)—CLAIM FOR SUPPORT—NOTICE OF CLAIM—SUFFICIENCY.

Under the Poor Relief Act (Nova Scotia) where a pauper was supported on a farm belonging to claimant, and the latter in making her claim for assistance against the Board of Overseers of the Poor for the district notified only one of the three members of the board such notice is sufficient notice to the overseers particularly where the overseers so notified had, as a result of the notice, visited the pauper and taken her deposition before a justice of the peace in reference to the claim.

Statement

THIS was an action brought under R.S.N.S. 1900, ch. 50, sec. 29, the Poor Relief Act, by Annie Sillers, wife of Lang Sillers, for the maintenance and support of an aged pauper, Agnes Sillers, the grandmother of the plaintiff's husband. It appeared from the evidence that the farm of which plaintiff was owner and in possession was at one time the property of Agnes Sillers and was sold by her to plaintiff's husband, payment of the purchase-price being secured by a mortgage and certain collateral promissory notes. One or more of the notes being overdue and unpaid plaintiff's husband being threatened with legal proceedings disposed of the property to a neighbour for the sum of $650, reserving the right to continue to occupy the place for the period of one year. The purchaser received an offer of $800 for the place and notified Sillers that he would have to move off at the

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end of the year, but finally sold to plaintiff for the sum of $850. Two years later, in 1905, Agnes Sillers came to live with plaintiff and her husband and no claim was made for assistance in supporting her until the end of February, 1909, when McDonald, one of the overseers, was notified and asked for relief. He visited the pauper with a justice of the peace and took her deposition and was again notified that plaintiff would look to the overseers for assistance, but none was furnished. About a year and a half after action was brought, and after the issue of the writ the pauper died.

Defendants pleaded generally in denial.

The cause was tried before Patterson, C.C.J., who gave judgment in favour of defendants on the ground that the farm on which the pauper was supported was the property of plaintiff's husband and not the property of plaintiff; that the transfer of the property to plaintiff was voluntary and made with the intention of defeating creditors; that the filing of the certificate under which plaintiff purported to be carrying on a separate business was a mere device to enable her to bring the action; and that the notice to one of the overseers, under the circumstances under which it was given, was insufficient to bind the others, the overseer notified having told plaintiff that she must see the others.

The appeal was allowed.

H. Mellish, K.C., and *J. U. Ross*, K.C., for appellant.

W. McDonald, for respondent.

Graham, E.J.

GRAHAM, E.J.:—The appeal must be allowed. Plaintiff's claim was brought to the notice of Hector McDonald, one of the overseers of the poor for the district, and this was sufficient notice to the other two.

Moreover, the learned trial Judge is mistaken as to the facts. Plaintiff purchased the farm from John L. McDonald, to whom it had been sold by her husband and paid him the price agreed, $850. That transaction was not successfully impeached. She was not one of the parties liable to support the pauper. Agnes Sillers was supported on the farm owned by the plaintiff. Plaintiff's husband, who was the grandson of the pauper, was not competent to do the business, and his wife, the plaintiff, was obliged to do it.

I think the overseers are liable.

Meagher, J.
Russell, J.

MEAGHER and RUSSELL, JJ., concurred.

Appeal allowed.

Re PINTO CREEK ELECTION.

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Saskatchewan Supreme Court, Lamont, J. October 2, 1912.

1. ELECTIONS (§ II C—69)—RECOUNT—JURISDICTION OF COURT TO COMPEL A JUDGE TO HOLD A RE-COUNT—R.S.S. 1909, CH. 3.

The Court has no jurisdiction under the Saskatchewan Elections Act, R.S.S. 1909, ch. 3, or otherwise, to compel the Judge of a District Court to hold a recount.

[*Re Centre Wellington Election*, 44 U.C.Q.B. 132; *McLeod* v. *Noble*, 28 O.R. 528; *In re Dubuc*, 3 W.L.R. 248, discussed and followed.]

2. ELECTIONS (§ II C—69)—RIGHT TO QUESTION SUFFICIENCY OF AFFIDAVIT UPON WHICH ORDER FOR A RE-COUNT HAS BEEN MADE.

The effect of the Saskatchewan Elections Act, R.S.S. 1909, ch. 3, is that, when once a re-count has been ordered by the District Court Judge, all questions of the sufficiency of the affidavit upon which the order was made are concluded, and no subsequent application can be entertained to set aside the order on the ground of the insufficiency of the affidavit.

Statement

THIS is an application for an order that Frederick A. G. Ouseley, the Judge of the District Court for the judicial district of Moose Jaw, do forthwith proceed to conduct a recount of the ballots cast in the electoral division of Pinto Creek at the election held on the 11th day of July, 1912, in the following polling subdivisions, namely, nos. 6, 7, 9, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 25, 26, 28, 30, 32, 34, 35, 36, 37, and 38, in accordance with the provisions of the Saskatchewan Elections Act.

The application was refused.

W. Oswald Smyth, for applicant Marcotte.

D. Buckles, for S. R. Moore.

Lamont, J.

LAMONT, J.:—On the said 11th day of July an election was held under the Saskatchewan Elections Act in the said electoral division, at which Arthur Marcotte and S. R. Moore were candidates. On July 12th, the returning officer opened the ballot boxes and added up the votes polled for each candidate from the statements of the deputy returning officers found in the boxes, and declared Moore to be elected. On July 24th an application under sec. 186 of the Act on behalf of the said Marcotte was made to his Honour Judge Ouseley, the Judge of the District Court for the judicial district in which the said electoral division is situated, that he recount and finally add up the votes cast in the polling divisions above mentioned, which were 23 out of the 38 polls held. The Judge granted the application, and made an order fixing the 31st day of July for the recount and final adding up of the votes of these 23 polls. That was the entire scope of the order as it was drawn up by Marcotte's solicitors and presented to the Judge for signature. On July 31st an application was made to the learned Judge

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for an order setting aside the order he had made on July 24th, on the following grounds, amongst others: that he had no jurisdiction to make it, that it was improvidently and improperly granted, and that the affidavit of Marcotte on which it was granted was not sufficient to give him jurisdiction to direct a recount to be held. The learned Judge held that Marcotte's affidavit was not sufficient to justify the granting of his first order, and he set that order aside and refused to proceed with the recount. When this decision was given the time had elapsed within which an application for a recount could be made. Marcotte then applied to me for an order to compel Judge Ouseley to proceed with the recount.

The application is opposed on two grounds: (1) on the ground that the Supreme Court has no jurisdiction to grant a mandamus to compel a recount under the Saskatchewan Elections Act, and (2) that even if it had, a mandamus should not issue because Judge Ouseley had no jurisdiction to order a recount, as the affidavit of Marcotte, by which alone he could have jurisdiction, was not a compliance with the requirements of the statute.

The question whether or not a superior Court has jurisdiction to grant an order directing a recount to be held has been the subject of several judicial decisions. In *Re Centre Wellington Election*, 44 U.C.Q.B. 132, the County Court Judge had directed a recount to be held. He counted the ballots at several polls, and then, owing to some irregularities in connection with poll 6, he refused to complete the recount. An application was then made to Chief Justice Hagarty in Chambers for an order directing the County Court Judge to proceed with the recount. The Chief Justice referred the matter to the Queen's Bench Division, which held that the right of determining all matters in connection with the election of members of Parliament and their right to sit and vote therein was primarily vested in the House of Commons, and that the Court had only such jurisdiction over election matters as had been expressly delegated to them by Parliament, and that, as the election Act then in force had not conferred upon the High Court of Justice authority to make an order compelling a County Court Judge to make a recount, the Court had no jurisdiction to grant the order. Subsequently to this decision, Parliament amended the Dominion Elections Act by providing that in case of the omission, neglect or refusal of the Judge to observe the provisions of the Act in respect to a recount, an application would lie to a Judge of a superior Court for an order directing the Judge authorised to hold the recount to proceed with the same.

In *McLeod* v. *Noble*, 28 O.R. 528, the right of a superior Court to enjoin a Judge of a County Court from proceeding

with a recount was before the Court for consideration. In that case, Judge Dartnell, the County Court Judge, had appointed a day upon which he would recount the votes cast in an election under the Dominion Elections Act. Before the arrival of the day fixed an injunction had been obtained from a Judge of the High Court of Ontario staying the proceedings before Judge Dartnell and restraining the returning officer from producing to him the packages containing the ballots. Notwithstanding this injunction, Judge Dartnell proceeded with the recount, and the returning officer produced to him the packages containing the ballots. The plaintiff, the defeated candidate, then moved to commit the returning officer for contempt of Court in not obeying the injunction. The Court held that the House of Commons alone had the right to determine all matters concerning the election of its own members and their rights to sit in Parliament, unless such right had been delegated to the Courts, that the right to restrain the County Court Judge from proceeding with the recount had not been so delegated, and the High Court, therefore, had no jurisdiction to grant the injunction. The injunction was therefore invalid, and disobedience to it was not contempt.

The same question came before the Courts of the North-West Territories in the case of *In re Dubuc*, 3 W.L.R. 248. There an application was made to compel the clerk of the executive council for the Province of Alberta to give notice in the official gazette of the election of the applicant Dubuc as a member of the first Legislative Assembly of Alberta for the electoral district of Peace River. Mr. Justice Scott, before whom the matter came, following the cases above cited, held that the Court had no jurisdiction to grant the application. At p. 251 he said:—

> The jurisdiction of this Court is limited to the jurisdiction exercised by the superior Courts of civil and criminal jurisdiction in England, and, as none of those Courts have, in the absence of a statutory enactment conferring it, jurisdiction over matters pertaining to elections to the House of Commons there, I do not see that this Court can, in the absence of any such enactment, exercise any such jurisdiction over matters pertaining to elections to the legislature of this province.

These authorities make it very clear that the Supreme Court of this Province has no jurisdiction to compel the Judge of a District Court to hold a recount under the Saskatchewan Elections Act unless that jurisdiction has been expressly given to the Court by the Legislature. It was admitted by counsel for Marcotte that no such jurisdiction had been given. I am, therefore, of opinion that I have no jurisdiction to entertain this application. It is quite competent for the Legislature of this province to delegate to the Supreme Court jurisdiction to compel

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a District Court Judge to hold a recount under the Provincial Elections Act, but until the Legislature does delegate that power to the Court, the Court is powerless to interfere. As to the second of the above objections, I am of opinion, notwithstanding the decisions referred to by the learned Judge, and which he followed, that the affidavit of Marcotte was sufficient to give him jurisdiction to hold a recount, although the order should have been for a recount or final adding up of the total votes cast, not merely the votes in certain specified polls. All that the statute requires is that it shall be made to appear to the Judge by affidavit that a deputy returning officer has improperly counted or improperly rejected any ballot paper, or that he made an inaccurate statement of the ballots cast for any candidate, or that the returning officer improperly added up the votes cast (sec. 186). Marcotte in his affidavit expressly alleged that he was one of the candidates at the election, that the deputy returning officers at each of certain polls (giving the numbers of the polls) made an incorrect statement of the ballots cast for himself, as one of the candidates, and for S. R. Moore, the other candidate, and that the returning officer improperly added up the votes, by adding in the votes cast at said specified polls. This affidavit the Judge apparently accepted, otherwise he could not have made the order which he did make. His mind, therefore, at that time must have been satisfied that some one of the things complained of had been done. Under the wording of the statute, all that is required is that such shall be made to appear to him by affidavit. His is the discretion, and if the allegations in the affidavit satisfy him that the things complained of were done, and he appoints a time and place for a recount, I cannot see how it can subsequently be said that the affidavit did not make it appear to him that the things complained of had been done. When application is made to him for a recount and the affidavit supporting it read, it is his duty to refuse to appoint a date unless it is made to appear to him that some one of the things set out in sec. 186 of the Act, (a) to (d) inclusive, has been done. If the material is insufficient to satisfy his mind, and he refuses to direct a recount to be held, the applicant would have until the expiration of the time provided by the statute to repeat the application on proper material; but if the affidavit does satisfy his mind and he accepts it as sufficient and orders a recount, I am of opinion that it was the intention of the Legislature that that should be conclusive of the matter, and that no subsequent application would be entertained to set aside the order on the ground of the insufficiency of the affidavit. As, however, I have no jurisdiction to entertain the application, it must be refused with costs.

Application refused.

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(Decision No. 2.)

Alberta Supreme Court, Harvey, C.J., Stuart, Simmons, and Walsh, JJ. October 4, 1912.

1. DISCOVERY AND INSPECTION (§ IV—31)—EXAMINATION OF AN OFFICER OF A CORPORATION—SALES AGENT—ALBERTA SUPREME COURT RULE 224.

A member of a firm, a part only of the business of which is to effect sales of the wares of an incorporated company on commission, who has no authority to close such sales or to bind the company by contract, and has no other connection with the company, cannot be examined for discovery as an officer of the company under the Alberta Supreme Court Rules.

[*Morrison* v. *Grand Trunk R. Co.*, 5 O.L.R. 38, discussed and followed; *Nichols* v. *Skedanuk* (No. 1), 4 D.L.R. 450, reversed on appeal.]

2. DISCOVERY AND INSPECTION (§ IV—31)—EXAMINATION OF OFFICER OF CORPORATION—WHAT QUESTIONS TO BE ANSWERED—PROCURING OF INFORMATION FROM OTHERS.

One who is examined for discovery as an officer of a corporation under the Alberta Supreme Court Rules must not only answer as to his individual knowledge, but must also obtain such further information from other officers, servants and agents of the corporation as will enable him to answer all proper questions, or must shew sufficient reason for not doing so.

[*Southwark Water Co.* v. *Quick*, 3 Q.B.D. 315; and *Berkeley* v. *Standard Discount Co.*, 13 Ch. D. 97, followed; see also Bray on Discovery, pp. 138 *et seq.*]

Statement

THIS is an appeal from an order of Beck, J., 4 D.L.R. 450, 21 W.L.R. 401, for the examination of one Alexander Shandro as an officer of the plaintiff company.

The appeal was allowed with costs, and the application below dismissed with costs.

Frank Ford, K.C., for plaintiff (appellant).

S. A. Dickson, for defendant (respondent).

Harvey, C.J.

HARVEY, C.J.:—The action is to establish a caveat filed to support a mortgage from the defendant to the plaintiff, which the plaintiff is unable to register owing to the non-production of the duplicate certificate of title. The defence is that if the mortgage was signed by the defendant the execution was obtained by the fraud of Alexander Shandro, the defendant believing that he was signing an order for machinery only.

In support of the application was read the affidavit of a solicitor in the office of the defendant's solicitor who stated that he was informed by the defendant that the said Shandro was the person who canvassed the defendant for the purpose of selling a threshing outfit and was the only person representing the plaintiff company that the defendant knew or had any dealing with and further stating that from information received from the defendant he believed that Shandro

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is engaged with the plaintiff company in such a capacity and that he is the person with authority to deal with third parties for and on behalf of the plaintiffs and that he is a fit and proper officer of the company for the purpose of examination for discovery.

In answer to this affidavit was read the affidavit of the general collection agent of the plaintiff company who stated that Shandro was a member of the firm of Shandro Bros. of Shandro, Alberta, who were allowed commission by the plaintiff company for finding purchasers of plaintiffs' machinery, but have no authority to close sales or bind the company by contract and are not officers of the company and have no other connection with the company and further stating that he is informed by them that they are engaged in other lines of business.

I find it a little difficult to see how, even with the broadest meaning that can be given to the word officer, a member of a firm, a part only of whose business is the effecting of sales of the company's wares on commission, can be said to be an officer of the company. The learned Judge refers to some Ontario cases in which a very liberal interpretation, indeed, was given to the word "officer" used in this connection by single Judges. The matter, however, was considered at much later date by the Ontario Court of Appeal in *Morrison* v. *Grand Trunk R. Co.* (1902), 5 O.L.R. 38, a consideration of which indicates that the earlier decisions had gone much too far. The purpose of an examination for discovery under our rules as they exist at present is two-fold, the first, and perhaps the primary one, to obtain discovery or information as to the facts, and the second, a very important one, to obtain admissions which may be used in evidence against the party who or whose officer is examined. Our rule 224 as amended in 1902 permits the examination of the officer of a corporation to be used as evidence in the same way as the examination of a party. This right did not exist in Ontario at the time some of the cases cited were decided, and it was pointed out that the examination could not be used in that way, but was for the purpose of information only. In *Morrison* v. *Grand Trunk R. Co.*, 5 O.L.R. 38, Osler, J.A., at p. 40, says:—

> The whole question of examination for discovery of officers of a corporation is full of difficulty, which might be solved in one direction perhaps, by treating the word officer as merely a synonym for servant, and regarding those as convertible terms. This if not actually decided appears to be the result of the decision in the Court below, but I am not prepared to go as far as to give the former word the wide meaning contended for. There would indeed be no practical harm in doing so were the rules as to the use which may be made of the deposition of the person examined the same as they were when Leitch's case was decided, when they could not be read against the corporation, if at all, unless the latter took part in the examination. . . It might be quite reasonable to examine for discovery merely any

officer or servant of a corporation, but to allow this examination to be used as evidence against the corporation in the same way as that of a natural person may be used, against himself, is a practice, the justice of which, in many cases at all events, is not so clear.

At p. 41 Maclennan, J.A., says:—

> At the time of our decision in *Leitch's Cases*, 13 P.R. (Ont.), 369, the officers of corporations could only be examined before trial for purposes of discovery and the depositions could not be read against the corporation, I thought and held in that case that the rule applied to every officer of a corporation who might reasonably be supposed to possess knowledge of the facts, discovery of which was sought. If the depositions could at that time have been read against the corporation, I think I would not have put so wide a construction upon the rule.

And Moss, J.A. (now C.J.O.), the only other Judge who gave reasons, at p. 43, says:—

> In endeavouring to ascertain whether any named person does or does not come within the term "officer" as used in the rule, it is of course essential to bear in mind its object and purpose.

And again on page 43:—

> Neither under the English order nor under rule 439 has it been held, as far as I am aware, that the right to interrogate or examine for discovery is intended to be more extensive in the case of a corporation party than in that of an individual party. . . . Speaking generally, I would say that the officer of a corporation who, if there was no action, would be looked upon as the proper officer to act and speak on behalf of and to bind the corporation in the kind of transaction or occurrence out of which the action arose, would, *primâ facie*, be the proper officer to be examined in the first instance under rule 439. And I would venture to say further that the fact that a person holding some position of subordinate rank or grade which some might call an office, happened to be the person whose dealing or conduct had given rise to the action, ought not necessarily to subject such person to examination on behalf of the corporation for the purposes of discovery any more than if he was an officer or employee under an individual party to an action.

It appears to me that the above case effectually disposes of the authoritative value of the earlier cases in interpreting our rule which has the consequences it has and inasmuch as in the following year (1903) the Ontario rule was amended in accordance with the suggestion of Osler, J.A., to provide for the examination of any officer *or servant* with the proviso that such examination shall not be used as evidence, thus limiting its purpose to the sole one of discovery, any subsequent decisions would be of little value for our rules.

The remarks of Moss, J.A., appeal to one with much force. If the plaintiff were a natural person, instead of an artificial person, the defendant would be limited in his right to examination to the plaintiff alone, but it would not follow that he could

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not get the information which is alone in the agent's possession, for it is pointed out by Bray on Discovery, pp. 138-9, that the information of the agent is the information of the principal and must be disclosed by the principal. He says:—

> Where a party is interrogated as to matters done or omitted to be done by his agents and servants in the course of their employment, he does not sufficiently answer by saying that he does not know, and that he has no information on the subject. He is bound to go further and obtain information from such agents or servants of his, or he must shew sufficient reason for not doing it.

It is true our method of obtaining discovery is by *viva voce* examination instead of by interrogatories, to which a reasonable time is allowed for making answer, but I see no reason why the principle may not be applied to the one as well as the other. The person attending for examination could acquaint himself with the facts which are within the knowledge of his agents or servants which they had acquired in that capacity before attending to be examined or the examination could be adjourned to permit of this being done, so that full discovery could be made by the party himself. The same principle can be applied in the case of corporations and the information obtained without unduly straining the meaning of the word "officer." In *Southwark Water Co.* v. *Quick*, 3 Q.B.D. 315, at p. 321, Cotton, L.J., says:—

> Directors of a company in answering interrogatories must not only answer as to their individual knowledge but in answering for the company they must get such information as they can from other servants of the company who personally have conducted the transaction in question, and they cannot properly answer interrogatories by saying they know nothing about the matter, when it is in their power to obtain information from other servants of the company who may have personal knowledge of the facts.

In *Berkeley* v. *Standard Discount Co.* (1879), 13 Ch. D. 97, at p. 99, Jessel, W.R., says:—

> The company has as much interest as anybody else in seeing that the proper man should answer, because the effect of the answer may be very serious as regards the position of the company.

Both on principle and on authority, therefore, it appears to me that there is no justification for holding that Shandro is an officer of the company for the purpose of examination for discovery and the appeal should be allowed with costs and the application below dismissed with costs to the plaintiff in the cause in any event.

Stuart, J.
Simmons, J.
Walsh, J.

STUART, SIMMONS and WALSH, JJ., concurred.

Appeal allowed.

Re De BLOIS TRUSTS.

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Supreme Court of Nova Scotia, Russell, J., in Chambers. May 29, 1912.

1. WILLS (§ III B—91)—WHO MAY TAKE—DEVISE TO WIFE OF ATTESTING WITNESS—R.S.N.S. 1900, CH. 120, SEC. 12.

A devise of property to the wife of an attesting witness to a will, is void under section 12 of the Wills Act (ch. 120, R.S.N.S.)

2. WILLS (§ III L—198*m*)—DEVISE—DIVISION OF RESIDUE—ABSOLUTE GIFT.

An absolute gift to the several persons named and not one to the executor in trust, is created by a devise of the residue of the testator's estate to such executor, subject to certain payments to persons named, which was followed by a clause making the executor residuary legatee "after all of the above bequests" have been faithfully carried out.

3. WILLS (§ III F—115)—PARTIAL INTESTACY—BEQUEST TO WIFE OF AN ATTESTING WITNESS.

A partial intestacy results where a testator devised and bequeathed the residue of his estate to a daughter whose husband was one of the attesting witnesses to the execution of the will.

4. WILLS (§ III F—115)—PARTIAL INTESTACY—VOID BEQUEST—LEGACY TO ——— OF PERROTTE.

A legacy bequeathed to ——— of Perrotte, not being identified in any way in the will, is void for uncertainty, and in respect thereof a partial intestacy results.

Statement

THE following questions were submitted to the Court by originating summons:—

1. Whether the fact that one of the two witnesses to the said will is the husband of the said Emily C. McCormick, invalidates or in any way affects the legacies and bequests made thereunder in favour of the following respondents, viz.: The Diocesan Synod of Nova Scotia, Henry de Blois, Leonas de Blois, Eleanor de Blois, Frederick C. de Blois, William M. de Blois and Henry Gordon McCormick.

2. Whether there has been an intestacy in respect of any portion of the estate of said Rev. Henry D. de Blois, and if so what portion.

3. Such further and other relief as the circumstances of the case may require.

4. How the costs of the application hereunder will be disposed of.

5. Whether the widow of the deceased is entitled to take under the will, and also to share in the intestate portion of said estate.

S. Rogers, K.C., for executors of will of Henry D. de Blois.

H. Mellish, K.C., for the Diocesan Synod *et al.*

W. E. Roscoe, K.C., and *F. W. Harris*, for Charlotte Corbitt *et al.*

Daniel Owen, for certain attaching creditors of Wm. de Blois.

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RUSSELL, J.:—The late Rev. H. D. de Blois by his last will and testament left certain property to his wife and made his daughter, who is the wife of one of the two attesting witnesses, his residuary legatee. Of course, the bequests to her must fail under the provisions of sec. 12 of the Wills Act (ch. 120 R.S.), but the question arises whether the gift must fail in so far as she is merely a trustee for other persons. It has been decided under the corresponding clause of the English Wills Act, that a gift in trust does not become void, but the English statute is in different terms from the statute of Nova Scotia.

The English statute enacts that if any person shall attest to the execution "of any will to whom or to whose wife or husband any beneficial devise, legacy estate, interest or gift, etc. (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made such devise, etc., shall so far only as concerns such person . . . or the wife, or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void."

The statute of this province omits the word "beneficial," but it contains the same exception as the English statute with respect to charges for the payment of debts. It omits also the very important words "so far only as concerns such person, etc."

If the statute is to be understood according to its letter, it will permit a witness to attest the execution of a will, who is directly interested in its validity as a creditor, whose debt is charged upon the estate, while it will disqualify a witness from taking under the will, who has no interest whatever in its validity, being a mere trustee for other persons, and if the devise or bequest to such trustee is to be absolutely void the persons beneficially interested, although not in any way concerned in the execution of the will, must forfeit the bounty intended for them by the testator.

It is needless to say that this is a result that never could have been in the contemplation of the Legislature when the statute was passed, but it does not follow that it may not be the necessary and inevitable construction of the statute and I am not sure that anything short of the discarded method of an equitable interpretation would be sufficient to make the statute a reasonable and just enactment. Such a construction I fear would, in the language of Gray, J., in *Sullivan* v. *Sullivan*, 106 Mass. 474,

> be founded rather upon a conjecture of the unexpressed intent of the Legislature or a consideration of what they might wisely have enacted, than upon a sound exposition of the statute by which their intent has been manifested.

The gift to the daughter is made in the form of a bequest of the residue "subject, however, to all the conditions hereinafter

expressed," first to pay, if possible, within one year after testator's decease $400 to the widows and orphans fund of the Diocesan Society, secondly, thirdly, fourthly and fifthly to pay certain other persons, certain other sums. There is then a change in the formula and the paragraph numbered "sixthly seems to be an independent direction that $100 be placed in the savings bank for the benefit of a grandson. "Seventhly" follows another gift of the residue to the daughter. "Eighthly" he wills and devises that on the death of his wife the property, real and personal, given her for life is to go one half to the daughter and the other to be divided among a designated family of grandsons. "Ninthly, after all the above bequests of this my last will and testament have been faithfully carried out, I make and appoint my daughter Emily C. McCormick my residuary legatee."

I think it will not be unduly straining the language used in this extremely inartificial document to hold that the testator was treating the sums payable to the widows and orphans fund and the others provided for in the clauses numbered secondly, thirdly, fourthly, and fifthly as bequests to the various other persons therein named. When the testator thus speaks in the clause numbered ninthly of "all the above bequests" it seems fairly arguable that he cannot be referring to the bequest of the residue to the daughter. I mean the first such bequest to the daughter, immediately after the provisions for the wife. When that bequest has been faithfully carried out there is nothing left of which to make her the residuary legatee. The testator must, therefore, have had in mind the several gifts to the widow and orphans fund, the bequest to —— of Perrotte and the others numbered thirdly, fourthly, etc. It is important in this connection to observe that the daughter is also one of the executrices of the will, the widow being the other executrix. If the provisions in question are to be interpreted as bequests to those persons the effect of the will in this respect is simply a direction to the daughter as executrix to discharge her duty as such.

I, therefore, answer the question propounded in the originating summons as follows:—

The bequests to the Diocesan Synod, Henry de Blois, Leonas de Blois and the other children of Henry D. de Blois and to Frederick de Blois and Henry Gordon McCormick are not invalidated.

There has been an intestacy in respect of all the property purporting to be devised and bequeathed beneficially to the daughter Emily McCormick and the legacy to ——— of Perrotte.

The fifth question, I understand, is not pressed.

The costs of the application will come out of the estate.

Declaration accordingly.

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LORRAINE et al. v. NORRIE.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Meagher, Russell, and Drysdale, JJ. March 12, 1912.

1. WATERS (§ II A—69)—OPPOSITE RIPARIAN OWNERS—RIGHT TO MAINTAIN WING-DAMS AND BANK-LINING.

The owner of farm lands, adjoining a river, is within his legal rights in protecting his lands against the inroads of the river, by the construction of wing-dams, or bank-lining, so far as necessary for that purpose, but is not justified in erecting or maintaining such structures, so as to injure the lands of proprietors on the opposite bank of the river, nor so as to alter the channel of the river to the detriment of the lands of his opposite neighbours.

[*Orr, Ewing* v. *Colquhoun*, 2 A.C. 839; *Bickett* v. *Morris*, L.R. 1 H.L. Sc. 47, referred to.]

2. APPEAL (§ VII L—508)—FINDINGS OF FACT—TRIAL WITHOUT A JURY.

Upon the question as to whether the owner of farm lands, contiguous to a river, in protecting his lands against the inroads of the river by the construction of wing-dams, has exceeded his right of defence, and so constructed and maintained the wing-dams as to injure the lands of proprietors on the opposite bank of the river, or so as to alter the channel of the river to the detriment of the lands of his opposite neighbours; if the trial Judge, trying the case without a jury, finds against the defendant, the appellate Court will consider whether the evidence for the defendant is of such a strong and overwhelming character as to justify the overturning of the finding of the trial Judge, and when unable, upon the whole case presented by the defence, to discover any such preponderating testimony, the finding will not be disturbed.

3. NUISANCES (§ II C—48)—ABATING A NUISANCE—ASSAULT—COUNTER-ASSAULT AND BATTERY—DAMAGES—TRESPASS "AB INITIO."

The law only justifies the abatement of a nuisance by a private individual where the right can be exercised without disturbing the public peace; and, in an action, where the plaintiff, a riparian owner, with teams and men in force, enters the lands of a neighbour (the defendant), and proceeds to cut down and remove a wing-dam thereon, on the ground that it constitutes a nuisance causing damage to the plaintiff's lands; and where the defendant, while resisting this action, was assaulted and beaten severely by the plaintiff, it appearing that, while the defendant did commit the first assault in defence of the wing-dam, the plaintiff and his associates retaliated, throwing him down and otherwise maltreating him; there is no justification for the excessive beating, and the plaintiff is liable in damages.

[Blackstone, 3 Com. 5; *Perry* v. *Fitzhowe*, 8 Q.B. 757; *Six Carpenters' Case*, 8 Rep. 146*a*, referred to.]

Statement

ACTION by the plaintiff James Lorraine as owner and occupier and the plaintiff Perley Lorraine as occupier of a farm at North river, in the county of Colchester, bounded on the east and south by said North river against defendant as owner and occupier of a farm bounded on the west by said river, claiming damages for obstructing the flow of said river and diverting the course of the same from its ordinary channel, whereby, it was alleged, the plaintiffs' land was cut away and damaged and breakwaters erected by the plaintiffs on their own land for the protection thereof were undermined and destroyed.

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Defendant denied the diversion complained of and counterclaimed in damages for the erection of plaintiffs' breakwaters whereby, as he alleged, the water of the river was diverted from its natural course and driven against the land of defendant, whereby said land was cut away and overflowed and damaged.

Also for trespass in breaking and entering defendant's farm and tearing down and partially destroying the breakwater or wing-dam erected by defendant.

Also for an assault committed by the plaintiff Perley Lorraine upon defendant on the occasion last referred to by striking him over the head with the butt or end of a whip whereby defendant was severely injured.

The judgment of Graham, E.J., appealed from, is as follows:—

Graham, E.J.

GRAHAM, E.J.:—There is an action and a counterclaim. The plaintiffs and the defendant own land on opposite sides of the North river, in Colchester county, not quite a mile above tide water. Part of the land of each on the river is low in places, and in times of freshets the water overflows the banks. At low water there appears to be a very considerable area of dry beach on both sides, but at different points. This overflowing will account for the erection of the wing-dams by the defendant and the breakwater by the plaintiff.

The plaintiff's breakwater on the west side of the river, running longitudinally along the bank and consisting of trees, logs, brush and stones, was built as far back as 1875. The spur, which retreats back from the river at right angles or nearly so, joining the upper end of the breakwater, was constructed some years later but more than twenty years before action, as the plaintiff Perley Lorraine proves. The other plaintiff, honestly enough, was confused about the date.

The breakwater is now 160 chains along the bank, and the spur 75 links.

Now, these structures, as originally erected or kept up, are not, as I understand it, complained of in this case. Probably the statute has given the plaintiffs a prescriptive right to them: Garrett on Nuisances, 3rd ed., p. 3. But in August or September, 1908, after a freshet in July of that year, the plaintiff repaired them and, it is claimed, raised them above the original height. The next previous repairing had been done in 1902. This alleged raising was after the defendant, on his side, had constructed his upper wing-dam nearly opposite but slightly above on the river.

This upper wing-dam of trees, brush and stone was constructed in the autumn of 1906. It ran from the defendant's bank into the bed of the river at nearly right angles, its course being S. 84 degrees W., and the river S. 18 degrees W., a dis-

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tance of 1.68 chains, having between its outer end and the plaintiffs' bank on the other side a distance of 75 links for the water of the river.

Later, the defendant constructed on his side below, at a distance of 1.82 chains, at the base from the other wing-dam what is called the lower or second wing-dam. The first half was constructed in September, 1908, and the outer half in March, 1909. It extends in length a distance of five chains but it starts diagonally into the river bed, and at its outer end is 1.80 chains from the bank, leaving but fifty links from the other bank for the water of the river. It is of the same material as the other. It, if not the upper one as well, is even at low water submerged at the outer end. All of the witnesses agree that a wing-dam constructed at an oblique angle to the current, as this one was, was better adapted to deflect the current of the river and divert it against the opposite bank, than a wing-dam at right angles to the current. It was, however, pointed out that in the course of time in the latter case, a similar action is in time produced owing to the right angle of the obstruction becoming an oblique angle through it being filled up with the deposits of gravel. These wing-dams not only deflect the current but the volume and velocity of the water is greatly increased at their outward ends. There is thus caused scouring, and when the water escapes the confines of the wing-dams part of it eddies around the ends and gravel is deposited in the slack water below the dams. The level of the water is raised on the other side. In course of time much gravel has lodged between these two wing-dams, and this has a tendency to force the water over against the plaintiffs' land.

The weight of evidence shews that the current has scoured beneath the foundations of the plaintiffs' breakwater, and this is due to the upper wing-dam, now assisted, in my opinion, by the lower one. The theory put forward by one of the defendant's engineers that this was due to another obstacle in the river, namely, some wood from a bank-lining of McKay's that has drifted away and stranded on the gravel now lodged above the upper wing-dam, may have caused the change of current and scouring, is, I think, untenable. The scouring was also produced before the wood went adrift and lodged there. That happened the winter before the trial and after the action was brought. But in any event I do not think it is the single cause of the damage now produced on the plaintiff's side. The lower wing-dam is a very aggressive structure. Its effect is to deflect the current against the opposite side and by forming a permanent channel to cut off the plaintiffs' land.

I think that the construction of these wing-dams cannot be justified. Parts of them are in the bed of the river. They are

not merely a protection and defence of the defendant's land. They exceed that: they are aggressive, and they are materially injuring the plaintiffs' land.

The defendant justifies the construction of the upper one on the theory that the current was diverted upon his land by a bank-lining put in on the other side by the adjoining owner, McKay. But long before that, years ago, his father had placed similar, but shorter, structures near this on different sites when there was no bank-lining, on the other side. Besides, McKay's action would not justify the defendant in injuring the plaintiffs, and, as I have intimated, this goes beyond defence; it is aggressive. The lower one was, in my opinion, put in with the following view: Not far below that point, the river turns sharply from running south to running west, and the defendant's bank (it is intervale), on this new course, has to resist the force of the current running from the north. The defendant thinks it would be expensive to keep up a bank-lining along there for the protection of his intervale, and that the lower wing-dam above, by diverting the current, is a cheaper and more effective thing, and that is, no doubt, so.

But it is only done at the expense of the plaintiff's land. If the defendant succeeds in maintaining his lower wing-dam the river, I think, would cut a new channel (a short cut it is true) diagonally across the plaintiff's land instead of following the two sides. Even granting the alleged raising of the plaintiff's breakwater and spur and that this is what actually affects the defendant's land, such an obstruction cannot be justified.

The Lord Chancellor (Chelmsford in *Bickett* v. *Morris*, L.R. 1 H.L. Sc. 47, at p. 56, said:—

> The proprietors on the banks of a river are entitled to protect their property from the invasion of the water by building a bulwark *ripæ muniendæ causa*, but even in this necessary defence of themselves they are not at liberty so to conduct their operations as to do any actual injury to the property on the opposite side of the river.

And in the case of *Orr Ewing* v. *Colquhoun*, 2 App. Cas. 839, Lord Blackburn, at p. 847, quotes from a decree prepared by Lord Eldon in the House of Lords, *Menzies* v. *Lord Breadalbane*, 3 Bligh N.S. 414, at p. 423, that the

> respondent ought to be prohibited and interdicted from the further erection of any bulwark or any other *opus manufactum* upon the banks of the Tay which may have the effect of diverting the stream of the river in times of flood from its accustomed course and throwing the same upon lands of the appellant.

There is this corollary to the principle quoted from Lord Chelmsford and it will be found in the case of *Trafford* v. *Reg.*, 8 Bing. 204, 2 C. & J. 265, in Exchequer Chamber. I quote from the reporter's note:—

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If an aqueduct be built so as in times of flood to pen back the water of a river and cause it to overflow the lands of the adjoining proprietors, they may raise fenders to protect their lands even though the water of the river be thereby forced against and endanger the aqueduct, unless by the construction or raising of the fenders the proprietors impede what was before the erection of the aqueduct the ancient and accustomed course for the escape of the waters in time of flood. I also cite *Farquharson* v. *Farquharson* (1741), Morrison, Dict. 12, 779, referred to in *Menzies* v. *Lord Breadalbane*, 3 Bligh N.S. 414, p. 422. And in this particular case, etc.

This brings me to the defendant's counterclaim. And his complaint is that the plaintiff by raising his breakwater and the spur has injured him.

The plaintiffs have up the river a fair bank. But at this point the bank and the land behind it falls away and there the breakwater was constructed.

I think in the first place that the weight of evidence shews that the breakwater was constructed on the plaintiff's bank and that its site did not extend into the bed of the river. The fact of the river having been forced over and scouring having taken place at the ends may cause it now to appear as if it had been built into the river. Anyway I think that it has not been extended outwards through any addition or repairs. The scouring beneath has resulted in its tipping outwards at one point but the plaintiffs are not responsible for that.

Then as to whether it or the spur was increased in height in 1908 or subsequently before action was brought in November, 1909. That is a difficult question of fact. There was at the time of the trial and probably at the time of the action, a layer of at least eighteen inches of additional material on top of the former structure. There were many witnesses who spoke of that. Most of them said it was two feet. The evidence on the other hand shews the tendency of the material of such a structure of brush to sag as years go by, and whether this layer made the structure really higher than the original height of the structure is another question.

If anyone looks at one of the photographs and sees the nature of the structure, at least the part longitudinal to the river, he will see how difficult it would be to make a comparison with what it was in former years. However, the mere weight of the impressions of witnesses together with the eighteen inch layer upon it now, and allowing for some sagging leads me to conclude that the structure—both breakwater and spur—were really higher as the result of the work in 1908.

But whether this eighteen inches of additional height has effected anything of which the defendant may complain is another question. I think the weight of evidence—I am speaking more particularly of the evidence of the engineers—is that the

whole structure—breakwater and spur—do not deflect the current to the opposite shore. I grant that one of the engineers called by defendant does advance that view, but the reasons he gives to support his theory that the defendant's wing-dams do not deflect the current to the plaintiff's side would lead one to conclude that the plaintiff's structure does not deflect to the defendant's side. I really think that the other engineer called by the defendant—a person too of more experience—does not controvert the plaintiff's two engineers' views that the whole structure is not calculated to deflect the current appreciably against the defendant's side and does not do so in fact.

But coming to the additional eighteen inches on top, and in dealing with this I must refer to the alleged effect of deflecting the current as well as the effect of raising the level of the water by restricting it on the back with a structure and consequently causing it to rise higher or go further on the defendant's side then there is this difficulty in the defendant's way. The evidence does not shew that either effect has resulted from this act. Taking the levels from the defendant's plan, not likely to be taken at places favourably to any view of the plaintiffs, the old brush on the breakwater was 38.00 and on the spur 40.00 and these appear to be higher than most other levels on the plan.

The evidence of Mr. Doane, the engineer, speaking from actual observation at or just after a freshet shews that the water had at two different points above marked on plan 6 flowed over the plaintiff's bank and a pond of water had formed on the plaintiff's land from overflow, while on the spur the indications were that the water during the freshet had not risen more than a couple of inches. Taking the whole evidence, and there is a great deal of it, given by unscientific witnesses who are liable to be wrong in their inferences, there is nothing which leads me to conclude that the effect of this raising of the structure has produced any effect on the defendant's land.

The defendant has, I think, a difficult task to shew that in that limited period the raising of the structure to that extent has produced any sensible effect on the plaintiff's side or is from the appearances there existing calculated in the future to produce it. He has not done so, and as far as I can understand it, there was nothing in the plaintiff's act of raising the height calculated to produce any sensible effect there. Moreover, under *Trafford* v. *Rex*, the plaintiffs were entitled to raise the height as a defence against the upper wing-dam provided they did not interfere with the course and levels of the river as it existed before the upper wing-dam was put in.

And it is, I think, reasonably clear that, before the restriction of the water by the upper wing-dam, that it would not rise

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as high as the "old brush" of the plaintiff's breakwater and spur.

There are the additional paragraphs in the statement of claim against Perley Lorraine, namely, the breaking and entering and the assault. The other plaintiff was not a party to it. Before the action was brought the plaintiff Perley Lorraine with his two teams and five men employed by him, started across the river to abate the lower wing-dam and commenced hauling it away. The defendant although alone undertook to resist this action. Now, it is possible he was the first to assault Perley Lorraine; whether it was by striking or by pushing him is not material. It also appears that he pushed another of the party so that he fell into the water. The defendant himself was assaulted in turn, and while held in a disadvantageous position by another or others, the plaintiff, Perley Lorraine, inflicted rather severe blows—one at least—upon his head and one at least on his cheek with the butt end of a whip handle. The defendant then started for help and the plaintiff and his men left.

I have the greatest doubt as to whether the license given by law to enter and abate the obstruction was not abused by that act as excessive and that the act was not justified and under the doctrine in the *Six Carpenters' Case* the plaintiff Perley Lorraine was not made a trespasser from the beginning.

But it appears that a battery may justify a wounding under some circumstances, *Cockroft* v. *Smith*, 2 Salk. 642, provided the force used is suitable in kind and reasonable in degree.

These paragraphs I should dismiss without costs because I think that the defendant received serious ill-usage at the hands of Perley Lorraine.

In respect to the action there will be judgment for the plaintiffs for the sum of thirty dollars as compensation for injuries to the plaintiffs' land, an injunction to remove the wing-dams, but the extent and terms of the order will have to be settled when the decree is taken. The plaintiff will have the costs of the action. The counterclaim is dismissed with costs, except in respect to those paragraphs which I have already mentioned.

Argument

Messrs. *J. J. Ritchie*, K.C., and *S. D. McLellan*, K.C., in support of appeal:—Plaintiffs' breakwater was increased in height and length in the year 1908 and this increase in height as a matter of fact diverted the flow of the water to defendant's land and changed the channel of the river which, for many years, had been along the bank of plaintiffs' land. This the plaintiffs could not legally do: Farnham on Waters, p. 1725; *Wallace* v. *Drew*, 59 Barb. 413; *Trafford* v. *King*, 2 C. & J. 265.

Messrs. *H. Mellish*, K.C., *J. P. Bill* and *W. M. Ferguson*, contra:—The defendant Norrie was gaining land all the time from the wash of the river on plaintiffs' land, and the trial

Judge rightly held that plaintiffs had the right to put in a breakwater to save it. The effect of the wing-dams erected by defendant was to undermine plaintiffs' breakwaters and throw the channel out of its natural course on to the other side. The wing-dams were not built for the purpose of protection but were aggressive, and the trial Judge so found.

As to the counterclaim for assault, defendant was the aggressor and the first to commit an assault, plaintiff only acting in self-defence. The trial Judge thought that both were to blame and for that reason would not allow the claim: *Attorney-General* v. *Lonsdale*, L.R. 7 Eq. 377, 379.

Argument

Ritchie, K.C., in reply.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—The learned trial Judge has stated the law which governs in the decision of this case, and the authorities on which it is founded. Each of the parties were within their right in protecting their respective lands against the inroads of the river by the construction of dams, or bank lining so far as necessary for that purpose, but neither would be justified in erecting works which had, or have the effect of injuring the land of the proprietors on the opposite bank of the river,—neither are they justified in constructing dams or other works which would alter the channel of the river to the detriment of the lands of their opposite neighbours: *Orr Ewing* v. *Colquhoun*, 2 A.C. 839; *Bickett* v. *Morris*, L.R. 1 H.L. Sc. 47.

The question then before us is one of fact.

Has the defendant by constructing the dams or wing-dams on his land exceeded his right? Have these wing-dams erected by defendant had this effect of altering the course of the river so as to injure the plaintiff's lands? The trial Judge after a very long investigation and hearing a very large number of witnesses on both sides, has come to the conclusion that the defendant has changed the channel of the river to the injury of the plaintiff's land in erecting the dams in the mode he has adopted, and has exceeded any right he has to protect his own property by building into the river, thus shifting the water from his own side on to the plaintiff's side. The effect has been to undermine plaintiff's breakwater—scouring the earth which supports it.

The evidence is very voluminous—too much so to admit of quoting any of it usefully, and I can do no more than state conclusions after studying the same with care. It is also of the most contradictory character, especially in regard to the conditions or situation of the river from time to time. Having regard to the learned Judge's findings, there is but one conclusion that he accepts, and adopted the evidence of the plaintiff's witnesses on the subject. The question then before me is to consider whether the evidence on the part of the defence is of such a strong and overwhelming character—in fact whether the whole case as

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presented by the defence is such that the Court would be justified in overturning the decision appealed from. After careful examination of all the evidence, and of all that has been urged I am unable to discover any preponderating testimony which alone would justify such a course, and I am therefore of opinion that in the main case the judgment below should be sustained.

I also agree that the defendant has failed to shew that plaintiffs' breakwater—even if slightly raised has had any appreciable effect in diverting the water on to his land, and, so far as that part of his counterclaim is concerned, it should be dismissed.

I am not so clear, however, that the learned Judge was right in dismissing the defendant's claim for damages for the assault and battery by the plaintiff Perley Lorraine.

Adopting his findings on this subject, which are fully justified by the evidence, that the defendant received serious ill-usage at the hands of Perley Lorraine—that the defendant was assaulted, and while held in a disadvantageous position by another or others the plaintiff Perley Lorraine inflicted severe blows—one at least upon his head, and one at least on his chest with a butt end of a whip handle. I can discover no justification for his conduct. The plaintiff with others was endeavouring to cut away and remove defendant's wing-dams on the ground that they constituted a nuisance causing damage to his land. The defendant, while resisting this action, was assaulted and beaten severely by the plaintiff. Now, the law only justifies the abatement of a nuisance by a private individual where the right can be exercised without disturbing the public peace, or, as stated by Blackstone, 3 Com., p. 5:—

> Whatever unlawfully annoys or doth damage to another is a nuisance and such nuisance may be abated, that is, taken away, and removed, by the party aggrieved thereby, so that he commit no riot in doing it.

See also *Perry* v. *Fitzhowe*, 8 Q.B. 757.

It appears from the evidence that while the defendant did commit the first assault in defence of the wing-dams, the plaintiff and his associates retaliated, throwing him down and otherwise maltreating him as found by the learned Judge. However justified the plaintiff may have been in his conduct in the first instance, there is no justification for the excessive beating he and his friends inflicted on the defendant. I am, therefore, unable to agree with the Judge below in dismissing that portion of his counterclaim relating to the assault. In my opinion, the appeal, so far as this claim is concerned, should be allowed with costs, and judgment for the defendant for ten dollars damages with all such costs as related thereto. In other respects the appeal should be dismissed with costs.

Meagher, J.

MEAGHER, J., read an opinion dismissing the appeal.

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RUSSELL, J.:—The plaintiff and defendant are owners of land on the west and east sides respectively of North river in Colchester county, which runs southerly for a mile or a little less past their properties to the tidewater. The river is subject to freshets and both the riparian proprietors have been accustomed to defend against freshets by the construction of bank linings and otherwise. The plaintiff relied wholly on bank linings and breakwaters, while the defendant put his confidence wholly if not altogether in wing-dams, which are structures built out into the river, not necessarily above the surface even at low water. The plaintiff's bank-lining begins at the boundary of his property and runs southerly till it comes to what may be called a breakwater with a spur, the former being a structure apparently along the river front, and the latter a mere extension of the breakwater, but curving to the westward inland. About midway between the beginning of the bank lining and this breakwater, and on the opposite side of the river, there is a wing-dam built by the defendant almost at right angles to the course of the river. Opposite the breakwater and spur is another wing-dam of the defendant, the shore end of which is nearly opposite the spur, while the structure extends in a direction which would make an acute angle with the line of direction of the river, so that in proportion to its height, that is to say, if built to the full height of the surface of the river, it would narrow the channel of the river very materially. It is not built throughout to the surface of the river, the lower end of it being below the river surface even at low water.

The plaintiff's claim is that the defendant's upper wing-dam has deflected the course of the river in such wise as to undermine his bank lining on the opposite shore, and that the lower wing-dam has so narrowed the channel of the river as to inflict serious damage upon him by the diversion of the course of the river to such an extent that, unless checked in time, the river would make for itself a new channel over the plaintiff's land. The defendant, on the contrary, sets up, both by way of defence and counterclaim, that the plaintiff's operations in recently raising the height of his breakwater and building the spur which was added to the structure in 1905, have had the effect of sending the water over upon him during freshets, and that his lower wing-dam was necessitated as a defensive measure in consequence of the plaintiff's work on his breakwater. The defendant also claims that he has been injured by a piece of bank lining that has been built in recent years on the property of one MacKay to the north of plaintiff's land, in the construction of which the plaintiffs or one of them assisted.

The evidence is immensely voluminous and it would be impossible, within any reasonable limits, to present a useful re-

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sumé. The learned trial Judge has found that the defendant was in the wrong, chiefly in respect to his lower wing-dam, which he describes as an aggressive structure which has had the effect of diverting the stream to the injury of the plaintiff.

I think that the weight of evidence supports this finding and that damages and an injunction have been rightly adjudged to be reliefs to which the plaintiff is entitled. But I am not so sure that the defendant's counterclaim for damages resulting from the plaintiff's recent work on his breakwater should have been dismissed. This breakwater was constructed so long ago that it is practically conceded that there can be no right of action in respect of its original construction. But the height of it was raised in 1908, and the defendant's lower wing-dam on the opposite side was constructed, part of it in September, 1908, and the outer portion in March, 1909. I have said that the spur to the breakwater was added in 1905. This was the statement of James Lorraine, one of the plaintiffs, when first called as a witness. In his testimony, when called later in the case, he attempted to change the date and put the construction of the spur at a much earlier date, but the attempt proved unsuccessful, and he was obliged to admit, on cross-examination, that "the heft" of the spur was put there in 1905. He admits that the object of the spur was to prevent the water from coming on his land in the case of very heavy freshets, and that after they built it there they found it useful; though he qualifies his statement to this effect by saying that it is putting it pretty fine whether the big freshet would go over the land. "That spur would be useful if the water ever got high enough to come over there." James Norrie, the former owner of the defendant's land, says very distinctly that the height of the breakwater was increased two feet, and that it had the effect of sending the water over upon the defendant's land to such an extent that where once there was green sod the land presented now the appearance of the bed of a river. Henry Norrie's evidence is to the same general effect. Charles Vincent's is to the effect that "the heft" of the water was on plaintiff's side up to within the last two years; then it turned around and cut through Mr. Norrie's beach below plaintiff's breakwater. Lewis Lynds holds an opinion in accordance with the testimony of the defendant's witnesses but I attach little importance to his statements as he has to admit on cross-examination that they are largely theoretical. Henry Bennyeat says that the water has run more on Norrie's side than formerly during the past two or three years and that the plaintiff's breakwater has been increased in height as well as lengthened twenty-five feet in recent years. Henry Norrie is naturally positive as to the change in the course of the river since the addition vertically and laterally to the break-

water. Paul Norrie's evidence is to the same general effect. Davison Hill is not so positive as most of the defendant's witnesses but I should incline to attach greater importance to his guarded statement than to the positive opinions of some of the other witnesses. He has said, subject to objection, that the plaintiff's breakwater, which, he says, projects in some places into the stream, would have a tendency to throw the water over that way, that is, towards the defendant's land. He recollects, but will not swear positively, that for twenty years the water followed Lorraine's bank and he remembers that there was a diversion of the water over towards Norrie's land before the defendant's lower dam was put in; that it would be difficult to protect defendant's land below the lower wing-dam because the land is low, but he does not exactly say, at least in this connection, that the difficulty of protecting it was any greater because of the plaintiff's additions to his breakwater. His evidence seems, however, to mean this. The only evidence that I can find to meet this strong body of testimony is that of the plaintiff's and Perley Lorraine, the latter being only to the effect that the water did not go over the breakwater before the addition to its height. I notice that the learned trial Judge bases his opinion that the breakwater did not injure the defendant's land, in part, upon the elevations indicated on the defendant's plan. If I understand the reasoning, as explained by plaintiff's counsel, it is that the old elevations on the breakwater and the elevation of the spur were higher than the elevations on the plaintiff's land farther up stream, the argument being that the spur and breakwater could not have had any effect in diverting the water because it must have overflowed the plaintiff's land at the lower levels farther up the stream before it came to the breakwater. I cannot find that this condition of things is indicated on the plan. The only elevations that I find on the plan of the bank lining above the stream are respectively 39.95, 41.24 and 41.31. The height of the old brush on the plaintiff's breakwater is indicated as 38.00 while the breakwater itself has an elevation of 39.86 to 43.04 on the spur. All this is in accord with the admitted purpose of the breakwater to prevent the water from flowing over the plaintiff's land, and it seems to me to be pretty clearly proved that the effect of the additions to the breakwater must have been, in seasons of freshets, to cause a greater flow of water upon the defendant than would have occurred had the stream been left to take its natural course. This I understand to be an actionable wrong for which the defendant could be entitled to damages.

The counterclaim for the assault by Perley Lorraine should also have been sustained. The evidence is clear that Perley

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Lorraine, having undertaken to abate the nuisance and being resisted used force and as is found by the learned trial Judge inflicted severe blows upon the defendant while the latter was being held in a disadvantageous position by another of the company engaged in the abating of the defendant's wing-dam. This was clearly illegal and I see no answer to the defendant's claim that it was an assault.

I think the appeal should be allowed as to the counterclaim, which should be sustained with costs, the damages being a very trifling consideration in comparison with the enormous costs that have been incurred by both parties to this ruinous litigation.

Drysdale, J.

DRYSDALE, J.:—Whilst I agree with the finding of the learned trial Judge that defendant's wing-dams were offensive structures and calculated to change the course of the stream I am of opinion that the weight of evidence establishes that plaintiff by increasing the length and height of his breakwater and the spur thereto caused the waters of the river during times of freshets to overflow the lands of defendant and in a measure to cause damage to defendant's land. I think the large body of testimony establishing that since the recent enlargement of the plaintiff's works on his side of the river the waters when in flood do not spread over the whole interval both on plaintiff's and defendant's side as formerly but are now so held by plaintiff's structures that at flood time the overflow is now on defendant has not been met. And in my opinion, although defendant cannot justify his structures as now built he is entitled to redress from plaintiff for the wrongful action of offensive structures that are calculated to cause and have under the evidence caused largely to defendant's lands. I agree with the opinion of Mr. Justice Russell herein as also on the counterclaim for assault.

Judgment below affirmed in part and appeal allowed in part.

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Nova Scotia Supreme Court, Meagher, Russell and Drysdale, JJ. March 12, 1912.

1. ASSAULT AND BATTERY (§ II—9)—NUISANCE—OBSTRUCTION IN RIVER—ABATEMENT—RESISTANCE—WHEN LIABLE FOR ASSAULT IN RESISTING.

In an action for damages for assault, where the plaintiff as a private individual is lawfully engaged in abating an obstruction in a river as a nuisance, and the defendant, in resisting the abatement assaults and pushes or strikes the plaintiff, whereby he falls into the water, the defendant is liable in damages for the assault, and this, although the assault in question instantly led up to an aggravated assault upon the defendant's person by one of plaintiff's companions who becomes liable in damages therefor.

[*Lorraine* v. *Norrie*, 6 D.L.R. 122, referred to.]

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THIS was an action brought by plaintiff against defendant claiming damages for assault. The defence was that at the time of the acts complained of defendant was owner of and in possession of lands at North River in the County of Colchester and upon such lands was a breakwater which was necessary for the protection of the lands against the encroachment of the river; that plaintiff was trespassing upon the lands, doing damage to the same by tearing up and destroying the breakwater, whereupon defendant, having requested plaintiff to leave said lands and to cease doing such damage, laid his hands upon him to remove him, using no more force than was necessary.

Statement

The facts were substantially the same as those set out in the case of *Lorraine et al.* v. *Norrie*, 6 D.L.R. 122.

The case came up on appeal from judgment of Graham, E.J.

The appeal was dismissed with costs.

The judgment appealed from is as follows:—

GRAHAM, E.J.:—Most of the facts are dealt with in the judgment of this date in *Lorraine* v. *Norrie*, 6 D.L.R. 122. The plaintiff was one of the five persons who went with Perley Lorraine to abate the lower wing-dam as an obstruction in the North River. The chances were largely in favour of this action resulting in a breach of the peace and it did so. A person taking his redress in his own hands is in great danger and he should not do so if his action is likely to result in a breach of the peace.

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If they did not meet with resistance the chances were largely in favour of them not being able to abate it to the proper extent. The plaintiff was pushed or struck by the defendant and fell into the water. The defendant thereupon was struck with a whiphandle on the head and face by Perley Lorraine.

I find for the plaintiff and assess the entire damages at the sum of $6 and I allow costs.

S. D. McLellan, for appellant. Plaintiff took the law into his own hands by going down to the river with Lorraine and his men, knowing what they were going for. He trespassed on defendant's land and defendant had a right to put him off after he warned him that he was a trespasser. Plaintiff was preparing to assault defendant when he was pushed into the water.

Argument

J. P. Bill, for respondent. Defendant did not give plaintiff a chance to leave, and without requesting him to leave struck him and knocked him off the wing-dam. Clerk and Lindsell on Torts (3rd ed.), pp. 141, 142, 317.

RUSSELL, J.:—The plaintiff was lawfully engaged in abating an obstruction in the North River. As the learned trial Judge has said, such an undertaking is very likely to lead to a breach of

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the peace, but the party who breaks the peace is not for that reason exempt from punishment. It seems that in such cases "it must needs be that offences come, but woe to that man by whom the offence cometh." The defendant in this case is the man and he must suffer the consequences of his rash conduct. The judgment against him should be affirmed with costs of the appeal.

Drysdale, J.

DRYSDALE, J.:—Accepting the findings of the trial Judge herein as I feel obliged to do I agree that the appeal must be dismissed.

Meagher, J.

MEAGHER, J., concurred.

Appeal dismissed with costs.

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PION v. FORTIER and DeREINILLARD (tiers-saisi).

Quebec Superior Court, Beaudin, J. October 1, 1912.

1. HUSBAND AND WIFE (§ II D—72)—WIFE'S SEPARATE BUSINESS—LIABILITY TO PAY HUSBAND A SALARY—RIGHT OF EXECUTION CREDITOR AGAINST HUSBAND.

There is no obligation on a wife to pay her husband any salary for his services given by him in relation to her separate business as a contracting carpenter for which there was no agreement to pay, and no execution proceedings can issue at the instance of a judgment creditor to seize any salary or wages purporting to be due by the wife of the judgment debtor to him under such circumstances.

2. EXECUTION (§ II—25)—SUPPLEMENTARY PROCEEDINGS—QUEBEC PRACTICE—JUDGMENT DEBTOR'S SERVICES NOT VALUED IN MONEY.

The amendment to article 891 of the Code of Civil Procedure, Quebec, by 2 Geo. V. (Que.) ch. 50, enacting the proceedings to be taken where the judgment debtor's services are not valued in money does not apply to all debtors, but only to insolvents who have made an abandonment of their property for the benefit of their creditors pursuant to the terms of C.P. Que., art. 853 *et seq;* nor does such amendment authorize the Court to place a valuation upon the services of the judgment debtor performed without salary for his wife carrying on business as a contractor.

Statement

PETITION by the plaintiff to have the Court fix the amount of the defendant's salary.

The petition was dismissed without costs.

G. St. Pierre, attorney for petitioner.

A. Duranleau, attorney for tiers-saisi.

Beaudin, J.

BEAUDIN, J.:—On February 21st, 1911, the plaintiff obtained judgment against the defendant for the sum of $210.57, with interest and costs taxed at $32.95. On July 4th, 1912, the plaintiff caused a writ of *saisie-arrêt* to issue in the hands of the garnishee, who is the defendant's wife and carries on business as contracting carpenter under the firm name of "Fortier & Co."

On July 15th, 1912, the garnishee appeared and declared

that she did not owe anything to the defendant. Under cross-examination she replied to the plaintiff's attorney as follows:—

> My husband works for me without salary; I clothe him and feed him as I do my children. I have no work on hand at the present time; business has been very quiet this year. I am cognizant of the contract which my husband undertakes for me. Since the month of May, 1912, I have not had a single contract. Since May I have only had a few small jobs which have returned about $100. I have not tendered for other contracts recently.

The garnishee appeared by attorney. On July 16th, the plaintiff served on the garnishee's attorneys a petition in which he alleged: that he had issued a *saisie-arrêt;* that the garnishee declared that the defendant was her husband and worked for her, but without any salary; that the defendant is insolvent and works for his wife in order to avoid paying his creditors and that it behooved the Court to determine the salary of the defendant; and he concluded by praying that the Court should fix the amount of the defendant's salary and that the said amount be declared under seizure for the purposes of the present seizure.

When this petition was presented the garnishee's attorneys contended that the law, 2 Geo. V. ch. 50, passed at the last session, did not apply to the present case because the defendant had never made an abandonment of his property as required by arts. 853 C.P. *et seq.*, and furthermore, that this law was inapplicable as between consorts, but only covered the case of an insolvent trader who has made an abandonment of his property according to art. 853 C.P., and who is working for a third party who is not his wife, without any salary.

I suggested to the parties, as the question was a new one of the greatest importance, that it would be preferable to file a regular contestation of the *saisie-arrêt*, but they insisted on a decision at the present stage of the proceedings in order to avoid costs, and they admitted that the defendant had never made an abandonment of his property within the terms of art. 853 C.P., and that the defendant worked for the garnishee, but without salary.

First question:—

Does the aforementioned law, sanctioned on April 3rd, 1912, and in force on June 3rd, 1912, apply generally to every debtor or does it only apply to a debtor who has made an abandonment of his property in accordance with art. 853 C.P.?

It is important to reproduce both the French and English versions of this text of law.

> Ch. 50. Loi amendant l'article 891 du Code de procedure civile. Sa Majesté, de l'avis et du consentement du Conseil Législatif, et de l'Assemblée législative de Québec, décrète ce qui suit. L'article

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891 du Code de procédure civile est amendé, en y ajoutant l'alinéa suivant:—

"Si, sur un jugement rendu contre le débiteur, le créancier a fait émaner un bref de *saisie-arrêt* et que, sur ce bref, le tiers-saisi a déclaré que le débiteur est à son emploi, mais que la valeur de ses services n'est pas fixée en argent, la Cour, sur requête du saisissant, peut ordonner de faire la preuve de la valeur des services du débiteur et, sur cette preuve, évaluer en argent la quotité du salaire dans le jugement déclarant la *saisie-arrêt* tenante, et le montant ainsi fixé est traité par la suite, pour toutes les fins de la cause, comme, ayant été et étant le salaire du débiteur jusqu'à ce quil soit établi, à la demande du débiteur ou du créancier, que le montant ainsi fixé doit être modifié."

Ch. 50. "An Act to amend article 891 of the Code of Civil Procedure. His Majesty, with the advice and consent of the Legislative Council and the Legislative Assembly of Quebec, enacts as follows:—

1. Article 891 of the Code of Civil Procedure is amended by adding the following paragraph:—

"If a writ of seizure after judgment has been issued in execution of a judgment rendered against the insolvent, and if the garnishee declares that the debtor is in his employ but that the value of his services has not been fixed in money, the Court, on application of the seizing creditor, may order proof to be made of the value of the debtor's services, and upon such proof may, in the judgment declaring the seizure binding, value in money the amount of the defendant's wages or salary; and thereafter, the amount so fixed shall be treated for all the purposes of the cause, as having been and as being, the debtor's wages or salary, until it is shewn on the application of the debtor or of the creditor that such amount ought to be changed."

It will be seen, therefore, that this is not a general law applicable to every debtor indistinctly, but a special law whereby the Legislature declares it is amending a special article of the Code of Procedure, to wit, article 891, to be found under the chapter treating of "Abandonment of Property" and which article before the amendment read as follows:—

> 891. The abandonment of his property discharges the debtor from his debts to the extent only of the amount which his creditors have been paid out of the proceeds of the sale of such property.

Now, the statute above cited declares that this article 891 C.P. is amended by adding the paragraph above set out which says in substance that when a creditor has caused to be issued a writ of seizure after judgment on a judgment rendered against a debtor and the garnishee declares that the debtor is in his employ but that the value of his services has not been fixed in money then the Court may order the value of the services of such debtor to be proven.

It seems to me impossible to come to any conclusion other than that the debtor mentioned in the amendment is the debtor spoken of in the original article, to wit, the debtor who has made an abandonment of his property in accordance with the

provisions of the chapter on abandonment of property and who has not completely paid his debts.

And what confirms me in this opinion is that the English version has translated the word "débiteur" by the word "insolvent," thus indicating in the most formal manner possible that it is the debtor who has made an abandonment of his property who is meant. It is quite true, as stated by the learned attorney for the plaintiff, that in cases of provincial statutes the French version is usually followed; but I take it to be one of the fundamental rules in matters of interpretation of statutes to accept that version which seems the more in harmony with the article or chapter amended, in cases of amendment. And as the word "insolvent" in the English version seems to me more in harmony with the chapter on abandonment of property amended by this law, I conclude on the first point that the only debtor falling under this 1912 law is the debtor who has made an abandonment of his property in accordance with the terms of articles 853 *et seq.* C.P.

Second question:—

Does this law of 1912 apply to consorts?

The decision on the first point would render a decision on the second point unnecessary in the present case, but I have other cases presently under advisement in which this question may arise. I think it, therefore, preferable to pass on this second point, especially if another Court should come to hold differently on the first.

Before this amendment our jurisprudence had constantly held that a creditor could not issue a seizure after judgment against a husband working for his wife, because the law does not oblige the wife to pay her husband a salary; on the contrary, by the sole fact of marriage the husband incurs the liability of maintaining his wife. A reference to arts. 173, 174 and 175 C.C. shews that the consorts owe each other assistance.

> 173. Husband and wife mutually owe each other fidelity, succour and assistance.
>
> 174. A husband owes protection to his wife; a wife obedience to her husband.
>
> 175. A wife is obliged to live with her husband and to follow him wherever he thinks fit to reside. The husband is obliged to receive her and to supply her with all the necessaries of life, according to his means and conditions.

And reference to Pothier, vol. 6, Nos. 380 and 381, shews that the husband is obliged to receive his wife in his home, and to treat her maritally—that is to say, to supply her with everything necessary to the needs of livelihood according to his means, faculties and social standing.

In a case of *Dussault* v. *Gingras and Couture*, T.S., 4 Rev. de J. 503, Mr. Justice Routhier held that a wife who is sep-

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arate as to property from her husband and who carries on business cannot be compelled to pay a salary to her husband, the manager of her business, and that consequently a judgment creditor of the husband cannot seize in the hands of the wife the value of the husband's work.

In the case of *St.-Pierre et al.* v. *Towle and Dufresne*, T.S., 5 Rev. de J. 378, Mr. Justice Gill followed the above decision. Held: The salary of a husband working for his wife is not seizable by *saisie-arrêt* at the instance of a creditor of the husband. This judgment was confirmed in Review, 17 Que. S.C. 361, Tait, A.C.J., Loranger, and Tellier, JJ.

The same doctrine was followed by Mr. Justice Pagnuelo in the case of *Arnoldi* v. *Stewart and Martel*, T.S., and his judgment was upheld by the Court of Review, 17 Que. S.C. 252, Loranger, Davidson, and Langelier, JJ. I refer more particularly to the remarks of Mr. Justice Davidson, the present Chief Justice of our Court, at page 261. He said:—

> It is of not infrequent occurrence that a wife buys the insolvent business of her husband and continues it in her own name. Experience teaches us that the transfer is often a nominal one. But, in the present case, the business bought was not that of the husband of the *tiers-saisi*, but of her father. In the formation of the new firm, and the acquirement of capital, there appears to have been perfect good faith. The *tiers-saisi* knew that a judgment existed against her husband. This may have influenced the method of the subsequent transaction, but, absolute reality as it was, this does not constitute fraud. We are not prepared to say, as learned counsel for the *tiers-saisi* would have us, that an agreement whereby one consort was to receive a salary for administering the estate of the other, would be illegal; but on the other hand where no agreement exists, and a husband voluntarily looks after the affairs of his wife, a Court of justice will not, in spite of them, assert that the services must be paid for. It is a natural responsibility.
>
> We might add further, that there is, in any event, no definite proof of what the husband's services were actually worth in dollars and cents. A *quantum meruit*, moreover, presupposes an original intention to pay according to the value of the work done. But, as already stated, no such intention is disclosed by the record. Indeed, the *tiers-saisi* when asked: "Would you not have been compelled to pay an agent, if your husband refused to look after the firm?" answered, "No, I would have done it myself," and in support of her ability in that respect states that she had worked in the business when her father carried it on.

Finally, the same thing has been held by Mr. Justice Charbonneau in *Frank* v. *Lafrance and Riopelle*, T.S., 32 Que. S.C. 438.

Did the statute above-mentioned alter the obligations which the consorts owe mutually to each other solely as a result of the celebration of the marriage? In my opinion there can be

but one answer to this question: it did not. The very terms of this law, in my opinion, clearly indicate that the only debtor it wishes to reach is the debtor working for a third party other than his wife, without any fixed salary, and who could take a *quantum meruit* action against the person employing him.

The legislature could not be ignorant of these judgments and if it had intended dealing with the husband debtor working for his wife it seems to me that other expressions would have been used. For the statute states as we have seen, that if a writ of seizure after judgment has been issued in execution of a judgment rendered against the insolvent and if the garnishee declares that the debtor "is in his employ"; now the husband is not in the employ of his wife. And the statute adds: that if the value of the services has not been fixed in money the Court may value in money the amount of the defendant's "wages or salary" and thereafter the amount so fixed shall be treated as the "wages or salary" of the debtor until it is shewn that such amount should be modified. Now, here again, the wife does not pay her husband any "salary" and cannot be compelled by law to pay him such salary and the seizing creditor who cannot have any greater rights than the husband cannot therefore sue his debtor's wife for salary.

I, therefore, conclude that we must of necessity hold that the text of this statute cannot apply to the husband working for his wife and that if the legislature had intended otherwise it would have stated categorically that it should apply to a husband working for his wife. In the absence of a formal text of law I cannot come to the conclusion that the Legislature decided to read out of our Civil Code the three articles abovementioned (173, 174, 175) which impose upon the consorts obligations resulting from the mere fact of marriage.

On this point as on the first I am obliged to decide against the contention of the plaintiff and to declare that his petition cannot be granted. The petition is dismissed.

But taking into consideration the special circumstances of this case which has been submitted without contestation it is dismissed without costs.

Petition dismissed.

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In re SCAMEN et al. v. CANADIAN NORTHERN R. CO.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, Simmons, and Walsh, JJ. September 25, 1912.

1. EVIDENCE (§ VII A—590)—LIMITATION OF EXPERT EVIDENCE—EVIDENCE ACT (ALTA.) 1910, CH. 3, SEC. 10.

Section 10 of the Alberta Evidence Act, 1910, 2nd sess., ch. 3, is an attempt to put a limit to what is commonly known as expert evidence, and it should not be extended to all evidence which might literally be called opinion evidence, but should be given a fair interpretation so as to make it reasonable and workable.

2. EVIDENCE (§ VII A—590)—ALBERTA EVIDENCE ACT—SEVERAL FACTS INVOLVED IN TRIAL—LIMITATION OF NUMBER OF EXPERT WITNESSES.

Upon the proper interpretation of section 10 of the Alberta Evidence Act, 1910, 2nd sess., ch. 3, in the event of a trial or inquiry involving several facts, upon which opinion evidence may be given, a party is entitled to call three witnesses to give such evidence upon each of such facts, and he is not limited to three of such witnesses for the whole trial.

Statement

THIS is a case stated by an arbitrator for the opinion of the Court as to the proper interpretation of section 10 of the Alberta Evidence Act which is as follows: "Where it is intended by any party to examine as witnesses persons entitled according to the law or practice to give opinion evidence, not more than three of such witnesses may be called upon either side."

O. M. Biggar, for railway company.

F. C. Jamieson, for the owners.

Harvey, C.J.

HARVEY, C.J.:—It is pointed out by counsel that in evidence given by the ordinary witness there is frequently more or less of opinion evidence, *e.g.*, where a witness states that a person was well when he saw him it is in reality nothing more than a statement of an opinion which he formed from the appearance of the person, and if the section is to be treated literally, since any one is entitled to give opinion evidence of such a character, any party might be limited to three witnesses in any case. It does not appear, however, that that is what the section contemplates. It appears to be an attempt similar to that in other jurisdictions to put a limit to what is commonly known as expert testimony and the Court should give it a fair interpretation, so as to make it reasonable and workable if its terms will warrant it.

The question then arises whether in the course of a trial or other enquiry in which witnesses are to be examined a party is to be limited to three of such witnesses for the whole trial or inquiry or whether in the event of such trial or inquiry involving several facts upon which opinion evidence may be given a party is entitled to three of such witnesses on each of such facts.

Witnesses are called for the purpose of proving facts and a witness can only give evidence as to one fact at a time. There

is nothing in the section referring to trials or enquiries. It simply deals with the giving of evidence.

Any fact which requires to be proved must be proved by evidence, and if opinion evidence in the sense mentioned is desired to be given as part of such proof, the section at once applies and limits the side which is attempting to prove and the side which is attempting to disprove the fact each to three of such witnesses. This interpretation appears to give effect to the intention of the section as indicated by its words and there appears to be nothing in it which would justify any further limitation.

SCOTT, SIMMONS, and WALSH, JJ., concurred.

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Judgment accordingly.

WINNIPEG ADVERTISING CO. v. HILSON.

Manitoba Court of Appeal, Howell, C.J., Richards, Perdue, Cameron and Haggart, JJ.A. October 10, 1912.

1. CONTRACTS (§ II B 4—193)—ADVERTISING SPACE ON THEATRE CURTAIN —THEATRE CHANGED TO MOVING PICTURE SHOW.

Where the plaintiff claims a balance as due for advertising, under a written contract which purported to lease to the defendant for one year for advertising purposes a numbered space on the "specialty drop curtain" of the "Empress Theatre" with a proviso for a *pro rata* reduction if the "theatre" during the term should close, or fail to give the regular number of performances; and, where the evidence shewed that such theatre was of the vaudeville class and within four months was moved with all its plant and scenery, except the "specialty drop curtain," to another building on another street in the city, and there adopted the same name "Empress Theatre" and that the name of the original "Empress Theatre" building was changed to the "Bijou," and was operated for the remainder of the term as a moving picture show under that name, the advertisement on the curtain remaining in the "Bijou" on the original drop curtain left there, the true construction of the words "Empress Theatre" read with "theatre" in the contract, as gathered from the whole instrument, is that the parties thereby contemplated the organization, including the plant and scenery, as an active theatre and vaudeville show giving regular performances, and therefore that as to the remaining eight months the defendant was not liable under the contract, the advertisement in the "Bijou" was not of the kind contracted for.

Statement

APPEAL by the defendant from the judgment of the County Court Judge at trial in favour of the plaintiffs in an action for the balance due on an advertising contract.

The appeal was allowed.

H. V. Hudson, for the plaintiffs.
F. J. G. McArthur, for the defendant.

The judgment of the Court was delivered by

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Haggart, J.A.

HAGGART, J.A.:—The plaintiff claimed from the defendant $100 as a balance after allowing certain credits for advertising under a contract in writing, the material portions of which are as follows:—

Winnipeg, Man., Nov. 24th, 1910.

The undersigned hereby agrees to lease space No. nine upon the specialty drop curtain of the Empress Theatre, Winnipeg, Man., for the period of one (1) year (12 mos.) commencing from Dec. 1st, 1910, for which I agree to pay to the Winnipeg Advertising Co., or order, the sum of one hundred and fifty dollars ($150.00), payable at the rate of twelve dollars and fifty cents per month on demand.

It is understood that should, for any reason, the theatre close or fail to give the regular number of performances, it shall in no way invalidate this contract, but a *pro rata* allowance in time shall be given the advertiser.

On the 21st April following the date of the contract the lessees of the Empress Theatre vacated the premises and removed all their plant (excepting the drop curtain, which did not fit the new building) to another building on another street in Winnipeg. The new building was given the name "Empress Theatre" and the building vacated was afterwards known as the "Bijou." The Empress, both in the old and in the new building, was what is generally known as a vaudeville show, while the Bijou was run as a moving picture show.

The advertisement appeared on the space contracted for on the curtain for the period agreed upon.

The defendant claimed that it was not the kind of advertising contracted for. The show was different, and the audiences were different. The defendant paid up until the 21st of April, but denied any further liability. The learned County Court Judge was of opinion that it was the place rather than the kind of performance, or the quality or kind of people that were going to see it, that was contemplated. With all deference and respect for the opinion of the County Court Judge, I think, on reading the evidence, and considering the conditions and circumstances surrounding, that the intention to be gathered from the document was that "Empress Theatre" must be taken to mean the organization, including the plant and scenery, as an active theatre and vaudeville show, giving regular performances.

The defendant's appeal is allowed with costs and the judgment of the plaintiff will be set aside and judgment entered for the defendant with costs.

Appeal allowed.

COONEY et al. v. JICKLING et al.

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Sept. 23.

Manitoba King's Bench. Trial before Macdonald, J. September 23, 1912.

1. COMPROMISE AND SETTLEMENT (§ I—4)—EFFECT OF ON CLAIMS ARISING PRIOR TO DATE—KNOWLEDGE OF CLAIMANT.

Where it appears that an agreement was intended to settle all matters then in dispute between the parties, no subsequent claim should be allowed in respect of a matter arising prior to the date of the agreement, of which the party claiming had knowledge at that date.

Statement

THE late Lemon Jickling appointed his wife executrix under his will and as such she disposed of a portion of the estate as she had a right to prior to the grant of the probate. Subsequently she renounced, and letters of administration were granted to the defendant McConnell. Matters being in dispute between the parties, a settlement was arrived at under the terms of which the estate was divided. The remainder, after the specific portion allowed to the wife, was to be the portion of the defendants, other than the defendant McConnell.

The defendant carried out the terms of the agreement with the exception of the payment of $604.50, sought to be recovered in this action. Defendants did not deny this indebtedness, but set up by way of counterclaim a claim to that portion of the estate which the wife disposed of prior to the agreement and settlement. The agreement made between the parties was silent as to the portion of the estate the widow had disposed of, and no claim was set up to it until after her death. Defendants at the time of the settlement were aware of the fact that the widow had disposed of certain chattels now claimed by them as their share of part of the estate under the settlement.

Judgment was given for the plaintiffs and the counterclaim was dismissed.

A. W. Bowen, for the plaintiffs.

H. W. McConnell, for the defendants.

Macdonald, J.

MACDONALD, J.:—The defendants admit the claim of the plaintiffs, but resist payment of the same by way of counterclaim, and this counterclaim must be governed by the terms of the agreement, exhibit 1.

Under the will of the late Lemon Jickling, Elizabeth Jickling, his wife, was made executrix, and after his death, which took place in August, 1910, his widow, being his executrix, disposed of the chattels claimed by the defendants herein as part of his estate to which they now claim to be entitled under the terms of the agreement, exhibit 1.

The estate became vested in the executrix immediately after the death of the testator, and she as such executrix disposed of a

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portion of the estate as she had a right to, prior to granting of probate.

The defendant McConnell became vested of the remaining portion of the estate and title thereto and it was vested in him only by the issue of letters of administration and on the renunciation of the executrix.

The widow (and executrix) applied for probate of the will, which was opposed by the defendants other than the defendant McConnell. Litigation ensued, and finally, and upwards of a year after the decease of Lemon Jickling, the settlement, exhibit 1, was arrived at.

Under the terms of this settlement the estate was divided. The remainder, after the specific portion allowed to the widow, was to be the portion of the defendants other than the defendant McConnell. The defendants carried out the terms of the agreement with the exception of the payment of $604.50 sought to be recovered in this action. The defendants do not deny this indebtedness, but set up by way of counterclaim a claim to that portion of the estate which the widow disposed of prior to the agreement and settlement. The agreement is silent as to the portion of the estate she disposed of and no claim was set up to it until after the death of the widow. The defendants at the time of the settlement were aware of the fact that the widow had disposed of certain of the chattels now claimed by them as their share of part of the estate under the settlement. On the 30th of May, 1911, the solicitors of the defendants wrote the plaintiffs' solicitors expressing their knowledge of the fact and stating their intention of restraining her. The defendant Alfred Jickling says that before the agreement of settlement he discovered that Mrs. Jickling (the widow) was disposing of the estate. He knew of the sale of the automobile to Took shortly after the sale and a considerable time before the settlement, and now after the widow's death, they set up a claim to which a reference was not made in the settlement arrived at. Furthermore, they were aware of the fact that the widow had been disposing of a portion of the assets of the estate, for in clause 7 of the agreement of settlement they make a provision that they are to deliver up to her the furniture and household effects not already in her possession or not heretofore disposed of by her.

It seems to me that the agreement was intended as a settlement of all matters connected with the estate on the day of the date of the agreement and anything disposed of by the widow and executrix named in the will prior to that date was not intended to be taken into account as part of the estate. There will, therefore, be judgment for the plaintiffs for the sum of $604.50 together with interest at 8 per cent. from the 12th day of April, 1912, and costs. I dismiss the counterclaim of the defendants with costs.

Judgment for plaintiffs.

ALFRED and WICKHAM v. GRAND TRUNK PACIFIC R. CO.

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Oct. 4.

(Decision No. 2.)

Alberta Supreme Court, Beck, J. October 4, 1912.

1. STAY OF PROCEEDINGS (§ I—5)—JURISDICTION OF JUDGE OF SUPREME COURT OF CANADA—PRIOR TO JUDGMENT BEING CERTIFIED TO LOWER COURT.

Until a judgment of the Supreme Court of Canada has been certified to the Court below, a Judge of the Supreme Court has jurisdiction to order a stay of proceedings pending an appeal to the Privy Council. (*Per* Beck, J.)

[*Union Investment Co.* v. *Wells*, 41 Can. S.C.R. 244; and *Peters* v. *Perras*, 42 Can. S.C.R. 361, referred to.]

2. STAY OF PROCEEDINGS (§ I—5)—JURISDICTION OF JUDGE OF COURT OF FIRST INSTANCE TO GRANT.

Where the plaintiffs in an action have succeeded at the trial and in the provincial appellate Court, and the defendants have elected to appeal to the Supreme Court of Canada, in which also they have been unsuccessful, and, while the Supreme Court still had jurisdiction over the case, a Judge of that Court has refused a stay of proceedings pending an appeal to the Privy Council, and it appears that there has not been any miscarriage of justice through accident, mistake or otherwise, but that every question in dispute has been fully considered, and that the case involves merely a question of fact and nothing of public importance, and that the Privy Council is likely to refuse leave to appeal, a Judge of the provincial Court of first instance should not grant a stay of proceedings pending an appeal to the Privy Council.

[*Alfred* v. *Grand Trunk Pacific R. Co.*, 5 D.L.R. 154, and *Grand Trunk Pacific R. Co.* v. *Alfred*, 5 D.L.R. 471, specially referred to.]

Statement

THIS is an application to stay the payment of money out of Court pending the defendants' application for leave to appeal to the Judicial Committee of the Privy Council from the judgment of the Supreme Court of Canada, *Grand Trunk Pacific R. Co.* v. *Alfred and Wickham*, 5 D.L.R. 471, dismissing the defendants' own appeal from the judgment of the Court *en banc*, *Alfred and Wickham* v. *Grand Trunk Pacific R. Co.*, 5 D.L.R. 154, which had dismissed the appeal from the judgment of the trial Judge upon a verdict of a jury.

The application was refused.

J. E. Wallbridge, for plaintiffs.

S. B. Woods, K.C., for defendants.

Beck, J.

BECK, J.:—An application was made to Duff, J., of the Supreme Court of Canada for a stay. He refused it and it is stated by the plaintiffs' solicitor's Ottawa agents to have been on the grounds, as I gather from their letter, that the case was not one of public import and that the defendants themselves had elected to appeal to the Supreme Court of Canada.

A temporary stay of proceedings was made by my brother Walsh, on condition of the payment into Court of the whole amount of the judgment, $59,670.64, with leave to the defendants to apply to stay the payment out until the defendants

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could have their first opportunity to apply to the Judicial Committee for leave to appeal. It is this application for a further stay that is before me.

Against granting the application it is urged that the questions involved, though large, are of no public import; that there is in favour of the plaintiff the verdict of the jury and the unanimous decisions of the Court *en banc* and the Supreme Court of Canada dismissing appeals by the defendants; that the defendants themselves elected to appeal to the Supreme Court of Canada rather than direct to the Judicial Committee; that a Judge of the Supreme Court of Canada refused a stay of proceedings; and what is my own opinion, that the substantial justice of the case is with the plaintiffs while the defendants have raised some unmeritorious defences, such as the absence of the corporate seal, and the absence of sufficient proof of the authority of the defendants' general manager.

For the application it is urged that the defendants have, as every litigant, a right to go to the Court of last resort and that, inasmuch as it is shewn that the plaintiffs are now out of the jurisdiction and have no assets within it and outside of what they may eventually recover in this action appear to have little or no assets, an appeal to the Judicial Committee would be nugatory and would have to be abandoned.

Mr. Justice Duff refused the application to stay proceedings at a time when he had jurisdiction, see *Peters* v. *Perras*, 42 Can. S.C.R. 361, inasmuch as at that time the judgment of the Supreme Court of Canada had not yet been certified to this Court. He in fact dealt with the application on its merits and refused it notwithstanding that he and other Judges of the Supreme Court of Canada had, when dealing on the merits with applications for similar orders, granted them; see *Union Investment Co.* v. *Wells*, 41 Can. S.C.R. 244.

The fact that on the application before Duff, J., the amount of the judgment had not been paid into Court and now is in Court seems to me to make no real difference between the circumstances then and now inasmuch as had he thought it a proper case in which to grant the stay it is a matter of course that payment into Court would have been made the condition; see the last cited case.

In view of Mr. Justice Duff's decision and the facts that three tribunals have without dissent found in favour of the plaintiffs, that the defendants, having a right to appeal to the Judicial Committee direct, elected to appeal to the Supreme Court of Canada, from which they now have no appeal as of right, that it does not appear that there has been any miscarriage of justice, through accident, mistake or otherwise, but on the other hand, that every question in dispute has been fully

considered, that the case involves merely a question of fact and nothing of public import, and that in view of the decisions of the Judicial Committee, leave to appeal is, in my opinion, altogether likely to be refused; see cases collected in Holmested & Langton's Judicature Act, 3rd ed., 1038 *et seq.* I have come to the conclusion that I should refuse the application with costs as I now do. In this opinion four out of five of my brother Judges whom I have had an opportunity of consulting agree. It follows as a consequence of the dismissal of the application that the money in Court should be paid out to the plaintiffs and I accordingly so order.

Application refused.

ST. GERMAIN v. L'OISEAU.

Alberta Supreme Court, Harvey, C.J., Simmons, and Walsh, JJ.
October 4, 1912.

1. BROKERS (§ II B—12)—COMMISSION OF REAL ESTATE AGENT—CAUSA CAUSANS ESSENTIAL—SALE OF LANDS.

Although it is clearly the law that an agent may not be disentitled to the commission on a sale of lands, merely because the actual sale takes place without his knowledge, if his acts really brought about the relation of buyer and seller; yet, in a case in which the agent fails to shew that some act of his was the *causa causans* or an efficient cause of the sale, he cannot recover.

[*Burchell* v. *Gowrie*, [1910] A.C. 614, specially referred to.]

2. BROKERS (§ II B—12)—COMMISSION OF REAL ESTATE AGENT—CAUSA CAUSANS.

Where an agent claims commission under a contract for negotiating the sale of lands, the determining principle is that he must have brought the vendor and purchaser together, not necessarily a personal introduction, but one through which the purchaser knew that the land of the vendor was for sale; and the absence of that element is fatal to the claim.

Statement

APPEAL by defendant from the judgment at trial dismissing the plaintiff's action for commission on the sale of certain land.

The appeal was dismissed with costs.

H. A. Mackie, for plaintiff, appellant.

H. L. Landry, for defendant, respondent.

Harvey, C.J.

HARVEY, C.J.:—With considerable hesitation I have come to the conclusion that the appeal should be dismissed. It is perfectly clear that the fact that the sale was subsequently completed without the knowledge of the plaintiff does not in itself disentitle him to a commission on the sale for there are numerous authorities that decide that expressly, see *Burchell* v. *Gowrie*, [1910] A.C. 614, at p. 625.

However, in the same case at p. 624 it is stated:—

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In the words of the later authorities, the plaintiff must shew that some act of his was the *causa causans* or was an efficient cause of the sale.

It is in this respect that I think the evidence of the plaintiff does not go far enough to enable him to succeed in view of the learned trial Judge's dismissal of the action. The purchaser was clearly not disposed to help the plaintiff by his evidence and though some of his statements appear to me hardly consistent with other statements so that if I had been trying the case I am not sure that I would have come to the conclusion the trial Judge did, yet I cannot say that he was wrong for the evidence does not, beyond doubt, shew that the sale was really brought about by the plaintiff's efforts.

Simmons, J.

SIMMONS, J.:—I concur.

Walsh, J.

WALSH, J.:—One Denis bought the farm of a man named Desjarlais and when the sale was closed he asked the plaintiff if he knew of any other farm that he, Denis, could buy in the same neighbourhood. The plaintiff suggested that the defendant's farm was for sale. Denis already knew this, having been so informed by Desjarlais. Denis then told the plaintiff that if he, the plaintiff, could buy the defendant's farm at $30 per acre, being the price suggested by the plaintiff, he Denis would take it. Immediately after this the plaintiff saw the defendant and after some discussion the defendant by writing authorised the plaintiff to sell the land for $5,000, and by the same writing agreed that in the event of a sale being made by the plaintiff at this figure he would pay him $200 by way of commission. It appears that the name of Denis was not suggested to the defendant in these negotiations as that of the proposed purchaser. The plaintiff advised Denis that the defendant would sell for $5,000, but this was $200 more than Denis, who was really acting for others, was authorized to pay, and he said he would not buy at that price. This was the last and the only thing that the plaintiff had to do with Denis in the matter after receiving the defendant's authority to sell. A few days later Denis decided to buy and he went to the defendant and purchased his farm for $5,000, the defendant then being ignorant of the fact that Denis was the man with whom the plaintiff had been negotiating. The plaintiff sues to recover his commission of $200. The learned District Court Judge who tried the action dismissed it and from this judgment the plaintiff appeals.

In my opinion the judgment appealed from is right. I do not think that upon the facts of this case it can be said that any act of the plaintiff was the *causa causans* or an efficient cause of the sale. If the relation of buyer and seller had been really brought about between Denis and the defendant by the

acts of the plaintiff he would certainly have been entitled to his commission even though he had no hand whatever in the actual making of the sale. But I am unable to see how it can be said in this case that anything that the plaintiff did brought about this sale. The position is simply this, that a man who knew that the farm of another was for sale asked the plaintiff to ascertain for him the price for which it could be bought, and that the plaintiff did ascertain and communicate the price to this man, who subsequently bought from the defendant without any further intervention of the plaintiff. How did the plaintiff make himself the efficient cause of the sale? He did not discover the purchaser. He simply ascertained for a man, who already knew that the land was on the market, the price at which it could be bought. If Denis had not known before this talk with the plaintiff that the defendant's land was for sale I think it might then be very well said that it was through him that the sale was afterwards made and that this, coupled with the other facts of the case, would entitle him to his commission. But it is the fact that it was not the plaintiff who, to quote from the evidence, "put Denis next to the farm" but that Denis came to him knowing as much about the matter apparently as the plaintiff himself did, which, to my mind, distinguishes this case from all others of its kind with which I am familiar. I do not intend to load this judgment with references to or citations from any of the numerous decisions upon this branch of the law with which our reports, particularly those of Western Canada in recent years, are filled. But through them all will be found running this as the determining principle in such a case as this, that in order to entitle him to his commission the agent must have brought the vendor and purchaser together or must have given an introduction which resulted in a sale, not necessarily a personal introduction but one through which the purchaser knew that the land of the vendor was for sale. The absence of that element from the facts of this case is, I think, fatal to the plaintiff's right to recover, and I would dismiss the appeal with costs.

Appeal dismissed.

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Ontario Court of Appeal, Moss, C.J.O., Maclaren and Meredith, JJ.A., and Clute and Sutherland, JJ. June 28, 1912.

1. WATERS (§ II A—66)—RIGHT OF RIPARIAN OWNER TO ACCESS TO NAVIGABLE WATER—MARSHY GROUND INTERVENING.

One whose land is separated from navigable water by marshy ground is not a riparian proprietor in respect of the navigable water.

[*Ross* v. *Village of Portsmouth*, 17 U.C.C.P. 195; and *Niles* v. *Cedar Point Club*, 175 U.S. 300, referred to; *Merritt* v. *City of Toronto*, 23 O.L.R. 365, affirmed on appeal.]

Statement

APPEAL by the plaintiff from the judgment of a Divisional Court, 23 O.L.R. 365.

The appeal was dismissed, MACLAREN, J.A., and CLUTE, J., dissenting.

Argument

H. M. Mowat, K.C., for the plaintiff. The plaintiff has a patent for land "to the water's edge," and also for land outside of that, and the Court below erred in holding that the plaintiff was not the owner of land covered by water, and entitled to the rights of a riparian proprietor. The evidence shews that Ashbridge's Bay is a part of the Harbour of Toronto, and that the plaintiff bought on account of the riparian rights to which he claims to be entitled. The evidence further shews that, as a matter of fact, the bay was navigable, and that a great extent of the beach was clear, except where there were bits of floating bog that any one could easily move away. There was no "marsh hay" in front of the plaintiff's land, but only this species of aqueous growth which would float away, and did not deprive the water of its navigable quality. He referred to *Hood* v. *Toronto Harbour Commissioners* (1873), 34 U.C.R. 87, and to the Lake Scugog case, *Beatty* v. *Davis* (1891), 20 O.R. 373, which is the leading case on the subject, and which, it is respectfully submitted, is not successfully distinguished by the learned Chancellor from the case at bar. He also referred to a number of cases cited in the previous argument, 23 O.L.R. at p. 366, and to *Esson* v. *McMaster* (1842), 3 N.B.R. 501.

H. L. Drayton, K.C., and *G. A. Urquhart*, for the defendants, argued that the plaintiff was not a riparian proprietor, and had no rights as such. The plaintiff's rights are held under patent from the Ontario Government only; and if, as maintained by him, the marsh is navigable water, his patent is inoperative. As a matter of fact, however, the appellant's property has never been used for navigation purposes, and is incapable of being so used. In any case, the defendants' works do not obstruct navigation, and have caused no damage to the plaintiff. We have not blocked his entrance and have improved the general right of way. They referred to *Ross* v. *Village of Portsmouth* (1866), 17 C.P. 195, *per* Wilson, J., at p. 203; *Ratté* v. *Booth* (1886), 11 O.R. 491, *per* Boyd, C., at p. 498; S.C. (1887), 14 A.R. 419,

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Argument

per Patterson, J.A., at p. 432; *Orr Ewing* v. *Colquhoun* (1877), 2 App. Cas. 839; *The Queen* v. *Meyers* (1853), 3 C.P. 305; *Baldwin* v. *Erie Shooting Club* (1901), 127 Mich. 659, 660-662; *The Queen* v. *Robertson* (1882), 6 Can. S.C.R. 52; *Attorney-General* v. *Perry* (1874), L.R. 9 Ch. 423, *per* Jessel, M.R., at p. 425*n*.

Mowat, in reply, argued that *Ross* v. *Village of Portsmouth*, *supra*, turned on a different state of facts, as there it was a question of a wadable stream. *Beatty* v. *Davis* is conclusive in the plaintiff's favour. There is no doubt as to his *bona fides*, and he should be given the benefit of any doubt that may exist in the matter.

Moss, C.J.O.

Moss, C.J.O.:—Appeal by the plaintiff from a judgment of a Divisional Court affirming the judgment of Magee, J., after trial without a jury, dismissing the action.

So far as the facts of the case are concerned, it is unfortunate that, owing to the accidental destruction of the stenographer's notes of the testimony on behalf of the defendants, there is no complete transcript of the evidence in the case, and the only record of that part of the testimony is furnished by the notes of the learned trial Judge. However, the testimony bearing on the question of the nature of the plaintiff's property and the navigability or supposed navigability of the waters of Ashbridge's Bay has been noted with very considerable fulness and detail.

And it is proper to assume that, in determining the issues, the learned Judge gave due and proper weight to that evidence, so far as it is opposed to the evidence adduced on behalf of the plaintiff.

The plaintiff rests and can only rest his case against the defendants upon such rights as he has under the grant to him of what is designated the lot covered with water extending south to the property granted to the defendants by the two several patents in the case. And it was incumbent upon him to shew, not only that the waters of Ashbridge's Bay were navigable in the sense in which that quality is to be found in order to confer riparian rights of the kind claimed, but also that his property did in fact border upon the waters. If that which intervenes between his dry land fronting on Eastern avenue and the north limit of the defendants' property has always been marshy, boggy land, and the defendants' property for some distance south of the north limit has always been of the same nature, there is nothing in the respective grants and conveyances to turn them into water lots.

Upon the best consideration I have been able to give to the testimony, and without the aid of what is recorded in the publications referred to by Middleton, J., I come to the same conclusion as the Chancellor, viz., that the plaintiff's property, com-

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prised within the conveyances and grants under which he claims, is now and always has been marsh, and nothing but marsh; and that between it and the artificial channel through which he seeks access as riparian owner there is land of a like character.

Present appearances, after so much has been done by means of dredging and channelling to create a condition of open water, afford no index to the condition in early days of the waters of the Ashbridge's Bay marsh and of the lands bordering upon them. But, whatever the conditions may have been at the easterly part, the testimony makes it plain that there always was bog and marsh to the west in front of the property now claimed by the plaintiff, and that its character has undergone but slight change, though liable, of course, to some changes in appearance and wetness according as the year or season was a wet or dry one.

Upon the whole, I am unable to say that the conclusion of the Divisional Court is erroneous; and I would, therefore, dismiss the appeal.

Sutherland, J. SUTHERLAND, J., agreed with MOSS, C.J.O.

Meredith, J.A. MEREDITH, J.A.:—The only right which the appellant contends for here is a right of navigation; no other rights, riparian or otherwise, are set up. The question, and the only question, therefore, is, whether the waters, in front or at the back, whichever any one may choose to call it, were, at the time of the acts of the defendants complained of, navigable: entirely a question of fact.

The trial Judge adjudged that they were not: but, unfortunately, he gave no reasons for his conclusion; and we are, therefore, without any assistance from him in now considering the question. A Divisional Court, upon an appeal from him to them, affirmed his judgment; but, unfortunately, did so, largely, upon statements contained in local private publications, which were not evidence, and which were not attempted to be put in as evidence by either party, or indeed even mentioned, upon the trial, or upon the argument before it; so that that judgment is vitiated and cannot stand, nor can it afford much assistance upon this appeal.

But, upon the whole evidence adduced at the trial, it is quite impossible for me to find that the waters to which the plaintiff's land extended were navigable; and the onus of proof that they were is, of course, upon the plaintiff. It may very well be that at no very great cost a channel, sufficient for small boats, might have been made, giving access from the plaintiff's land to navigable waters of the bay—through shallows, reeds, and other obstructions—but no such right appertained to the land. Those who are familiar with the marshes along the great lakes, and

connecting rivers, which bound this Province to a great extent, can have no great difficulty in understanding the evidence and reaching the conclusion that the plaintiff's land did not extend to navigable marsh waters: see *Niles* v. *Cedar Point Club* (1899), 175 U.S. 300, and *Ross* v. *Village of Portsmouth*, 17 C.P. 195.

It cannot make much, if any, difference what causes the obstruction to navigation, or whether or not it is in any sense a floating obstruction, so long as it destroys navigability, and is permanent, or there be no right, in the land-owner, to compel its removal, or to a way through it.

I would dismiss the appeal.

CLUTE, J.:—Appeal from the Chancery Division dismissing the appeal from the trial Judge, who dismissed the action with costs. Clute, J.

The plaintiff is the owner of certain land in the city of Toronto, having a frontage of 166 feet 3 inches on Eastern avenue, with a depth of 265 feet, which is alleged to extend to the water's edge, hereafter referred to as the "land lot."

He also owns a strip of land covered with water, of the same width, to the south of the land lot, and extending on the westerly side 596 feet 7 inches, and on the easterly side 546 feet 6 inches, and containing $2\frac{17}{100}$ acres, to the northerly limit of lands owned by the City of Toronto, hereafter referred to as the "water lot."

The plaintiff claims riparian rights in respect of the land lot, and charges that the defendants have interfered with those rights by digging a canal through their property and throwing the earth excavated therefrom on the north side of the canal adjoining the plaintiff's property, and thereby shutting him off from access to the navigable waters of Ashbridge's Bay. This he claims to be contrary to the distinct understanding between the city, himself, and other owners of land fronting on Ashbridge's Bay, and that, in violation of such understanding between the parties, they registered a plan of the proposed work without recognising the riparian rights of the plaintiff. The plaintiff asks for a mandamus to compel the defendants to amend the plan by reserving the riparian rights of the plaintiff and to compel the defendants to remove the obstructions placed in front of the plaintiff's land, and an injunction to restrain the defendants from interfering with the rights of the plaintiff, and for damages and other relief.

The defence denies the plaintiff's title, or that he ever had any riparian rights in respect of his lands, claims a binding agreement which debars the plaintiff of all claim or right to cross the defendants' land, and claims under grant from the Province of Ontario up to the line so settled, and, in the alternative, under Dominion grant, and that the plaintiff's claim, if

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any existed, was by arbitration under sec. 437 of the Consolidated Municipal Act, 1903, and is barred by sec. 438 of the same Act, more than a year having elapsed since damages were sustained, and that the defendants' work was for the public benefit.

The trial Judge, Magee, J., gave no written opinion, but endorsed on the record a simple dismissal of the action. An appeal was taken to the Divisional Court. The Chancellor there states, 23 O.L.R. 367, that the action was dismissed by the trial Judge on the ground that the plaintiff's property was land, and not water, and that he was not in any sense a riparian proprietor. The Chancellor in his judgment says that "the plaintiff's land is now, and always has been within historical memory, marsh and nothing but marsh;" and that "the law of the case is that law which pertains to the ownership of marsh land." Middleton, J. (p. 372), was of opinion that the rights of the parties are the rights of adjoining proprietors, and that no question of riparian or water rights arises. "Each owner may reclaim or may ditch as he sees fit, but neither has any right over the lands of the other. This swamp was not such a body of water as either has the right to have maintained. It is, in truth, no more than a wet parcel of land where reeds and brushes grow, upon which marsh hay is cut, and this must be regarded as land, and not water." The appeal was dismissed, Riddell, J., agreeing in the result.

The plaintiff claims ownership to the "land lot" by a certificate of ownership under the Land Titles Act, dated the 26th November, 1890. This description on the east is to the water's edge. It does not follow the water's edge, however, but proceeds westerly parallel with Eastern avenue. The water line (or swamp, whichever it be) encroaches on the south-westerly portion of the lot, so that the whole front of the land lot touches the water (or marsh) on its southerly boundary.

The plaintiff's title to the "water lot" is by grant from the Crown dated the 3rd December, 1889, and is described as $2\frac{7}{10}$ acres of land covered with water, and may be known as follows. The description then is: "Commencing at a point on the water's edge of Ashbridge's Bay," the point being the south-western corner of the "land lot;" "thence south 16 degrees east 596 feet 6 inches more or less to the northern limit of the property of the Corporation of the City of Toronto, as patented to them on the 18th May, 1880; thence north 56 degrees 40 minutes 15 seconds east along said limit to a point where a line drawn parallel to the limit between township lots Nos. 11 and 12 and distant 297 feet measured westerly thereupon and at right angles thereto will intersect the said lot; thence north 16 degrees west 546 feet 7 inches more or less to the water's edge"—that is, to the

south-east corner of the "land lot"—"thence south 74 degrees west parallel to Eastern avenue, *and along said water's edge* 160 feet 3 inches to the place of beginning." The grant is made upon the condition and undertaking that, should any claim be made in respect of the premises by the Government of Canada, the grantee shall not be entitled to claim compensation from the Ontario Government. The Crown also reserves "the free use, passage, and enjoyment of, in, over, and upon any navigable waters that shall or may be hereafter found under or be flowing through or upon any part of the said parcel or tract of land covered with water hereby granted as aforesaid."

The grant to the City of Toronto, referred to in the plaintiff's patent, describes the land as that certain parcel or tract *of marsh land and land covered by water* containing by computation 1,385 acres, more or less, reserving the right of passage over all navigable waters "that shall or may hereafter be found on or under or be flowing through or upon any part of the said premises hereby granted," and also reserving all rights of fishery and free access to the shores of Lake Ontario and the Bay of Toronto.

The defendants also claim by grant from the Dominion Government dated the 10th October, 1903. The consideration mentioned is $20. The patent recites "that whereas the lands hereinafter described form part of a public harbour vested in His Majesty as represented by the Government of Canada;" and the lands are described as "all and singular that parcel of marsh land and land covered by water in the city of Toronto, reserving the free use and passage and enjoyment over all navigable waters that shall or may be found on or under or be flowing through or upon any part of the lands thereby granted."

A large number of witnesses were examined as to the extent the lands of the plaintiff and the city were covered with water, and whether the waters covering such lands were navigable. What is known as Ashbridge's Bay is made up of portions of open water and land covered or partly covered with water, through which have grown reeds and marsh grass. A portion of this so-called land covered with water is a floating vegetable mass, with clear water between it and the solid ground. Large portions of this floating mass would from time to time, under strong winds, drift away; and one old resident, Mr. Leslie, stated that he remembered one occasion when the whole floating mass had drifted off to the south of the bay, leaving the shore line from this place to the east of the plaintiff's "land lot," and so along the west shore to Carlaw avenue, entirely free from marsh grass, and the water clear. This probably was an innocent exaggeration, although the evidence does clearly establish that sometimes very large portions of this floating mass

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of vegetable matter would move across the bay under heavy winds. It does not follow that, if the lands referred to are not navigable for large or small craft or at all, the plaintiff has no riparian rights. If it be "land and nothing but land," doubtless the plaintiff has no claim; but, if it be land between high and low water mark, different considerations arise.

After much negotiation, the city and the owners of lands along the water's edge, including the plaintiff's predecessor in title, agreed upon a conventional line, known as the "Unwin line." It was, no doubt, expected and intended at the time that the various owners should be recognised as owners down to the boundary line of the property conveyed to the city; but the Ontario Government, claiming for the Crown the land between the water's edge and open water, granted to the city the part south of the conventional line, and to the plaintiff and others the land north thereof; and it is a matter worthy of note that the plaintiff's patent describes the "water lot" as covered with water, referring to it "as being composed of water lot in front of part of lot No. 12, broken front concession from the bay." It recognises the southern limit of the plaintiff's "land lot" as being "a point on the water's edge of Ashbridge's Bay," and the reservation contained in the grant, in respect of the free use "of all navigable waters," leads one, I think, fairly to the conclusion that both the Government and the purchaser considered the "water lot" in question land covered with water, and not simply land.

The evidence clearly shews that immediately in front of the "land lot" there is, even in comparatively low water, open water, which at times varies from 16 inches in low water to 2, 3, and even 4 feet deep in high water.

This depth of water extends at all events from the "land lot" 30 to 40 feet, where, it would appear, for some distance the water is not so open and not so deep.

Hay has been cut over the lands immediately to the east for many years, and probably to a certain extent over the "water lot" in question, but this is not so clear.

In cutting the hay the men waded through the water, varying in depth in the different seasons; and, beneath this "crust" formed of rotted vegetable matter, there was clear water that, in some places, in breaking through, would take a man up to his neck.

In high water over a large part, if not all of this area, a boat could pass and did pass; the fishers and hunters passed over it in that way in fishing and hunting; but it was not navigable for boats of any considerable size over this "water lot" except in high water.

In making the soundings for the works of the defendants

complained of, the engineer found clear water beneath the "crust" along the boundary line of the city property and for 30 to 50 feet to the north, as far as they sounded it.

I think, therefore, that the lands included in the plaintiff's "water lot," and in the similar lands to the south of the defendants' line to the open water of the bay, may be properly described as lands between high and low water mark—with this further fact that, beneath this vegetable "crust" formed by decayed vegetable matter, there was clear water. This space between the crust and the bottom proper was taken into account by the defendants' engineers in ascertaining the amount of the excavations to be allowed the contractors.

In order to ascertain whether the plaintiff is a riparian proprietor, and if so what are his rights, it will be necessary to consider the effect of the grant of which his land forms a part, and also in what way, if any, his rights were affected by the conventional line now separating the property of the plaintiff and the defendants.

The township lot is described as being composed of lot No. 12 in the first concession with broken front east of the River Don, in the township of York, with all the woods and waters thereon lying, beginning at a post in front marked 12/13; thence north 16 degrees west 125 chains; thence north 74 degrees east 20 chains; thence south 16 east *to the front;* thence westerly *along the front* to the place of beginning, with allowance for roads. What does "the front" in this description mean? It was clearly established by the evidence that there was open water at the south-east corner of lot 12, and a wharf known as Leslie's wharf was built on lot 11 at that place, and used for many years for receiving and shipping wood and other freight, and that there was open navigable water from the wharf both into Toronto Bay and Lake Ontario. I think the word "front," therefore, means the water's edge, and the line follows along the front or water's edge from the point between 11 and 12 westerly to the place of beginning. If the water's edge of Ashbridge's Bay were not navigable, this description would carry the ownership to the middle line of the waters which form one of the outlets of the Don River. But, from the evidence, I think that there can be no doubt whatever that Ashbridge's Bay is navigable for small craft; and, therefore, the ownership extended only to the water's edge. This would give the owner of lot 12 riparian rights; and the plaintiff, as the owner of a part of the township lot 12, and which is described as coming down to the water's edge, has the same riparian rights as his predecessor in title had, unless lost by consent given to the conventional line forming the boundary betwen the property of the plaintiff and that of the defendants.

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With great respect, I am unable to agree with the view expressed in the Divisional Court by the Chancellor and Middleton, J., that the portion of the land in question below the water's edge must be treated simply as land without riparian rights. I think it established, by the witnesses of the defence as well as by the witnesses of the plaintiff, that the land south of the line forming the southerly boundary of township lot 12 and the open water is land between high and low water mark. It rises and falls with the rising and falling of the water in the lake and bay. In high water, small boats may pass over it. Fish in great numbers are found there. Clear water is found beneath the floating mass of vegetation; and, notwithstanding the rank growth of aquatic grass, it is quite distinct from what may be called solid land proper. The greater portion of it for the greater part of the year is covered with water. Even when hay is being cut on the land east of the plaintiff's land, it is overflown with water several inches deep, and the floating mass sinks under the tread, as the growth of grass is being cut.

If I am right as to the water line, then, following the English rule of law applied to navigable and non-navigable waters alike, excepting only navigable tide waters, there is the *primâ facie* presumption that the grant from the Crown to the plaintiff's predecessor in title carried his ownership to the middle thread of the bay (the decision in this case by the trial Judge having been given prior to and so not affected by 1 Geo. V. ch. 6(O.): *Keewatin Power Co.* v. *Town of Kenora* (1908), 16 O.L.R. 184.

It was probably this view of the case that led to the agreement in regard to the conventional boundary line. But I think there exist circumstances and conditions in this case sufficient to repel such presumption. The description of the lot by metes and bounds beginning at a post and giving the acreage—the fact that it fronts on a bay, which is a part of Lake Ontario and connected with it and only separated from it by sands thrown up by the waves—the uniform action of the Crown in claiming ownership of the lands below high water mark by granting to private persons the bed of navigable waters below high water mark—render it quite impossible to apply the English rule of law in favour of the owners of lot 12 fronting on the bay, so as to extend their ownership to the land covered with water. I am, therefore, of opinion that, in the present case, the *primâ facie* presumption is rebutted, and that the grant by the Crown of lot 12 is limited to high water mark. Prior to the *Keewatin* case, the English rule seems not to have been applied in this country to navigable waters, and there are many *dicta* to the contrary. See the cases collected by Anglin, J., in the *Keewatin* case (1906), 13 O.L.R. 237, at pp. 252, 253. It was recently held in the House of Lords, the House being equally divided,

and so affirming the decision of the Irish Court, that no right can exist in the public to fish in the waters of a navigable, inland, non-tidal lake, no matter how large: *Johnston* v. *O'Neill*, [1911] A.C. 552.

The B.N.A. Act and special legislation would seem to govern such a case. This, however, has only an indirect bearing on the present case; as, subject to public regulations, the plaintiff is entitled to fish there either as riparian owner or owner of the water lot.

Prior to the grants, the land between high and low water mark belonged to the Crown as represented by the Province of Ontario, except such portions as the Dominion might claim under the B.N.A. Act in respect of harbours. See Lord Herschell's judgment in the stated case *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario Quebec and Nova Scotia*, [1898] A.C. 700, quoted below.

The right of the riparian owner to use the water does not depend upon the ownership of the soil under the water; and whether owned by the Crown, as represented by the Dominion or Province, or by a private person, cannot affect the plaintiff's riparian rights.

Then what were the riparian rights of the grantee of lot 12 and other lots fronting on Ashbridge's Bay? Much emphasis was laid upon the right of navigation in the discussion at bar, but that right of a riparian proprietor is common with the right of the public; and it does not follow that, because the land between high and low water mark in front of the plaintiff's lot is not navigable, therefore he has no riparian rights, or that he would not be affected by the obstruction placed in front of his water lot by the defendants. This depends upon other considerations, to which I will refer presently.

Many questions affecting the present case were submitted in the special case referred by the Governor-General in Council for decision to the Supreme Court, *In re Provincial Fisheries* (1896), 26 Can. S.C.R. 444. The case was carried to the Privy Council: *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario Quebec and Nova Scotia*, [1898] A.C. 700. Lord Herschell, in giving judgment, pointed out the distinction between proprietary rights and legislative jurisdiction under the B.N.A. Act; that, "whether a lake or river be vested in the Crown as represented by the Dominion or as represented by the Province in which it is situate, it is equally Crown property, and the rights of the public in respect of it, except in so far as they are modified by legislation, are precisely the same. . . . There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament pro-

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prietary rights were transferred to it. . . . Whatever proprietary rights were at the time of the passing of that Act possessed by the Provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion." It was held that the transfer of "public harbours" operates on whatever is properly comprised in that term, having regard to the circumstances of each case, and is not limited merely to those portions on which public work has been executed. His Lordship expressed the opinion (p. 712) "that it does not follow that, because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would, no doubt, form part of the harbour; but there are other cases in which, in their Lordships' opinion, it would be equally clear that it did not form part of it." With regard to fisheries and fishing rights, it was held that sec. 91 of the B.N.A. Act did not convey to the Dominion any proprietary rights therein, although the legislative jurisdiction conferred by the section enabled it to affect those rights to an unlimited extent, short of transferring them to others.

It was held in this case by the Supreme Court that the owner, having riparian rights before Confederation, had an exclusive right of fishing in non-navigable, and in navigable non-tidal, lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown, following *The Queen* v. *Robertson*, 6 Can. S.C.R. 52. Their Lordships of the Privy Council declined to answer this question, as the riparian proprietors were not parties to the litigation, or represented before their Lordships.

It was held in *Pion* v. *North Shore R.W. Co.* (1887), 14 S. C.R. 677, that a riparian owner on a navigable river is entitled to damages against a railway company, although no land is taken from him, for the obstruction and interrupted access between his property and the navigable waters of the river, for the injury and diminution in value thereby occasioned to his property. This was affirmed in the Privy Council: *North Shore R.W. Co.* v. *Pion* (1889), 14 App. Cas. 612. Lord Selborne gave a very full judgment, commenting upon a number of cases. He points out that in *Miner* v. *Gilmour* (1858), 12 Moore P.C. 131, 157, that tribunal determined, after two arguments, that with respect to riparian rights (in that case the river was not tidal or navigable), there was "no material distinction between the law of Lower Canada and the law of England." He quotes from Lord Kingsdown, who delivered the judgment of the committee in that case, where he said: "By the general law applic-

able to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes, and for his cattle; but, further, he has a right to the use of it for any purposes, or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors, either above or below him." He then points out that this general law was decided, in *Lyon* v. *Fishmongers' Co.* (1876), 1 App. Cas. 662, 683, to be applicable to navigable and tidal rivers. At p. 621 he proceeds: "The only ground of distinction suggested between a non-navigable river (such as that in *Miner* v. *Gilmour*) and a navigable or tidal river, forming at high water the boundary of riparian land, was that in the case of a non-navigable river the riparian owner is proprietor of the bed of the river *ad medium filum aquæ*, which, in the case of a navigable river such as the St. Charles, belongs to the Crown. The same distinction was contended for in *Lyon* v. *Fishmongers' Co.*; but the House of Lords, on grounds with which their Lordships concur, thought it immaterial. Lord Cairns rejected the proposition that the right of a riparian owner to the use of the stream depends on the ownership of the soil of the stream; he adopted the words of Lord Wensleydale in *Chasemore* v. *Richards* (1859), 7 H.L.C. 349: 'The subject of right to streams of water flowing on the surface has been of late year fully discussed, and by a series of carefully considered judgments placed upon a clear and satisfactory footing. It has now been settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure naturæ*, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity, and quality, and to go from him without obstruction, upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state.' . . . Their Lordships have considered the authorities referred to in support of this part of the appellants' argument, and they are of opinion that none of them tend to establish the non-existence of riparian rights upon navigable or tidal rivers in Lower Canada, or to shew that the obstruction of such rights without Parliamentary authority would not be an actionable wrong, or that, if in a case like the present the riparian owner would be entitled to indemnity under a statute authorising the works on condition of indemnity, the substituted access by openings such as those which the appellants in this case have left would be an answer to the claim for indemnity."

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In *Miner* v. *Gilmour*, 12 Moore P.C. 131, it was held that in respect of riparian rights (in that case the river was not tidal or navigable) there was "no material distinction between the law of Lower Canada and the law of England." Lord Kingsdown, delivering the judgment of the committee, said (p. 156): "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes, and for his cattle; but, further, he has a right to the use of it for any purposes, or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors, either above or below him." And this general law was, in England, held applicable to navigable and tidal rivers (with the qualification only that the public right of navigability must not be obstructed or interfered with), by the House of Lords in *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662.

In the *Lyon* case, the head-note reads: "By the Thames Conservancy Act (20 & 21 Vict. ch. 147), sec. 53, the Conservators appointed under that Act have a power to grant a license to a riparian proprietor to make an embankment in front of his own land abutting on the river, but though such license might be the owner's justification so far as the public right of navigation was concerned, it would not authorise a licensee, being a riparian owner, to embank in front of his own land so as injuriously to affect the land of another riparian owner." The Lord Chancellor (Lord Cairns) says (p. 672): "With much deference for the Lords Justices, I should have thought that some authority should be produced to shew that the natural rights possessed by a riparian proprietor, as such, on a non-navigable river, are not possessed by a riparian proprietor on a navigable river. The difference in the rights must be between rivers which are navigable and those which are not; and not between tidal and non-tidal rivers; for, as Lord Hale observes, the rivers which are *publici juris*, and common highways for man or goods, may be fresh or salt, and may flow and re-flow or not; and he remarks that the Wey, the Severn, and the Thames, 'and divers others, as well above the bridges as below, as well above the flowings of the sea as below, and as well where they are become to be the private propriety, as in what parts they are of the King's propriety, are public rivers *juris publici*.' A riparian owner on a navigable river has, of course, *superadded to his riparian rights*, the right of navigation over every part of the river, and on the other hand his riparian rights must be controlled in this respect, that whereas, in a non-navigable river, all the riparian owners might combine to divert, pollute, or diminish the stream, in a navigable river the public

right of navigation would intervene, and would prevent this being done. But the doctrine would be a serious and alarming one, that a riparian owner on a public river, and even on a tidal public river, had none of the ordinary rights of a riparian owner, as such, to preserve the stream in its natural condition for all the usual purposes of the land; but that he must stand upon his right as one of the public to complain only of a nuisance or an interruption to the navigation. The Lord Justice suggests that the right of a riparian owner in a non-navigable river arises from his being the owner of the land to the centre of the stream, whereas in a navigable river the soil is in the Crown. As to this, it may be observed that the soil of a navigable river may, as Lord Hale observes, be private property. But putting this aside, *I cannot admit that the right of a riparian owner to the use of the stream depends on the ownership of the soil of the stream.*"

He then quotes from Lord Wensleydale in *Chasemore* v. *Richards*, and proceeds: "My Lords, I cannot entertain any doubt that the *riparian owner on a navigable river, in addition* to the right connected with navigation to which he is entitled as one of the public, retains his rights, *as an ordinary riparian owner, underlying and controlled by, but not extinguished by, the public right of navigation.*"

Lord Chelmsford in the same case (p. 678) says: "Why a riparian proprietor on a tidal river should not possess all the peculiar advantages which the position of his property with relation to the river affords him, provided they occasion no obstruction to the navigation, I am at a loss to comprehend. If there were an unauthorised interference with his enjoyment of the rights upon the river connected with his property, there can, I think, be no doubt that he might maintain an action for the private injury."

Lord Selborne (p. 683) says: "The title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of the stream, which can only be appropriated by severance, and which may be lawfully so appropriated by every one having a right of access to it. *It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream;* but lateral contact is as good, *jure naturæ*, as vertical; and not only the word 'riparian,' but the best authorities, such as *Miner* v. *Gilmour*, and the passage which one of your Lordships has read from Lord Wensleydale's judgment in *Chasemore* v. *Richards*, state the doctrine in terms which point to lateral contact rather than vertical. It is true that the bank of a tidal river, of which the foreshore is left bare at low water, *is not always in contact with the flow of the stream, but it is in such contact for a great part of every day* in the ordinary and regular course of nature,

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which is an amply sufficient foundation for a natural riparian right."

In *Stockport Waterworks Co.* v. *Potter* (1864), 3 H. & C. 300, it was held that "a riparian proprietor derives his rights in respect of the water from possession of land abutting on the stream, and if, by a deed which conveys only land not abutting on the stream, he affects to grant water rights, the grant, though valid as against the grantor, can create no rights for an interruption of which the grantee can sue a third party in his own name."

In *Attorney-General* v. *Burridge* (1822), 10 Price 350, 24 R.R. 705, it was held that the Crown might grant, by letters patent, all the lands between high and low water-marks: but this subject-matter of grant, as being *jus privatum* in the King, must be subject to the *jus publicum* or public right of the King and people, to the easement of passing and repassing both over the water and the land.

See also *Attorney-General* v. *Parmeter* (1822), 10 Price 378, 24 R.R. 723, where the right to the seashore was very fully considered, the case afterwards going to the House of Lords.

In *Attrill* v. *Platt* (1884), 10 Can. S.C.R. 425, it was held that the lateral or riparian contact of the land with the water was sufficient to entitle the riparian owner to object to the flow of the water in its natural state being interfered with.

Bigaouette v. *North Shore R.W. Co.* (1889), 17 Can. S.C.R. 363. A riparian proprietor on a navigable river is entitled to damages against a railway company for any obstruction to his rights of *accès et sortie*, and such obstruction without parliamentary authority is an actionable wrong; following *North Shore R.W. Co.* v. *Pion*, 14 App. Cas. 612.

Many of the American cases in regard to lands similar to those in the present case are governed by special statutes, and especially in respect of large areas of submerged or partly submerged lands along the great lakes.

Under special Act of 1850, the Federal Government in certain cases conveyed to the State, which was then enabled to make grants of land freed from riparian rights, all which presupposes such rights to exist where not so affected by statute. See *Brown* v. *Parker* (1901), 127 Mich. 390; *Baldwin* v. *Erie Shooting Club*, 127 Mich. 659. In the case of *State* v. *Lake St. Clair Fishing and Shooting Club* (1901), 127 Mich. 580, the majority of the Court held that "certain land which, in its natural state, was in some places a few inches above, and in others slightly below, the ordinary water level, and was at times entirely submerged, did not constitute a part of the bed of the lake, but was swamp and overflowed land, within the meaning of the Swamp-land Act of 1850, so as to pass to the State thereunder." Hooker, J., in this case,

dissenting, held that the lands did not come within the Acts relied upon by the majority of the Court, and that, therefore, they had to be dealt with as at common law; and he reviews the American cases very fully upon the subject. His description of the land in question is very like the present: "After passing the hard land of the island, the banks of the respective channels are submerged to a great extent, if not altogether, and are marked by a rank growth of aquatic plants, which not only border the open water of the channels, but cover a vast area of submerged land, which, time out of mind, has been called the 'St. Clair Flats.'"

The American authorities in regard to riparian and littoral rights are collected in 29 Cyc. 333-337. At p. 336, it is said: "The owner of land bounded by navigable waters has a right to free communication between his premises and the navigable channel of the river. This riparian right of access is strictly the right of access to the front of the property and does not include the right of access to the sides of piers. The right of access does not depend upon the ownership of the lands between low water mark and the line of navigability, and is the same whether the land abuts on tidal or non-tidal water. This right of access is property, and while the right does not prevent the State from assuming jurisdiction and control over the bed and banks between high and low water marks, yet any act which makes the front of his land less accessible to the water is an injury for which an action for damages may be brought, except where the right has been obtained by eminent domain or the interference is the improvement of the navigation of the river by the State or regulation of commerce by Congress. Where the riparian owner is deprived of such right of access, he may also enjoin the obstruction."

Applying the law as indicated in the foregoing cases to the facts here, I am of opinion that the grantee of the broken front of lot 12 had riparian rights quite independently of the right in common with the public of navigation, and that the plaintiff, by virtue of his ownership of the "land lot" which is bounded by the water, and is so recognised in the grant to him of the "water lot," has the same riparian rights. He has the right to use the waters unobstructed; to fish in them; to boat over them; and at all times to reach the open water in front.

I am further of opinion that the obstruction caused by piling earth from the cut on the bank between his land and the cut was an actionable interference with these rights. There was no necessity for their so doing. The cut could have been made without affecting prejudicially the plaintiff's rights by either removing the earth or piling it on the south side, as was done further to the east in front of Leslie's property.

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The defendants having made a channel, the plaintiff has the right to reach this channel over the submerged land without obstruction, and to utilise it for navigation; and this none the less because the depth of water has been thereby increased. See *Diamond* v. *Reddick* (1875), 36 U.C.R. 391; *Beatty* v. *Davis*, 20 O.R. 373; Hale, *De Jure Maris*.

I do not think the plaintiff is entitled to that part of the relief asking for the reformation of the plan registered, for the reason that, in my opinion, that does not affect his rights. It was not the registration of the plan or the making of the cut by which he was injured; it was the unnecessary raising of the obstruction, shutting him out from the open water.

The defences raised other than that of the denial of the plaintiff's property and riparian rights, I shall now consider. The defendants contend that the plaintiff is bound by the agreement of his predecessor in title, who, as one of the owners of the broken front, accepted a convenient boundary whereby were lost to him any riparian rights, if such ever existed. The recital in this agreement shews that what was in dispute was the boundary representing the high water mark, and it was this boundary they agreed to settle and abide by. Had the Crown been a party to this agreement, it would have given the owners the land down to this line, and that line by consent would have represented high water mark, and all lands which came down to that line would have been riparian proprietors'. This agreement was acted upon by the city obtaining a grant of land south of this line. Of course, the Crown was not bound by this agreement; and, to perfect his title, the plaintiff got a grant of what was considered land covered by water stretching between the "land lot" and the conventional boundary line. The plaintiff, therefore, has the right to rest upon this agreement upon which the defendants acted and obtained their grants both from the Ontario and the Dominion Government; and to say that, by consent and by virtue of that agreement, the conventional line as between the plaintiff and defendants must be considered the water's edge or high water mark.

This view as to the intention of the parties and the meaning of the agreement is borne out by reference to what was done by the parties, and is perfectly good evidence, not to vary the terms of the patent, for which it is inadmissible (*Wyatt* v. *Attorney-General of Quebec*, [1911] A.C. 489), but to shew that the patent was issued in pursuance of the agreement.

To understand the full effect of what was done, it is necessary to go back to the license of occupation granted by the then Province of Canada to the City of Toronto on the 12th January, 1847. Leaving out the formalities of the document, it is a license to the city to occupy "the marsh lying to the eastward

of the city and the peninsula which forms the harbour of the city, reserving free access to the beach for vessels, boats, and persons." The city claimed to be entitled to a patent under this license; and, by an order in council of the 1st October, 1866, the issue of the patent for these lands was authorised. In January, 1873, a plan and report were prepared, at the instance of the city, shewing the northern boundary of the marsh to be high water mark, and this is clearly defined on the map and so stated by their engineer. (See his letter to the Mayor of the 18th January, 1873, exhibit 15.)

On the 6th March, 1873, the City Solicitors transmitted the plan and other papers to the Commissioner of Crown Lands, and asked for a patent for the lands as shewn on the plan. It thus clearly appears that what they claim was the land to high water mark. In a subsequent letter of the 20th April, 1874, reference was made to what had already been done, and the question whether anything further was required was asked. It appears to have been at this stage that the property-owners along the bay raised the question of their rights; and in July an agreement was come to, which was succeeded by the agreement of the 23rd October, above referred to.

In the final petition for the patent, the plan of survey, the description of lands, the first agreement and the agreement of the 23rd October, Unwin's report, and the report of the council, were all included with the petition as the necessary documents upon which the patent was asked.

In Unwin's report, which forms part of the material used in asking for the grant, he says: "The construction to be put upon these terms 'marsh' and 'front' must be a matter of opinion. From the Harbour Master's official records it is clear that what may be termed 'marsh' at a certain season of one year would be covered deep with water at the same season in some other year." He further points out: "That the old surveys of record in the registry office and in your own private keeping shew the high water mark and marsh limit in a position altogether removed from the limits of high water and marsh as seen at the present time."

He then suggested the advisability of adopting for a boundary such straight lines as would, while giving the owners all they were entitled to receive, be satisfactory to the corporation. Here again it is quite plain that what the defendants were striving to obtain was not land in the proper sense of the term, but land between high and low water mark, and, therefore, of certain seasons of the year admittedly covered with water.

Mr. Unwin further refers to the circular inviting the owners to be present, and the difficulty of obtaining a final agreement, which, however, was finally settled upon. There was some diffi-

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culty about the final agreement being signed, because of the opening of certain streets which had not been mentioned in the first agreement.

The grant to the city was finally made in pursuance of the agreement and consent, recognising the boundary line as high water mark. In a letter to the Commissioner of Crown Lands dated the 31st August, 1880, Mr. McWilliams, who had formerly been the City Solicitor, on behalf of the land-owners, points out that, had his clients not believed that the Government admitted their right to all lands lying to the north of those to which the city were entitled, they would never have entered into the agreement for establishing the boundary which led to the issue of the patent to the city.

The Government seems to have recognised the righteousness of the owners' claim by making a grant to the plaintiff of the land between his "land lot" and the boundary line as land covered with water, and at what must be considered a nominal sum; nor did the city take a different view.

In the report of the City Engineer on the reclamation of Ashbridge's Bay, dated the 21st December, 1891, exhibit 7, he says, after referring to the expenditure necessary to cleanse the bay: "This it is that the city, it seems to me, desires to see done; and the main obstacle that stands in the way of doing it is the great expense, coupled with the difficulty and probable further expense of dealing with riparian proprietors on the north shore of the bay whose property will be affected by the works in question. It is this obstacle of expense that has hitherto been a bar to the city's undertaking the work," etc.

As late as 1895, the executive committee submitted their report respecting Ashbridge's Bay improvements, in which they said: "Your committee beg to recommend the adoption of the following report of the City Engineer *re* the above, and that a copy of the plan referred to be filed by the City Surveyor in the registry office for East Toronto; but no work shall be done on the north shore between Blong street and the eastern terminus until satisfactory arrangements have been made with the property-owners as regards riparian rights and filling."

After a perusal of the admitted documents bearing upon this branch of the case, I find it impossible to come to any other conclusion than that the city, down to the commencement of the improvements, recognised that the property-owners had certain riparian rights, which such improvements might prejudicially affect. The agreement fixing the boundary line, so far from being an answer to the plaintiff's claim, is, in my judgment, the strongest kind of recognition on the part of the defendants of the existence of such claim, and of the settlement upon that basis, and of their recognition of the owners' rights, by receiv-

ing a patent from the Crown based upon their consent, and in this action setting up that patent as their title to the land south of the conventional boundary. In my opinion, they are estopped, by their conduct in obtaining the agreement, in acting upon it, and in availing themselves of it, from now denying the existence of those riparian rights which such agreement recognises.

The foregoing affords, in my opinion, distinct ground upon which the plaintiff is entitled to succeed in this action.

It was a reliance of the plaintiff on the action of the council in pursuance of this clear understanding that delayed the plaintiff in bringing his action.

There was no intention and no agreement by the owners to abandon their riparian rights. The conventional boundary having been agreed to, the Government was enabled to grant to the city lands to the south of what was recognised by both parties as the water line. Even had no patent been granted for the part south of the "land lot" to the plaintiff, the defendants would, I think, have been estopped from denying that the plaintiff's title came down to the conventional boundary; but, whether that be so or not, the grant from the Crown of the "water lot" puts the plaintiff's right, in my opinion, beyond question. The plaintiff has now the same rights that he would have had if there had been no grant to the defendants or to himself of the land covered with water, except that the water line by consent is shifted further south. The effect of the conventional line simply settles the boundary of their lands, both of which are lands between high and low water mark and subject to the law affecting such lands.

I have this further to say as to the way the case strikes me. The city, as early as 1847, accepted a license of occupation from the Government of Canada, which, as representing the Crown, could only own the land as representing the bed of navigable waters below high water mark. The land having passed at Confederation either to the Dominion as having control of harbours or to the Province as the owner of the bed of navigable waters not theretofore conveyed to a private owner, and having taken a grant from both, the defendants now seek to have it declared that the land was neither one nor the other, but land free from all rights which attach by virtue of that character under which alone they claim the right to have the grants from the Crown made to them. This, in my opinion, they have no right to do, but are bound by the nature and character of the land as represented in their grants, whether from the province or the Dominion. This view is not based only upon the principle of estoppel, but upon the broader ground of public policy, that an individual receiving a grant from the Crown cannot

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be permitted under that grant to claim something different in character from that asked for and granted.

This point is very well put in *Brown* v. *Parker*, 127 Mich. 390, and a quotation from *Beard* v. *Federy* (1865), 3 Wall. 478, 492. The following observations may be referred to: "If parties asserting interests in lands acquired since the acquisition of the country could deny and controvert this record, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor. The patentee would find his title recognised in one suit and rejected in another, and, if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests, or notions of justice of witnesses and jurymen might suggest." And again: "We are of the opinion that the survey by the Government, and transfer to and sale by the State to the meander lines, as State swamp land, conclusively establish the boundaries of the lake, and that title of abutting proprietors extend to them upon the presumption that must be conclusive, *i.e.*, that when the meander lines were run they followed the true shore of the lake." If one puts here the conventional boundary in the present case as representing the authorised surveyed land, and both parties requested the Government so to treat it, by applying for their grants recognising it, the words quoted are directly apposite, I think, to the present case.

The action taken by the Dominion Government in erecting a break-water to protect the harbour cannot affect the plaintiff's rights in this action; the plaintiff is not complaining here of that act, whether right or wrong.

Nor can effect be given, in my opinion, to the defence set up under the patent from the Dominion Government. If the defendants rely upon that grant, they are bound by its terms, and it declares that the lands conveyed form part of the public harbour. If this be so, the plaintiff's lands abut on this harbour, to which he has a right of access as to navigable waters.

It is, however, contended for the defence that an action does not lie, and that the plaintiff, whatever his rights may be, must proceed under sec. 437 of the Municipal Act by arbitration; and that, more than a year having elapsed, any claim that he may have had is barred.

I think there are several answers to this objection. The first answer is, that the improvements made were not made under the Municipal Act, but under special statutes, 54 Viet. ch. 82, sec.

6, and 56 Viet. ch. 85, sec. 9. A further answer is, that the defendants have by their pleadings taken the position that the plaintiff does not own the lands claimed by him, that he has no riparian rights in respect thereof, and that his patent from the Crown is void. These are issues raised by the defence which cannot be tried, I think, by an arbitrator appointed under the Municipal Act. But, on referring to the Act, it will be seen that the injury complained of does not "necessarily result" from the exercise of such powers. Indeed, as before indicated, any injury to the plaintiff would not necessarily follow from the making of the cut. It was the defendants' negligent and wrongful act in depositing the earth taken from the cut to form a northern barrier against the plaintiff. This was wholly unnecessary, and in such case the Act does not apply. Damages under the Act must be the legal and necessary results of the act complained of: *The Queen* v. *Poulter* (1887), 20 Q.B.D. 132. It is only for damages thus necessarily resulting from the exercise of the statutory powers that the land-owner is compelled to seek compensation under the statute: *Corporation of Raleigh* v. *Williams*, [1893] A.C. 540, at p. 550. See *Brine* v. *Great Western R.W. Co.* (1862), 31 L.J.Q.B. 101; *Foster* v. *Rural Municipality of Lansdowne* (1899), 12 Man. L.R. 416.

It may be further noticed that the council may file plans and give notice under sec. 439, and that claims for damages must be filed within sixty days, and in default the claim is barred. Here no notice was served upon the plaintiff; but, on the contrary, the defence takes the position that he has no title. Section 440 declares that the claim shall be barred within one year. Section 443 provides that the claim shall not be barred where the plans do not disclose the damage that may be sustained; and in the present case the plans do not shew that it is the intention to pile the excavated earth as a bank on the north side of the cut, and so do not disclose the damage that the plaintiff may sustain. For these reasons, I think the plaintiff is entitled to bring his action, instead of seeking relief, which could not be adequate, by arbitration.

The judgment appealed from should be set aside; and, the defendants having denied the plaintiff's title and riparian rights, he is entitled to have a declaration confirming the same, and also an injunction restraining the defendants from continuing the obstructions complained of.

Counsel stated, as I understood, at the bar, that the plaintiff was willing to forgo his right to have the obstruction entirely removed if he was permitted access to the open cut along his water front. If the defendants so elect, the order may be so worded in lieu of the injunction.

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The plaintiff is entitled to the costs below and of this appeal.

MACLAREN, J.A., agreed with CLUTE, J.

Appeal dismissed; MACLAREN, J.A., *and* CLUTE, J., *dissenting.*

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Re CANADIAN SHIPBUILDING CO.

Ontario High Court, Riddell, J. June 22, 1912.

1. EQUITY (§ I A—2*a*)—PASSING OF TITLE TO VESSEL—AGREEMENT BETWEEN NAVIGATION COMPANY AND SHIPBUILDING COMPANY FOR CONSTRUCTION OF A VESSEL—PROPERTY TO VEST IN NAVIGATION COMPANY AFTER FIRST PAYMENT PURSUANT TO CONTRACT.

An agreement by a shipbuilding company to build a vessel for a navigation company for a certain price, payments to be made every two months to the extent of 80% of the work done and material supplied, and the balance on completion, which provides that, as the work goes on after the first payment, the property in the vessel so far as constructed and in all machinery and materials purchased therefor shall become vested in and be the absolute property of the navigation company, and that the shipbuilding company will, at the request of the navigation company, execute and deliver to it such bill of sale as may be necessary so as to vest the vessel, machinery and materials in the navigation company, operates in equity, without the execution of a bill of sale, as a transfer of ownership to the navigation company, from the time of the first payment, of all the vessel, machinery and materials.

[*Holroyd* v. *Matshall*, 10 H.L.C. 191, discussed and applied. See also *Re Thirkell, Perrin* v. *Wood*, 21 Gr. 492; *Mason* v. *MacDonald*, 25 C.P. 435, at p. 439; *Coyne* v. *Lee*, 14 A.R. (Ont.) 503; *Horsfall* v. *Boisseau*, 21 A.R. (Ont.) 663.]

2. STATUTES (§ II B—115)—CONSTRUCTION OF BILLS OF SALE AND CHATTEL MORTGAGE ACT, 10 EDW. VII. (ONT.) CH. 65—STRICT CONSTRUCTION.

The Bills of Sale and Chattel Mortgage Act, 10 Edw. VII. (Ont.) ch. 65, being one which makes void perfectly legitimate and proper transactions, must be read strictly.

3. CHATTEL MORTGAGE (§ III—31)—LIQUIDATOR OF COMPANY—NECESSITY OF COMPLYING WITH STATUTORY REQUIREMENTS—STATUS OF LIQUIDATOR.

The liquidator of an incorporated company is not a creditor of, or a purchaser for valuable consideration from the company, within the meaning of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1897, ch. 148 (see now 10 Edw. VII. (Ont.) ch. 65).

[*Re Canadian Camera and Optical Co.*, 2 O.L.R. 677, distinguished, and dictum of Street, J., therein, dissented from.]

Statement

APPEAL by the liquidator of the Canadian Shipbuilding Company Limited from a certificate of an Official Referee, to whom a reference was directed for the winding-up of the company under the Dominion Winding-up Act, of his finding against the claim of the liquidator to the ownership of an unfinished ship

which the company was building for the Hamilton and Fort William Navigation Company Limited when the winding-up order was made.

The appeal was dismissed.

J. A. Paterson, K.C., for the liquidator.
H. E. Rose, K.C., for the navigation company.

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June 22, 1912. RIDDELL, J.:—The Canadian Shipbuilding Company, on the 18th February, 1907, made a contract to build a steamer for the Hamilton and Fort William Navigation Company Limited, for $297,000. The shipbuilding company was paid $30,000 on account of the work done, etc., etc., and on the 4th November, 1907, made a bill of sale of what had been done (I use popular language) to the navigation company. Then, on the 27th November, 1907, it made another bill of sale to the said company; and went into liquidation in January, 1908. The steamer was not finished; the navigation company, wishing to get possession of it, applied to the Court; and, on the 3rd March, 1909, the following order was made by the Chief Justice of the Common Pleas:—

"1. It is ordered that the petitioners do give security in the sum of $40,000, by a bond of themselves and the Inland Navigation Company, to pay whatever amount (if any) it may be found that the liquidator of the Canadian Shipbuilding Company Limited now has a lien for, and for any damages which the liquidator may suffer by reason of the above-named petitioners taking possession of the said material, such amount to be promptly determined by the Referee in the winding-up proceedings.

"2. It is further ordered that, upon the completion and delivery of such security, the said petitioners shall be at liberty to take possession of the ship (if any), and the material purchased and intended to be used for constructing the same, covered by the said bill of sale, as are now in the possession of the said liquidator.

"3. And it is further ordered that the parties hereto keep a true account of everything received by the said petitioners as possession is taken.

"4. And it is further ordered that, save as herein expressly provided for, the rights and liabilities of the Hamilton and Fort William Navigation Company and of the Canadian Shipbuilding Company and its liquidator do stand in the same position as they do now stand.

"5. And it is further ordered that the costs of this application be disposed of by the said Referee in the winding-up proceedings."

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The navigation company took possession of the unfinished ship, etc.; and the Referee proceeded with the reference as directed.

The liquidator claimed the ownership of the work, basing his claim upon the proposition that the bills of sale were invalid as against him.

The Referee found against him, and he now appeals.

The first matter to be considered is, whether it was open to the Referee to consider this point at all—I think that his conclusion that he could, is entirely justified. There is no adjudication in the order of reference as to the ownership, but the rights of the navigation company and the insolvent company (and its liquidator) are presumed—the navigation company is allowed to take possession of the ship and materials, but that is all. The reference is to determine the amount of lien, if any, and any damages the liquidator may suffer by reason of the navigation company taking possession of the said material. In other words, if there be a lien, how much is it? And, if there be ownership, what damages for taking the property from the possession of the owner?

By the agreement, the shipbuilding company was to build a freight steamer for the navigation company by the 1st October, 1907, for $297,000; payments to be made every two months to the extent of 80 per cent. of the work done and material purchased by and delivered to the contractor for constructing the steamer—balance on completion—the shipbuilding company to provide all manner of labour, material, and apparatus. As work goes on after the first payment, "the property in the said steamer, so far as constructed, and in all machinery belonging thereto and in all materials purchased and intended to be used for constructing the same or any part thereof, shall become vested in and be the absolute property of the owner [*i.e.*, the navigation company]; and the contractor [*i.e.*, the shipbuilding company] shall and will then or at any time thereafter, at the request of the owner, execute and deliver to the owner such bill of sale or other assurance as the owner may be advised to be necessary to so vest said steamer and machinery and material in the owner, subject to the lien of the contractor upon the said steamer and its machinery and equipment for any unpaid balance . . . and subject to the possession of the said steamer remaining in and with the contractor until the owner is entitled to delivery in accordance with the provisions of this contract."

This provision operated in equity as a transfer of ownership, from the time of the first payment, of all the ship and materials, etc., without the execution of a bill of sale. There is, I presume, no difficulty as to that part of the ship and materials in hand *in esse* at the time of this payment; and I think there can be no doubt as to the rest.

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In *Holroyd* v. *Marshall* (1862), 10 H.L.C. 191, 9 Jur. N.S. 213, T., owning certain machinery in a mill, sold it to H., remaining in possession. Desiring to repurchase it, he executed a deed declaring that it was the property of H., conveying it to B. in trust that, when he paid for it, it should be transferred to him; but, if he failed, then to be held in trust for H .T. also covenanted that all the machinery which should be placed in the mill, during the continuance of the deed, in addition or substitution for the original machinery, should be subject to the same trusts. T. sold some of the machinery, and bought other machinery instead, which he brought into the mill. H. did not take possession; T. got in low water; and a creditor of his seized under a *fi. fa.* H. filed his bill; Stuart, V.-C., held the *fi. fa.* invalid as against the deed, in respect of the added and substituted articles; the Lord Chancellor (Lord Campbell) reversed this decree: (1860), 2 DeG. F. & J. 596; and an appeal was had to the House of Lords. Judgment was reserved for more than a year and a second argument heard. The Lord Chancellor (Lord Westbury) said (p. 211): "If a vendor . . . agrees to sell . . . property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt . . . that the contract would, in equity, transfer the beneficial interest to the . . . purchaser immediately on the property being acquired. . . . Immediately on the new machinery and effects . . . being . . . placed in the mill, they . . . passed in equity to the mortgagees, to whom T. was bound to make a legal conveyance, and for whom he, in the meantime, was a trustee of the property in question." Lords Wensleydale and Chelmsford concurred in allowing the appeal.

In that case there was, not unlike this, a covenant that T. should "do all necessary acts for assuring such added or substituted machinery, implements, and things, so that the same may become vested accordingly." It was strongly argued that this express covenant must be taken as shewing that the property did not pass without a deed (see p. 225). On p. 204, Amphlett, on the first argument, is reported as saying *arguendo:* "Nothing whatever has been done for so vesting the added machinery, and therefore it has not vested;" and on the second argument (p. 207): "There must be a real (or if that was impossible) a constructive delivery of these new chattels in order presently to vest them in the appellants. There had not been any such delivery here. There ought to have been a new bill of sale of them, and a new registration of it." But the Lord Chancellor said (p. 209): "In equity it is not necessary for the alienation of property that there should be a formal deed of conveyance." Lord Chelmsford said (p. 225): "It seems to be neither a con-

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venient nor a reasonable view of the rights acquired under the deed, to hold that for any separate article brought upon the mill a new deed was necessary, not to transfer it to the mortgagee, but to protect it against the legal claims of third persons."

This case has frequently been referred to and followed in our own Courts, *e.g.*: *Re Thirkell, Perrin* v. *Wood* (1874), 21 Gr. 492; *Mason* v. *MacDonald* (1875), 25 C.P. 435, at p. 439; *Coyne* v. *Lee* (1887), 14 A.R. 503; *Horsfall* v. *Boisseau* (1894), 21 A.R. 663, and others.

The statutes R.S.O. 1897, ch. 148 (the Bills of Sale and Chattel Mortgage Act), and the like, are appealed to by the liquidator. I do not think that the liquidator can take advantage of the provisions of these Acts—he is not a creditor or a purchaser for valuable consideration.

It is said that he stands for the creditors; but the Act does not speak of those who stand for the creditors, but of creditors; and sec. 38 of R.S.O. 1897, ch. 148, does not extend the meaning to liquidators, but only "to any assignee in insolvency of the mortgagor, and to an assignee for the general benefit of creditors." Had it been intended to extend the meaning to cover liquidators, that could easily have been done.

Before the Act of 1892, 55 Viet. ch. 26, it had been held that an assignee for the benefit of creditors could not claim in the capacity of creditor any benefit from want of registration: *Parkes* v. *St. George* (1882), 2 O.R. 342, at p. 347, *per* Boyd, C.; *Kitching* v. *Hicks* (1884), 6 O.R. 739, *per* Proudfoot, J., at p. 745; *per* Osler, J., at p. 749, and cases cited. And, while an assignee in insolvency was held to be entitled to take advantage of the Act, that was so "decided upon the peculiar language of our late Insolvent Act:" *per* Oslet, J., in *Kitching* v. *Hicks*, *ut supra*, at p. 749, citing *Re Barrett* (1880), 5 A.R. 206; *Re Andrews* (1877), 2 A.R. 24.

It has been considered in England in some cases, *e.g.*, in cases of fraudulent conveyances under the statute of 13 Eliz., that, if any fraud against creditors exists in a transaction to which the insolvent or bankrupt was a party, the assignee or trustee may take advantage of it, and that a deed which is void as against creditors is also void as against those who represent creditors. But it must be borne in mind that such deeds were contrary to the common law, and that the statute was merely an affirmance of the pre-existing common law.

In our case we have a statute which makes void perfectly legitimate and proper transactions, and this statute must be read strictly. I think that one who is not a creditor cannot claim as though he were a creditor, unless he can bring himself within the words of the Act.

I do not read the cases as excluding this view.

In *In re South Essex Estuary and Reclamation Co.* (1869),

L.R. 4 Ch. 215, at p. 217, Lord Hatherley, L.C., says: "The official liquidator had therefore now to act for the benefit of creditors as well as of the shareholders. . . ." And in *In re Duckworth* (1867), L.R. 2 Ch. 578 (and other cases, including some in our own Courts), it is said that "the liquidator represents the creditors;" but, as Lord Cairns, L.J., says, L.R. 2 Ch. at p. 580, "The liquidator represents the creditors . . . but only because he represents the company." This is approved in the House of Lords by Lord Westbury in *Waterhouse* v. *Jameson* (1870), L.R. 2 H.L. Sc. 29, at p. 38.

In *Re Canadian Camera and Optical Co.* (1901), 2 O.L.R. 677, it is indeed said that, in considering the statute now under examination, "it is necessary to bear in mind the position in which a liquidator stands in a compulsory winding-up, viz., that, while in no sense an assignee for value of the company, yet he stands for the creditors of the company, and is entitled to enforce their rights. . . ." The learned Judge cites *In re South Essex Estuary and Reclamation Co., ut supra*—nothing, however, in that case, I venture to think, justifies the statement of law in the case in 2 O.L.R. just cited. What was held, and all that was held, was, that the solicitors for an insolvent company may be compelled to produce documents relating to the company upon application of the liquidator, but without prejudice to their lien for costs; and even this was founded on sec. 115 of the Companies Act of 1862—which may be read on pp. 1297, 1298, of the second volume of Lindley on Companies, 6th ed.—and which, it will be seen, gives the Court power to dispose of the papers, etc., of the company.

The dictum of Mr. Justice Street was not necessary for the determination of the case, as it was held that the creditors never had the right to treat the insolvent company as owner. I do not think that the provisions of a statute so severe as that respecting bills of sale, etc., are to be extended beyond the cases to which they are clearly applicable—and I think the liquidator is not a creditor within the meaning of the Act. But, even if he were, the decision in the case just mentioned would seem to be adverse to him in respect of some of the goods at least. There W. delivered a lathe to the company, under condition that the property should not pass until the lathe was paid for in full; the company was wound up; the liquidator became possessed of the lathe, and sold it. W. claimed his "lien;" the Master in Ordinary allowed part only; but the Divisional Court held that the provisions of the Conditional Sales Act did not "help the liquidator in his capacity of representative of the creditors of the insolvent company, because the creditors never had a right to treat the bailee as owner." In our case "the materials purchased and intended to be used," after the execution of the agreement and after the payment of the first bi-monthly instalment, never be-

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came the property of the shipbuilding company as against the navigation company, but in equity became at once, upon purchase, the property of the navigation company.

It is unnecessary, however, to pursue this matter.

I have not said anything as to the validity of the bills of sale, but I am not to be considered as dissenting from the view of the learned Referee in that regard.

I think the appeal should be dismissed with costs.

Appeal dismissed.

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STAPLEY v. THE CANADIAN PACIFIC R. CO.

(Decision No. 2.)

Alberta Supreme Court, Harvey, C.J., Stuart, Simmons, Walsh, JJ. October 4, 1912.

1. DISCOVERY AND INSPECTION (§ I—2)—AFFIDAVIT ON PRODUCTION—CLAIM OF PRIVILEGE.

An affidavit on production is conclusive, and must be accepted as true by the opposite party, not only as regards the documents that are or have been in the possession of the party making production, and their relevancy, but also as to the grounds stated in support of any claim for privilege from production, subject, however, to the provisions of a rule of court whereby the court is authorized to judicially determine the question of privilege upon inspection of the document.

[*Stapley* v. *C.P.R.* (No. 1), 6 D.L.R. 97, varied on appeal.]

2. DISCOVERY AND INSPECTION (§ I—2)—ALBERTA SUPREME COURT RULES—REMEDYING OLD PRACTICE.

The object of the provision in the Alberta Supreme Court Rules, permitting the Court to inspect any document, for which privilege is claimed upon an application for an order for inspection, is to get rid of the fetters imposed by the old practice, and to give power to determine at once whether the objection sought to be raised is well founded.

[*Ehrmann* v. *Ehrmann* (No. 2), [1896] 2 Ch. 826, referred to.]

3. DISCOVERY AND INSPECTION (§ I—2)—CLAIM OF PRIVILEGE—INSPECTION BY JUDGE OF QUESTIONED DOCUMENT—ALBERTA SUPREME COURT RULES.

Where, on an application in Alberta for an order for inspection of documents, privilege is claimed for any document, the Judge applied to should not order the inspection of such document without first exercising his power under the Supreme Court Rules to inspect it himself, in order to see whether the claim for privilege is well founded.

Statement

APPEAL by the defendants from the order of Beck, J., *Stapley* v. *The Canadian Pacific R. Co.*, 6 D.L.R. 97, made on the application of the plaintiffs for a better affidavit on production, by which after amendment had been allowed so as to make the application one for inspection, it was ordered that the defendants should produce for inspection and deposit with the clerk of the Court the documents referred to in certain depositions taken on an examination for discovery and also a certain bundle of papers identified and referred to in the schedule to the defendant's affidavit on production, as being in its possession, but as to which it claimed privilege.

The order below was varied.

C. A. Grant, and *Davis*, for plaintiff, respondent.
O. M. Biggar, and *J. W. Hugill*, for defendant, appellant.

HARVEY, C.J.:—I concur in judgment of Walsh, J.

STUART, J.:—I concur in judgment of Walsh, J.

SIMMONS, J.:—I concur in judgment of Walsh, J.

WALSH, J.:—The defendant filed its affidavit on production made by one of its officers. The second part of the first schedule described the documents in its possession which it objects to produce as a bundle of documents fastened together and marked with the letter "A" and initialled by the deponent. Paragraph 5 of the affidavit refers to these documents in the following words:—

> 5. That the last mentioned documents consist of letters, correspondence and papers, or copies thereof, which have passed between the defendants' legal advisers and their servants, officers and agents or others in the relation to the matters in question in this case and with a view to the defendants' defence to the plaintiff's claim, which are numbered 1 to 96 inclusive, and are fastened together in a bundle marked with the letter "A" and initialled by me; for all of which the defendants claim the usual privilege.

After this affidavit was filed C. S. Maharg, one of the defendants' superintendents, was examined for discovery. On this examination he spoke of certain reports which had been made to him respecting the accident out of which this action had arisen. These reports were made by the conductor and engineer of the wrecked train, by the company's physician who was despatched to the scene of the accident, and by other employees of the company. Mr. Maharg was asked by the plaintiff's solicitor who was conducting the examination to produce these reports for his inspection but he refused to do so. He stated that some of them had been passed on to the defendants' solicitors and to the general superintendent, and some, or duplicates of them, were still on his own file. He apparently had some of them with him on the examination for he referred to them, and in answer to questions put to him, gave in some instances some at least of their contents. None of these documents are set out in the defendants' affidavit on production. The only document produced is a release from the female plaintiff and the only other documents mentioned in the affidavit are those for which privilege is claimed.

The plaintiffs applied for a better affidavit on production and upon the return of the summons my brother Beck allowed it to be amended so as to ask for an order for inspection and ordered that the defendant should produce for inspection and

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deposit with the clerk of the Court the documents referred to in Mr. Maharg's deposition taken on his examination for discovery and the bundle of documents referred to in the affidavit on production for which privilege is claimed. From this order the defendant appeals upon the sole ground that the learned Judge erred in holding that these documents are not privileged.

I think there can be no question but that the order appealed from is too broad in so far as the documents referred to in the affidavit on production are concerned, for documents of the character described in paragraph 5 of the affidavit are clearly privileged from production.

The general rule is that an affidavit on production is conclusive and must be accepted as true by the opposite party respecting not only the documents that are or have been in the possession of the party making discovery and their relevancy but also as to the grounds stated in support of a claim for privilege from production. It is provided, however, by O. 31 rule 19 A (2) of the English Supreme Court rules, which is in force here, that

> where on an application for an order for inspection privilege is claimed for any document it shall be lawful for the Court or a Judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

The object of this rule as stated by Stirling, J., in *Ehrmann* v. *Ehrmann* (No. 2), [1896] 2 Ch. 826, at p. 828, is to get rid of the fetters imposed by the old practice and to give power to determine at once whether the objection sought to be raised is well founded.

When the order for inspection was asked for by the plaintiffs and was resisted by the defendant under the claim of privilege, I think that the documents should have been examined by the learned Judge himself under this rule for the purpose of deciding as to the validity of this claim and that this Court should now order to be done what he should then have done. There was nothing before him to indicate that the claim of privilege was improperly made in the affidavit even if anything but the affidavit itself could have been looked at for that purpose and I think that an order should not have been made exposing these documents to the inspection of the plaintiffs until the invalidity of the claim of privilege had been decided. The action is on the list for trial at the sittings at Edmonton which commence on the 15th inst. and it is therefore important that if the plaintiffs are entitled to see any of these documents they should have an opportunity to do so without delay. My brother Beck, owing to his absence from the country, will not be available for the purpose of inspecting them, and there will be no Chambers Judge in Edmonton before the opening of the

sittings. Chambers will be held in Calgary next week and the Judge holding the same will be the only Judge available in that week for the inspection of these papers. For these reasons the inspection must take place there.

The order appealed from is varied by directing that the defendant do produce to the Judge presiding in Chambers at Calgary on Wednesday the 9th day of October instant the documents numbered 1 to 96 inclusive referred to in the 5th paragraph of the affidavit on production made herein by R. J. Lydiatt for the defendant on the 27th day of April, 1912, and filed on the 29th day of April, 1912, for the purpose of enabling him to decide as to the validity of the claim of privilege made for same and that only such of said documents, if any, as he may decide are not privileged from production be produced for inspection and deposited with the clerk of the Court at Edmonton as directed by the order appealed from. As the time limited by the order therefor has expired it is necessary to fix a new time which shall be within two days after such decision is given.

The claim of privilege for the documents referred to in Mr. Maharg's examination was abandoned upon the argument of the appeal and it is only necessary therefore to say that these should be produced and deposited at once. It is manifest that the affidavit on production is defective with respect to them, for if they are not included in the 96 documents for which privilege is claimed they should have been set out in the first part of the first schedule as being documents in the possession of the defendant which it does not object to produce, while if they form part of the 96 documents, of which there is no evidence, they should not have been included with them for they clearly are not documents of the character described in paragraph 5.

As success is divided with fairly even hand on this appeal, and as practically the only costs incurred are for counsel fees on the argument, the preparation of appeal books and factums having been dispensed with and the appeal having been most informally brought on, there will be no costs of it to either party.

Order varied.

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McMULKIN v. TRADERS BANK OF CANADA

Ontario Divisional Court, Falconbridge, C.J.K.B., Teetzel, and Middleton, JJ. March 2, 1912.

1. GARNISHMENT (§ I B—5)—AGAINST WHOM GARNISHMENT WILL LIE—ONT. C.R. 162, 911.

The test as to the liability of a fund to be attached in garnishment proceedings under Rule 911 (Ont. Con. Rules of 1897), is the ability to serve the garnishee within Ontario or the ability to bring the case within Ontario Con. Rule 162, if service cannot be made in Ontario.

2. CONFLICTS OF LAWS (§ II—151)—JURISDICTION—EXTRA-TERRITORIAL RECOGNITION OF GARNISHMENT JUDGMENTS.

The question as to whether foreign Courts might not accord Ontario Courts any extra-territorial recognition is a question of policy affecting those who make the law and cannot be considered by the Courts who are called upon to administer the law as they find it.

[*The King* v. *Lovitt*, [1912] A.C. 212, distinguished; *Western National Bank of New York* v. *Perez, Triana and Co.* [1891] 1 Q.B. 304; *Tytler* v. *C.P.R.*, 29 Ont. R. 654, specially referred to.]

Statement

AN appeal by the plaintiff (judgment creditor) from the judgment of FINKLE, Co.C.J., Oxford, upon the trial of a garnishee issue.

The following statement is taken from the judgment of MIDDLETON, J.:—

The facts are not in dispute. On the 8th August, 1911, the plaintiff recovered a judgment against one Couldridge for $211.33. On the 17th August, 1911, the plaintiff obtained a garnishee order *nisi*, attaching any debt due from the Traders Bank of Canada, the defendants in the issue, to the judgment debtor. This order was served on the manager of the Traders Bank of Canada at Ingersoll, on the 17th August, and upon the manager at the head office at Toronto, on the 18th August.

An issue was directed between the attaching creditor and the garnishees for the purpose of determining whether, at the time of the service of the said order, there was any amount owing from the garnishees to the judgment debtor, and whether the garnishee order "was a valid attachment of such debt."

At the trial the learned Judge found against the attaching creditor, no reasons being assigned.

It appeared that, at the time of the recovery of judgment, the judgment debtor had $3,415 upon deposit in the branch of the Traders Bank of Canada at Ingersoll. This sum was withdrawn, and on the 9th August was deposited with the branch of the bank at Calgary. When the attaching order was served, it was accompanied by a notice addressed to the bank, warning the bank that the money sought to be attached was upon deposit with the Calgary branch. The general manager forwarded the attaching order to Calgary. It reached the Calgary office before banking hours on the 24th. Notwithstanding this, the bank permitted the withdrawal of the whole $3,415, and it was upon the

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same day redeposited by the judgment debtor to his own credit "in trust;" and, later on in the same day, the money so deposited was again withdrawn.

J. B. Clarke, K.C., for the appellant. The question is, whether the order binds the branch of the bank in Alberta. I submit that it does. The bank, not the branch, is the debtor. The branch is merely an agent of the bank for certain purposes. The bank is subject to the jurisdiction of the Courts here. I refer to *Tytler* v. *Canadian Pacific R.W. Co.* (1898), 29 O.R. 654; *Ferguson* v. *Carman* (1866), 26 U.C.R. 26; *Prince* v. *Oriental Bank Corporation* (1878), 3 App. Cas. 325; *The King* v. *Lovitt*, [1912] A.C. 212. The test is, not the situs of the debt; but, could the debtor sue in Ontario to recover the debt due him by the garnishees? See Con. Rule 911.*

R. McKay, K.C., for the respondents. This money was not a debt in Ontario which could be ordered by the Ontario Courts to be paid over. The Traders Bank of Canada is a corporation having its head office in the Province of Ontario, but it is domiciled in every Province where it has offices. A judgment from this Court would not have the required effect in the Province of Alberta. It is the situs of the debt that governs. In order that the Ontario garnishment process may apply, the debt must be present here in Ontario. I refer to *Deacon* v. *Chadwick* (1901), 1 O.L.R. 346; *Vézina* v. *Will H. Newsome Co.* (1907), 14 O.L.R. 658; *Brennan* v. *Cameron* (1910), 1 O.W.N. 430; *Pavey* v. *Davidson* (1896), 23 A.R. 9; *S.C., sub nom. Purdom* v. *Pavey & Co.* (1896), 26 S.C.R. 412; *In re Maudslay Sons & Field, Maudslay* v. *Maudslay Sons & Field*, [1900] 1 Ch. 602; *Attorney-General for Ontario* v. *Woodruff* (1907), 15 O.L.R. 416, [1908] A.C. 508; *Parker* v. *Odette* (1894), 16 P.R. 69, Con. Rule 911.*

*911.(1) The Court or a Judge, upon the *ex parte* application of the judgment creditor, either before or after the oral examination mentioned in Rules 900 to 904 and 910, and upon affidavit by him or his solicitor, or some other person aware of the facts, stating that judgment has been recovered, that it is still unsatisfied, and to what amount, and that some third person is indebted to the judgment debtor, and is within Ontario, may order that all debts owing or accruing from the third person (hereinafter called the garnishee) to the judgment debtor, shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee appear before the Court or a Judge or before such officer as the Court or Judge shall appoint, to shew cause why he should not pay the judgment creditor the debt due from the garnishee to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.

(2) Upon a like application where the garnishee is not within Ontario, and upon its being made to appear on affidavit that the garnishee is so indebted to the judgment debtor and that the debt to be garnished is one for which the garnishee might be sued within Ontario by the judgment debtor, an order may be made that such debt shall be attached to answer the judgment debt; and, by the same or any subsequent order, leave may be given to serve upon the garnishee, or in such manner as may seem proper, a notice (which may be embodied in the order), calling upon the

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Clarke, in reply.

March 2. The judgment of the Court was delivered by MIDDLETON, J. (after setting out the facts as above):—There is no doubt that, at the time of the service of the garnishee order, the garnishees were indebted to the judgment debtor. The only question is, whether this indebtedness was subject to attachment at the instance of the judgment creditor in the Ontario Courts. This falls to be determined on Con. Rules 911 *et seq.* These Rules were validated by 58 Vict. (Ont.) ch. 13, sec. 42, and 59 Vict. (Ont.) ch. 18, sec. 15. No notice has been served, as required by sec. 60 of the Judicature Act, if it is intended to contend that this legislation is *ultra vires* of Ontario.

By the Rules in question, it is plain that the intention was to make exigible to answer a judgment recovered in Ontario: (*a*) any indebtedness to the judgment debtor where the garnishee was within Ontario; or (*b*) where the garnishee was not within Ontario, but the case would fall within the provisions of Con. Rule 162 if the judgment debtor was himself seeking to assert his rights within Ontario. The Rule does not proceed upon any theory as to the *situs* of the cause of action to be taken in execution, but proceeds upon the theory that the creditor has a right to be subrogated to the position of his debtor, and to assert, for the purpose of enabling him to obtain satisfaction of the judgment, any right which the debtor himself could assert. If the garnishee is within Ontario and can be served within Ontario, the judgment creditor is given the right to collect any debt due by him to the judgment debtor. If the garnishee is not within Ontario and cannot be served within Ontario, then a debt cannot be collected under this process unless it falls within the classes enumerated in Con. Rule 162.

This narrows the question for determination to an inquiry whether the debtor could himself sue in Ontario to recover the debt due him by the garnishees.

Before the decision of the Privy Council in *The King* v. *Lovitt*, [1912] A.C. 212, no one would have doubted this right. The question in that case was not one between the bank and its customer. What was there discussed was the right of New Brunswick to claim succession duty with respect to moneys on deposit in the St. John branch of the Bank of British North America.

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garnishee to appear before the Court or a Judge or before such officer as the Court or Judge may appoint, to shew cause why he should not pay the judgment creditor the debt due from the garnishee to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.

(3) The order allowing the notice so to be given shall limit a time when the motion is to be heard, having regard to the place or country where or within which the notice is to be served.

(4) Where the garnishee is not within Ontario and is neither a British subject nor in British dominions, notice of the order according to form No. 126, and not the order itself shall be served.

The head office of the bank was in London, England; the domicile of the testator was Nova Scotia. The right of the Province to tax was said to be limited to assets within the Province. It was argued that the *situs* of this simple contract debt was either at the residence of the debtor—*i.e.*, where its head office was, in London, England—or the domicile of the creditor, *i.e.*, Nova Scotia. The Province claimed that the debt was a debt payable at St. John, and that it was primarily recoverable at St. John; the contract, properly understood, being a contract to be implemented at the branch of the bank in St. John. The Privy Council agreed with this, and thought that the locality of the debt was in truth fixed by the agreement between the parties, and that branch banks, although agencies of the bank itself, for certain purposes, may be regarded as distinct trading bodies.

Had our Rules been based upon the locality of the debt to be taken in execution, this judgment would be conclusive against the attaching creditor; but, if I am right in thinking that this is not the test, then the decision has no application. The sole test given by our Rules is the ability to serve within Ontario, or the ability to bring the case within Con. Rule 162 if service cannot be made within Ontario. Had the contract been made between two residents of Calgary, and had the promise been to pay at Calgary and nowhere else, so that the parties had given as definite and complete a locality to the debt as is possible in the case of simple contract debts, and had the debtor thereafter moved within Ontario, then the debt would none the less be liable to attachment under our Rule, which merely requires the existence of a debt and presence of the debtor within Ontario. The debtor would not be exempt from suit at the instance of his original creditor if found and served within Ontario, because the Courts of Ontario have universal jurisdiction in all personal actions, subject only to their ability to effect service within their own jurisdiction: *Tytler* v. *Canadian Pacific R. Co.*, 29 Ont. R. 654.

Upon the argument, much was made of the difficulty that might in some cases arise if the Courts of Ontario were to assume authority to take in execution a debt of this kind, because, it was suggested, foreign Courts might not accord to the judgment of the Ontario Court any extra-territorial recognition. It is a sufficient answer to this to point out that this is a question of policy, affecting those who make the law, and that it cannot be considered by the Courts, who are called upon to administer the law as they find it: *Western National Bank of City of New York* v. *Perez Triana & Co.*, [1891] 1 Q.B. 304.

But it is not likely that in this case any such question can arise, because, at the time of the original suit, the judgment debtor was resident within Ontario, and he appears to be still here, as he was served with a notice of this appeal at Ingersoll.

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The appeal should be allowed, and the garnishees should be directed to pay to the judgment creditor sufficient to satisfy the judgment debt and the costs of the attachment proceedings, of the issue, and of this appeal.

Appeal allowed.

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KOLEGA v. GENSER.

Manitoba King's Bench, Patterson, Referee. June 27, 1912.

1. EXECUTION (§ I—9)—EFFECT OF PAYMENT OF EXECUTION UPON GARNISHING ORDER—POSSIBILITY OF OTHER EXECUTIONS COMING IN TO SHARE—PRO RATA DISTRIBUTION.

Where after judgment the plaintiff placed an execution in the hands of the sheriff and a garnishing order was also issued and the money was realized by the sheriff under the execution, the judgment debtor is not entitled to a discharge of the garnishing order until it has been ascertained whether other creditors, if any, will come in with executions upon which they would be entitled to share *pro rata* upon the fund in case such other executions were received by the sheriff within the statutory period of three months after the sheriff's notice given under secs. 24 and 25 of the Executions Act, R.S.M. 1902, ch. 58.

[Secs. 759 and 762 of the King's Bench Act, R.S.M. 1902, ch. 40, specially referred to.]

Statement

THE plaintiffs, having recovered judgment in this action for $1,000, issued a writ of execution and placed it in the hands of the sheriff and at the same time procured and served a garnishing order attaching the defendant's money in the Bank of Nova Scotia to the extent of the judgment.

The sheriff seized the goods of the defendant under the execution whereupon the defendant paid the amount to the sheriff, together with costs and sheriff fees; the defendant moved for an order to discharge the garnishee so as to release the money attached in the hands of the latter.

The application was refused.

W. P. Fillmore, for the plaintiff.

A. K. Dysart, for the defendant.

Patterson, Referee.

PATTERSON, REFEREE:—Before the enactment of the statutory provisions now contained in secs. 24 and 25 of the Executions Act, R.S.M. 1902, ch. 58, payment to the sheriff of the full amount of the execution undoubtedly operated as a discharge of the judgment, and the sheriff would make a return of money made to the writ, but now he has to retain the money for three months to enable other creditors of the same judgment debtor to put executions in his hands for the amounts of their claims; and, in the event of there being any such at the end of the three months, the first execution creditor will only be entitled to receive his *pro rata* share of the money realized.

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In such case, therefore, the sheriff would be entitled to make a further levy to realize the balances of the claims of the first as well as the other execution creditors. So that, until it shall appear that there are no other execution creditors to share in the money paid in by this defendant, it cannot be known with certainty whether the plaintiff's judgment and execution are satisfied or not, and the sheriff cannot return the writ.

It is urged on behalf of the plaintiff that to discharge the garnishee now would put the plaintiff into such a position that he might eventually only receive a percentage of the amount of his judgment, and that he is entitled to retain the lien upon the moneys attached which is given him by rules 759 and 762 of the King's Bench Act as a security that he will ultimately receive payment of his judgment in full.

The statutes have made no provision for such a case and the point does not seem to be covered by authority.

It is not, therefore, without some hesitation that I come to the conclusion that I must refuse the order asked for, but I do so without costs.

Motion refused.

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Ontario High Court. Trial before Boyd, C. June 25, 1912.

1. CONSTITUTIONAL LAW (§ II A 5—249)—RAILWAY COMPANY INCORPORATED UNDER DOMINION PARLIAMENT—PROVINCIAL LEGISLATION REGULATING WORK ON SUNDAY—RIGHT OF PARLIAMENT TO PASS—R.S.C. 1906, CH. 37, SEC. 9.

Section 9 of the Railway Act, R.S.C. 1906, ch. 37, enacting that every railway situated wholly within one province of Canada and declared by Parliament to be either wholly or in part a work for the general advantage of Canada, shall be subject to any Act of the Legislature of the province in which it is situated prohibiting or regulating work on Sunday, is *intra vires* of the Parliament of Canada.

2. CONSTITUTIONAL LAW (§ II A 5—249)—RAILWAYS—OPERATION ON SUNDAY—WHAT AMOUNTS TO A CONTINUOUS ROUTE—R.S.C. 1906, CH. 37, SEC. 9, SUB-SEC. 5.

In order that a railway or part of a railway may form part of a continuous route or system within the meaning of sub-sec. 5 of sec. 9 of the Railway Act, R.S.C. 1906, ch. 37, respecting operations on Sunday, there must be a direct physical connection between it and the other through road of which it is to form a part, and proper facilities by way of sidings and accommodations for the transfer of traffic must exist, which should generally be sanctioned by the proper authorities.

[*Hammans* v. *Great Western R. Co.*, 4 Ry. & Canal Traffic Cas. 181; *Great Central R. Co.* v. *Lancashire & Yorkshire R. Co.*, 13 Ry. & Canal Traffic Cas. 266; *Black* v. *Delaware & Raritan Canal Co.*, 22 N.J. Eq. 402, referred to.]

3. STATUTES (§ II A—96)—CONSTRUCTION OF PROVINCIAL ENACTMENT—LEGISLATIVE INTENT—POWER OF COURTS TO QUESTION THE REASONABLENESS OF THE ENACTMENT.

In considering the constitutionality of any enactment of a Provincial Legislature, every intendment will be made to support it, and it is not

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the business of the courts to pass upon its wisdom or reasonableness, but simply to say whether it is fairly within the area of the constitutional powers of the Legislature.

4. RAILWAYS (§ II D 1—31)—OPERATION—SUNDAY LAWS—BINDING EFFECT OF PROVINCIAL ACT ON STREET RAILWAY COMPANY INCORPORATED BY DOMINION PARLIAMENT—6 EDW. VII. (ONT.) CH. 30, SEC. 193.

Section 193 of the Ontario Railway Act 1906, 6 Edw. VII. ch. 30, respecting operation on Sunday is, by virtue of sec. 9 of the Railway Act, R.S.C. 1906, ch. 37, binding upon an electric railway situate wholly within the Province of Ontario, which was incorporated by the Parliament of Canada in 1910, and declared to be a work for the general advantage of Canada.

Statement

ACTION to recover $1,200 penalties from the defendants for running their cars on three Sundays, contrary to the provisions of the Ontario Railway Act, 1906.

Judgment was given to the plaintiff for the penalties claimed.

J. A. Paterson, K.C., for the plaintiff.
M. K. Cowan, K.C., and *J. B. Holden*, for the defendants.

Boyd, C.

June 25, 1912. BOYD, C.:—The simple question here is, whether the defendants are liable to pay penalties for running their cars on Sunday. The answer is far from simple, and involves difficulties in the application of constitutional law not covered by previous authority. It appears necessary to take a somewhat general survey of the whole field of pertinent legislation, Imperial, Canadian, and Provincial.

But first as to the legal status of the defendants, a body incorporated on the 17th March, 1910. On the ground, the line of track of the defendants extends over an area of some sixteen miles, from London to Port Stanley, on Lake Erie. Power is given by the charter to establish a line of lake steamers and so communicate with the State of Ohio at Cleveland. Power is also given to construct various ramifications all near-by the present line and all within the Province of Ontario. The railway is at present nothing more than an electric road within the Province. Its possibly larger operation in the future over other Provinces or over the Great Lakes is a matter of contingency that does not affect the present situation. Nevertheless, by reason of presenting, in its application for incorporation, this extended character as in contemplation, it became a subject for incorporation by Dominion charter, and so was passed the statute 9 & 10 Edw. VII. ch. 120, wherein the undertaking was declared to be a work for the general advantage of Canada, and the company was empowered to hold, maintain, and operate the railway subject to the provisions of the Railway Act of Canada (R.S.C. 1906, ch. 37). That statute does not, nor does the private Act, prohibit the running of cars on Sunday. The running in this case took place on the 11th, 18th, and 25th days of December, 1910. It is proved that on one of these days His Majesty's mail was carried, by

special request, from London to Port Dover, in addition to the usual carriage of passengers and their belongings.

There has been a long-standing attempt in this Province to enforce cessation of labour on local railways during Sunday, and many efforts have been made to place the law in this respect upon a plain and intelligible footing. This is a most desirable result in regard to all penal or criminal laws, which should be made simple and clear for all men. What has been attempted and decided will now be related as briefly as possible.

In March, 1897, it was decided by the Court of Appeal that a company incorporated for the purpose of operating street cars by electricity was not an inhibited "person," within the meaning of the provisions of the Lord's Day Act then in force, R.S.O. 1887, ch. 203: *Attorney-General* v. *Hamilton Street R.W. Co.* (1897), 24 A.R. 170.

The Legislature forthwith proceeded to remedy this by passing a new "Act to prevent the Profanation of the Lord's Day" (R.S.O. 1897, ch. 246). This was of larger scope than the one of 1887 passed upon by the Court, and by secs. 7 and 8 expressly provides for the prohibition of Sunday excursions by railway, and forbids generally (with exceptions not now relevant) the operating of electric street railway cars on the Lord's Day.

In 1901, a broader legal question was raised as to the power of the Provincial Legislature to enact ch. 246. The whole Act was brought before the Court of Appeal for Ontario upon questions submitted by the Lieutenant-Governor in Council. The first question was as to the validity of the whole Act, and in particular as to secs. 1, 7, and 8, and it was answered by a majority of the Court, and the answer affirmed the validity of the statute. Two subsidiary questions were also submitted: (1) as to the power of the Province to prohibit Sunday work on railways subject to the exclusive legislative authority of the Dominion; and (2) as to the like powers in the case of railways declared to be for the general advantage of Canada. These latter questions were answered negativing such power in the Province: *Re Lord's Day Act of Ontario* (1902), 1 O.W.R. 312. An appeal was then taken to the Privy Council, and that tribunal reversed the opinion of the majority of the Judges below on the first question, and it was decided that the Act as a whole was *ultra vires*, for substantially the same reasons as those given by Armour, C.J.O., the dissentient Judge. Their Lordships held that the Act, "treated as a whole," was one dealing with a subject falling under the classification of "criminal law," which, by the distribution of powers in the British North America Act, 1867, sec. 91, sub-sec. 27, was reserved for the exclusive legislative authority of the Parliament of Canada: *Attorney-General for Ontario* v. *Hamilton Street R.W. Co.*, [1903] A.C. 524. Their Lordships held that this answer to the first question rendered it unnecessary to answer the second (as above

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set forth), thus in effect, as I understand, affirming the view expressed by all the Ontario Judges in appeal, that the clauses as to the operation of the Dominion railways were not within the competence of the Provincial Legislature.

Other remaining questions (not now, it would seem, relevant to this litigation) the Lords of the Privy Council declined to entertain, as being of hypothetical character which should be left for decision in concrete cases as and when they might arise.

The next attempt to resolve the broad question was by the Dominion, upon a special case referred by the Governor-General in Council to the Supreme Court of Canada in February, 1905: *In the Matter of the Jurisdiction of a Province to Legislate respecting Abstention from Labour on Sunday* (1905), 35 Can. S.C.R. 581. This case set forth a draft Act embodying legislation contemplated by the Province of Ontario in 1904, and in particular asked for direction as to its competence to prohibit the operation of railways on the Lord's Day in the case of undertakings incorporated by the Province and those incorporated by the Dominion, and also as to those incorporated by the Dominion which were declared to be for the general advantage of Canada, but authorised to operate within one Province only (to wit, Ontario), and whose operations were confined to such Province. The majority of the Judges (as it were under protest and without prejudice) indicated their opinion to be that all such interferences making for the compulsory observance of the Lord's Day were beyond the proper competence of the Province and fell within the views expressed by the Privy Council in 1903 as being of criminal character and so within the ambit of the Dominion Parliament.

Pending the launching and the decision of this special case, the Dominion had been legislating, and we find the Canada Railway Act, 1903, being amended by the statute of 4 Edw. VII. ch. 32 (passed on the 10th August, 1904), in which first appear the important clauses upon the force and effect of which the present litigation is mainly to be determined. One provision relates to every railway (electric and other) wholly situate within one Province of Canada, but in its entirety or in part declared to be a work for the general advantage of Canada, and enacts that it shall, notwithstanding such declaration, be subject to any Act of the Legislature of the Province in which it is situated, prohibiting or regulating work, etc., upon the first day of the week—which is in force at the time of passing the Act (sec. 2, adding sec. 6*a* to the Act of 1903). And by sub-sec. 2 it is enacted that "the Governor in Council may at any time and from time to time by proclamation confirm, for the purposes of this section, any Act of the Legislature of any Province passed after the passing of this Act" (*i.e.*, 10th August, 1904), "for the prohibition or regulation of work, business or labour upon the first day of the week, commonly called Sunday; and from and after the date of any such

proclamation the Act thereby confirmed, in so far as it is in other respects within the powers of the Legislature, shall for the purposes of this section be confirmed and ratified and made as valid and effectual as if it had been enacted by the Parliament of Canada; and, notwithstanding anything in this Act" (*i.e.*, the Railway Act) "or in any other Act, every railway, steam or electric street railway, and tramway, wholly situate within such Province, but declared by the Parliament of Canada to be, in its entirety or in part, a work for the general advantage of Canada . . . shall thereafter, notwithstanding such declaration, be subject to the Act so confirmed, in so far as that Act is otherwise *intra vires* of the Legislature."

This first appears as an amendment to the Railway Act, and is carried into the revision of 1906, where it now stands as sec. 9, with some few immaterial verbal variations: R.S.C. 1906, ch. 37, "An Act respecting Railways."

This large committal of powers to the Provincial Legislature in respect of local railways was subject to some exceptions: the section was not to "apply to any railway or part of a railway,—(*a*) which forms part of a continuous route or system operated between two or more Provinces, or between any Province and a foreign country, so as to interfere with or affect through traffic thereon;—or, (*b*) between any of the ports on the Great Lakes and such continuing route or system, so as to interfere with or effect through traffic thereon;—or, (*c*) which the Governor in Council by proclamation declares to be exempt from the provisions of the section" (sec. 9, sub-sec. 5).

In the year 1906, being that of the last revision of the Dominion statutes, the Province passed "The Ontario Railway Act, 1906," 6 Edw. VII. ch. 30, assented to on the 14th May, in which provisions are to be found respecting and under the heading of "Sunday Cars." Section 193 (1) declares that no company operating a street railway, tramway, or electric railway, shall operate the same or employ any person thereon on the first day of the week, commonly called Sunday, except for the purpose of keeping the track clear of snow or ice, or for the purpose of doing other work of necessity. With certain exceptions (not now relevant) the section is to apply to all railways operated by electricity, whether on a highway or a right of way owned by the company (sub-sec. 6).

The proclamation of the Governor-General in Council confirming sec. 193 of the Ontario Railway Act (just set forth) was duly promulgated on the 8th December, 1906.

The defendant company came into existence on the 17th March, 1910, by Dominion Act 9 & 10 Edw. VII. ch. 120, under this condition of prior legislation (Federal and Provincial). Nothing has been done, as I have said, by the company, in the way of lake navigation in connection with their line.

No proof was given of any such facts as would indicate that this

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local road forms part of a continuous route or system carrying through traffic, within the meaning of these words as used in railway legislation. The cases shew that there must be a direct physical connection between the local road and the other through road of which it is to form part, and that proper facilities by way of sidings and accommodations for the transfer of traffic must exist, and these generally should be sanctioned by the proper authorities (in this case the Board of Railway Commissioners) before the particular road can form part of a "continuous route or system:" *Hammans* v. *Great Western R.W. Co.* (1883), 4 Ry. & Canal Traffic Cas. 181, and *Great Central R.W.Co.* v. *Lancashire and Yorkshire R.W. Co.* (1908), 13 Ry. & Canal Traffic Cas. 266. To the same effect is American Railway law: *Black* v. *Delaware and Raritan Canal Co.* (1871), 22 N.J. Eq. 130, 402.

I find as facts that the road has always been strictly a local concern, with no such connection as would constitute it part of "a continuous route or system," and that the traffic of the company was in no sense "through traffic," within the meaning of the Dominion Railway Act, R.S.C. 1906, ch. 37, sec. 9. So that the road, as operated at the time of the alleged offences, was not within any of the exceptions expressed in such section of the Dominion Railway Act. Wherefore, the net result is, that the defendant company, though it be an undertaking which has been declared to be for the public benefit of Canada, is yet, by virtue of the Canada Railway Act and the proclamation of December, 1906, subject to sec. 193 of the Ontario Railway Act, which prohibits the operation of electric railway cars on the first day of the week, commonly called Sunday.

The way is now cleared to consider the constitutional aspect of the controversy.

The Parliament of Canada, by the agency of the Governor-General in Council, undertakes to confirm any Act of the Ontario Legislature within the legislative authority of the Province, in so far as the Act prohibits or regulates work, business, or labour upon the first day of the week on any electric railway wholly situate within the Province and which has been declared by the Parliament of Canada to be a work for the general advantage of Canada.

In the present case, the Parliament of Canada has, through the agency of the executive proclamation, ratified and confirmed sec. 193 of the Ontario Railway Act, and made it as valid and effectual as if it had been enacted by the Parliament of Canada: R.S.C. 1906, ch. 37, sec. 9 (3). So far as express language can effect anything, this defendant company has been made subject to the said section 193, in so far as it has been so confirmed (*ib.*, sub-sec. 4).

All that remains, as I regard the case, is to consider whether what has been done by this conjoint legislation is within the scope

and power of the respective Legislatures under the Imperial Constitutional Act so as to justify this Court in exacting the penalties claimed.

The defendants' road is territorially within the Province, and is, as operated, strictly a local work respecting which Ontario might properly legislate. But authority to legislate in respect of this road by the Province has been superseded by the intervention of the Dominion, because of its being regarded as a work for the general advantage of Canada: see B.N.A. Act, sec. 92 (10). The Constitutional Act there confers exclusive legislative authority as to this road on the Dominion (sec. 91 (29)). But the Dominion is invested with authority to make laws for the peace, order, and good government of Canada in all matters not assigned exclusively to the Provinces: and this means, I take it, the exercise of large and liberal discretionary powers to be exercised for the well being of the community and for the right working of the constitution: sec. 91 and *Riel* v. *The Queen* (1885), 10 App. Cas. 675, at p. 678, *per* Lord Halsbury.

The authority of the Dominion extends to such works as, though wholly situate within the Province, are, before or after their execution, declared to be for the general advantage of Canada. Here the declaration was made before the execution and in anticipation of what was to be done. Suppose no steps to be taken as to the navigation of the lake by the company or in establishing part of a continuous route or system, it would be competent for the Dominion to nullify the declaration and to subject the company to provincial legislation. I see no good reason why the Dominion should not suspend the affect of this declaration, either directly or indirectly, for sufficient cause, so as to restore (as it were) the power of legislation to the Province in regard to the particular company. Legislative authority exists in the Province as to all local works and undertakings, though it may be superseded by the paramount power of the Dominion in suitable cases. But the Dominion may still utilise the Province as one of the agencies of government, by inviting it to intervene with legislation considered desirable, and not contrary to any controlling enactments passed by the Dominion Parliament. This may be regarded as supplementary legislation of which the Dominion is willing to avail itself or of which the Dominion is willing that the Province should avail itself. The consideration in these cases is not grounded on the doctrine of *ultra vires*, but rather as to what is permissible reciprocally to a superior and a subordinate Legislature in regard to subjects on which each has some right to make laws. The case in hand illustrates this position. We have to deal with two law-making bodies acting with plenary and exclusive powers within the ambit of subjects distributed to them by the Constitutional Act, and yet with some class of rights in which the exercise of power by one may infringe on the exercise of power

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by the other. The Court is not to deal with a legislative enactment as with a by-law. The Legislature or Parliament is not called on to shew cause or give reasons why a certain law has been passed. The policy of the Dominion dealing with long lines of railway through the Provinces and to foreign lands is against any breaking of carriage for any period of time, and insists on a continuous transit, and Parliament, therefore, places no restriction on the running of railways on every day in the week. The policy of Ontario appears to be in favour of a restricted use of the railways subject to provincial control on the first day of the week. If one assumes that, after the many attempts to get judicial guidance to assist in formulating valid and efficient laws on the subject of Lord's Day observance, the law-makers came to the conclusion that no satisfactory statute could be framed on this head which would answer the demands and the requirements of the various Provinces of the Dominion: *e.g.*, that what would satisfy a new western community might not harmonise with the views of the oldest centres of population—that what might satisfy Quebec would not satisfy Manitoba—and so on; this conclusion of inability might serve to explain why we have the present complexity of legislation, bringing into exercise apparently the ingenuity of the legal profession and the reserved resources of the constitution to find out some suitable and effective outcome. One is not to assume that legislation is futile; rather to seek to give effect to it, if possible.

The Parliament on this point as to railways means to leave it to each Province to determine what shall be done with Sunday, or rather what shall be done on Sunday. What I have sought to express has been considered also, I find, by Mr. Justice Barker in *Ex p. Green* (1900), 35 N.B.R. 137, at p. 147. He says: "I am disposed to think that the Dominion Parliament, in designedly refraining from legislating on this subject, did so because it was one which did not concern the general public or affect them all to the same extent or apply to them all in the same degree; but was rather to be regarded and dealt with as a police regulation, local in its character and in its application, which required to be moulded so as to suit the requirements and meet the conditions of different localities and different classes of population, and in that way ensure a reasonable cessation from labour and worldly business on Sunday." See *The Queen* v. *Halifax Electric Tramway Co.* (1898), 30 N.S.R. 469.

Apart from the religious observance of the day, which cannot be enforced by law, the legislators must have recognised the value of a recurring period of rest in railway life, more than ever needed in modern stress and competition. The political value of a rest-day is put thus by Macaulay: "During this cessation of labour a process is going on quite as important to the wealth of the nation as any process which is performed on more busy days. Man, the

machine of machines, is repairing and winding up so that he returns to his labour on Monday with clearer intellect, with livelier spirits, with renewed corporeal vigour." However the day of rest may be used or abused, the legislators may well consider the policy a wholesome one in so far as corporations are concerned over which they have creative and regulative power.

It seems to me possible as well as proper so to fit together these enactments as to induce harmonious and efficient action between the two Governments, Federal and Provincial, in order to the attainment of an end which both have had in view. One may wonder why the Sunday labour question was not dealt with directly and immediately by the Parliament of Canada. But, whatever the reason be, it is for the Court to explain and as far as possible to render effective the joint legislation (suggestive on the one hand and responsive on the other), so that by co-operation the desired end may be reached of securing one day of periodical rest.

The scheme of this twofold legislation is not to be regarded as a delegation of legislative power in a matter of criminal law to a body having no capacity to legislate criminally, but rather the designation by the Dominion of a legislative agency to decide whether it is expedient to enact a law for the regulation of the Lord's Day in its secular aspect, as to railways entirely within the Province, and a legislative report being made by an appropriate enactment, then to give full legal force and efficacy to such provincial action by accepting it and assuming responsibility for it as if it were a Dominion statute. The statute of the Province indicates the policy acceptable to the Province, and the Dominion says "be it so." In this regard, the legislative power of the Province is no longer overridden by the Dominion, but is recognised as a power properly exercised. It appears to me that the Dominion may relax its hold on any internal provincial railway and lay it open in a defined degree to be regulated or controlled by the local Legislature.

As I read the opinion given upon the special case in 35 S.C.R., the Court intimates that a Province has no power to restrict the operation of companies of their own creation to six days in each week because that restriction seems to be within the views expressed in the Privy Council and to be regarded as a matter of criminal law, *ultra vires* of the Province. See pp. 582 and 592, in answer to question 5.

This point, in this limited way, as to purely provincial corporations, was not before the Lords of the Privy Council, and their guarded deliverance would rather imply that this was one of the questions not passed upon. However, with all proper deference to the Judges of the Supreme Court, I cannot regard the opinion expressed on this head as a judgment binding on me, nor can I accept it as the law. I fail to see why the Province may not

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legally and validly incorporate a railway company in Ontario as a local undertaking with power to operate only on six days of the week. A refusal to allow work on the Sunday would not in this connection savour of the criminal law, but would be a supposed or an accepted salutary rule of conduct imposed for the benefit of the workmen and the better working of the road itself. If the company accept such a charter with such a limitation, wherein is the Constitutional Act offended against? The legislative working of the whole constitution in these cases of apparent conflict or discrepancy is to be accommodated or adjusted by the expedient worked out in the *Hodge* case and others in the same direction: *Hodge* v. *The Queen* (1883), 9 App. Cas. 117; *Fielding* v. *Thomas*, [1896] A.C. 600, 611; *Grand Trunk R.W. Co.* v. *Attorney-General of Canada*, [1907] A.C. 65, 68. The aspect of the law takes colour from its surroundings, *i.e.*, the nature of the legislation and the object aimed at. Here is no general criminal intent, but the incorporation of a local concern, over which the Province has plenary power of legislation, covering all things and conditions considered expedient and desirable by the incorporating power.

After the disposal of the special case in the Supreme Court, the Province of Ontario passed their railway law, which by its enactments imposes this limitation upon electric railways, 6 Edw. VII. ch. 30, sec. 193, and that has not been questioned as being *ultra vires*. The power to legislate as to the Lord's Day by the provincial law-makers, as to railways subject to their legislative authority, is recognised in the Dominion Lord's Day Act, R.S.C. 1906, ch. 153, sec. 3 (2).

Briefly to sum up the results. It is not to be overlooked that the defendants in this case take the Dominion charter subject to the state of existing legislation. It is taken, therefore, with knowledge that the Dominion had permitted the Province to legislate as to Sunday work on local railways (despite the declaration as to the undertaking being for the public advantage of Canada), and that the Province had legislated to the effect that for six days only should the road be worked for profit, and that the executive of the Dominion, under sanction of the Parliament of the Dominion, had approved and confirmed this provincial law. How then can the defendants defend this action on the ground that the charter was not taken on this footing? Can the company be allowed thus to "approbate and reprobate"? Can the privileges of the charter be enjoyed and the conditions be repudiated?

I may add a few words as to laws having more than one aspect. Marshall, C.J., said in *Gibbons* v. *Ogden* (1824), 9 Wheat. 1, 204, that "all experience shews that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical."

Besides the constitutional cases already referred to, the point has arisen in the consideration of municipal and other by-laws.

In *Calder and Hebble Navigation Co.* v. *Pilling* (1845), 14 M. & W. 76, a by-law that a canal was not to be used on Sundays was held invalid because not warranted by the general power of a local statute to make by-laws for the good government of the company and for the good and orderly using of the navigation and the work—governing of the bargemen, etc. The by-law was held to be one relating to matters which ought to be left to the general laws of the land as to the observance of Sunday. Rolfe, B., said that under peculiar circumstances the by-law might be upheld; as if, for instance, the company were to come to the conclusion that, in order to secure a due supply of water in the canal, it was necessary to have no navigation on it during one day out of seven in order to make navigation good during the other six, and then Sunday might be taken as the fittest day to close the canal: p. 90. In other words, though the by-law would be bad if made for merely moral purposes, *pro salute animarum*, it might be upheld if susceptible of another construction, and if regarded in a different aspect, bringing it within the competence of the corporation or law-making body.

Another illustration of this double aspect in a by-law, as to whether it deals with the morals of the community rather than with the good rule and government of the locality, may be found in *Thomas* v. *Sutters*, [1900] 1 Ch. 10, 15. In that case *Calder and Hebble Navigation Co.* v. *Pilling*, 14 M. & W. 76, is discussed, and it is pointed out that, while a navigation company may have no legal concern about the behaviour or morals of those who use it, the power of a municipality dealing with the good order of their streets goes far beyond that: pp. 16, 17. So there is a further advance in power and responsibility when the field of action is laid open to a legislative body such as one of the Provinces of the Dominion. In this last case every intendment will be made to support the legislation, and it is not the business of the Courts to pass upon the wisdom or reasonableness of the enactment, but simply to say whether it is fairly within the area of its constitutional powers.

By the legislation of the Dominion it has been left to the Province to say whether any condition shall be imposed upon local electric railways in regard to the working of the road on Sundays. And the response made by the Province is, that it is fitting that there should be one day of rest in seven, and that Sunday is the fittest day for that purpose. Good reasons may easily be found for such a policy, having regard to Sunday as a secular institution; public economy requires for sanitary reasons a periodical day of rest from labour, and this salutary rule may rightly and legally be imposed upon corporations which owe their existence to the provincial power which so legislates and creates. This is not, therefore, a general law extending to the public at large—to all

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classes and conditions of men—but to a corporate body over which the local Legislature has, inherently or by delegation from the Dominion, legislative plenary power as to its conduct, governance, and operation.

The late decision of the Supreme Court on Sunday law in *Ouimet* v. *Bazin* (1912), 3 D.L.R. 593, is not in point for the present case. It is distinguishable both because it purports to be a general law framed for all persons, and because the case did not involve the question of local corporations over which the Province has constitutional power and competence.

The legislation is not to be regarded as a section of the criminal law of Canada, but as a particular penal law intended for the regulation of local electric railways within the Province.

So viewed, I would uphold the impeached legislation as *intra vires*, and would award to the plaintiff the penalties claimed.

There should be no exemption as to the day on which the mail was carried. The cars were not run for the purpose of carrying the mail, but the mail was carried as a favour because the cars ran that Sunday.

Costs to the plaintiff.

Judgment for plaintiff.

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RENAUD v. THIBERT.

Ontario Divisional Court, Meredith, C.J.C.P., Teetzel and Kelly, JJ. August 20, 1912.

1. STATUTES (§ II C—120)—CONSTRUCTION—RE-ENACTING STATUTES—DECLARATION AS TO LAW PREVIOUSLY LAID DOWN—INTENTION.

The effect of the amendment to the Division Courts Act, 4 Edw. VII. (Ont.) ch. 12, sec. 1, respecting claims the amount of which is ascertained by the signature of the defendant (see now 10 Edw. VII. (Ont.) ch. 32, sec. 62), was to declare the law as previously laid down, and it was not intended to narrow the jurisdiction already conferred.

[*Kreutziger* v. *Brox*, 32 O.R. 418, referred to.]

2. COURTS (§ II A 3—160)—JURISDICTION OF DIVISION COURTS—AMOUNT ASCERTAINED BY SIGNATURE—10 EDW. VII. (ONT.) CH. 32, SEC. 62, SUB-SEC. (1), CLAUSE (*d*).

Clause (*d*) of sub-sec. (1) of sec. 62 of the Division Courts Act, 10 Edw. VII. (Ont.) ch. 32, has reference to cases where, after production of the document and proof of the signature, something further is necessary to shew the liability of the defendant thereunder, such as proof of the fulfilment of a condition on which the document was to take effect, and does not apply to a case in which evidence is necessary to establish the plaintiff's status with reference to the document.

3. COURTS (§ II A 3—160)—JURISDICTION OF DIVISION COURTS—ACTION ON A COVENANT IN A MORTGAGE—10 EDW. VII. (ONT.) CH. 32, SEC. 62.

The amount of the claim of a mortgagee upon the covenant for payment in the mortgage is ascertained by the signature of the defendant within the meaning of sec. 62 of the Division Courts Act, 10

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Edw. VII. ch. 32, in spite of the fact that, in order to establish his right to sue in his own name, the plaintiff must establish by evidence other than documentary that an alleged assignment of the mortgage, though absolute in form, was only by way of collateral security.

Statement

APPEAL by the defendant from the judgment of the Junior Judge of the County Court of the County of Essex, in favour of the plaintiff, for the recovery of $260, in a Division Court action upon a covenant in a mortgage made by the defendant to the plaintiff.

The mortgage had been assigned by the plaintiff to one Meloche, by an assignment absolute in form, but which, as the trial Judge found, was not intended to be absolute, but a collateral security only for an advance by Meloche, who was made a defendant in the action.

At the trial, the plaintiff produced a document purporting to be a reassignment of the mortgage from Meloche to the plaintiff, but failed to prove that it was executed by Meloche or under his authority.

The appeal was dismissed.

Argument

J. H. Rodd, for the defendant, argued that the Division Court had no jurisdiction to try the action, as the amount of the claim was not ascertained by the signature of the defendant, within the meaning of the statute 10 Edw. VII. ch. 32, sec. 62—other than documentary evidence being required in order to shew that the assignment to Meloche was merely collateral. He also argued that the claim was barred by the Statute of Limitations, and that the order of the Judge directing a new trial, after a judgment by default, had been unduly limited, and was irregular.

F. D. Davis, for the plaintiff, argued that the new trial had not been limited, as alleged, to proving the re-assignment of the mortgage, which it was unnecessary for the plaintiff to maintain, as the original assignment was only by way of collateral security, and he was entitled to prove that fact, as he had done, without ousting the jurisdiction. He referred to *Dawson* v. *Graham* (1877), 41 U.C.R. 532; *Prittie* v. *Connecticut Fire Insurance Co.* (1896), 23 A.R. 449, 453; *Hostrawser* v. *Robinson* (1873), 23 C.P. 350. [MEREDITH, C.J., referred to *Slater* v. *Laberee* (1905), 9 O.L.R. 545].

Rodd, in reply, cited *Ward* v. *Hughes* (1884), 8 O.R. 138, at pp. 143, 144.

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August 20, 1912. TEETZEL, J. (after setting out the facts as above):—The only question upon which judgment was reserved at the argument was, whether the learned Judge had jurisdiction to try the action under sec. 62 of the Division Courts Act, 10 Edw. VII. ch. 32.

Jurisdiction of the Division Court was first extended to claims

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for $200 by 43 Vict. ch. 8, sec. 2, and the extended jurisdiction was made to embrace "all claims for the recovery of a debt or money demand, the amount or balance of which does not exceed $200, and the amount or original amount of the claim is ascertained by the signature of the defendant or of the person whom, as executor or administrator, the defendant represents."

This provision was amended by 56 Vict. ch. 15, sec. 2, by making a provision that interest accumulated upon any such claim should not be included in determining the question of jurisdiction, but that the same might be recovered in addition to the claim, notwithstanding that the interest and the amount of the claim so ascertained together exceed $200.

There were many conflicting decisions as to the principle of construction of the word "ascertained" in the Act conferring the extended jurisdiction, and the leading ones are reviewed in *Kreutziger* v. *Brox* (1900), 32 O.R. 418, where the learned Chancellor, in delivering the judgment of a Divisional Court, lays down the following as the proper construction to be applied: "The amount of the claim is ascertained by the signature of the defendant if it is thereby *made certain, i.e.*, if upon proof of the signature the liability is established. If other and extrinsic evidence is required, such as to shew completion of the contract—in the case of a signed building contract to pay so much for a house—the stipulated price is not ascertained by the mere evidence of contract. 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."

By 4 Edw. VII. ch. 12, sec. 1, the Act was amended by adding the following section: "72*a*. The amount or original amount of the claim shall not be deemed to be ascertained by the signature of the defendant or of the person whom, as executor or administrator, the defendant represents within the meaning of clause (*d*) of sub-section 1 of section 72, when in order to establish the claim of the plaintiff or the amount which he is entitled to recover, it is necessary for him to give other and extrinsic evidence beyond the mere production of a document and the proof of the signature to it."

The effect of this section is, apparently, to declare the law to be as laid down in *Kreutziger* v. *Brox*; but it clearly, I think, was not intended to narrow the jurisdiction already conferred.

In sec. 62 of the revised Division Courts Act, *supra*, the language of the amendment of 1904 is altered by omitting the words "in order to establish the claim of the plaintiff or the amount which he is entitled to recover," and it now reads: "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."

The presence in the statute of 1904 of the words omitted in 1910 led to the suggestion in the argument of *Slater* v. *Laberee* (1905), 9 O.L.R. 545, that the presence of those words was intended to limit the jurisdiction of the Division Court in a case of that kind; but in that case, which was an action upon a promissory note, it was held that where the production of the note and the protest and the proof of the signature would *primâ facie* entitle the plaintiff to recover, the case is brought within the jurisdiction of the Division Court; and at p. 547, the judgment proceeds: "It is not for us to determine whether upon proof of the endorsement without more the plaintiff would be entitled to recover. If the plaintiff is not entitled to recover without more, then, if it should become necessary for the learned Judge to enter upon a further inquiry and to take evidence for the purpose of shewing some ground for making the defendant liable, in all probability his jurisdiction would be ousted and he would be bound to stop the further trial of the action; but upon the first question, that is, whether upon the face of the instrument the defendant is liable, that is for the Division Court and not for us." And further on: "The order must be framed so as to make it clear that we are not directing a trial if extrinsic evidence is necessary in order to make the defendant liable."

Now in this case it is plain that upon the production of the mortgage signed by the defendant, and the time for payment thereunder having passed, *the defendant is primâ facie liable to the owner of the mortgage*, and it would not be necessary for the plaintiff to give other or extrinsic evidence beyond the production of the mortgage and the proof of the defendant's signature in order that the amount of such liability might be said to be "ascertained."

The question in this case is, does the fact that, in order to establish the plaintiff's right to sue in his name on the covenant, he must establish by evidence other than documentary that the assignment was only by way of collateral security, oust the jurisdiction of the Division Court? I am of opinion that it does not.

It seems to me that, in making the provision as to proof, it was the ascertainment of the defendant's liability under a document and the amount of such liability that the Legislature had in view, and not the matter of the plaintiff's interest in or right to the document by which the same are ascertained.

In every action upon a document, if the plaintiff does not appear on the face of it as the person entitled, he must establish his title by other evidence, which may not always be documentary. The holder of a note, in an action against the payee as endorser, would have to prove by oral evidence the facts of presentment

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and dishonour, in the absence of a notarial certificate of those facts. A surviving member of a partnership, suing in his own name upon a note or other written agreement for payment of money, would have to prove the death of the other members of the firm to shew his title by operation of law.

Besides these instances and cases like the one now being considered, it may often happen that a plaintiff cannot establish his title to the document sued on by documentary evidence only. To hold that he cannot, for that reason, avail himself of the increased jurisdiction of the Division Court, notwithstanding that he is able to ascertain and establish the defendant's liability and the amount thereof under the document, by its production and proof of his signature, would be to make the statute a dead letter in many cases.

Once the production of the document and proof of its execution establish the liability of the defendant to the owner thereof and ascertain the amount of such liability without the necessity of other and extrinsic evidence to establish either, I think there is nothing in the statute or in any of the cases decided upon it which suggests that evidence to establish the plaintiff's title would be "other and extrinsic evidence" in contemplation of the statute. The appeal should be dismissed with costs.

Kelly, J.

KELLY, J.:—The question for determination in this appeal is, whether, under the circumstances, there was jurisdiction, under sec. 62 of the Division Courts Act, 10 Edw. VII. ch. 32, to try the action in the Division Court.

By that section jurisdiction is given to 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

"(i) ascertained by the signature of the defendant or of the person whom as executor or administrator he represents or

"(ii) the balance of an amount not exceeding $200, which amount is so ascertained," etc.

The section also declares that 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.

This, in my view, has reference to cases where, the document being produced and the signature proven, something further is necessary to shew the liability of the defendant thereunder—such, for instance, as proving the fulfilment of a condition on which the document was to take effect—and does not apply to evidence necessary to establish the plaintiff's status with reference to the document.

If the document be produced, and if the signature of the defendant, or of the person whom as executor or administrator

he represents, be proven, and if there be no further evidence necessary to shew the completion of the transaction, so far as the person signing it is concerned, then there is an ascertainment within the meaning and intention of sec. 62.

Giving this interpretation to that section, I am of opinion that the appellant cannot succeed, and that the appeal should, therefore, be dismissed with costs.

MEREDITH, C.J.:—I agree in the conclusion to which my learned brothers have come. Meredith, C.J.

Appeal dismissed.

ZOCK v. CLAYTON.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Riddell, JJ. July 17, 1912.

1. PUBLIC LANDS (§ II—23)—CANCELLATION OF CROWN PATENT—ADDING ATTORNEY-GENERAL AS PARTY INTERVENING.

Judgment should be withheld until the Attorney-General of the province is given an opportunity to intervene so as to claim on behalf of the Crown the cancellation of a land patent as wrongfully obtained from the lands department in an appeal by the defendant from the judgment of the trial judge in favour of the plaintiff in an action for a declaration that the latter was the owner in fee of a certain island and for an injunction restraining the defendants from entering thereon, where the evidence shewed that the plaintiff's predecessor in title to the island, who made application to the Minister of Lands, for an island in a lake, stated that he wanted the largest island therein, but being misled by a departmental map, he had erroneously described it in his former application as being intersected by a certain line as indicated on such map, that a patent was issued to him for a different island, described as containing two and one-half acres; that he took and held possession of the largest island not intersected by such line and which contained about seven acres; and that the defendant, learning some time later that there was question as to the title claimed by the plaintiff as successor in title to the alleged patentee, made application for a patent for the larger island, which was issued to him after a hearing by the Minister of Lands to which the plaintiff was a party, where the trial judge has found as a fact in the decision being appealed from that the statements made by the defendant to the lands department were made falsely and fraudulently, and that the decision of the lands department in defendant's favour had consequently been obtained by the defendant's fraud.

APPEAL by the defendants from the judgment of Latchford, J., in favour of the plaintiff, in an action for a declaration that he was the owner in fee of a certain island, and for an injunction restraining the defendants from entering thereon, and for other relief. Statement

E. D. Armour, K.C., for the defendants.

M. C. Cameron, for the plaintiff.

FALCONBRIDGE, C.J.K.B.:—The Minister of Lands, Forests and Mines, before the issue of defendant's patent, considered Falconbridge, C.J.

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and disposed of the claim arising under Zock's patent, and thereupon defendant received the certificate of title. That the Court cannot review his finding and judgment, is well settled.

But in view of the very strong opinion of the trial Judge that statements not only false, but false to the knowledge of Clayton were made by him to the department, whereby the officials were misled, and the Minister's judgment practically obtained by fraud, and of the further fact that in the present case a prior patent issued to the plaintiff, I agree that the Attorney-General should have an opportunity to intervene herein.

The plaintiff will notify him accordingly. If the Attorney-General signifies his intention not to intervene this appeal will be allowed with costs and the action dismissed with costs.

If the Attorney-General should desire to be heard or to adduce evidence or to cross-examine witnesses already called, he may be added as a party, and arrangements may be made either for re-argument or for hearing the new evidence.

Judgment will be withheld until the Attorney-General shall have determined what course he will take.

Britton, J.

BRITTON, J.:—All the material allegations in the statement of defence have, in my opinion, been established by the evidence.

The evidence before the Court shews that the Crown intended to grant, and did grant, to the defendants the island in question.

The claim of the plaintiff is that the island granted to Walter Duncan by patent No. 2803, and as to which a certificate of ownership under the Land Titles Act was obtained by the said Duncan calling the land parcel 1024, is the same island as was subsequently granted to the defendants by patent No. 3368, and as to which the defendants obtained a certificate of ownership under the Land Titles Act—describing the island as parcel 1620. The answer to plaintiff's case—apart from any question of fraud, is first, that the identity of parcels separately described as only one parcel is not established. The evidence does not satisfy me that what plaintiff got as Duncan Island is, or was intended to be the same as what the defendants got as the Clayton Wood Island. The description in grant to plaintiff's predecessor is:—

> Duncan Island, containing 2¼ acres, more or less, situate in Bolger lake opposite lots No. 20 and 21 in the 7th concession of the said township of Burton.

The description in the patent to defendants, is:—

> Clayton Wood Island, containing 7 and 1/5 acres, more or less, situate in Bolger lake, in the said township of Burton, as shewn on a plan of survey . . . a copy of which plan is attached to and forms part of the said letters patent.

It is not clear to me that any person can possibly from this plan say, with any degree of certainty, that the islands so differently described are really only one island. The plaintiffs attack the ownership of what was unquestionably conveyed to them as Clayton Wood Island—and the proof must be made by plaintiff that this very island bought and paid for by defendants had already, by another name, been bought and paid for by Duncan. The plaintiff has failed in his proof.

Second. The question of identity was raised by the plaintiff in opposition to the application of the defendants to the Minister of Lands, Forests, and Mines, for a patent for this island. An investigation was had—enquiry was made— the result of which was that the opposition of plaintiff was not effective, and the patent issued to defendants. The Minister issued his certificate. The plaintiff had caused a caution to be filed against the issue to the defendants of a certificate of title.

After the disposition of the matter by the Minister of Lands, Forests, and Mines, the plaintiff withdrew this caution and the certificate of title issued to the defendants. The question of identity seems to me as between the parties to this action is *res judicata*. As I said the act of the Crown was advisedly done. The plaintiff had full opportunity if the facts would warrant it of preventing the patent from issuing to the defendants.

Fraud in applying for the purchase of land should not be imputed where all parties interested were heard—and when there was a decision apparently on the merits.

I am of opinion that the appeal should be allowed and the action dismissed, both with costs.

Riddell, J.

RIDDELL, J.:—The learned Judge's findings of fact are, in my opinion, after a careful perusal of the evidence, entirely justified. Some of his conclusions which are complained of might, indeed, have been the other way; and, perhaps, a reading of the words used by the witnesses as they appear in cold black and white would suggest that his view of the conduct of the defendants was unduly severe; but my brother saw the witnesses and could best judge of them: and I cannot say that his conclusions are not wholly warranted.

Duncan, who had been shooting in the neighbourhood of Bolger lake, in Burton township, district of Parry Sound, and who with three others was the owner of a lot of 28 acres upon which they had a shooting camp, was desirous of buying an island in the lake. He knew quite well the island he wanted to buy, the largest Island in the lake; he saw Mr. Aubrey White (Deputy Minister of Lands Forests and Mines), told him he wanted to buy the largest island in the lake, and put in a formal application, in which, being misled by the departmental map, he

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described the island as being intersected by a certain line. The extent of the island was, by an officer of the department, estimated at 2½ acres. Duncan paid $25, the purchase-price, got his patent and then his certificate of ownership from the Local Master of Titles at Parry Sound. This all took place before the end of the year 1907. Thereafter, the island was commonly known as "Duncan Island;" and Duncan had no idea that he had not become regularly the owner of the island he had desired to buy, until April, 1909; and in the meantime, in 1908, sold to the plaintiff. The island he claims as having been patented to him is not intersected by the said line, and it contains in fact about 7½ acres, being admittedly the largest island in the lake. The defendant Clayton, hunting in the vicinity, was told by the guide Brownell that the large island was Duncan Island; Brownell suggested some difficulty in the title. Clayton then made up his mind "to play for it and take a chance in getting it any way." I do not think there is any doubt that Clayton knew perfectly well that the island was claimed by Duncan. But he put in an application for the island—Duncan was notified, as was Zock—and the Minister took the matter into his consideration, heard witnesses, and finally decided that Duncan's patent did not cover the island in question, and directed a patent for the island to issue to the defendants. Zock had in the meantime filed a caution; but, upon receiving a notice under R.S.O. 1897 ch. 138, sec. 169 (2),* he withdrew his caution. A certificate was produced whereby it appeared that the claim arising upon Zock's patent had been considered by the Commissioner and dis-

*Section 169 of ch. 138, R.S.O. 1897, is as follows:—

169. (1) When letters patent for any land situated in Muskoka, Parry Sound, Nipissing, Algoma, Manitoulin, Thunder Bay or Rainy River are issued, the same shall be forwarded to the Local Master of Titles of the district, for the purpose of the patentee being entered as the first registered owner of the land, with any necessary qualification. R.S.O. 1887, ch. 116, sec. 141 (1).

(2) Before making such entry the Local Master shall obtain from the registrar of the registry division a certificate stating what instruments, if any, have been registered affecting the land, and in case he finds that any such instrument has been registered, he shall, unless as is in the next sub-section provided, give notice to the patentee and to all other persons interested, before registering the patentee as owner; this sub-section shall only continue in force until and including the 12th day of April, 1899: R.S.O. 1887, ch. 116, ch. 141 (2); 60 Vict. ch. 21, sec. 2 (1) part.

(3) It shall not be necessary to issue a notice in respect of any instrument of which a Local Master has notice by registration or otherwise, in case by the certificate of the Commissioner or Assistant-Commissioner of Crown Lands it appears that the claim arising upon such instrument was considered by the Commissioner and disposed of before the issue of the patent; and if before the receipt of such a certificate any proceedings shall have been taken by a Local Master in respect of such instrument, he shall thereupon discontinue the same, and disallow any objection or claim founded on such instrument, and may make such adjudication as to costs as he deems just: 56 Vict. ch. 22, sec. 10 (2).

(4) In case there is no contest as to the rights of the parties the Local Master may make the requisite entry and issue his certificate; but in

posed of by him before the issue of the defendants' patent; and thereupon the defendants received their certificate of title.

The plaintiff brought his action, alleging: (1) patent to Duncan; (2) transfer to himself; (3) patent of same land to the defendants; and claimed: (a) a declaration that he is owner in fee of the island; (b) an injunction restraining the defendants from entering, etc., the same; (c) an injunction restraining the defendants from transferring or mortgaging, etc., the same; (d) costs; (e) general relief.

At the trial my learned brother gave the plaintiff his claims (a), (b), and (d) only.

The defendants now appeal.

So far as the facts are concerned, upon the evidence there can be no doubt that the Crown did grant a patent to Duncan of the island, not quite accurately described indeed. No doubt it was thought that there were only 2½ acres, instead of 7½, probably because the water had been high when the original surveyors were in the neighbourhood. The exact position topographically also was not correctly represented. But that the large island for which the patent was afterwards issued to the defendants was bought and paid for by Duncan, and that it was intended that the patent he got should cover this island, upon the evidence adduced before the trial Judge and before us, there can be no doubt.

But it is contended by the defendants that the Court cannot go behind the finding and judgment of the Minister (Commissioner). There are several cases in our own Courts in which there was a dispute between parties as to who was entitled to a patent to certain lands; and it has been invariably held that, where the Government have examined into and considered the claims of such opposing parties to receive the patent, and decided in favour of the one and issued a patent accordingly, the other cannot successfully appeal to the Court—the Court will not and cannot interfere. . . .

Boulton v. *Jeffrey* (1845), 1 E. & A. 111, is one example.

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case of a contest he shall transmit the papers to the Inspector of Titles before registering the patentee as owner, and shall otherwise proceed as provided in section 166 of this Act: R.S.O. 1887, ch. 116, sec. 141 (3).

(5) Where the Local Master to whom a patent is forwarded is aware that an instrument which is registered cannot affect the interest of the patentee, he need not give any notice on account of such instrument.

(6) Unless a caution is filed with the Master, under section 85 of this Act, no such notice need be given in respect of the sale of timber or trees when the sale is subject to a condition that the timber or trees shall be removed within a specified time, and such time has expired: 52 Vict. ch. 20, sec. 14.

(7) Letters Patent from the Crown demising lands, or Mining Rights for a term of years, or for any greater estate, which have been granted on or after the 31st day of December, 1887, or which may be hereafter granted shall be deemed to have been and to be within the provisions of this section: 60 Vict. 23, sec. 3, ch. 21, sec. 6.

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The unsuccessful claimant filed a bill in equity to have the successful one declared a trustee for him; but he failed, and would have failed even if he had shewn improvidence, etc.

In *Barnes* v. *Boomer* (1864), 10 Gr. 532, the Crown Lands Department decided that one of two applicants should receive a patent; and it was held that the Court could not interfere. There, however, it was not shewn that the Crown acted in ignorance or misapprehension.

But in *Kennedy* v. *Lawlor* (1868), 14 Gr. 224, the Court (Vankoughnet, C.), held that it had no power to review the decision of the Commissioner, and say he acted improvidently or in error or mistake.

Somewhat to the same effect is *Farmer* v. *Livingstone* (1882), 8 Can. S.C.R. 140.

But in none of these cases was there a prior patent issued to the plaintiff on the strength of which an attack was made on the defendants' patent or its validity, as in the present case.

Section 169 of R.S.O. 1897, ch. 138, which was the enactment in force at the time of the transactions in question, is relied upon by the defendants. The Local Master found Duncan's patent registered (sec. 169 (2)), and gave notice accordingly to Zock; he received a certificate under sec. 169 (3), and thereupon discontinued the proceedings and disallowed the objection and claim founded on the Zock-Duncan instruments, as was his duty under that section. The legislation, it seems to me, makes the position of the defendants under their patent and the decision of the Commissioner unassailable—and the plaintiff must get rid of that patent before he can say that the defendants have no right in the island.

"A long line of decisions has settled that an action to declare void a patent for land, on the ground that it was issued through fraud or in error or improvidence, may be maintained, and that measure of relief granted, at the suit of an individual aggrieved by the issue of such patent, and to such an action the Attorney-General as representing the Crown is not a necessary party: *Martyn* v. *Kennedy* (1853), 4 Gr. 61; *Stevens* v. *Cook* (1864), 10 Gr. 410. See also *Farah* v. *Glen Lake Mining Co.* (1908), 17 O.L.R. 1:" *per* Moss, C.J.O. in *Florence Mining Co.* v. *Cobalt Lake Mining Co.* (1909), 18 O.L.R. 275, at 284.

If it were quite clear that there is nothing more in the way of evidence, etc., available, one might now declare the defendants' patent void: but it must not be forgotten that the Commissioner has had before him witnesses and documents—perhaps he had personal knowledge or information which is not before us. It would not be proper—if the responsible advisers of the Crown desire to insist upon the propriety of the Commissioner's decision and to contend that Duncan's patent did not cover this

island—for us, in the absence of the Attorney-General and without affording him an opportunity of supporting by evidence and argument the view of his former colleague and the validity of the patent issued in accordance with such view, to decide in favour of the plaintiff. I have been careful to say that the conclusions of fact arrived at are such as are justified by the evidence before Mr. Justice Latchford and this Court: but these conclusions may be in fact quite erroneous, and by further evidence shewn to be erroneous.

I think that the Attorney-General must be given an opportunity to state and if necessary to justify the stand taken now by the Crown. If he, upon being applied to by the plaintiff, states that the Crown does not desire to intervene, the case may be disposed of upon the evidence now before the Court without further argument; if he desires to be heard in argument, such argument may be heard on some day to be arranged; if he desires to cross-examine witnesses already heard and (or) adduce further witnesses, he may be made a party to the action, all proper amendments made in the pleadings, and the trial continued before Mr. Justice Latchford at some convenient time, the evidence already taken to stand.

In the meantime this motion will be retained.

Direction accordingly.

THE COLONIAL INVESTMENT CO. v. BORLAND.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, Simmons, and Walsh, JJ. October 4, 1912.

1. BUILDING AND LOAN ASSOCIATIONS (§ III A—14)—RIGHT TO INTEREST ON MORTGAGE—OPTION OF BORROWER TO APPLY PAYMENTS ON ACCOUNT OF SHARES IN PAYMENT OF PRINCIPAL AND INTEREST.

Section 6 of the Interest Act, R.S.C. ch. 120, prevents the recovery of any interest, where a mortgage to a loan company contains a covenant for monthly payments of interest at the rate of 12 per cent. per annum, and also a proviso giving to the mortgagor the option of making certain monthly payments on account of shares in the company, subscribed for by him, which shall be accepted in full payment of principal and interest, and the proviso does not shew what is the rate of interest per annum if the method of payment thereby allowed be adopted, nor does the covenant for interest shew that the rate thereby provided for is the same, and in fact it is not the same in result as the payments under the proviso, and the mortgagor has adopted the method of payment allowed by the proviso.

2. PAYMENT (§ I—16)—MEDIUM OF—PAYMENT TO AGENT AFTER NOTICE TO PAY DIRECT—RETURN TO AGENT—RIGHT OF BORROWER TO CREDIT ON MORTGAGE.

Where a loan company notifies a borrower to make his payments direct to the company, and not to any agent, and the borrower nevertheless makes a payment to the agent, which is forwarded to the company, and the company sends it back to the agent, who does not return it to the borrower, the company, having once received the money, is accountable for it, and must credit the borrower with the amount.

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APPEAL by plaintiffs from judgment at trial in an action upon a mortgage for payment and foreclosure, reducing the rate of interest to six per cent. per annum.

The appeal was dismissed with costs.

James Short, K.C., for plaintiffs, appellants.

James Muir, for defendant, respondent.

HARVEY, C.J.:—The plaintiffs' claim is upon a mortgage for $600 in respect to which they ask for payment, foreclosure, etc. The mortgage contains the following covenant and proviso:—

> Firstly, that I, the said mortgagor, will pay to the said company the sum of six hundred dollars in gold or its equivalent at the office of the said company in the city of Winnipeg, as follows: The said principal sum of six hundred dollars to become due and be paid on the first day of July, A.D. 1917;
>
> Secondly, that I, the said mortgagor, will pay interest at the same place on the said sum at the rate of twelve per centum per annum, as well after as before maturity, by equal monthly payments on the first day of each month until the whole of the said sum and interest shall have been fully paid and satisfied, the first of such payments of interest to be made on the first day of July, 1907, all interest in arrear to become principal and to bear interest at the rate aforesaid.
>
> Provided, however, that upon payment to the said company on or before the first day in each and every month, for 120 months commencing with the first monthly payment made in respect of the said shares of the sum of 60 cents per share per month payable in respect of the said shares of stock as subscribed for by me the said mortgagor, as above recited and also the following additional payments, commencing from the date of execution hereof, the sum of forty cents per month for each one hundred dollars and in that proportion for any fraction of one hundred dollars advanced being the premium agreed to be paid by me, the mortgagor, and also interest monthly on the said principal sum at six per centum per annum, that the same shall be taken in full payment of the principal and interest above reserved, and if all other covenants provisoes and conditions herein contained are satisfied then this mortgage will be discharged.

In the statement furnished by the mortgagee to the mortgagor shewing the manner in which the amount of the loan was disbursed appear the items:—

June and July share due	$7.20
July interest on loan	3.00
Premium on loan	2.40

Whether the mortgagor had intimated his intention of paying the mortgage under the terms of the proviso or whether the company had no other form of payment in contemplation is not important in my opinion for the mortgagor did continue to make his payments under the proviso for some three years and such payments were accepted, both parties thereby accepting and concurring in the method of repayment authorized by the

proviso. The pass book supplied by the company in which the payments by the mortgagor were noted shews that monthly payments of $9 were made with a fair degree of regularity up to and including August, 1910, making a total of $345.60, of which $36, however, is disputed by the company. These entries of payments also include a sum of $21.60 made in August, 1907, which include the share dues, interest, and premium which I have already indicated were deducted by the company. Whether this amount, *e.g.*, $12.60, was really paid twice or whether the entry was made in the book simply to shew what credits the mortgagor was entitled to does not appear clear.

In November, 1910, when the plaintiffs commenced this action notwithstanding that $345.60 as shewn by the pass book or $309.60 as admitted by the plaintiffs had been paid, the statement of claim only allows a credit of $93 for interest while $242 overdue interest is claimed up to the 1st day of November, 1910, together with interest at 12 per cent. per annum from 1st November, 1910, on $761.20, the balance claimed as of November 1st. A letter from the plaintiffs' solicitors after the action was brought states that

> the amount paid on stock by the defendant has on account of non-payment been forfeited absolutely to the company and the mortgagor therefore has no right and has not been credited with the amount paid on stock so forfeited.

A more barefaced attempt to appropriate for themselves moneys paid for a particular purpose for the benefit of the payor it would be difficult to imagine and for the credit of the profession it is pleasing to note that on the argument before this Court counsel for the company made no suggestion of attempting to justify it. If one could have any doubt about the honesty of the company in offering the method of repayment set out in the proviso it would be set at rest by the company's conduct in declaring forfeited two-thirds of all the moneys received by it under this proviso. The legislatures and the Courts would fail to justify their existence if such dishonesty could be permitted to have its intended effect.

In my opinion the case is quite simply disposed of by the provisions of the Interest Act, ch. 120, R.S.C. 1906, section 6 of which provides as follows:—

> 6. Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement shewing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half yearly, not in advance.

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As already pointed out this mortgage is made payable in two ways one of which the company may insist upon, the other of which the mortgagor has the right to adopt.

But though the company could not compel payment under the terms of the proviso the mortgage is made payable in accordance with its terms quite as much as it is under the other method if the mortgagor so desires. It would be absurd to hold that because the moneys paid under it are declared to be paid in part on account of shares and in part for other purposes there is any difference in the effect, the result as provided being that such payments when made "shall be taken in full payment of the principal and interest above reserved."

The form apparently is an attempt, but as I think quite an unsuccessful one, to evade the provisions of the above section. The mortgage contains no "statement shewing the amount of the principal money and the rate of interest chargeable thereon calculated yearly or half-yearly not in advance." There is nothing in the covenant to pay the principal and interest at 12 per cent. to suggest that it is in the result the same as far as amount is concerned as the payments under the proviso and a slight computation shews that it is not in fact. Moreover it is not a compliance with the statute since it provides for interest monthly and not "yearly or half-yearly not in advance."

The mortgage therefore comes within section 6 and as there is no statement as required by the terms of that section no interest whatever is recoverable.

The learned trial Judge without deciding the questions I have dealt with reduced the rate of interest to 6 per cent. being the amount he found the defendant had been told and supposed he was to pay, and counsel for the defendant on this appeal does not ask for any further deduction. There is only one other question involved and that is the amount for which the defendant is entitled to credit and in this respect I think the appeal fails. The moneys which were paid were paid for the purpose of repaying the principal and interest secured by the mortgage and were so received by the mortgagees and the mortgagor is entitled to credit for them. Of the amounts paid by the defendant $36 which was paid to the company's agent and by him transmitted to the company is not now in the company's hands having been returned to the agent, who, however, did not return it to the defendant.

The company's excuse for not keeping this money was that they had notified the defendant to pay direct to head office and had notified the agent not to receive it. In my opinion this did not justify the company in not accepting the money and giving credit for it when it was received at head office. If the money had been paid to the agent after such notice and not handed

over to the company then the defendant would not be entitled to credit but if the defendant saw fit to make any one whether he was the company's agent or not his agent to pay the company, I see no reason why he should not be at liberty to do so, and if the company received money on the defendant's account as it did it had no right to return it to anyone but the defendant or some one authorized to receive it and must be held accountable for it. The money was paid by the agent's cheque but no objection was taken to the form of payment and it does not appear nor is it suggested that the cheque was not good or perhaps even an accepted one, therefore nothing hinges on that.

The appeal should be dismissed with costs.

SCOTT, STUART, SIMMONS, and WALSH, JJ., concurred in the judgment of HARVEY, C.J.

Appeal dismissed.

HERRON v. TORONTO R. CO.

Ontario Divisional Court, Mulock, C.J.Ex.D., Clute and Riddell, JJ. September 12, 1912.

1. NEW TRIAL (§ III B—15)—INCONSISTENT AND UNCERTAIN FINDINGS OF JURY—PERSONAL INJURY—NEGLIGENCE.

In a personal injury action arising from a car colliding with a rig, where the jury finds (*a*) that by reasonable care plaintiff, had he seen that he had sufficient time to cross the tracks, could have avoided the accident, (*b*) that by reasonable care defendant's motorman had he applied the brakes when he first noticed plaintiff heading across the tracks could have avoided the accident, (*c*) that the accident was caused by negligence of *both* plaintiff and defendant, such findings are inconsistent and uncertain and a ground for a new trial.

2. NEW TRIAL (§ III B—15)—VAGUE AND AMBIGUOUS FINDINGS—JURY PERPLEXED—PERSONAL INJURY—NEGLIGENCE.

In a personal injury case arising from a street car colliding with a rig, where the jury upon their first return into Court found under one question that after defendants' motorman saw that the plaintiff was about to drive across the tracks the motorman could *not* by reasonable care have avoided the accident, while finding under another question that the motorman was guilty of negligence in waiting too late before applying the brakes, and while finding under a third question that the motorman was negligent in not applying the brakes when he first noticed the plaintiff heading across the tracks, and where, upon proper comment by the trial Judge on such contradictory findings, the perplexed jury struck out the answers to the two questions first mentioned still leaving doubt as to what they meant by the answer to the third question, such findings are vague and ambiguous and a ground for a new trial.

3. STREET RAILWAYS (§ III C—42)—COLLISION WITH VEHICLE—ULTIMATE NEGLIGENCE.

In a personal injury case arising from a street car colliding with a rig, where the trial Judge submits the question of ultimate negligence, but the jury did not deal with it (or there is doubt as to whether they did deal with it), even in a case where, upon unravelling confused jury findings, the effect may be that both were to blame

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and that the motorman after he saw the plaintiff in danger could not have stopped the car, but there is no finding by the jury as to whether the motorman could by reasonable diligence have avoided the accident *after* he should have known that the plaintiff was about to cross in front of the car, and where the finding at most is that the motorman could not have stopped the car after he *saw* (not might have seen) the plaintiff, such findings are incomplete and ground for a new trial to the plaintiff if there was evidence before the jury sufficient to support a finding, had there been one, of ultimate negligence on the part of the defendant.

4. NEW TRIAL (§ III B—15)—JURY FINDINGS—PERPLEXED JURY—UNCERTAINTY.

Where the result of jury findings and of what takes place at the trial with reference to their answers and to questions put by trial Judge (both written and oral) leaves uncertainty as to what they meant, a new trial will be granted.

Statement

APPEAL by the plaintiff from the judgment of MEREDITH, C.J. C.P., after trial with a jury, dismissing the action with costs.

The action was to recover damages for personal injuries sustained by the plaintiff, by reason of a car of the defendants striking the wheel of a buggy in which he was driving, whereby he was thrown out and hurt.

The appeal was allowed, and a new trial ordered, RIDDELL, J., dissenting.

Alexander MacGregor, for the plaintiff.

D. L. McCarthy, K.C., for the defendants.

Clute, J.

CLUTE, J.:—The accident occurred at the junction of Margueretta and Dundas streets, by a collision between a west bound car and the plaintiff's rig, whereby the plaintiff was thrown to the ground and received the injuries complained of.

The plaintiff had driven down to a bicycle shop on the south side of Dundas street, and had left his horse facing west. On coming out of the shop he picked up the weight which held the horse, put it into the buggy and waited until a car went east. He then got into the buggy, when he saw another east bound car and waited until that car went by. He says that he looked both ways before crossing over and did not see any west bound car. He judged that the east bound car was about 30 feet away from the buggy when he started to cross. It does not appear that he looked to the east again before crossing, and he says that he never "knew anything" until he heard the crash.

He further states that there was also another west bound car passed, and that the first west bound car and the first east bound car crossed "just back of the buggy." That is, as I understand the evidence, there were two east bound cars and two west bound cars, and he was struck by the second west bound car.

Many witnesses were called on both sides, and as pointed out by the trial Judge, there is not only a conflict of evidence, but

a great difference of opinion among the witnesses for the plaintiff, and also differences of opinion between the witnesses for the defendants.

The case was very carefully presented to the jury and questions submitted. These questions and answers, as they were first brought in, and what took place subsequently are reported as follows:—

"His Lordship reads the jury's answers to the questions as follows:—

"Q. 1. Was the motorman guilty of negligence? A. Yes.

"Q. 2. If so, of what negligence? A. By not applying the brakes when he first noticed plaintiff heading across the tracks.

"Q. 3. Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. Yes.

"Q. 4. If he could, in what respect was he negligent? A. In not seeing he had sufficent time to cross to the north side of the tracks in safety.

"Q. 5. Was the accident caused (*a*) by the negligence of the motorman? (*b*) or by the negligence of the plaintiff? (*c*) or by the negligence of both? A. Both.

"Q. 6. Could the motorman, after he saw the plaintiff was about to drive across the tracks, by the exercise of reasonable care have avoided the accident? A. No.

"Q. 7. If he could, of what negligence was he guilty? A. In waiting until too late before applying the brakes.

"Q. 8. At what sum do you assess the plaintiff's damages? A. $800."

The learned Chief Justice was not satisfied with the answers, and the following is the official report of what then took place:—

"His Lordship: Your answer to the 6th is inconsistent with the answer to the 7th.

"Mr. Dewart (counsel for the defendants): I submit not.

"His Lordship: Plainly so. You find they are both guilty of negligence, and you find that the motorman was guilty in waiting till too late before applying the brakes. Now what does that mean in connection with 6?

"Foreman of Jury: He was too near to the man in the rig to stop to avoid the accident.

"His Lordship: Then why do you say that he was negligent in waiting until too late before applying the brakes? One or other of those answers is wrong, it strikes me, or they are inconsistent with one another. Now, what is it you mean? Just state generally what idea you have in all this answer. Just state generally what you think was the position of the parties and the negligence of both.

"Foreman: According to the evidence, he had not a chance to do anything but what he did.

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"His Lordship: Then you should have answered this 7th question—you should not have answered the way you did—'He was negligent in not applying the brakes'—because that means that, after he became aware that the plaintiff was in danger, he might have avoided the accident by putting on the brakes or by doing something. Is that what you mean, or do you mean the contrary?

"Foreman: We mean the contrary—that he could not have done it in the time.

"His Lordship: Then your 7th answer should be struck out. Now, which of these answers is to be taken as correct?

"Foreman: We said he could not have avoided the accident when he noticed it.

"His Lordship: Then the answer to the 7th should be struck out; because you say in effect that he could have avoided the accident if he had not waited until too late. I think you had better go back, consider it, and come back again. And make sure what you really mean.

"The jury then retired and after some time return again to the court-room.

They had struck out the answers to questions 6 and 7 altogether, but it was not noticed that they had struck out the answer to question 6. The report continues:—

"His Lordship: The only change is taking out the answer to 7. What you say in effect is, that both these people were to blame, and that the motorman, after he saw that the plaintiff was in danger, could not have stopped his car. That is the effect of it?

"The Foreman: Yes.

"His Lordship: Mr. MacGregor, I must endorse the record dismissing this action. The jury have been rather friendly to the railway company. I cannot help it.

"Mr. MacGregor (counsel for the plaintiff) asks for a stay.

"His Lordship: I had not observed that the jury had struck out the 'No' in answer to the 6th question. But I have asked them if their idea was that the motorman after he saw the position in which the plaintiff was could not, by the exercise of reasonable care, have prevented the accident. They said that was their view. I will give you a stay."

It will be seen that the jury found that the motorman was guilty of negligence in not applying the brakes when he first noticed the plaintiff heading across the tracks; that the plaintiff, by the exercise of reasonable care, could have avoided the accident; and that he was negligent in not seeing that he had sufficient time to cross to the north side of the track in safety, meaning, as I take it, that he should have seen that he had not sufficient time to cross to the north in safety, and

should not, therefore, have attempted it. They further say that the accident was caused by the negligence of both.

When they first returned to Court they answered the 6th question ("Could the motorman after he saw the plaintiff was about to drive across the track, by the exercise of reasonable care have avoided the accident?") "No." To the 7th, "if he could, of what negligence was he guilty?" they answered: "In waiting until too late before applying the brakes." The 6th and 7th questions being contradictory they retired, and on their return they had struck out the answers to both the 6th and 7th questions. The trial Judge not observing at the moment that the answer to No. 6 was struck out, said: "What you say in effect is that both these people were to blame, and that the motorman, after he saw the plaintiff was in danger, could not have stopped the car," to which the foreman answered, "Yes." And his Lordship said: "I must endorse the record dismissing this action." His ordship then said, "I had not observed that the jury had struck out the 'No' in answer to question 6, but I have asked them if their idea was that the motorman, after he saw the position in which the plaintiff was, could not, by the exercise of reasonable care have avoided the accident. They said that was their view."

On the argument the notes did not contain the word "not" in the two places above indicated, but this has since been corrected by the reporter with the approval of the trial Judge.

The question of ultimate negligence was clearly submitted to the jury; but, as the answers now stand, the jury have not dealt with that question, unless it be that their answer to the second question was intended to deal with the question of ultimate negligence.

As the trial Judge points out

> in the pleadings there is no statement as to the specific acts of negligence which the plaintiff charges the defendants' servants to have been guilty of; but as I would gather from the course of the trial and from the observations of the learned counsel for the plaintiff, the case is put upon the ground that there was a duty resting upon the motorman of the car, which he was propelling, the east bound car, somewhere about Margueretta street, to sound the gong for the purpose of warning people who were about to cross, warning people who were in the lawful exercise of their rights, travelling on foot or in vehicles; that the motorman did not do that; that in consequence of that the plaintiff was lulled into a feeling of security, had a right to expect that no car was approaching from the east, and that he might have safely crossed the track.

Upon that question so submitted the jury did not find against the defendants. That, of course, would have been original negligence had the jury so found. His Lordship then proceeds:

> Then another ground is that when the motorman saw, as it seemed

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to me he admitted he saw, the plaintiff's horse on the track in the act of crossing he did not sound the gong then to warn the man.

That also would be original negligence, and on this the jury have made no finding against the defendants.

The third ground is that, even if the plaintiff was, as the defendants contend he was, guilty of negligence in the way he attempted to cross the track, the motorman saw him, or ought to have seen him in sufficient time to enable him, if he had used the appliances which he had at his command as he ought to have used them, to have stopped the car and to have avoided the collision.

This is a charge of ultimate negligence, and it has not reference to the ringing of the gong which covered the first two points, but has reference exclusively to what the motorman ought to have done after the plaintiff had been guilty of his act of negligence in attempting to cross the track.

Having regard then to the manner in which these several questions were put and the answer to No. 2, it appears to me that that has reference to this third ground—to the ultimate negligence: If that be so, the effect of this answer would give the plaintiff the right to recover notwithstanding the negligence of the defendants.

By the answer to question 5, however, both plaintiff and defendants were guilty of negligence. If the answer to question 2 was not intended by the jury to refer to ultimate negligence, then the jury have not dealt with that question, the answers to 6 and 7 having both been struck out on the second occasion when they retired, unless they sufficiently answered that questions on their return.

The jury, during the course of conversation, said clearly enough that the motorman could not have avoided the accident when he noticed it; that is, I take it, when he saw the plaintiff. But, on their second return, when the answers to questions 6 and 7 had been struck out, only this was said: "The only change is in taking out the answer to 7. What you say in effect is, that both these people were to blame; that the motorman, after he saw that the plaintiff was in danger, could not have stopped his car." It does not say that the motorman could not, had he exercised reasonable diligence, have avoided the accident after it appeared quite clear that the plaintiff was about to cross in front of the car, but it only says that he could not have stopped the car after *he saw* (not might have seen) the plaintiff. Of course, if there is no evidence that ought to have been submitted to the jury that the motorman, by the exercise of reasonable diligence, ought to have seen the plaintiff's rig in time to stop the car, then the judgment should stand; but, if it appears that there is evidence which would support such finding—that is, of ultimate negligence—then that question has not been answered,

and the case ought to go back for trial. It, therefore, remains to examine the evidence upon this point. It is apparent from the judgment that the trial Judge took the view that there was evidence which could properly be submitted on the question of ultimate negligence; and, in my opinion, after a careful reading of the evidence, he was right in this view. I shall not quote all the evidence bearing upon this question, but sufficient as I think to shew that there was ample evidence to support a finding, had there been one, on the question of ultimate negligence; and, as pointed out by the learned Chief Justice, the strongest evidence supporting this view was given by some of the witnesses for the defendants. A fair summary may be found in the charge.

James Caines, with his wife, was waiting for a car at the north-east corner of Dundas and Margueretta streets. He says Herron was just about turning to come up Margueretta street.

His horse seemed to be about the south rail of the track, as far as I could judge.

Q. Which track? A. South track.

Q. When he was there, where was this east-bound car? A. It was east of us about a couple of car lengths. That is, the car was east of the east side of Margueretta street about two car-lengths when the plaintiff turned his horse up Margueretta street.

Q. What occurred next? A. Well, I saw Mr. Herron and he seemed to be straightening up to come up Margueretta street. To us he seemed to be coming across the track all right, but if the car had been going anyway reasonable Mr. Herron had lots of time to cross the track coming up Margueretta street, but before he had time the car struck him and he was upset. This witness is positive that the gong did not ring.

Q. Where was the car when it struck Mr. Herron as regards Margueretta and Dundas streets? A. It was west of Margueretta, on the west side of the street; very close to the west side of the street.

Q. Would you give us as clear an idea as you can of where the car was when it stopped? A. Well, when that car stopped the east end of that west bound car was about in line with the fence line of the west side of Margueretta street.

Q. Were the brakes applied? A. The brakes were not applied before they struck the man. The car was going at speed when it struck the man, and it brought him about half a car length before it came to a stop.

On cross-examination he says:—

A. I saw him on the opposite side of the street just turning to come up Margueretta street. His horse's head was about the south rail of the south track.

Q. Was the horse's head east or west of the body of the rig? A. His horse seemed to be turned up Margueretta street.

Q. And at that time when you saw him in that position with his horse on the south rails and facing north towards the west side of Margueretta street, how far was the car away? A. About two car lengths.

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Q. And that is the time you noticed the car? A. That is the time I noticed the car.

His wife, Caroline Caines, says:—

Q. Did it slow down before it struck him? A. No, it did not.

Buchner, who has the bicycle shop referred to, says:—

Q. Your shop is opposite the west end of Margueretta street? A. Yes.

Q. What did you first know of the matter? A. Well, it was when I heard the fender, as I suppose, drop on the rail.

Q. Where was the car, do you say, when the fender dropped on the rail? A. It was somewhere about the centre of Margueretta street, facing——

Q. On Dundas street? A. Yes.

Q. Then what occurred? A. Well, I heard—it seemed to me when the fender dropped that they used only the ordinary brake just then. Then there was another brake seemed to come on; there was a terrible rumbling, like applying the other brake.

Pearn was a passenger on the car which struck the plaintiff's rig. He says:—

A. I was standing about 8 or 10 feet from the front end of the car in the aisle facing the north.

Q. What did you first know about the matter? A. The first I knew about it was the crash.

Q. Was there any gong rung before the crash? A. There was no gong rung.

Q. Are you sure of that? A. Positively sure.

John Foster was driving east on Dundas street, west of Margueretta street. He says:—

Where were you relatively to Margueretta street? How near was the car that struck the rig to you when you saw it strike the rig? A. I was almost by the side of it.

Q. Where was the car when it struck the rig? A. Just in the middle of Margueretta street.

Q. How far would you say the west bound car was east of Mr. Herron when he went to cross the track? A. About 75 feet.

Q. Are you sure of that? A. Yes.

Q. About where, as regards Margueretta street, did these two cars pass one another? How far east? A. About 90 feet.

On cross-examination he said:—

Q. He was in the act of crossing at the time that you say you saw the car coming west, 75 feet away? A. Yes.

Q. How far had he got with his horse at that time? A. The horse had crossed over the tracks and just as the buggy was on the track.

Q. That was when you saw the east bound car coming 75 feet away, was it? A. No, the west bound car.

Q. It was when the west bound car was 75 feet away, was that the time his horse had just got across the tracks and his buggy was on the tracks? A. Yes.

For the defence the motorman Thompson was asked:—

Q. What was the first that you saw of Mr. Herron and his rig? A. Well, I had just been after passing a car going east bound. Just east of Margueretta street. Just on Margueretta at the east. I sounded the gong approaching the car and just as the car had got clear of me I noticed Mr. Herron's horse starting to come across, and I sounded the gong again. I saw that he was not going to stop. I would not say that I sounded the gong after that, but I put my best energies towards stopping the car, and I thought that I was going to succeed till I was about to hit him. Mr. Herron never seemed to see me until I was within 4 feet of him and then he looked around at the time.

Q. How far then was he away from you in a direction east and west, at the time that you saw him first? A. Well, I was approaching Margueretta street when I saw his horse's head first. That was after the horse's head had passed.

The next question and answer is inconsistent with this:—

Q. Give me the distance? A. I could not swear to exactly the feet; because I cannot. I suppose probably to give an estimate I would be 8 or 10 feet into Margueretta street; but I might be mistaken.

Q. How far back of that was it that you had passed the east bound car? A. Well, I would be just passing the other car then. The car would just be east of the line I would judge.

Q. And where did you say the car struck the rig? A. Somewhere about 4 feet east of the west line of Margueretta street.

Q. How far did it take you to stop this car? A. About a car-length I consider. I do not know how long a car is, about 35 feet I suppose.

Q. Have you ever stopped in shorter? A. Well, I might if I was going slow.

Q. If you had been going slower you might have stopped quicker? A. Yes.

Q. Which way was the head of the horse facing when you saw Mr. Herron first? A. He was swinging around to the north.

Q. To go up Margueretta street? A. Yes.

Q. And the head was around facing that way when you first saw the head? A. Yes.

Robert Bernstein was walking on Dundas street:—

Q. How far were you from Margueretta street when your attention was called to anything? A. We were just about at Margueretta street when we heard a gong.

Q. What else did you see? A. As soon as we heard the gong we saw the horse coming over the rails so we turned back. As soon as we turned back to look where the car was the buggy was turned over.

George Faulkner says:—

Q. What was the first thing that called your attention? A. The loud sounding of the gong.

On cross-examination he says:—

Q. When you heard the gong ring what did you do? A. I looked to see—I at once came to the conclusion that there was something wrong.

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Q. And it was right then that the crash came? A. Right then; right after the gong sounded. I looked out of the window and saw the man in the buggy, and it appeared as if he was pitched up.

Everett Holden says:—

Q. Where were you at the time? A. I was sitting near the front of the car at the time on the north side of the car.

Q. What was the first that attracted your attention? A. The first that attracted my attention was the man. He was sitting in the buggy and the horse was facing towards the west, and after we passed the east bound car about half way down the block the gentleman simply turned right round and drove right in front of the car going west. I could not say exactly where the car was.

Q. Do you remember how many cars you passed? A. No, I could not say.

Q. How far was the west bound car from Margueretta street when this man turned? A. Well, I could not say. I should imagine about three lengths of the car, that is roughly.

Q. Then what happened as far as the car was concerned? A. The motorman rang the bell, I should imagine about twice. That was all the time he had. Then he put on the brakes and stopped the car as quickly as he could.

According to this witness, when the motorman saw or might have seen the plaintiff, his car was three car-lengths east of Margueretta street.

Q. And did you notice where the car was after it had stopped? A Well, I should think it would be about four or maybe six feet east of the west side of Margueretta street—in that neighbourhood.

Q. And where did you say the car was when the gong was rung? A. Well, it would be about 60 feet I should imagine, when he started to ring the gong. The man was driving north at the time.

Q. And you looked when you heard the gong. A. I was looking out at the front of the car at the time on the streets.

Q. And you could clearly see the man at the time 60 feet away? A. Yes.

Harold Judge was strap-holding on the front end of the car about three feet from the door.

Q. Then just tell me what you saw? A. The car would be probably two lengths from Margueretta street east of Margueretta street, when I heard the gong, and looking out I saw the buggy with Mr. Herron, I suppose, in the buggy. I did not notice anything different until I heard the crash and looking out I saw Mr. Herron on the fender.

Q. At the time you looked, and the car was two lengths east of the east side of Margueretta street, where was Mr. Herron's rig? A. He was coming across the track turning north-east.

Q. How far had he got? A. Well, he would be about between the two tracks, I would imagine.

Q. What do you mean by that? A. Between the east and west track.

Q. The devilstrip? A. Yes.

Q. Did the motorman do anything? A. He rang the bell once.

Q. In addition to the ringing of the gong, what else was done? A. I heard the motorman put the brakes on, and I was almost thrown off my feet, that was all, I heard the crash of course.

On cross-examination, he said:—

Q. When did you first see Mr. Herron? A. Well, as I said, about two car-lengths east of Margueretta.

William J. Rashleigh was the conductor on the car in question. He says:—

Q. What was the first that attracted your attention? A. Ringing of the gong and the sudden applying of the brakes.

Q. Where was the car relatively to Margueretta street at the time you heard the gong ring? A. Just about on the east side of Margueretta street.

Q. And brakes you say put on? A. Yes.

Walter McRae, a master mechanic, swears the car in question was 40 feet in length. He says that the car could be stopped, going at the rate of 10 or 12 miles an hour, in about two car-lengths. He also says that going 8 miles an hour it could be stopped in two car-lengths.

His Lordship: Do you want this jury to understand that it could not be stopped any quicker going 8 miles an hour than it could going 12? A. Yes, it would.

Then he further says that going 12 miles an hour it could be stopped at 90 feet.

From these witnesses it appears that there is evidence by some of the witnesses that the east-bound and west-bound cars crossed each other east of Margueretta street; that, according to several of the witnesses, the plaintiff's horse and rig could be seen from two to three car lengths east of Margueretta street, when he was was in the act of crossing to the north. According to the motorman's own evidence, he actually stopped the car within about a car length, although the mechanical engineer speaks of two car lengths as necessary to stop the car going 8 miles an hour, which was about the rate at which the car in question is said to have been moving.

If the jury believed this evidence, they could well find, as they did find, that the negligence of the motorman was in not applying the brakes when he first noticed the plaintiff heading across the tracks, and this was the answer which they brought in to question 7, "In waiting until too late before applying the brakes."

The case is then reduced to this: (1) no negligence found against the defendant as to speed or not ringing the gong, which, upon the charge, were referred to as original negligence on the part of the defendants; (2) negligence on the part of the plaintiff in not seeing that he had time to cross the track; (3) ultimate negligence on the part of the motorman in not applying the

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brakes at an earlier stage when, according to the witnesses and his own evidence, he might have stopped the car notwithstanding the negligence of the plaintiff.

The evidence is very contradictory upon almost every point. Five of the witnesses for the plaintiff swear positively that the gong did not sound. A number of witnesses for the defendants swear that it did.

The jury not having found in favour of the plaintiff upon this issue, it must be taken that the gong did sound.

In one view of the findings, they may mean that when the motorman saw the plaintiff it was too late to stop the car.

The result of the jury's findings and of what took place at the trial with reference to their answers and questions put by the learned trial Judge, leaves uncertainty, in my opinion, as to what they meant.

I think there was evidence of ultimate negligence that could not be withheld from the jury, and that they could have given no clear and sufficient answers to the questions submitted to them.

There should, therefore, be a new trial. Costs of the former trial and of this appeal to be costs in the cause.

Mulock, C.J.

MULOCK, C.J., agreed with CLUTE, J.

Riddell, J.

RIDDELL, J. (dissenting):—The plaintiff had a horse and buggy standing on the north side of Dundas street, east of Margueretta street, the horse facing west. Coming out from a shop, he intended to drive away; he picked up the weight, put it into the buggy, and himself stood by the side of the buggy till a car went past east. As he picked up the weight, the horse turned his head to the car to go across; the plaintiff got into the buggy and sat there till another car went by to the east—then he picked up the lines and his horse started to cross—the last east going car having got about 30 feet away by this time. Two cars had passed to the west during this period. When crossing he saw a third west bound car when it came within four feet of his buggy, he grabbed the whip to get over, but did not succeed in escaping, the car struck the right hand front wheel, he was thrown out and hurt.

He brought an action which was tried before Meredith, C.J. C.P., and a jury, at Toronto.

While the statement of claim does not particularize the negligence complained of, it is apparent from the proceedings at the trial that three acts of negligence were alleged: (1) not sounding the gong thereby lulling the plaintiff into a sense of security with the particular case; (2) not sounding the gong when the motorman saw that the plaintiff's horse was on the track, and (3) "the motorman saw him or ought to have seen him in suffi-

cient time to have enabled him, if he had used the appliances which he had at his command, as he ought to have used them, to have stopped the car and have avoided the collision."

After much evidence had been given and after a careful and unexceptionable charge questions were left to the jury, which they answered thus:—

Q. 1.—Was the motorman guilty of negligence? A. Yes.

Q. 2.—If so, of what negligence? A. By not applying the brakes when he first noticed plaintiff heading across the tracks.

Q. 3.—Could the plaintiff by the exercise of reasonable care have avoided the accident? A. Yes.

Q. 4.—If he could in what respect was he negligent? A. In not seeing he had sufficient time to cross to the north side of the tracks in safety.

Q. 5.—Was the accident caused (*a*) by the negligence of the motorman? (*b*) or by the negligence of the plaintiff? (*c*) or by the negligence of both? A. Both.

Q. 6.—Could the motorman after he saw the plaintiff was about to drive across the tracks by the exercise of reasonable care have avoided the accident? A. No.

Q. 7.—If he could of what negligence was he guilty? A. In waiting until too late before applying the brakes.

Q. 8.—At what sum do you assess the plaintiff's damages? A. $800.

The learned Chief Justice was not satisfied with the answers and the following is the official report of what then took place:

His Lordship: Your answer to the 6th is inconsistent with the answer to the 7th.

Mr. Dewart (counsel for the defendants): I submit not.

His Lordship: Plainly so. You find they are both guilty of negligence and you find that the motorman was guilty in waiting till too late before applying the brakes. Now what does that mean in connection with 6?

Foreman of jury: He was too near to the man in the rig to stop to avoid the accident.

His Lordship: Then why do you say that he was negligent in waiting until too late before applying the brakes? One or other of those answers is wrong, it strikes me, or are inconsistent with one another. Now, what is it you mean? Just state generally what idea you have in all this answer. Just state generally what you think was the position of the parties and the negligence of both.

Foreman: According to the evidence he had not a chance to do anything but what he did.

His Lordship: Then you should have answered this 7th question—you should not have answered the way you did: He was negligent in not applying the brakes; because that means that after he became aware the plaintiff was in danger he might have avoided the accident by putting on the brakes or by doing something. Is that what you mean, or do you mean the contrary?

Foreman: We mean the contrary—that he could not have done it in the time.

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His Lordship: Then your 7th answer should be struck out. Now, which of these answers is to be taken as correct?

Foreman: We said he could not have avoided the accident when he noticed it.

His Lordship: Then the answer to the 7th should be struck out; because you say in effect that he could have avoided the accident if he had not waited until too late. I think you had better go back, consider it, and come back again. And make sure what you really mean.

The jury then retire, and after some time return again to the court-room.

They had struck out the answers to questions 6 and 7 altogether, but it was not noticed that they had struck out the answer to question 6. The report continues:—

His Lordship: The only change is taking out the answer to 7. What you say in effect is that both these people were to blame, and that the motorman, after he saw that the plaintiff was in danger, could have stopped his car. That is the effect of it?

The Foreman: Yes.

His Lordship: Mr. McGregor, I must endorse the record dismissing this action. The jury have been rather friendly to the street railway company. I cannot help it.

Were it not for what follows, I should have thought that what the learned Chief Justice said was "the motorman . . . could not have stopped his car." This as reported was a finding that the motorman could have stopped the car, that he was guilty of the ultimate and causal negligence, and would entitle the plaintiff to a verdict.

But the report continues thus:—

Mr. McGregor (counsel for the plaintiff) asks for a stay.

His Lordship: I had not observed that the jury had struck out the "No" in answer to the 6th question. But I have asked them if their idea was that the motorman after he saw the position in which the plaintiff was could by the exercise of reasonable care have prevented the accident. They said that was their view. I will give you a stay.

There seems to have been some misapprehension at the trial and perhaps the report is not accurate. Neither party, however, offered or asked to have the reporter's notes examined to find if the official report is accurate: and we must deal with the case upon the material before us upon this appeal by the plaintiff.

On the notes as they stand, it would appear that the learned Chief Justice was referring to the first question and the answer already found—and not at all to the sixth and seventh questions.

Whether the jury so meant or whether they had changed their mind and thought the sixth question should be answered in the affirmative, may be doubtful—and if the case turned upon this, a new trial should be had.

But I do not think the matter of any importance in the present case. While it is the best and most convenient practice

to submit in writing all questions which the jury are to answer, there is nothing in the statute (O.J.A. sec. 112) to compel this to be done; and I would consider that the answers of a jury to questions submitted orally from the bench are answers to questions within sec. 112. But it must be not tentative, but final answers that are to be so taken—consequently in this case we must, I think, look to the answers given after the jury returned the second time.

The result will be that the jury have found (1) negligence by the motorman (2) which would not have caused the accident had the plaintiff exercised reasonable care, but (3) "the motorman after he saw that the plaintiff was in danger could have stopped his car." Or if this be not the case, but the negligence referred to in answer to the first question is the same as that referred to in answer to the oral question: then the case is as put by Mr. Justice Meredith in *Jones* v. *Toronto and Y. R. Co.* (1911), 20 O.W.R. at p. 468, "no negligence on the part of the defendants causing the injury, negligence on the part of the plaintiff causing it, but . . . the defendants by the exercise of ordinary care might have avoided the injury." It makes no difference which way it is put—if the last finding of the jury be justified by the evidence, the plaintiff is entitled to his verdict.

The question is: Could the jury upon this evidence have been justified in finding that the motorman could and should have stopped the car by any exertion at or after "the point at which it became reasonably apparent that the plaintiff intended to proceed in his course across the track: *per* Garrow, J.A., *Jones* v. *T. & Y. R.* (1911), 20 O.W.R. at p. 464. Any negligence prior to that time is "met by the finding of contributory negligence:" *per* Meredith, J.A., S.C. p. 468.

The only evidence apparently bearing upon that point is that of the motorman: he says:—

"Well, I had just been after passing a car going east bound just east of Margueretta, just on Margueretta at the east. I sounded the gong approaching that car, and just as the other car had got clear of me I noticed Mr. Herron's horse starting to come across, and I sounded the gong again. I saw that he was not going to stop. I would not say that I sounded the gong after that, but I put my best energies towards stopping the car, and I thought that I was going to succeed till I was about to hit him."

The view of the plaintiff and consequently that of the motorman had been at first obscured by the car going east.

Q. But in the position where you were, with the east bound car where it was, was it possible for you to see him? A. No.

Q. Were you on the lookout? A. Yes.

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Q. Was there anything to take your attention away from your work at that time? A. Nothing at all.

Q. And were you on the job? A. I was on the job.

Q. From the time that you saw Mr. Herron until you brought the car to a stop, how far did the car go? A. I judge about a car-length.

Q. Where was the horse at the time the rig was struck? A. It had just crossed.

Q. The horse was clear of the north track? A. Yes.

Q. What kind of appliances had you on this car? A. Air-brakes.

Q. What condition were they in on that day? A. In good order.

Q. Did they work? A. Worked satisfactorily.

Q. Did you apply the reverse at all? A. I did.

Q. And how did it act? A. Worked all right.

Q. What kind of a stop did you make? A. I made a quick stop, as quick as I could.

Q. Were there any appliances there that you did not use? A. Well, I used the best appliances that I knew how to use at the time and the quickest.

Q. And you understand how to use them? A. And I knew how to use them.

Q. Was there anything else you could have done to have made a shorter stop? A. I do not know of anything else; not any better.

I think that it could not be found on this evidence that the motorman was guilty of negligence after he saw or could have seen that the plaintiff "intended to proceed in this course across the track."

The plaintiff can tell nothing about the matter: he did not see the car "till it came crash right up against the rig about four feet off"—"it was right on top of me or close to me before I seen anything." Buehner heard the brakes put on but does not insist on this point.

McCormick says when he noticed the horse crossing the track then he heard the motorman ring the gong—"the door was open and the car began to slow down, but it did not quite stop before it struck the buggy—the motorman shut off the power, and put on the brakes and rang the bell."

Holden says the motorman "stopped the car as quickly as he could." Judge "heard the motorman put the brakes on, and . . . was almost thrown off his feet." Cowan "the car approached him as if it were stopping—in a slow manner."

None of those witnesses helps at all in the enquiry now in hand—and I cannot see that any case is made of ultimate or causal negligence.

In my opinion the appeal should be dismissed with costs.

Note.—Since the above was written we have been informed by the official stenographer that his transcript of his notes is erroneous in leaving out the word "not" in two places. He says his notes read:—

His Lordship: The only change is taking out the answer to 7. What you say in effect is that both these people were to blame and that the motorman, after he saw that the plaintiff was in danger, could not have stopped the car. That is the effect of it?

The Foreman: Yes.

The second passage should read:—

His Lordship: I had not observed that the jury had struck out the "No" in answer to the 6th question. But I have asked them if their idea was that the motorman, after he saw the position in which the plaintiff was, could not, by the exercise of reasonable care have prevented the accident. They said that was their view.

This clears up much difficulty and makes, in my view, inevitable the conclusion I have already arrived at.

New trial ordered; RIDDELL, J., *dissenting.*

CARGEME v. THE ALBERTA COAL AND MINING COMPANY.

Alberta Supreme Court, Harvey, C.J., Scott, Beck, Stuart, Simmons, and Walsh, JJ. October 4, 1912.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION ACT—APPEAL—QUESTIONS OF LAW.

In an action under the Workmen's Compensation Act (Alta.), there is no appeal from the District Court Judge, except that given by paragraph 4 of the second schedule of the Act, which is by implication only, and limited to questions of law, by analogy to the English Workmen's Compensation Act of 1897.

[*Smith* v. *Lancashire and Yorkshire R. Co.*, [1899] 1 Q.B. 141, applied.]

2. MASTER AND SERVANT (§ II A 2—49)—WORKMEN'S COMPENSATION ACT (ALTA.)—WORKMEN NOT DISENTITLED BECAUSE OF CONTRACT WORK.

One is not disentitled to the compensation under the provisions of the Workmen's Compensation Act (Alta.), merely by reason of the fact that he contracted to do the work at which he was employed at a lump sum and not upon a time basis.

3. APPEAL (§ VIII C—676)—QUESTIONS OF LAW—REVERSAL—QUESTIONS OF FACT REMITTED.

Upon an appeal from a decision of a District Court Judge under the Workmen's Compensation Act (Alta.), limited by statute to questions of law, the appellate Court on reversing the trial Judge as to the law will remit the cause to the trial Judge if a further finding of fact becomes necessary because of such reversal, so that the District Court Judge may pronounce a new judgment in view of the decision in appeal and of his own further findings of fact.

Statement

APPEAL by the plaintiff from the judgment at the trial, under the provisions of the Alberta Workmen's Compensation Act, finding that the plaintiff was a contractor and therefore not entitled to compensation.

At the close of the argument the appeal was allowed and the District Court Judge's finding set aside and the case was reserved to determine the proper form of order to be made.

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THE
ALBERTA
COAL AND
MINING
COMPANY.

Harvey, C.J.

B. Pratt, for plaintiff, appellant.
W. G. Harrison, for defendant, respondent.
The judgment of the Court was delivered by

HARVEY, C.J.:—The right of appeal from the Judge's decision under the Workmen's Compensation Act is to be found in paragraph 4 of the second schedule. The right is not given expressly but it is by implication given in case of "any decision on any question of law." No other or further right of appeal is given and it follows in consequence that the appeal in all cases must be limited to questions of law. The English Act of 1897 was in much the same terms as ours in this respect and the consequence was held to be as above stated by the Court of Appeal in *Smith* v. *Lancashire and Yorkshire R. Co.*, [1899] 1 Q.B. 141. Inasmuch as we have held that the applicant is not disentitled to compensation on the ground stated there remains to be considered the question whether he is otherwise entitled and if so in what amount. These are facts which under the Act are to be determined by the District Court Judge and the proper order appears to be to remit the matter to the District Court Judge so that he may make the order which he should have made: *Kempson* v. *"Moss Rose,"* 4 B.W.C.C. 101; *Hall* v. *Tamworth Colliery Co.*, 4 B.W.C.C. 107; *Tamworth Colliery Co.* v. *Hall*, 4 B.W.C.C. 313.

The order will therefore be that the appeal be allowed with costs, the judgment of dismissal set aside and the case remitted to the District Court Judge for further consideration.

Order accordingly.

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GALBRAITH v. McDOUGALL.
McDOUGALL v. GALBRAITH.

Ontario High Court. Trial before Britton, J. August 23, 1912.

1. PARTNERSHIP (§ I—3)—WHAT CONSTITUTES—TRANSFER OF AN UNDIVIDED INTEREST IN LANDS—TRANSFEREE LAYING OUT INTO A SUBDIVISION.

An agreement, whereby the owner of land transfers an undivided interest therein, and in all the profits arising therefrom to another, who undertakes to provide funds for laying out the land into lots and for other incidental expenses preparatory to offering the lots for sale, and to devote a reasonable amount of his time to the affairs of the property, constitutes the parties partners in respect of the land.

Statement

THE first action was for a declaration that the plaintiff Galbraith was entitled to one-quarter of the profits arising from the sale of any part of lot No. 12 in the 2nd concession of the township of Whitney, in the district of Sudbury, and to an undivided one-quarter of the part of that lot not sold; and for an account, on the basis of a partnership between the plaintiff

and defendant as to this land, as to which the plaintiff claimed to be entitled to one-fourth of the net profits arising thereout.

In the second action, McDougall, the plaintiff therein, alleged that Galbraith could only be entitled to anything out of the proceeds of sales of town-site lots, part of lot 12, upon payment to him, McDougall, of one-half of all the expenses of surveying, developing, marketing, and selling the said lots. McDougall also asked to have a caution, registered by Galbraith, released.

Statement

By an order of the Master in Chambers of the 2nd May, 1912, the two actions were consolidated.

The consolidated action was tried before BRITTON, J., without a jury, at Cornwall.

G. I. Gogo, for Galbraith.

F. E. Hodgins, K.C., and *T. E. Godson*, K.C., for McDougall.

BRITTON, J.:—McDougall was the owner of lot 12 in the 2nd concession of Whitney, containing 160 acres. This lot was known as and called "the McDougall Veteran claim." On the 11th February, 1911, the parties to this action made an agreement in writing by which McDougall purported to transfer to Galbraith one-fourth interest in the 160 acres. This transfer was to cover all surface, mineral, and other rights in the property. Galbraith was to provide funds for surveying and laying out the property into town lots, and other incidental expenses, preparatory to offering the lots for sale. These expenses were to be equally shared by each when the property should be disposed of, or when a sufficient sum should be realised.

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This agreement was subject only to this, that the Temiskaming and Northern Ontario Railway Commission would locate a station upon some part of the 160 acres. In due course the station was located as expected. The parties then apparently thought it necessary to have a more formal agreement. It was not suggested by either party to this litigation or by any one that there was need for further negotiation—or that any new terms would be introduced. It was simply that an agreement should be drawn up by a lawyer. On the 28th March, 1911, the more formal agreement was prepared by a solicitor and executed by the parties. The agreement recites the facts—there McDougall agreed to advance from time to time as might be necessary or to become liable for one-half of all the expenses incurred through the expedient (sic) laying out of the said lots or any part thereof into a town-site, the survey, filing a plan and advertisement of the same, and the costs and expenses of clearing, grading, and laying out the streets of timber from the same lot, and all other necessary and expedient expenses or outlays in connection with the development of the said town-site and the exploration of all mineral rights thereon.

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Galbraith was to devote a reasonable amount of his time and attention to the affairs of the town-site and to assist in the laying out and improvement of the same and the sale thereof.

In consideration of this, McDougall was to give to Galbraith an undivided one-fourth share or interest in the proceeds arising from the sale of the said town-site, in lots or otherwise, the timber and mining rights thereon, and in all profits or benefits arising therefrom in any respect whatever.

Then it was provided that proper books of account should be kept of the receipts and expenditures in connection with the said townsite, and an audit of the same should be made at the expiration of every six months or oftener; a division of the profits was to be made every six months until the whole of the interests of the parties should be disposed of.

According to the agreement, it was the duty of McDougall to devote his time and attention to the requirements of the said town-site, and act in conjunction with Galbraith, etc.

This venture seemed to prosper and it ripened fast. McDougall did most of the work and made by far the greater part of all necessary expenditure. Money seems to have come in from sales of property, so that, for that reason or some other, Galbraith was not called upon to furnish money in terms of the agreement; when he was called upon, it was only because of the interpretation McDougall placed upon the agreement, viz., that Galbraith was to pay, as a certain sum, one-half of the total expenses for one-fourth of the gross proceeds of sales of the town-site property. I interpret these agreements as, virtually, one agreement, and as particularly set out in the writing dated the 28th March, 1911; and the agreement is to all intents and purposes a partnership agreement.

McDougall was the owner of this property, which promised to become and which actually became very valuable, as town-site property. He approached the plaintiff and made the offer of a quarter interest in it, if the plaintiff would agree to finance the undertaking, that is to say, if the plaintiff would agree to advance and pay from time to time, as might become necessary, or if the plaintiff would become liable for, one-half of all expenses. When the advances were being made, and money was being expended for purposes mentioned, the plaintiff was not asked to furnish money. Unquestionably he was liable. If advances were obtained from outsiders, the plaintiff was liable with the defendant to such persons. If the defendant furnished the money, the plaintiff is liable to the defendant for one-half upon the settlement between the plaintiff and defendant. The clauses in the agreement by which McDougall agrees to give Galbraith not only the one-quarter interest in the proceeds arising from the sale of the

town-site, but in all profits or benefits arising therefrom in any respect whatever, and that the division of profits, if any, should be made every six months, seem to me conclusive in Galbraith's favour as to the interpretation of the contract. If the plaintiff was to get an undivided quarter interest in the land, it necessarily follows, in the absence of any agreement to the contrary, that he would be entitled to one-quarter of the profits. Books of account were to be kept to ascertain what profits were made. I think the plaintiff's contention as to how the profits are to be arrived at is correct. According to the defendant's contention, it might so happen that, although the defendant would make a large amount of money, in the transaction, the plaintiff would be a loser. For example, suppose the gross proceeds of sales to be $10,000, the plaintiff's quarter would be $2,500, and the defendant's expenses $5,000. If the plaintiff were obliged to pay half of these, his one-fourth would be absorbed. That might go on from time to time and the plaintiff get nothing. That could not have been the intention of the parties. No such result was contemplated, and the agreement will not bear that construction.

The argument of counsel for the defendant is, that, if the agreement was that Galbraith should pay $6,000 and be entitled to a one-quarter interest in the proceeds, no question could arise, as he would be liable for the $6,000 as the purchase-price of his interest, irrespective of what that interest amounted to. That is quite true, but the agreement did not end where counsel leaves it. If the agreement ended with payment, it would make no difference whether payment was of a definite sum—say $6,000—or a sum to be ascertained as half of the expenses McDougall should incur in doing something.

The first agreement, the one of the 11th February, 1911, was not, as I have already stated, merely for the transfer to Galbraith of one-fourth the lot in question "with its surface, mineral, and other rights," but it is a conditional agreement—the condition being that "the Temiskaming and Northern Ontario Railway Commission locate their station on said lot." This shews that a speculation was being entered upon. Then the agreement goes on to say that Galbraith should provide the funds for surveying, etc., preparatory to offering the property for sale—these expenses to be equally shared by each when the property is disposed of or when a sufficient sum is realised. The plain meaning of that is that if, by a sale of lots, a sufficient sum is realised to pay expenses, expenses are to be paid out of the money so realised. Then, coming to the more full and complete agreement of the 28th March, 1911, the recitals are full and consistent with what the plaintiff contends was his real position in this transaction.

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Galbraith agreed to advance or become liable for one-half of all expenses incurred, etc., as above stated. The venture became a joint one—perhaps through the generosity of the defendant—but it is too late now to make a new agreement.

I do not appreciate, to the extent urged, the expert evidence of accountants offered to prove the necessity, under the agreement in question, of setting aside some of the money to establish a capital account.

I find that there was and is a partnership between the plaintiff and defendant in reference to the land mentioned and the dealings with it; and there will be a declaration to that effect.

The plaintiff will be entitled to one-fourth of the profits arising from the sale of such part or parts of said land as have been sold, or arising in any way whatever out of the dealings by the defendant with the said lands since the making of the agreement; and, further, that the plaintiff is entitled to an undivided one-fourth of the unsold part of said land. As to most of the items it was stated at the time that there would be no dispute, once the principle is determined as to the mode of taking the account. So there will not be a necessity for much, if any, oral evidence; and the reference may well be to the Local Master at Cornwall.

There was not, in my opinion, any necessity for the second action. All the questions raised therein could well be disposed of in the first action.

As this second action has been consolidated with the first and so cannot now be further proceeded with as an independent action, and as the defendant McDougall must bring forward whatever he has by way of account or set-off or counterclaim, I do not formally dismiss the second action; and, if any formal disposition of it, other than above, be necessary, that can be made after the report, and on further directions. There will be judgment for the plaintiff directing a reference to the Local Master at Cornwall to take the accounts and report. The judgment will be with costs to Galbraith against McDougall in both actions down to and including the trial. Costs of reference and further direction reserved.

The appointment of a receiver was asked for. That is not necessary at present. The plaintiff may, at his own risk as to costs, if he deems it necessary, apply later on. The accounts will be taken as partnership accounts, and not only the items brought forward by Galbraith, but also those asked for by McDougall in his second action, and those brought forward and claimed by him in the reference, will be included.

Judgment for plaintiff.

CRUIKSHANK and BRIEN v. IRVING.

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Alberta Supreme Court. Trial before Beck, J. April 23, 1912.

1. EVIDENCE (§ II K 1—311)—ONUS—WAIVER OF PORTION OF AGREEMENT.

The onus rests upon the plaintiff, a real estate broker, in an action for one-half of the net profits from a sale of land by him under a contract with the defendant, of shewing that he was relieved by the former of the duty imposed upon him by such contract, of sub-dividing the land into lots at his own expense, and of advertising it for sale.

2. BROKERS (§ II B—11)—VENDOR ACTING AS PURCHASER'S AGENT—SHARE OF PROFITS.

Where in an agreement for the sale of land by the plaintiff to the defendant, the former agreed to act as agent in its sale, and to subdivide it into lots and advertise them for sale, for which he should receive one-half of the net profits from the sale thereof after repaying to the defendant the purchase money, and where, on the failure of the plaintiff to perform such covenant, the defendant did not terminate his agency in the manner required by the agreement, nor proceed to do what the plaintiff should have done but sold the land *en bloc* without any sub-division into lots, the plaintiff is entitled in the absence of any provision to the contrary in the agreement, to the agreed proportion of the profits obtained by the sale *en bloc*.

Statement

ACTION by real estate agents for a share of profits under an agreement for dealing in certain subdivision lands intended for sale in lots for the joint benefit of the agents and owners after reimbursement of the purchase price and expenses.

Judgment was given for the plaintiffs.

A. H. Clarke, K.C., for the plaintiffs.

D. S. Moffat, for the defendants.

Beck, J.

BECK, J.:—The decision of this case depends upon the interpretation of an agreement under seal dated the 15th April, 1909, made between the plaintiffs, Cruikshank and Brien, real estate agents, called the vendors, and the defendants, called the purchasers, and a trust company.

The land, the subject-matter of the agreement, contains 57 acres. It was bought by the plaintiffs for $75 an acre, that is, $4,275. In the agreement, the sum stated is $4,007.80, being at the rate of $75 per acre, "subject to the terms, conditions, covenants, and stipulations hereinafter set forth and contained," one of the provisions of the agreement being that Cruikshank should be entitled to retain—though that is not the word used—a one-sixteenth interest in the share of the property of the defendants. It was for this reason that $4,007.80, being $4,275 (*i.e.*, 57 acres at $75 per acre) less $267.20 (being 1/16 of $4,275) was stated to be the purchase-price at $75 an acre, as having been paid in the first instance by the plaintiffs and in the second instance to be paid by the defendants to the plaintiffs.

With this explanation I give a synopsis of the agreement, so far as is necessary for the decision of the question involved in this action. The recitals are:—

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Whereas the vendors have agreed to sell to the purchasers, and the purchasers have agreed to purchase from the vendors. . . . . [the land in question] for the sum of $4,007.80, being at the rate of $75 per acre, subject to the terms, conditions, covenants, and stipulations hereinafter set forth and contained.

And whereas the purchasers, to enable the said property to be expeditiously disposed of, have requested the vendors to transfer the same to the trust company, on the terms and conditions hereinafter mentioned and contained.

And whereas the trust company has agreed to accept the trusts herein contained.

Then it was agreed that:—

1. The vendors, for and in consideration of the sum of $4,007.80, to be paid to them by the purchasers, hereby covenant and agree to forthwith transfer . . . to the trust company in trust for the purchasers, free from all liens, charges, and incumbrances, the land in question, containing 57 acres.

2. The vendors further covenant and agree that the sum of $4,007.80 is the actual price paid by them for the said property.

3. The vendors further covenant and agree, at their own cost and expense, to forthwith take all such steps as may be necessary to have the said lands subdivided into lots and blocks, and on the terms and conditions hereinafter set forth to act as the sole and exclusive agents for the sale thereof, for a period of six months from the 15th day of April, 1909, and to advertise the said lots and blocks for sale, and to use all reasonable efforts, as agents, to sell and dispose of the said property. Providing that the trust company shall not approve of the plan of subdivision until authorized in writing by the purchasers, or a majority in interest of the purchasers, so to do.

4. The purchasers covenant and agree to and do hereby, subject to the terms of this agreement, appoint the vendors, so long as they shall continue to carry on business in partnership, as their sole and exclusive agents for the sale of the said lots and blocks as subdivided as aforesaid, for a period of six months from the 15th day of April, 1909, provided, however, that, when and so soon as two-thirds of the said lots have been sold by the vendors, the purchasers shall have the right to terminate the agency of the vendors and withdraw the balance of the said lots from sale or otherwise dispose of them in any way they may desire without reference to the vendors.

5. It is mutually covenanted and agreed by and between the vendors and the purchasers that all sums expended by the vendors in subdividing said lands into lots and blocks as aforesaid and in advertising the same as aforesaid shall be evidenced by proper vouchers and receipts to the satisfaction of the purchasers.

6. It is further covenanted and agreed by and between the purchasers and each of them and the trust company that the interests of each of the purchasers in the said land and in the moneys to be derived from the sale thereof shall be as follows.

Then follows an allotment of fifteen-sixteenths among the defendants. Then is added:—

Provided further, however, that, in the event of the said Cruikshank

continuing to carry on business in partnership with the said Brien as agents for the sale of the said lots for the purchasers, as provided by the terms and provisions of this agreement, and of all the said lots being disposed of within six months from the 15th day of April, 1909, as aforesaid, unless withdrawn from sale or otherwise dealt with by the purchasers as provided by this agreement, then he, the said Cruikshank, shall be entitled to a one-sixteenth interest in the one-half share of the net profits of the purchasers as hereinafter defined, but not otherwise.

It is further mutually covenanted and agreed by and between the vendors and the purchasers, that, in the event of the death of either of the vendors, the survivor shall accept all the liabilities of the vendors and the terms of the agreement, and that, in the event of the death of the said Cruikshank, while the vendors are acting as agents for the purchasers under the agreement, neither his personal representatives nor his surviving partner shall be entitled to or have any claim to any profits to which the said Cruikshank might be entitled had he survived, as provided in paragraph 6 of this agreement.

Clause 8 provided that the trust company should sell said lots, at such prices and on such terms as the company should be directed by a majority in interest of the purchasers, and that Cruikshank should have no voice in this:—

9. It is further mutually understood and agreed by and between the purchasers and the trust company that the trust company shall . . . . execute all such documents as may be necessary to give effect to the terms of this agreement and the due and proper performance of the trusts hereby created and after the sale of the said lots at such prices as may be determined by the purchasers as hereinbefore provided and after deducting its remuneration . . . to hold all moneys received by it and to distribute the same subject to the following trusts:—

Firstly, to repay to the purchasers the sum of $4,007.80 without interest in the proportion represented by the share interests as herein provided.

Secondly, to divide the balance of all moneys received, and from the sale of the said property, hereby defined as "net profits," in equal shares between the vendors and the purchasers, the trust company being under no liability to inquire into the nature and character of the interests of such of the vendors, but to divide the one-half interest of the purchasers in the net profits as aforesaid, according to the respective interests as hereinbefore stated, but nothing herein contained shall be taken, read or construed as entitling the said Cruikshank to receive any portion of the said profits until the determination of the agency of the vendors as herein stated. Provided, however . . . that the trust company shall advance to the vendors out of the net profits to which they may be entitled, as hereinbefore provided, the sum of $200, whenever the sum of $1,000 is paid to the purchasers as herein provided until such time as the vendors have received on account of their share of the net profits a sum equal to the sum expended by them in subdividing the said land into lots and blocks and advertising same as aforesaid.

10. It is further understood and agreed by and between the vendors

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and the purchasers that in the event of the purchasers at any time being dissatisfied with the manner in which the vendors are conducting their agency for the sale and disposition of the said lots, they may give notice in writing to that effect to the vendors . . . specifying wherein said agency is not being conducted to their satisfaction and requiring the vendors within ten days after the receipt of such notice to remedy the same, failing which, the purchasers may at any time after the expiration of the said ten days determine the said agency, whereupon the said agency shall cease and determine, and all rights, titles, and interest of the vendors, or either of them, under this agreement or otherwise howsoever, for commission or otherwise in connection with the subdividing, advertising, and sale of the said lands, shall absolutely cease and determine.

No notice was given in pursuance of the last recited clause. Nothing was done in the way of subdividing the land, the plaintiffs alleging that the subdividing was not done as a result of their believing that it would be better, in view of projected railways and other enterprises, to postpone it, and of the defendants falling in with this view; the defendants, on the other hand, alleging that the plaintiffs refused to do anything toward subdividing, because they had come to the conclusion that the agreement was much too stringent in their regard.

On the 27th June, 1911, the land was sold by the defendants to one Cooper, *en bloc*, at the price of $275 per acre. The question is, whether the plaintiffs are entitled to one-half of the net profits upon this sale. No claim is made by the plaintiff Cruikshank for a one-sixteenth interest in the defendants' share of the net profits. The partnership between Cruikshank and Brien was dissolved "shortly after" the making of the agreement of the 15th April; and, as I suppose, this means within six months of its date.

I suppose Cruikshank has come to the conclusion that, under clause 6 and other provisions of the agreement, he has ceased to have a right to a one-sixteenth interest in the defendant's share of the net profits. The defendant Irving speaks of an interview of himself and the defendant Garrett with Cruikshank, which he says was between sixty and ninety days after the making of the agreement. Garrett also says that the interview was before the lapse of six months. They seem to have asked Cruikshank about subdividing the property, and Cruikshank seems to have said that he did not intend to do anything under the agreement because it was too stringent upon him, and that at any time the defendants could deprive him of his interest.

There is no evidence of any of the defendants intimating in any distinct way to Brien that they insisted upon the land being subdivided promptly; and he says that he learned nothing of what had taken place with Cruikshank. He says, too, in effect, that he advised Irving that it would be better to delay

the subdividing, and thought the defendants had ultimately fallen in with this view, I am satisfied that neither Cruikshank nor Brien ever intended to abandon such interest, as they held alike under the agreement, and that they neither did nor said anything which can be taken as a repudiation of the agreement in this respect. The onus of proving an abandonment or repudiation is on the defendants; and, in my opinion, neither is established.

I think Cruikshank's complaint was with regard to his prospective one-sixteenth interest, and that he had made up his mind that, under the terms of the agreement, which he thought extremely stringent, it was that interest which he would fail to secure. Irving states in effect that the conditions upon which this prospective interest should become an actual one were made as a "guarantee" of prompt activity on the part of Cruikshank; and this is fairly evident from the terms of the agreement.

Having disposed of the question of abandonment and repudiation, the question becomes, as I stated at the beginning, a question of interpretation. I think that not much weight should be given to the mere form of the agreement, and especially to the expressions "vendors" and "purchasers" and cognate expressions. These terms are obviously used as a convenient means of expressing what could as well have been expressed in other terms; and are, therefore, in a sense, arbitrary formulæ.

The substance of the agreement is this. The plaintiffs had just bought the land. They and the defendants both believing that a considerable profit could be made by subdividing and advertising, it was agreed that, in consideration of the defendants refunding to the plaintiffs the price they had paid, the land should be placed in the hands of a trust company for sale, on the terms that, after repayment of the original cost of the property without interest and the charges of the trust company, but not the expenses of subdividing or advertising, the surplus should be divided equally between the plaintiffs on the one side and the defendants on the other. In addition to this, and as a substantial and integral part of the agreement, the plaintiffs agreed—the words are

> The vendors further covenant and agree . . . at their own cost and expense; (1) to forthwith take all such steps as may be necessary to have the land subdivided into lots and blocks; (2) on the terms and conditions hereinafter set forth, to act as the sole and exclusive agents for the sale thereof for a period of six months from the 15th April, 1909; (3) to advertise the said lots and blocks for sale and to use all reasonable efforts as agents to sell and dispose of the said property.

The plaintiffs have failed to shew to my satisfaction that the defendants relieved them from their obligation forthwith to

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subdivide. It seems to me that the obligation of submitting a proposed plan of subdivision to the defendants, and, if approved by them, to the trust company, lay upon the plaintiffs, and that they were not relieved from this obligation—a thing, however, which might easily have happened.

If the work of subdividing is to be treated as something separate and distinct from the "agency" of the plaintiffs—as a merely literal interpretation would perhaps indicate—then I think the covenant relating to it should be taken to be an independent covenant and not a condition; the remedy on default being, that the defendants could subdivide and charge the costs to the plaintiffs; but, I think, the proper construction is, that all the things which in clause 5 the plaintiffs covenanted to do are comprehended under the subject "agency" as dealt with in clause 10, and that for the breach of any provision of clause 5—although, no doubt, the defendants could themselves cause to be done the things which the plaintiffs ought to have done, and charge the cost to the plaintiffs—yet the defendants could not deprive the plaintiffs of their right to a one-half share of the net profits otherwise than by a strict compliance with the provisions of clause 10, that is, by a written notice of specific dissatisfaction, which admittedly was not given.

The defendants having sold, it is too late to give any such notice—conditions are now such that the clause can no longer be put into operation.

This being my finding upon the facts and my interpretation of the agreement, an order will go declaring the plaintiffs entitled to a one-half interest in the net profits of the land, after repayment to the defendants of $4,007.80, without interest up to the 15th October, 1909, and with interest after that date, at the rate of 5 per cent., per annum, and after payment of the amount ($25, I think) paid to the trust company, and without any deduction for any expenses incurred by the plaintiffs, and without any allowance to the plaintiff Cruikshank in respect of his prospective one-sixteenth interest. If necessary, there will be a reference to the clerk. The costs will go to the plaintiffs. The order should contain directions regarding some incidental questions. The minutes may be submitted to me.

Judgment for plaintiff.

N. L. MARTIN (appellant) v. Frederick C. FOWLER et al. (respondents). CAN.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. May 7, 1912.

1. ASSIGNMENTS FOR CREDITORS (§ VIII A—72)—CREDITORS' RELIEF ACT —CONTESTING CREDITOR'S LIEN—ASSIGNMENTS AND PREFERENCES ACT.

The provision of the Creditors' Relief Act, 9 Edw. VII. (Ont.) ch. 48, sec. 6, which enacts that where proceedings are taken by a sheriff for relief under any provisions relating to interpleader, those creditors only who are parties thereto and who agree to contribute *pro rata* in proportion to the amount of their executions to the expense of contesting any adverse claim shall be entitled to share in any benefit which may be derived from the contestation of such claim so far as may be necessary to satisfy their executions, confers a preferential lien upon the contributing creditors of which, in case of the debtor making an assignment for the benefit of his creditors, such contributing creditors are not deprived by the general direction of section 14 of the Assignments and Preferences Act. 10 Edw. VII. (Ont.) ch. 64, as to the precedence to be given to such assignment.

[*Re Henderson Roller Bearings Ltd.*, 24 O.L.R. 356, affirmed on appeal.]

Statement

APPEAL from a decision of the Court of Appeal for Ontario, 24 O.L.R. 356, *sub nom. Re Henderson Roller Bearings, Ltd.*, which maintained the judgment of a Divisional Court, 22 O. L.R. 306, in favour of the respondents.

The appellant was assignee for the general benefit of creditors under an assignment by the Henderson Roller Bearings, Ltd., and the respondents were execution creditors of the insolvent company. Under the executions issued by the respective respondents the goods of the company were seized by the sheriff, but before they were sold the company assigned. The respondents successfully contested an interpleader issue with a guarantee of the goods which were then sold by order of Court and the proceeds paid into Court.

The only question for decision of the Court on this appeal was whether or not the preferential lien given to an execution creditor by the Creditors' Relief Act, sec. 6, sub-sec. 4, which is set out in the above head-note, is taken away by section 14 of the Assignments and Preferences Act. The Courts below held that it was not.

The appeal was dismissed.

Argument

Lefroy, K.C., for the appellant:—The intent of the Legislature in enacting section 14 of the Assignments and Preferences Act was to make it impossible for a creditor to obtain more than a ratable share of an insolvent's assets unless his execution has been completely executed by payment and the interpleader proceedings cannot defeat that intent: *O'Brien* v. *Brodie*, L.R. 1 Ex. 302.

The cases of *Reid* v. *Murphy*, 12 Ont. P.R. 338, and *Reid* v. *Gowans*, 13 Ont. App. R. 501, relied on in the Courts below, are distinguishable and do not apply.

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Argument

Watson, K.C., and *J. Grayson Smith*, for the respondents:—The goods were not sold under execution, but under a Court order. See *Reid* v. *Murphy*, 12 Ont. P.R. 338; *Reid* v. *Gowans*, 13 Ont. App. R. 501; *Federal Life Ins. Co.* v. *Stinson*, 13 O. L.R. 124, on appeal, *sub nom. Scott* v. *Swanson*, 39 Can. S.C.R. 229; the execution creditors had, therefore, acquired a new and independent status.

The execution creditors who have borne the brunt of the proceedings and recovered the assets in the interpleader issue should not be deprived of the benefit of their act in favour of other creditors who have held aloof: see *Wood* v. *Joselin*, 18 Ont. App. R. 59.

D. J. McDougal appeared for the respondent the sheriff of Toronto.

Fitzpatrick, C.J.

THE CHIEF JUSTICE:—I would dismiss this appeal with costs.

Davies, J.

DAVIES, J.:—The substantial question to be determined upon this appeal is whether the language of the 14th section of Assignments and Preferences Act, 10 Edw. VII. ch. 64 (Ont.) is broad and comprehensive enough to embrace and cover creditors of the debtor who have previously to the assignment acquired a preferential claim or lien upon the proceeds of the sale of the debtor's property under an interpleader order under section 6, sub-section 4 and 5 of the Creditors' Relief Act, 9 Edw. VII. ch. 48 (Ont.).

I confess myself to have been greatly influenced by the able argument presented by Mr. Lefroy for the appellants, who contended that all and any preferences or liens which would ordinarily exist in favour of certain special creditors under the Creditors' Relief Act had been swept away by the 14th section of the Assignments and Preferences Act.

A careful consideration of these two statutes, however, has convinced me that the impression made upon my mind at the argument was wrong and that so far as a preference lien, private claim or salvage claim, as my brother Duff prefers to call it, existed in favour of the respondents' claims under the Creditors' Relief Act it was not taken away by the 14th section of the Assignments and Preferences Act.

That section reads as follows:—

> An assignment for the general benefit of creditors under this Act shall take precedence of attachments, garnishee orders, judgments, executions not completely executed by payment and orders appointing receivers by way of equitable execution subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the sheriff's hands, or to the lien, if any, for his costs of the creditor who has the first execution in the sheriff's hands.

The language of the section, it is true, is very broad and

general, and the object and intention of the Legislature plain, namely, to make an assignment for the general benefits of creditors "take precedence of attachments, garnishee orders, judgments, executions not completely executed by payments and orders appointing receivers by way of equitable execution."

The question is: Does this extend to the preference, priority, lien, salvage, or what you choose to call it, specially created by sub-sections 3 and 4 of section 6 of the Creditors' Relief Act in favour of those creditors who accept and discharge the onus of defraying the expense of contesting any adverse claim made by a third party to the property or its proceeds seized under execution and as to which adverse claims have been set up, interpleader orders made, and contests entered upon, with the result of defeating such adverse claims?

Does the 14th section of the Assignments and Preferences Act extend to such a case at all?

To determine that requires, of course, a careful examination of the object and provisions of the Creditors' Relief Act.

And, first, I would remark that the preference, lien, prior-charge or salvage, whatever it may be, given to the creditors who take upon themselves the risk and expense of contesting adverse claims to the property or moneys in dispute is not a preference or lien arising out of an unsatisfied execution in the sheriff's hands simply, but is a statutory right created as a reward or salvage to those creditors who undertake at their own expense to defeat an adverse claim and who are successful in doing so. Those creditors who refuse to accept the onus or burden the statute makes the price of the prize or salvage to be gained do not share in the latter's distribution. The creditors who are entitled to join in, or to accept, the statutory burden and to reap the statutory reward are not execution creditors only. "Certificated creditors" are equally entitled to become parties to the interpleader proceedings and to contribute towards the expense of contesting adverse claims *pro ratâ* and to share *pro ratâ* in the fruits of the contest.

These certificated creditors are those who not having obtained judgment for the amount of their claims are creditors who have under the statute obtained from the County Court Judge a certificate or allowance of their claim.

This Creditors' Relief Act not only abolishes priority amongst execution creditors, not only creates a lien or charge in favour of those creditors who agree to assume the expense of contesting adverse claims to the property or its fruits levied upon, but puts the certificated creditor on a par with the execution creditor and entitles him

> to share in any distribution as if he had delivered an execution to the sheriff.

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The Act also declares, sub-section 3, section 10, that "*for the purposes of interpleader proceedings* the certificate should be deemed to be an execution."

Sub-section 4, of section 6, expressly limits the distribution in cases where proceedings are taken by the sheriff for relief under interpleader proceedings to such execution or certificated creditors who become parties to the interpleader proceedings, agree to contribute proportionately to the expense of the contest, and if successful become entitled to share in the fruits of success.

I do not think the general words of the 14th section of the Assignments and Preferences Act extend to such special statutory priorities, liens or privileges conceded as a reward for the burden assumed.

Take a case where the execution creditor on an adverse claim to the property seized being made refused to assume the burden of contesting, and a "certificated creditor" stepped into the breach, accepted the onus and successfully contested and defeated the adverse claim, the conduct of the proceedings being given to him by the Judge, would section 14 take away his right of preference or priority of payment which was purely a statutory creation? I venture to think not and that this negative answer to the question answers the appellant's contention as to the scope of section 14.

No reference is made in that section to the certificated creditors' priority or lien. That did not flow from any execution because none such existed as regards the certificated creditors' debt. It was a pure creation of the statute, and I find no words in the 4th section broad enough to cover it or take it away. This argument I confess influences me very much in determining the proper construction of that section.

It was contended that the special lien created by the Creditors' Relief Act had been reduced by the 14th section of the Assignments Act above set out to the right to have the costs reimbursed to the creditors who had become liable for them.

But, as I said, that section does not extend to the special priority or lien given under the 6th section of the Creditors' Relief Act.

At any rate I have not been able to satisfy myself that the judgments of the Divisional and Appeal Courts are both clearly wrong in their construction of these statutes and, therefore, concur in dismissing the appeal.

I have not in view of my conclusion as above expressed deemed it necessary to refer to any of the other points argued.

Idington, J.

IDINGTON, J.:—I agree in general with the reasoning of the several judgments of the learned Judges in the Courts below rejecting the claim of the appellant, and do not think it would

serve any profitable purpose to repeat same here. Yet I may, in addition thereto, point out that the costs made by section 14 of the Assignments Act a preferential claim, are by no means the same costs which the amendment of the Creditors' Relief Act constitute, and always constituted, a lien in favour of execution creditors taking upon them the burden of an interpleader issue and which are sometimes very great indeed.

To give effect to the contention of the appellant would deprive these execution creditors of all the costs incidental to the interpleader proceedings.

If the Assignments Act had been amended before or at the same time as the Creditors' Relief Act was amended in that regard to add such interpleader costs to what section 14 of the former preserves as a preferential lien, then the argument of the appellant might have had more force. The grievance of interpleading creditors had long been manifest and when the Legislature undertook to remedy it, surely the only remedy manifest in the legislation ought to be applied.

It would be clearly inequitable to expose creditors, entering upon expensive litigation to defeat frauds upon creditors, to defeat and serious loss by such contrivances as manifestly were resorted to in this case.

In this regard the amendment to the law was certainly posterior to the original enactment.

I may also point out as supplementing the alleged technical application of legal principles involved in some of the reasoning I adopt and are relied upon below, that if the appellant or one in the like position was driven to make an independent attack upon any fraudulent assignment, he would, as incidental to relief granted, if creditors such as the respondents were joined as defendants, as inevitably they must be, to give entire relief, have to pay these costs as a condition of relief.

I am not saying such a course was open to him, but if conceivable it would come with a beter grace from an assignee in the appellant's position, to claim he was only seeking equity than seems open to appellant herein.

I think the appeal must be dismissed with costs.

Duff, J.

DUFF, J.:—I think the appeal should be dismissed. Apart from statutory enactment an assignee for the benefit of creditors takes only that which his assignor can give him. A transfer of property impeachable under the Statute of Elizabeth as a fraud upon the creditors of the transferor may be perfectly inexpugnable so long as the creditors take no steps to have the property applied in satisfaction of their claims; as against the debtor it may give a perfectly good title to the property transferred. At common law, therefore, an assignee under an assignment for the benefit of creditors as such has no status to attack

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such a transfer as having been made in fraud of creditors. The Assignments and Preferences Act appears to treat these transfers in this way. The property affected is regarded as being in the hands of the transferee exigible in satisfaction of the just claims of the creditors generally to the same extent as it would have been so exigible in the hands of the debtor himself. For the purpose of satisfying such claims the transfer is treated as non-existent and an assignee under an assignment to which the Act applies is authorized as the representative of the creditors generally, to take such proceedings as may be necessary to have their rights declared. But in the event of the assignee failing to take steps to make the property affected by a fraudulent transfer available for the creditors generally, the Act authorizes any individual creditor to take such proceedings and confers upon such creditors the exclusive right to enjoy the benefits resulting therefrom if the proceedings should be successful. In this latter case the property affected by the transaction successfully impeached is not captured by the assignment at all.

Provisions similar in principle are found in the Creditors' Relief Act. Under those provisions, speaking broadly, execution creditors who in interpleader proceedings assume the risk of contesting an adverse claim and are successful, become entitled to the benefits arising from their successful proceedings to the exclusion of creditors who have refused to partake in the responsibilities of the contest.

I think there is nothing in the Assignments and Preferences Act in virtue of which an assignment by the debtor can have the effect of divesting such creditors of this privilege once it has vested in them. It is not necessary to pass upon the question whether the surplus of property, the subject of such proceedings, could after payment of the privileged creditors be claimed by the assignee for the behoof of the creditors generally: it seems to be clear that there is nothing in the Act which can fairly be held to displace the privilege in favour of such creditors. Section 14, which is relied upon, gives the assignment precedence over "judgments and executions not completely executed by payment." But the privilege in question is not an incident of the creditor's judgment or execution, it is a special privilege conferred upon him by the law as a reward for his activity in frustrating an attempt to commit a fraud; and I do not think the language of section 14 requires us to hold that it is within the purview of that section. On the whole, reading the relevant statutory provisions together, a reasonable view appears to be that the Assignments and Preferences Act recognizes the principle upon which the privilege created by the Creditors' Relief Act is based and there is nothing in the former Act which requires us to hold that the benefit of that privilege once acquired

is by its provisions divested for the behoof of the creditors as a whole.

ANGLIN, J.:—In my opinion the assignment to Martin did not deprive the execution creditors who had successfully contested the interpleader issue against Atkinson of the special lien upon the goods under seizure which they thereby acquired in virtue of the provisions of the Creditors' Relief Act, 9 Edw. VII. (O.) ch. 48. The effect of those provisions was not merely to establish the right of the contesting execution creditors to payment of their executions out of the proceeds of such goods, but also to bar *pro tanto* the right to share in them of all other creditors (sec. 6, sub-sec. 4), including the real claimant who is prosecuting the present proceedings in the name of the assignee, Martin. If any interest in those goods passed to Martin by the debtor's assignment, it was subject to the rights which had accrued from the anterior interpleader proceedings. I find nothing in the Assignments and Preferences Act (10 Edw. VII. (O.) ch. 64, which deprives the contesting execution creditors of the statutory privilege which their activity had secured to them—nothing which restores to the other creditors rights of which the Creditors' Relief Act by reason of their inaction had deprived them.

Mr. Justice Meredith, I venture to think, misses the point when he says of the statutory privilege acquired by the contesting execution creditors, that it was

> a lien which, of course, their executions alone gave them; there could be no other.

After the determination of the interpleader issue in their favour the successful execution creditors, in virtue of the statutory right conferred by the Creditors' Relief Act, occupied a much stronger position than that of mere execution creditors. Elsewhere the same learned Judge speaks of the creditor in whose behalf the present proceedings are taken as

> one who . . . never had the opportunity of joining in the contest.

It would almost seem that he had overlooked the provisions of sections 7 *et seq.* of the Creditors' Relief Act, 9 Edw. VII. ch. 48—particularly that of sub-section 3 of section 10. Neither can I agree with him that

> it is quite clear that the goods in question have always been as against creditors and the assignee, the property of the debtors.

The learned Judge writes as if he were under the impression that a conveyance which is fraudulent as against creditors is absolutely void. As pointed out in numerous cases under the Statute of Elizabeth, notwithstanding that such a deed is there declared to be "clearly and utterly void, frustrate and of none effect," it is good *inter partes* and not absolutely void, but only voidable at the instance of creditors.

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Till made void by "creditors and others," it is a valid deed, and one by virtue of which the legal estate vests in the grantee, subject to its being divested. (See May on Fraudulent Conveyances, 2nd ed., pp. 316-7, 325.)

It may be that these premises account in part for the conclusion of the learned appellate Judge, who differed from his colleagues, that the 14th section of the Assignments and Preferences Act "very plainly covers this case."

Except as against the contesting execution creditor the conveyance to Atkinson had not been avoided when the assignment to Martin was made; nor has it since been avoided. On the contrary, as has been pointed out in the Courts below, the reconveyance from Atkinson, under which the assignee Martin now asserts title, proceeds on the assumption that the debtor's property had passed to and was vested in Atkinson.

I respectfully concur in the opinions expressed in the provincial Courts by the learned Judges who held that the Martin assignment cannot prevail against the rights of the respondents and would dismiss this appeal with costs.

Brodeur, J.

BRODEUR, J.:—I concur in the opinion expressed by Mr. Justice Davies.

Appeal dismissed with costs.

CHADWICK v. STUCKEY.

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Alberta Supreme Court, Stuart, J., in Chambers. June 30, 1912.

1. SPECIFIC PERFORMANCE (§ I E—30)—RIGHT TO REMEDY—FAILURE TO PAY INSTALMENTS OF PURCHASE MONEY WHEN DUE—TENDER OF INSTALMENTS IN ARREARS.

Where an agreement for the sale of lands provides for payment in six instalments, and two full instalments only are paid and a payment is made on account of the third instalment a few days after it is due, and the purchaser then leaves the province without notifying the vendor, who, two months later, served notice of cancellation based upon the default in paying the balance of the third instalment, and nothing is heard from the purchaser thereafter for over two months, and, in the meantime, another instalment falls due, and is not paid, the purchaser on afterwards tendering the arrears of principal and interest, which the vendor refuses to accept will be refused specific performance where he gives no explanation of the delay, and the property is of speculative value.

2. TENDER (§ I—6)—EFFECT OF TENDER OF ARREARS OF INSTALMENTS OVERDUE ON LAND CONTRACT—NOTICE OF CANCELLATION—OFFER TO REINSTATE AGREEMENT—INCREASED PRICE.

Where a vendor of land gives notice of cancellation of the agreement of sale on the ground of default in payment of an instalment of the purchase price, and the purchaser subsequently tenders the arrears, the vendor does not, by offering to re-instate the agreement upon an addition being made to the purchase price, treat the agreement as being still on foot, so as to entitle the purchaser to specific performance upon payment of the arrears.

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APPLICATION upon originating summons for an order continuing a caveat and declaring that John M. Chadwick, purchaser from William Stuckey, was entitled to an equitable interest in certain land under a contract for sale.

Pescod, for Chadwick, applicant.
A. H. Clarke, K.C., for Stuckey, respondent.

STUART, J.:—Stuckey, by an agreement in writing, agreed to sell certain lands to Chadwick. The latter filed a caveat under the Land Titles Act to protect his interest. Default having been made in a payment, the owner, Stuckey, obtained a Judge's order shortening to 15 days the time for the purchaser to proceed on his caveat.

The purchaser took no proceedings; but nothing was done in the registry office, and the caveat remained. Eventually, after tender of the arrears and after refusal, and over six weeks after the time limited for taking proceedings on the caveat, the purchaser, Chadwick, obtained from Mr. Justice Simmons an originating summons asking for an order that the caveat be continued and for a declaration that the purchaser is entitled to an equitable interest in the land. The summons came before me in Chambers, and affidavits were filed and read by counsel for the parties. It was agreed that all questions of the regularity of the proceedings under the Land Titles Act should be waived, and that I should treat the matter as an action for specific performance by the purchaser.

Before assenting to go on in this way, I distinctly asked the parties if it were certain that all material facts were set forth in the documents before me, and if there were no possibility of a dispute upon facts. It was agreed that the facts were undisputed, and that everything necessary to the determination of the rights of the parties was contained in the material filed. I have, therefore, to decide whether, upon this material, the purchaser, Chadwick, is entitled to specific performance.

I have come to the conclusion that he is not. The facts are these. The agreement was dated the 18th January, 1911, and was for the sale and purchase of the west half of section 2, in township 25, range 2, west 5th meridian, for the sum of $25,280, payable as to $4,201.75 thereof by the purchaser assuming a mortgage to that amount in favour of one Adam Smeal and one William Smeal, and $2,000 on the 1st August, 1911, $2,000 on the 1st November, 1911, $2,000 on the 1st days of February, May, and August, 1912, and $3,078.25 on the 1st November, 1913, with interest on the unpaid purchase-money at 7 per cent. per annum. The agreement also contained the following clause:—

The vendor is to be at liberty to retain possession of the said pre-

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mises until the 15th day of April, 1911, upon which date the purchaser is to be entitled to full possession of the same, and thereafter to retain possession until default shall be made by him in the payment of any of the instalments of principal or interest due under the said mortgage or in the payment of any of the instalments of purchase-money or interest hereby provided for, and upon such default being made the vendor is to be entitled to re-enter in and upon the said premises, and to have the same as of his former estate and interest therein, and to expel, put out, and remove the purchaser therefrom.

There was also a clause in the agreement by which the vendor agreed to give title to the land in parcels as paid for (except as to the discharge of the mortgage) at the rate of $79 per acre, which was the rate at which the land was sold. This was quite evidently inserted to allow the purchaser to re-sell by way of sub-division, and confirms the statement in the vendor's affidavit that the land was purchased for speculative purposes. The following clause was also included in the agreement:—

> Time is to be considered of the essence of this agreement, and if the purchaser makes any default in the payment of the said mortgage-money or interest or of the purchase-money called for under this agreement or the interest thereon, the vendor may, immediately or at any time after the happening of such default, notify the purchaser in writing that this agreement has, by reason thereof, been determined and put an end to, which notice may be effectually given by depositing the same in the post office of Calgary in an envelope addressed, "John M. Chadwick, Esq., Calgary, Alta.," and prepaid and registered, and immediately upon the giving of the said notice all of the rights of the purchaser under this agreement shall be thereby determined and put an end to, and the vendor may re-enter upon the said premises and hold the same to his own use free from all claim of the purchaser thereupon, and may re-sell the same or otherwise deal with it as though this agreement had not been made, and may retain to his own use all sums of money paid to him in respect thereof by the purchaser.

The instalments of $2,000 each and interest payable on the 1st August and 1st November, 1911, were the only ones paid. An instalment of $2,000 and interest became due on the 1st February, 1912, but the purchaser paid only $600 on account of this, and this was paid on the 9th February. The vendor accepted this sum, but there is nothing to shew what occurred between the parties at that time.

In the absence of any such evidence, I do not think I can assume that any further time was given to pay the balance of the instalment. I think the default continued. The vendor states that, shortly after making this payment, the purchaser left Calgary without giving him any intimation of his intention to do so, although a conversation had occurred between them once or twice within a week before Chadwick's departure. He

also states that Chadwick had "promised me faithfully before leaving that he would pay up the balance of the instalments (*sic*) then past due."

There is no intimation in this that Stuckey had agreed to extend the time. Stuckey also says that he frequently went to Chadwick's office in Calgary, which was in charge of one Baxter, in order to inquire as to his whereabouts, and that all that Baxter could tell him was that Chadwick was in California, but he could not give any address. Stuckey further states that, as he could not get into communication with the purchaser, he decided to re-enter and did re-enter and take possession of the property, finding no one in possession thereof. He also, on the 10th April, 1912, signed and mailed a notice, in pursuance of the agreement, addressed to Chadwick, as provided therein, which notice, after referring to the agreement, proceeded thus:—

> Take notice that you made default in payment of the instalment of purchase money payable thereunder on the 1st day of February, A.D. 1912 (you having paid me only $600 out of an instalment due on 1st February, 1912, of $2,000 and interest), by reason of which default I hereby notify you that the said agreement has been determined and put an end to.

On the 11th April, that is, the next day after the mailing of this notice, Stuckey obtained the order from Mr. Justice Beck, above referred to, shortening the time for proceeding upon the caveat; and a copy of this order and of a notice stating that, unless proceedings were begun within 15 days, the caveat would cease to have any effect, were mailed to Chadwick, in care of Messrs. Millican & Millican, whose office was the address for service given in the caveat, on the 11th April, 1912. Then nothing absolutely is heard from the purchaser or from any one on his behalf for over two months.

On the 1st May, another $2,000 and interest fell due. Chadwick was apparently out of the country. This instalment was not paid, nor any part of it. Finally, on the 18th June, one Mapson, who alleges that he is the duly appointed agent for Chadwick, tendered the arrears of principal and interest to Stuckey, under instructions from Chadwick, and the money was refused. The next day the present summons was obtained, and also the next day, the very day the proceedings began, the solicitors for Chadwick paid the mortgage money due to the Smeals to Messrs. Clarke, McCarthy, Carson, & MacLeod, who were the Smeals' solicitors, as well as Stuckey's, and the money was received by them, but only as the Smeals' solicitors, and a discharge given.

At the time of the tender on the 18th June, Stuckey adhered to his position, but offered to "reinstate the agreement" if an additional sum of $2,000 was added to the purchase price.

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In my opinion, he did not, by this action, treat the agreement as still on foot. He merely offered to make a new agreement. Stuckey states that the property had increased in value to as much as $400 or $500 per acre, and that he had been greatly embarrassed, giving detailed reasons therefor, by not receiving the money due him. There is no explanation whatever, given upon behalf of Chadwick, as to why he did not make his payments. He makes no affidavit himself at all; and, for all that appears from the material before me, he may have deliberately refrained from payment. In any case he seems to have sent no communication whatever to the vendor for at least four months after making the $600 payment.

It may well be that, by accepting the $600 on the 9th February, when, by the terms of the contract, it should have been paid on the 1st, the vendor waived the term of the agreement making time of the essence of the contract; but there is absolutely nothing to shew that he thereby extended the time to any definite future period. He, in fact, waited two months before taking any action, and he was not obliged to seek out the purchaser and remonstrate with him. Apparently, the purchaser left the country altogether. He took no notice of the notices served upon him in the way he had stipulated they should be served. He allowed another instalment to fall due and again made default. Then, after four months' silence, some one makes a tender on his behalf. Nothing is heard from him himself. No word of explanation of the delay is given. The vendor had cancelled the agreement, as he had a right to do; the property was of speculative value; and, in all the circumstances, I think specific performance should be refused; and there will be judgment accordingly.

The vendor has offered to repay the money received; and, upon his doing so, and repaying the amount paid on the mortgage or paying both sums into Court without interest, the vendor may have an order directing the removal of the caveat. The purchaser should pay the vendor's costs of the proceedings.

Order vacating caveat on terms.

Carrie **SHEARER** (defendant, appellant) v. Andrew S. **HOGG** (plaintiff, respondent).

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. March 21, 1912.

1. WILLS (§ III G 5—140)—DEVISE BY LEGATEE OF RESIDUE UNDISPOSED OF AT HER DEATH—"IN HER POSSESSION OR NOT DISPOSED OF."

Where following a gift by will of all the testator's property absolutely to his wife with a direction that their children should be suitably maintained and educated by her, the will provided that should the wife die leaving any of said property or rights, "in her possession or not disposed of," then upon her decease the same should be divided "among our said children" in a specified manner, such provision does not empower the wife to dispose of the residue at the time of her death by will but has the effect of creating a substitution *de residuo* in favour of the children.

[*Shearer* v. *Forman*, 40 Que. S.C. 139, affirmed on appeal.]

Statement

APPEAL from the Superior Court, sitting in review, at Montreal, 40 Que. S.C. 139, *sub nom. Shearer* v. *Forman*, affirming the judgment of Lafontaine, J., in the Superior Court, District of Montreal, which maintained the plaintiff's action with costs.

The appeal was dismissed with costs.

The action was originally instituted by Addie M. Shearer, one of the children of the testator, against her sister, the present appellant, and John Forman, her husband. The original plaintiff died and the present respondent, by *reprise d'instance*, became plaintiff as the executor of the last will and testament. The action was dismissed in so far as it affected John Forman and was maintained in respect of the present appellant; no appeal having been taken in regard to the decision in favour of Forman, the judgment of the Court of Review merely affirmed the judgment of Mr. Justice Lafontaine against the appellant, Carrie Shearer. The clauses of the will of the late Andrew Shearer, in respect of which the dispute arises on the present appeal, are quoted in the judgments now reported.

Leo H. Davidson, K.C., for the appellant.
W. D. Lighthall, K.C., for the respondent.

Fitzpatrick, C.J.

THE CHIEF JUSTICE:—The circumstances under which this will was made may help us materially to ascertain by interpretation of the language used what the intention of the testator was. Married under conditions which established community of property between himself and his wife, the testator wished evidently to provide for her and her four young daughters, two of whom were for some reason the object of his special solicitude. He had managed to accumulate a modest fortune barely sufficient, as he foresaw, to provide for the maintenance of those dependent on him in a very humble way. His estate at his death was valued at $7,000. Having confidence in his wife's prudence

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and capacity, which confidence has been fully justified, and to avoid, no doubt, the partition of the community, a costly and cumbersome proceeding, he gave her his estate, burdened, however, with these obligations: 1st. That she should, during her lifetime, keep her children with her and provide for their education and maintenance according to their station in life; 2ndly. That such portion of the estate as might remain undisposed of or in her possession at her death should go to their four children in certain proportions which he fixes.

The words used in the will, and the interpretation of which has resulted in this litigation, are:—

> And finally it is my desire, will and wish that should my said wife die leaving any of my said property or rights in her possession *or not disposed of*, the same should be divided among our said children as follows, etc.

The words which have created the embarrassment are, "or not disposed of." Are those words mere surplusage in the sense that they add nothing to those that precede, as for instance, the words "her heirs and assigns" in the disposing clause; or are they words of amplification conferring power upon the widow to dispose of the estate by will, as they would if they were construed without reference to the context?

Taken literally, I would be disposed to say that these words might be construed, in view of the context, to convey the right to dispose of the residue of the estate in her possession at death by will. In that way effect is given to each word; property which is the object of a testamentary disposition remains until death in the possession of the testator. "Le mort saisit le vif." It is also possible to say that these words are mere surplusage, that is, the testator meant that property in possession of his wife in the sense that it was not disposed of by her by deed *inter vivos* would go to their children. That being a possible construction, should, in my opinion, prevail as being most consistent with the clear intention of the testator whose chief desire evidently was to provide for the support and maintenance of those dependent upon him as far as his modest estate would permit. To hold that the widow had an absolute power of disposition by will would be to defeat the clearly-expressed object of the testator. Nothing is more apparent than his solicitude for the care and maintenance of his young and helpless family, and if he gave his widow the power free from any limitation of making a will she might in the event of her death following close upon his dispose of the estate for the benefit of absolute strangers. Nothing could be further from the thought of the testator. Any possible construction of the terms used by him which would prevent the happening of such a contingency should be adopted.

I would dismiss this appeal and confirm the judgment below.

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Davies, J.

DAVIES, J.:—The controversy between the parties to this appeal depends for its solution entirely upon the construction given to the will of the late Andrew Shearer of Montreal.

The respondent claims that there was a substitution created by the will on the death of Mrs. Shearer and that he was the heir of one of the substitutes. The appellant's contention is that the will did not create a substitution, that the devise to the wife was absolute and that the power of disposition given to her of the property extended as well to a testamentary disposition as to one made in her lifetime.

The whole question is one of the testator's intention which is to be gathered not from any one phrase or sentence, but from the instrument read as a whole. The rules with respect to the construction of wills in the Province of Quebec are not different from those which prevail in all the other provinces of Canada. Articles 872 and 928 C.C. In all cases the intention of the testator, to be gathered from the whole instrument, is to govern.

By his will, executed in 1867, Andrew Shearer devised and bequeathed all the property, estates and rights, without exception, of which he should die possessed or entitled to unto his wife Elizabeth Crowe and her heirs and assigns for ever.

Following this absolute devise of his property are the two paragraphs in question which read as follows:—

> And, it is further my will and wish, that my said beloved wife keep with her our daughters as long as any of them may wish to remain, and especially that our daughters Addie and Edith have such education and upbringing as she will be able to afford them according to their station in life, and that inasmuch as our second daughter, Tina, is afflicted with sickness that she should be her mother's special care, during her said mother's lifetime with such necessaries as she may be able to provide her with.
>
> And finally, it is my desire, will and wish, that should my said wife die leaving any of my said property or rights in her possession or not disposed of that upon her said decease, the same should be divided among our said children as follows:—One-half thereof to our said daughter Tina, and the other half to our children, or those then living, in equal shares, one share to each of them, and their heirs and assigns forever.

I do not think any reasonable doubt can exist as to the testator's intention as expressed in and gathered from the entire will.

He first gives the property to his wife absolutely and then he impresses upon his gift a trust during her lifetime for the maintenance, support and education of his daughters. The power of the wife to dispose of the property or any part of it for the purposes specified in the will during her life was unquestionable. The will then provided that if at her death any

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of the property remained "in her possession or not disposed of" *upon her decease* the same should be divided among their children in the manner he then proceeds to specify.

The whole question before us resolves itself into this: Do the words "should my wife die leaving any of my said property or rights *in her possession or not disposed of*" give the wife the power of testamentary disposition over the property; or is the disposition referred to one to be made by her during her life?

I think the latter expresses the true intention of the testator. There seemed to be much difficulty in giving a meaning to the words "in her possession" preceding those "or not disposed of." I am inclined to think they were inserted to cover the possible case of proceeds of property disposed of by the wife and which were at her death in her possession and held by her to be applied as the will prescribed for her own maintenance and that of her children. At any rate they are applicable to such a condition and to such process. The remainder of the property not sold would be embraced by the words "or not disposed of." General words giving a power of disposition unless controlled by their context may well be held to embrace testamentary disposition. I cannot think they do so as they stand in this will. Such a construction would seem to me to be opposed to the testator's entire plan as to the disposition of his property. His wife gets the absolute power of disposition over it during her life for her own and her children's maintenance and the latter's education, and all the property not, in the wife's judgment, disposed of by her in her lifetime, for the persons and purpose he specially indicates, is to be divided among his children in the proportions he specifies. To construe the words "or not disposed of" as giving the wife a testamentary power of disposition which might be used to give the property to strangers or, as in fact the widow attempted to use it, to give the undisposed of property to one child to the exclusion of the others would be to defeat the testator's intention and the plan and object he evidently had in mind when framing his will.

I conclude, therefore, that the respondent's construction of the will is the correct one and that it created a substitution, on the death of Mrs. Shearer, with respect to the then undisposed of property in favour of the testator's children.

I would dismiss the appeal.

Idington, J.

IDINGTON, J.:—As I interpret the language of the will in question, it cannot be construed otherwise than as creating the substitution found therein by the Courts below and, therefore, would dismiss the appeal with costs.

Duff, J.

DUFF, J.:—It is conceded by counsel on both sides that if the words "desire, will and wish," in the fifth paragraph of the

will, are properly construed as words of disposition and not of recommendation merely then the disposition effected by that paragraph is in law incompatible with the vesting in the widow of powers of disposition by will. I have no doubt that the words in question must be construed as words of disposition; and it follows, consequently, that the widow had no power of disposition by will and that a substitution *de residuo* was created.

Anglin, J.

ANGLIN, J.:—Notwithstanding the absolute terms in which the testator had couched the legacy to his wife, observing the fundamental rule of construction which prescribes that testamentary intention should be gathered from the entire will (arts. 928 and 872 C.C.), this bequest must be held to be subject to such qualifications and restrictions as will give due effect to the provisions which follow it. By the first of these the widow's power of disposition of the property during her life is made subject to the rights of her daughters Addie, Edith and Tina to maintenance, care and education. It is the manifest intention of the testator that the property bequeathed to his wife shall be used by her for these purposes and for her own support. Actuated by the same wish he proceeds to state that it is his "desire, will and wish," not that his wife shall by her will make a designated disposition of so much of his property as shall at her death be left "in her possession or not disposed of," but that such property shall under the operation of his own will pass to his children in defined shares. While this is clearly intended as a dispositive provision, its effect is perhaps not so obvious.

The subject of the gift over to the children is such of the property bequeathed to her as the widow dies "possessed of" and such of it as she leaves "not disposed of." It is a little difficult, at first blush, to appreciate what the testator had in mind which might be property not disposed of and yet not in possession of his widow at her death. But, although at first inclined to read "or" as "and," since it is conceivable that some of the property though not disposed of might, nevertheless, be out of the widow's actual possession at the time of her death, I do not think we would be justified in substituting "and" for "or." It is not clear that it is necessary to do so in order to carry out the testator's intention.

What is the restriction imposed upon the widow's power of disposition? On a literal reading of the will she is first denied the power to alienate any of the testator's property of which she dies possessed. This *primâ facie* excludes the power of disposition by will because, ordinarily, she would die possessed of property which she might thus dispose of. Confining the application of the words "or not disposed of" to such property (if any) as though not in her physical possession yet belonged to her at her death (*i.e.*, had not been alienated) as must be done to give to

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them any effect, when read in conjunction with the other words "in her possession," do they import a power of disposition by will? I think not. Although, if they stood alone, the words "not disposed of" might well mean "not disposed of by act *inter vivos* or by will" (Pothier, Œuvres, vol. 8, "Des Substitutions," s. 4, No. 149), when taken in conjunction with the words "in her possession" and treating these latter words as not being mere surplusage, but as intended to impose some real restraint on the widow's power of alienation, I think the words "not disposed of" should be read as "not disposed of by act *inter vivos*" and, therefore, as not implying a right in the widow to make a disposition by will. On this question of construction, *Stevenson* v. *Glover*, 14 L.J.C.P. 169, referred to by Mr. Justice Lafontaine, is in point.

The words "not disposed of" are satisfied by a construction which restricts them to disposal by acts *inter vivos*, and that construction seems to me to best accord, not only with the words immediately preceding, but also with what appears to be the governing intention of the testator, namely, that, while giving his wife the control, management and disposition of his entire estate during her life in order to provide for her own needs and for the education, maintenance and care of his children, he wishes by the dispositions of his own will to secure to the children what should remain of his estate upon his wife's decease.

In view of the form of the bequests to the wife (art. 944 C.C.), the powers of disposition given her (arts. 952, 975, 976 C.C.), and the dispositive provision by which the daughters take the property undisposed of or in the widow's possession at her death not from her, but directly from the testator (art. 962 C.C.), and having regard to article 928 C.C., I respectively concur in the conclusion of the learned Judges of the Superior Court and Court of Review that we have here a case of substitution of residue. Its scope and extent I have indicated above.

The appeal fails and should be dismissed with costs.

Brodeur, J.

BRODEUR, J.:—For the reasons given by the Chief Justice I am of the opinion that this appeal should be dismissed and the conclusions of the judgments of the Superior Court should be confirmed.

Appeal dismissed with costs.

OLIPHANT v. ALEXANDER.
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British Columbia Supreme Court, Murphy, J. August 14, 1912.

1. ARREST (§ II—20)—PROCEDURE—ARREST BY CAPIAS—SETTING ASIDE ORDER—DEFECTIVE AFFIDAVIT.

It is beyond the jurisdiction of a Judge in Chambers in British Columbia to set aside an order for a *capias* after it has been passed and entered, on the ground of defects in the affidavits on which it was made.

[*Damer* v. *Busby*, 5 P.R. (Ont.) 356, referred to.]

2. ARREST (§ II—20)—OBJECTIONS TO ORDER FOR CAPIAS—DEFECTIVE AFFIDAVIT—RIGHTS AFTER BAIL HAS BEEN PUT IN.

Objections to an order for a *capias* on the ground of defects in the affidavits upon which it was made cannot be taken after special bail has been put in.

[*Robertson* v. *Beers*, 7 B.C.R. 76, referred to.]

3. ARREST (§ II—20)—PROCEDURE—MOTION FOR DISCHARGE OF BAIL—R.S. B.C. 1911, CH. 12, SEC. 7.

Upon a motion by the defendant under section 7 of the Arrest and Imprisonment for Debt Act, R.S.B.C. 1911, ch. 12, for the discharge of bail put in to a writ of *capias*, the Judge in Chambers may go into the whole matter at large.

4. EVIDENCE (§ II E 5—177)—PRESUMPTION AS TO INTENT TO LEAVE PROVINCE—ARREST AND IMPRISONMENT FOR DEBT ACT, R.S.B.C. 1911, CH. 12.

There is reasonable cause for believing that the defendant is about to quit the province within the meaning of the Arrest and Imprisonment for Debt Act, R.S.B.C. 1911, ch. 12, if the intended absence is likely to prove of such duration as would, before the abolition of imprisonment for debt, have prevented the taking of the defendant's person in execution.

[*Larchin* v. *Willan*, 4 M. & W. 351, referred to.]

5. BAIL AND RECOGNIZANCE (§ I—10)—DISCHARGE OF BAIL PUT IN TO WRIT OF CAPIAS—INABILITY OF PLAINTIFF TO SUCCEED IN ACTION.

It is only in a very plain case that bail put in to a writ of *capias* under the Arrest and Imprisonment for Debt Act, R.S.B.C. 1911, ch. 12, should be discharged on the ground that the plaintiff cannot succeed upon his alleged cause of action.

Statement

AN application by the defendant in both above cases to set aside an order for a *capias* on the ground that the affidavit leading to the grant of the order was defective, the order having been passed and entered, and special bail put in on behalf of the defendants.

The order was granted in the *Selkirk* case and refused in the *Oliphant* case.

S. S. Taylor, K.C., for defendant.
D. Armour, for plaintiffs.

Murphy, J.

MURPHY, J.:—As I consider the principles which I hold cover the objections to the original material and to the writs of *capias* applicable to both, I deal with the two cases so far as these objections are concerned together. With regard to the affidavits

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on which the order was made as distinguished from defects in the writ of *capias* itself it seems beyond the jurisdiction of a Judge at Chambers to set aside such order after it has been passed and entered inasmuch as it is then a judicial act subject to review only by the Court of Appeal: *Damer* v. *Busby* (1871), 5 P.R. 356. At any rate it appears to be too late to make such objections after special bail has been put in: *Robertson* v. *Beers*, 7 B.C.R. 76.

Apparently, it is likewise too late after such bail has been put in to object to irregularities in the writ such as are set up here, or, at any rate, if it is not, such irregularities may be amended. See the cases above cited. Any necessary amendments are therefore allowed. But it is open to defendant to move to have the bail discharged under sec. 7 of the Act and the motions made herein alternatively ask for such order. At the hearing it is open to the Judge at Chambers to go into the matter at large. He must be satisfied that plaintiff has a cause of action against the defendant to the amount of one hundred dollars or upwards or has sustained damage to that amount and that there is reasonable cause for believing that the defendant is about to quit the province.

Dealing with the last question first, as I think there is no distinction with regard to it in the cases before me, the principle to be acted upon is that if the intended absence is likely to prove of such duration as would have prevented the taking of the defendant's person in execution before the abolishment of imprisonment for debt this requirement is satisfied: *Larchin* v. *Willan*, 4 M. & W. 351. I see no reason why this principle should not still be applied despite such abolishment, for a judgment debtor may still be examined in aid of execution.

Now the defendant in the material filed shews that he does intend to leave the province for a period of five or six months. In the ordinary course of procedure the cases could be tried and a decision arrived at before such period elapsed and I therefore hold that this requirement is made out. This decides the case of *Oliphant* v. *Alexander*, as on the question of the existence of the cause of action it can hardly arise inasmuch as such cause of action is sworn to by the plaintiff and no material in reply is filed by defendant. It is possible that plaintiff's affidavit is open to objection as not being sufficiently definite but I think, as above stated, that point can only be taken in a Court of Appeal.

As to *Selkirk* v. *Alexander*, I have after careful perusal of the material come to the conclusion that the alleged cause of action cannot possibly succeed. The authorities shew that only in a very plain case should bail be discharged on this ground and I have therefore been at pains to weigh the material. I rest my

judgment on the cross-examination of the plaintiff himself. He admits seeing telegrams from defendant to Mendehlson asking explicitly about his possible claim for commission and he admits seeing the replies which he knew were sent to defendant to the effect that Mendehlson was the only person against whom he, plaintiff, was to have any claim. He admits further that he paid defendant a sum of $9,000 subsequent to the time when the alleged claim for commission arose and made no counterclaim whatever, though to obtain the necessary $9,000.00 he was forced to heavily discount agreements for sale. I do not see how this action can possibly succeed in face of this and other admissions contained in the plaintiff's cross-examination. I therefore propose to order the discharge of the special bail in the *Selkirk* case, but as possibly it may not appear so hopeless to other minds and as the law is that only in a very plain case should such decision be given, this order is not to become operative in the *Selkirk* case for a period of thirty days, to allow time for an appeal to be entered, if deemed advisable.

Orders accordingly.

THOMSON v. PLAYFAIR.

(Decision No. 2.)

Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A., and Lennox, J. June 28, 1912.

1. CONTRACTS (§ I E 5—97)—STATUTE OF FRAUDS—SUFFICIENCY OF WRITING—SEVERAL PAPERS.

Where a receipt for a payment on account of the purchase price of an interest in lands, containing sufficient particulars to satisfy the Statute of Frauds, is signed by the vendor, and a copy of it, headed "copy of receipt," is signed by the agent of the purchaser and handed to the vendor, the two documents may be read together, and constitute as against the purchaser a sufficient memorandum in writing to satisfy the Statute of Frauds.

2. CONTRACTS (§ I E 6—121)—SALE OF STANDING TIMBER—PART PERFORMANCE—POSSESSORY ACTS.

Where an agreement has been made for the sale of standing timber on an island, the action of the purchaser's agents in going to and landing upon the island, and inspecting the timber thereon, does not constitute such part performance of the agreement as to take the case out of the Statute of Frauds.

[*Thomson* v. *Playfair*, 2 D.L.R. 37 (head-note 2), reversed on this point; and see Annotation to that case, 2 D.L.R. 43.]

3. PRINCIPAL AND AGENT (§ II D—26)—AUTHORITY OF AGENT—RATIFICATION.

Where one who represents himself as an agent to purchase standing timber on an island enters into an agreement therefor and notifies his principals thereof and draws a draft on them in favour of the vendor marked "on account of the purchase," and his principals pay the draft, and enter the payment in their books as being "on account of the purchase" of the island, and write to the agent that they are pleased that he has secured the island and trust it will turn out a good one for

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timber, and subsequently send the agent to inspect the island and estimate the timber thereon, and the agent in his defence describes the transaction as a purchase, and it appears that the principals had for some time desired to purchase the island, the principals must be taken to have ratified the transaction as a purchase and cannot thereafter be heard to say that they had taken an option only.

[*Thomson* v. *Playfair*, 2 D.L.R. 37, affirmed on other grounds.]

APPEAL by the defendants Playfair and White from the judgment of RIDDELL, J., 2 D.L.R. 37, 25 O.L.R. 365.

The appeal was dismissed.

Argument

R. McKay, K.C., and *F. W. Grant*, for the appellants. Neither Hugh C. Thompson nor C. E. Byers had any authority to enter into any contract on behalf of Playfair and White for the purchase of Yeo Island. This being so, it is clear that, even if any contract had been entered into by either Thompson or Byers in writing, within the provisions of the Statute of Frauds, it would not have been binding on the appellants. There is no evidence of any act on the part of Playfair and White, in any way communicated to the plaintiff, or her agent, affirming or ratifying the alleged contract: *Marsh* v. *Joseph*, [1897] 1 Ch. 213, at pp. 238 and 247. The document signed in the name of Playfair and White by the defendant Byers, was merely given as a copy of the receipt which he himself was taking from the plaintiff's agent, and the document is expressly so marked on its face: *Keighley Maxsted & Co.* v. *Durant & Co.*, [1901] A.C. 240. At the time at which it is alleged that ratification took place, there was no evidence of any knowledge on the part of Playfair and White of what the alleged contract was. There is, in any event, no sufficient memorandum within the Statute of Frauds. The receipt does not purport to be an agreement on the part of the appellants; it does not state the name of the party purchasing, and does not state the name of the vendor in any part of it: *Bradley* v. *Elliott* (1906), 11 O.L.R. 398; *Potter* v. *Duffield* (1874), L.R. 18 Eq. 4; *Skelton* v. *Cole* (1857), 1 DeG. & J. 587; *Williams* v. *Jordan* (1877), 6 Ch. D. 517; *Thomas* v. *Brown* (1876), 1 Q.B.D. 714; *Green* v. *Stevenson* (1905), 9 O.L.R. 671, at pp. 675, 679; *Vandenbergh* v. *Spooner* (1866), L.R. 1 Ex. 316; *White* v. *Tomalin* (1890), 19 O.R. 513; *Bohan* v. *Galbraith* (1907), 13 O.L.R. 301, 15 O.L.R. 37; *Williston* v. *Lawson* (1891), 19 Can. S.C.R. 673. The whole agreement must appear in writing: *Queen's College* v. *Jayne* (1905), 10 O.L.R. 319; *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311; *Bristol Cardiff and Swansea Aerated Bread Co.* v. *Maggs* (1890), 44 Ch. D. 616, and the cases cited therein. That the sale of standing timber is within the Statute of Frauds is clearly and expressly decided by the case of *Hoeffler* v. *Irwin* (1904), 8 O.L.R. 740, at pp. 745 *et seq.* There were no acts of part performance sufficient to take the case out of the statute: Fry on Specific Performance, 5th ed., pp. 31, 283, 291, 294 (sec. 585), and 295

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Argument

Thynne v. *Earl of Glengall* (1847), 2 H.L.C. 131, at p. 158; *Alderson* v. *Maddison* (1881), 7 Q.B.D. 174, affirmed in the House of Lords, *Maddison* v. *Alderson* (1883), 8 App. Cas. 467; *Harrison* v. *Mobbs* (1908), 12 O.W.R. 465, at p. 467.

G. H. Kilmer, K.C., and *D. Robertson*, K.C., for the plaintiff. There was ample evidence to justify the learned trial Judge in finding that the defendants Playfair and White adopted and ratified the contract entered into on their behalf with the defendant Byers. Ratification may be inferred from silence alone: Evans on Principal and Agent, 2nd ed., pp. 75, 79; *Ferguson* v. *Carrington* (1829), 9 B. & C. 59. The words "on account of purchase" mean on account of agreement to purchase: *Long* v. *Millar* (1879), 4 C.P.D. 450, at p. 454. The defendants Playfair and White had knowledge of what the contract was, at the time of the alleged ratification, because they had received the receipt signed by W. A. Thomson, the plaintiff's agent. The action of an unauthorised agent in entering into a contract where one is required under the Statute of Frauds, intending to contract on behalf of another, but without his authority, may be ratified by that other: *Bolton Partners* v. *Lambert* (1889), 41 Ch.D. 295, followed in *Re Portuguese Consolidated Copper Mines Limited, Ex p. Badman, Ex p. Bosanquet* (1890), 45 Ch. D. 16, at p. 31; *Durant & Co.* v. *Roberts and Keighley Maxsted & Co.*, [1900] 1 Q.B. 629. Although this case was reversed in *Keighley Maxsted & Co.* v. *Durant & Co.*, [1901] A.C. 240, it was on the ground that the agent who made the contract did not profess at the time of making it to be acting on behalf of a principal. The inference is, that the person paying the money is the purchaser and the person receiving it the vendor: *Green* v. *Stevenson*, 9 O.L.R. 671; *Carr* v. *Lynch*, [1900] 1 Ch. 613. There was a sufficient memorandum within the statute. It is sufficient under the Statute of Frauds if the terms of the contract can be collected from several distinct writings, which refer to each other in such a manner as to shew that they relate to the same transaction: *Wylson* v. *Dunn* (1887), 34 Ch. D. 569; *Studds* v. *Watson* (1884), 28 Ch. D. 305; *Pearce* v. *Gardner*, [1897] 1 Q.B. 688. The plaintiff relies not on the duplicate receipt alone, but on the receipt signed by the plaintiff's agent, a copy of the receipt signed "Playfair and White, *per* C. E. Byers," and the order; and it is submitted that they all clearly refer to one another: *Cave* v. *Hastings* (1881), 7 Q.B.D. 125. The receipt signed by the plaintiff's agent is sufficient as to terms: *Devine* v. *Griffin* (1854), 4 Gr. 603; *Coles* v. *Trecothick* (1804), 9 Ves. 234; *Standard Realty Co.* v. *Nicholson* (1911), 24 O.L.R. 46. The letter of Mr. Grant, solicitor for the appellants, can likewise be read to assist in making a complete memorandum : *In re Hoyle*, [1893] 1 Ch. 84; *In re Holland*, [1902] 2 Ch. 360, at p. 383. If any parol evidence is required to connect the receipt, the copy of the receipt, and the

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order, it can be given: *Ridgway* v. *Wharton* (1856), 6 H.L.C. 238, at p. 257. We refer also to *Cameron* v. *Spiking and Teed* (1877), 25 Gr. 119.

McKay, in reply, referred to *Campbell* v. *Dennistoun* (1873), 23 C.P. 339.

June 28, 1912. The judgment of the Court was delivered by MEREDITH, J.A.:—There are just two substantial questions involved in this appeal: (1) Is there a sufficient memorandum in writing to satisfy the requirements of the Statute of Frauds? And, if so, (2) are the defendants bound by it?

The receipt given for the payment of $100 is quite sufficient to bind those who gave it, but obviously it could not bind the defendants, who did not; the plaintiff must rely on other writing for that purpose, which she does: at the time when this receipt was given, a copy of it was made, headed with the words "copy of receipt;" Byers, acting as if their agent in this transaction, signed it; and this writing was given to the plaintiff's agent; the other being retained by Byers and afterwards sent by him to his masters, the defendants.

If the word "approved," or "correct," or something of that character, had been added to either writing, and had been thereunder signed by the defendants, I can have no doubt that the writing would be a memorandum of the sale sufficient to satisfy the requirement of the enactment; and I can find no good reason against attributing to the copy of the receipt the same meaning as if such a word had been inserted above the signature. The copy of the receipt was made, signed, and given as binding evidence of the transaction; it was a certification, in the defendants' names, of that which was set out in the receipt. Then, reading the two writings together, as of course one may, there is, in my opinion, a sufficient memorandum signed by the parties to be charged as well as by the other parties.

On the other point, I am unable to differ from the trial Judge in his finding that the transaction was ratified by the defendants, and so is binding upon them, whether or not Byers or Thompson—who also was an agent of the defendants and took part with Byers in making the agreement—had authority to make it.

An order was given by Byers on the defendants to pay the $100 "on account of the purchase of Yeo Island," and it was paid; the transaction was so entered in the books of the defendants: for a long time before the transaction, the defendants had an eye to the purchase of this property; and investigation to some extent had been made for that purpose. On the 23rd May, the defendants wrote to Byers, "Trust you will find a lot of timber on Yeo Island;" on the following day, Byers wrote to them, "We closed for the Island, at least we have bound the

bargain;" and on the same day, they wrote to him, "I am pleased that you have secured Yeo Island, and trust it will turn out a good one for cedar."

These things are not conclusive, but, with others, support the finding, by the trial Judge, of ratification; and, in addition to that, seem to me sufficient evidence of an antecedent authority.

I cannot, however, find anything in the evidence which would support this transaction on the ground of part performance.

Although not altogether on the same grounds, I would affirm the judgment directed to be entered by the trial Judge.

Meredith, J.A.

Appeal dismissed.

Re VILLAGE OF CALEDONIA and COUNTY OF HALDIMAND.

Ontario Divisional Court, Meredith, C.J.C.P., and Teetzel, and Kelly, JJ. August 20, 1912.

1. BRIDGES (§ I—7)—COST OF CONSTRUCTING AND MAINTAINING—COUNTY'S OBLIGATION WHERE STREAM MORE THAN 100 FEET IN WIDTH—MUNICIPAL ACT, 3 EDW. VII. (ONT.) CH. 19, SEC. 616.

A bridge is more than 100 feet in width within the meaning of sec. 616 of the Consolidated Municipal Act, 1903, and should be built, kept and maintained in repair by the county municipal corporation in which it is situate, where the water crossed by it, though normally less than 100 feet wide, rises in the spring of each year, and occasionally at other times, to such an extent as to be more than 100 feet wide and to overflow the road at each end of the bridge.

[*Village of New Hamburg* v. *County of Waterloo*, 22 Can. S.C.R. 296, followed.]

Statement

APPEAL by the Corporation of the County of Haldimand from the decision of the Judge of the County Court of the County of Haldimand, dated the 14th May, 1912, declaring that Black creek, where it is crossed by a bridge on the main highway passing through the Village of Caledonia, is more than 100 feet in width, within the meaning of sec. 616 of the Consolidated Municipal Act, 1903 (3 Edw. VII. ch. 19), and that such bridge should be built, kept, and maintained in repair by the Municipal Council of the County of Haldimand.

The appeal was dismissed.

T. A. Snider, K.C., for the appellants.

H. Arrell, for the Corporation of the Village of Caledonia, respondents.

Kelly, J.

The judgment of the Court was delivered by KELLY, J.:—Black creek is a stream emptying into the Grand river, within the Village of Caledonia. Just above this point it is crossed by a bridge connecting a main highway leading through the county. The land, both to the east and the west ends of the bridge, is low-lying.

The evidence shews that in the springtime of every year, and

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at other times as well, the water in the creek at the bridge rises to such an extent as to be more than 100 feet in width; at such times the water overflows the road for a considerable distance at either end of the bridge.

The conditions are such as, in my opinion, justify the finding of the learned Judge of the County Court, and bring the case within the authority of *Village of New Hamburg* v. *County of Waterloo*, 22 Can. S.C.R. 296, in which it was laid down by Gwynne, J. (at p. 299), that, "after heavy rains and during freshets, which are ordinary occurrences in this country, the waters of the streams and rivers are accustomed to be much swollen and raised to a great height; and a bridge, therefore, which is designated to be the means of connecting the parts of a main highway leading through a county which are separated by a river, must necessarily be so constructed as to be above the waters of the rivers at such periods; and the width of the rivers at such periods must, therefore, in my opinion, be taken into consideration in every case in which a question arises like this which has arisen in the present case under the sections of the Act under consideration."

The appeal will, therefore, be dismissed; there will be no order as to costs.

Appeal dismissed.

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MAYBURY v. O'BRIEN.

Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A., and Lennox, J. June 28, 1912.

1. PRINCIPAL AND AGENT (§ II A—8)—RIGHTS AND LIABILITIES OF PRINCIPAL ON SALE OF LAND—ABSENCE OF AUTHORITY TO ALTER TERMS.

Where an agent is authorized to sell land upon the terms of payment of one-third of the price in cash on signing the agreement, an agreement for sale made by him stipulating for a payment of a lesser sum on signing the agreement and for payment of the balance required to make up the one-third cash when the title and documents are accepted is not binding upon his principal.

[*Maybury* v. *O'Brien*, 25 O.L.R. 229, 3 O.W.N. 393, reversed on appeal.]

2. BROKERS (§ II A—5)—AUTHORITY OF AGENT FOR SALE OF LAND—RELATIONSHIP OF PRINCIPAL AND AGENT.

To prove that a person was appointed by the owner as his agent for the sale of land there must appear in some shape an offer upon the one hand and an acceptance on the other, out of which there grew a contract establishing the mutual rights and responsibilities of the relation of principal and agent. (*Per* Garrow, J.A.)

APPEAL by the defendant from the judgment of Clute, J., 25 O.L.R. 229.

The appeal was allowed.

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W. M. Douglas, K.C., for the defendant. Pardee was not the agent of the defendant, but of the plaintiff, and he had no authority whatever to bind the defendant. In all the negotiations with the defendant relating to the alleged sale, Pardee was acting for and on behalf of himself or the plaintiff. The receipt in question was drawn up behind the back of the defendant, solely for the purpose on the part of Pardee of giving some advantage to his client, the plaintiff; and the receipt, either by implied authority or otherwise, is not binding upon the defendant: *Canadian Pacific R.W. Co.* v. *Rosin* (1911), 2 O.W.N. 610. The receipt does not constitute a sufficient memorandum as required by the Statute of Frauds: first, because Pardee was not the agent of the defendant and had no authority to sign the receipt; and, again, because the name of the defendant, the person on whose behalf the receipt is now said to have been given, did not in any way appear therein, and extrinsic evidence cannot be admitted to identify him. Further, the receipt does not contain the terms and conditions of the sale. And, besides, the receipt is indefinite and inconclusive. The learned trial Judge erred in holding that a certain memorandum made by the defendant in his own book satisfied the Statute of Frauds, and that this memorandum and the receipt meant the same thing. The terms of the alleged contract, as set forth in the receipt, are too vague and indefinite to be specifically performed. I refer to the following cases on the Statute of Frauds: *White* v. *Tomalin* (1890), 19 O.R. 513, at p. 521; *Williams* v. *Lake* (1859), 2 E. & E. 349; *Potter* v. *Duffield* (1874), L.R. 18 Eq. 4; *Jarrett* v. *Hunter* (1886), 34 Ch.D. 182; *Filby* v. *Hounsell*, [1896] 2 Ch. 737; *Bradley* v. *Elliott* (1906), 11 O.L.R. 398; *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267; *Thuman* v. *Best* (1907), 97 L.T.R. 239; *Chadburn* v. *Moore* (1892), 61 L.J. Ch. 674.

A. W. Anglin, K.C., for the plaintiff. The plaintiff's case is founded not alone upon the receipt signed by Wilcox & Pardee, but upon the memorandum made by the defendant, and upon other writings proved at the trial. Pardee was, to the defendant's knowledge, acting as agent of a probable purchaser, whose name was not at the time disclosed to the defendant, and he was expressly authorised by the defendant to sell the defendant's equity in the land in question, at the price and on the terms mentioned in the receipt and memorandum; and this authority to sell carried with it the authority to sign a memorandum in writing sufficient to satisfy the Statute of Frauds: *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267; *Canadian Pacific R.W. Co.* v. *Rosin*, 2 O.W.N. 610; *John Griffiths Cycle Corporation Limited* v. *Humber & Co. Limited*, [1899] 2 Q.B. 414. The receipt and the memorandum mean the same thing; the difference being in expression, and not in meaning or substance. Neither the receipt

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nor the memorandum is indefinite or inconclusive: *McDonald* v. *Murray* (1883-5), 2 O.R. 573, at p. 581, 11 A.R. 101, at p. 122. The receipt without the counterfoil is sufficient as to parties. It discloses both a vendor and a purchaser, and it was proved that Pardee was agent for the defendant: *Filby* v. *Hounsell*, [1896] 2 Ch. 737; *Morgan* v. *Johnson* (1911), 3 O.W.N. 297, at p. 300. The defendant is shewn to be the vendor by the counterfoil, which, with the receipt, formed one document, and they are still to be so regarded, though severed, and the counterfoil retained by the defendant's agent: *Pearce* v. *Gardner*, [1897] 1 Q.B. 688. Should the counterfoil and receipt be regarded as separate documents, their relation may be shewn by parol evidence: *Oliver* v. *Hunting* (1890), 44 Ch.D. 205, at p. 209; *Kennedy* v. *Oldham* (1888), 15 O.R. 433. The defendant is shewn to be the vendor by the correspondence subsequent to the receipt: *Buxton* v. *Rust* (1872), L.R. 7 Ex. 279, at p. 282. The defendant's memorandum is sufficient to bind him under the Statute of Frauds. It was made in his own book, in his own writing; and the character "O'B.", contained in the memorandum, is a sufficient signature under the statute: *In re Hoyle*, [1893] 1 Ch. 84; *Newell* v. *Radford* (1867), L.R. 3 C.P. 52; *In re Holland*, [1902] 2 Ch. 360, at p. 385. There was a concluded agreement of sale and purchase. The defendant's memorandum and his solicitor's letter of the 23rd June are inconsistent with the defendant's contention that negotiations were still pending: *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124; *Gray* v. *Smith* (1889), 43 Ch.D. 208. "Cash" is a relative term in real estate transactions. It ordinarily means money in exchange for the shewing of title. See *Andrews* v. *Calori* (1907), 38 Can. S.C.R. 588, and the cases cited therein; *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311, at p. 321; *McDonald* v. *Murray*, 11 A.R. 101.

Douglas, in reply.

GARROW, J.A.

June 28, 1912. GARROW, J.A.:—Appeal by the defendant from the judgment at the trial before Clute, J., without a jury, in favour of the plaintiff. The action was brought to enforce specific performance of an alleged agreement in writing by the defendant to sell to the plaintiff certain lands in the town of Sault Ste. Marie. The agreement is thus pleaded and set out in the statement of claim:—

"2. On or about the 16th day of June, 1911, the defendant agreed to sell to the plaintiff, and the plaintiff agreed to buy from the defendant, part of lot 19 on the north side of Queen street in the said town of Sault Ste. Marie, being the westerly half of said lot, south of King street, in the said town, except the westerly 26½ feet, for the price of $6,412.50, payable as follows: $200 down, balance of $1,937.50 after approval of title

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and documents—portion of equity about $1,000 equally on December 11 and June 12, remainder semi-annually, about $500 in Sept. and March each year until paid. Interest 7 per cent. A note or memorandum of which agreement is in writing and signed by Wilcox and Pardee by John B. Pardee, who were thereunto by the defendant lawfully authorised."

The agreement referred to reads as follows:—

"Sault Ste. Marie, June 16th, 1911.

"Received from Alfred W. Maybury two hundred dollars, a/c purchase 28½ ft. x 132, being pt. lot 19, N. Queen adjoining Sault Star Bldg. on east. Price $225.00 per front ft. Terms $200.00 down, blce. of $1,937.50 after approval title and documents. $500.00 in Sept. and Mch. Blce. of equity, about $1,000, equally on Dec. 11 and June 12. Remainder semi-annually, about $500.00, in Sept. and Mch. each year until paid. Int. 7 per cent. Purchase-price $6,412.50.

"Wilcox & Pardee

"by Jno. B. Pardee."

The defendant denied making the agreement, denied that Wilcox & Pardee were, or that John B. Pardee was, his agents, or agent, or had his authority to make such an agreement, and pleaded the Statute of Frauds as a defence.

At the trial, an application was made by the plaintiff to amend by adding to the paragraph of the statement of claim before set out these words—"and a further note or memorandum of which is also in writing and signed by the defendant;" which note or memorandum, consisting of an entry made at the time by the defendant in his note-book, is as follows:—

"June 15 Sold 28½ feet N. Queen to J. B. Pardee

"Price 225.00 per foot one 1/3 cash

"Total purchase-price 6,412.50

"1/3 cash 2132.50

"Balance of O'B. equity payments Dec. & June. Interest 7 per cent.

"Keenan payments to be assumed as per agreement

"Cost of property 4,788.00

"1,624.50."

After some evidence had been given, the amendment was allowed. This memorandum was unsigned, but it is said the "O'B. equity" means the defendant's equity in the lands; and that, therefore, this memorandum, written by himself, in which he uses the initials of his name, is a sufficient signature under the statute. The memorandum, however, was made in the course of the negotiations; and, when made, it is clear that no agreement had then been arrived at.

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The learned trial Judge was of the opinion: (1) that the defendant had appointed Mr. Pardee his agent, and had authorised him to make the agreement in question; and (2) that the agreement referred to and set out in the statement of claim was sufficient to satisfy the Statute of Frauds.

My difficulty is to accept the first proposition, which, with deference, I think was not proved. This proposition seems to divide itself into two questions: (1) was Mr. Pardee an agent for the defendant for any purpose? and (2), if he was, was he or his firm authorised to make the particular agreement sued on? And I think both should be answered in the negative. They are both, of course, questions of fact; and, in dealing with them, I am bound to regard the learned trial Judge's statement that he prefers the evidence of Mr. Pardee to that of the defendant when they differ.

The onus was upon the plaintiff to prove by reasonable evidence an agency in fact. There were and are no circumstances in the case to justify a finding that the alleged agency was an agency in law, or, in other words, arose by estoppel; and, indeed, no such contention is advanced.

Now what is the evidence? And I will take Mr. Pardee's own statement for it. He says he had frequently acted for the plaintiff in buying lands. He acted for him in making a resale of the same lands to Mr. Plummer, at an advanced price. At the opening of the negotiations in question he went to the defendant on behalf of the plaintiff. No claim is made that, at or prior to that time, he was acting or had any authority to act, either personally or for his firm, for the defendant. He did not inform the defendant for whom he was acting, but the conversation implied that he was acting for a principal:—

"I mentioned that *my purchaser* would like to have an answer at once."

"Q. He never said anything to you about $200 did he? A. No; I do not think he did.

"Q. And he never said anything to you about signing any receipt did he? A. No.

"Q. You and Mr. O'Brien were dealing at arm's length, were not you? A. We were dealing in the office there.

"Q. You know what I mean? A. No, I do not know what you mean by arm's length.

"Q. You were dealing as one man would with another in a business transaction. A. Exactly.

"Q. There was no association between you? A. No.

"Q. There was no common interest? A. No.

"Q. You were trying to get the best terms you could for your client? A. Yes.

"Q. And he was trying to get the best terms he could for himself? A. Yes.

"Q. You for Maybury, he for O'Brien? A. Exactly.

"Q. He told you he would not sell unless he had a third cash? A. Exactly.

"Q. Which was what you understood? A. Yes.

"Q. And you finally came down to the terms one-third cash? A. Exactly.

Q. What did you understand by that? A. A third of the total payment.

Q. Cash down on the signing of the agreement? A. I presume so, yes.

"Q. And, so far as you are concerned, is that all that you had to do with it? A. That is all.

"Q. Then you signed the receipt, exhibit 3, as you thought, in pursuance of some authority given you by Mr. O'Brien? A. No, I signed it as we do generally; we take a deposit when we sell property.

"Q. So that that was quite apart from any actual authority given you? A. Yes, I cannot recall any actual amount named as a deposit by Mr. O'Brien.

"Q. Nothing was said about a deposit, was there? A. Well, it went without saying, if we sold the property, we would take a deposit.

"Q. That is your usual practice? A. Yes.

"Q. And there was no other mention of any terms or conditions in connection with the agreement than those which you have indicated? A. Exactly."

Then, after the personal interview, what took place was entirely over the telephone:—

"Q. You got as far as stating that Mr. O'Brien rose from his desk, and you took that as an intimation that the interview was over, and you left? A. I did.

"Q. And you stated that, immediately before that, you stated to Mr. O'Brien that the purchaser would consent to the increase in the cash payment? A. No, I did not.

"Q. What was said? A. Mr. O'Brien said to me after rising from his desk that he would call me up in the evening and let me know the best terms he would sell on—the best cash payment . . . ."

"Q. Mr. O'Brien did not call you up? A. Mr. O'Brien did not call me up that evening. On the following morning I called Mr. O'Brien up at his hotel. I was informed that he was not in. I left word for him to call me up when he did come in. He did so, I should say in the neighbourhood of ten or fifteen minutes afterwards. He stated to me that he would sell on the proposed terms of a third down, the balance of his equity, about $1,000, in December, 1911, and June, 1912, at 7 per cent. interest, and the purchaser assume Mr. Keenan's payments under Mr.

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Keenan's agreement. I informed Mr. O'Brien over the telephone that, if I could sell on those terms, I would do so without consulting him further. He said that was satisfactory. Mr. Maybury came into the office a few minutes afterwards, and I told him I was able to sell Mr. O'Brien's property at the price of $225 a foot under the terms as he stated to me. Mr. Maybury stated to me that he would take the property. I then called up Mr. O'Brien, got him on the 'phone in Mr. Maybury's presence, and told him that I had sold the property. Mr. O'Brien answered 'All right.' I asked him who was looking after his interests in the matter, and he informed me that Boyce & Hayward—

"Q. What next? A. Mr. Maybury then gave me $200—a cheque for $200—to bind the bargain, and I gave him a receipt for it."

I am wholly unable, even without the defendant's denial, to see in this evidence, which is the whole story upon that branch of the case, any reasonable evidence that the defendant appointed or agreed to appoint Mr. Pardee or his firm his agents. A man is not to have an agent thrust upon him in that way. The appointment necessarily results from a contract, in which there must appear in some shape an offer upon the one hand and an acceptance upon the other, out of which there grow the mutual rights and responsibilities of the relation. Down to the conversation over the telephone, there is not the very slightest room even to pretend that either party contemplated the alleged agency. Mr. Pardee was there in the defendant's office as the representative of the plaintiff, and of him alone. He was the "purchaser" who wanted an immediate answer, and it was in his interests, and not the defendant's, that Mr. Pardee haggled over the down-payment with the defendant, which he wished to have reduced. The defendant's impression of what occurred is set out in the memorandum in his note-book before set out, put in by the plaintiff, which he says he read over to Mr. Pardee, who does not, so far as I see, deny the statement, in which the defendant states that the sale was to Mr. Pardee himself. This memorandum, fairly read, is utterly inconsistent with an agency such as that alleged, or of any other kind.

Then, in the conversation by telephone, the expressions, "I informed Mr. O'Brien that, if I could sell on these terms, I would do so," and, "I told him I had sold the property," and the defendant's reply, "All right," are to be read in conjunction with the earlier course of the negotiations, and are, I think, perfectly consistent with Mr. Pardee still being, in the defendant's opinion, the agent only of the purchaser, and are wholly insufficient, in the light of all the evidence, to create, in such an obscure and indirect manner, the important relation now claimed for them of also making him the agent of the vendor.

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Then, upon the second question, as to the alleged authority to make the particular agreement which was made. The instruction, on Mr. Pardee's own shewing, was to make an agreement upon the term (among others) of one-third cash on signing the agreement, and he made no such agreement. What he did make was an agreement stipulating for $200 down, and the balance of the one-third cash payment when the title and documents were accepted. I cannot, with deference, agree that these mean the same thing. It is, however, not exactly that, but whether an explicit instruction has been followed. It is, in other words, a question of power and authority pure and simple; and, in my opinion, there was no power or authority to substitute for one-third cash on signing the agreement, the term of $200 down and the balance when the title and documents were accepted. The latter, doubtless, had, in Mr. Pardee's eyes, the merit of giving him so much of the defendant's money in hand, in case there should subsequently be a dispute about his agency for the defendant, and its resulting commission, which if he did not claim, he would be a very unusual agent.

Upon the whole, and without entering upon some of the other matters discussed before us, which, in my opinion, become unimportant in the view which I take of the facts, I think, for the reasons I have given, that the appeal should be allowed and the action dismissed with costs.

MACLAREN, J.A.:—I agree. Maclaren, J.A.

MEREDITH, J.A.:—Accepting as accurate, as the learned trial Judge did, the testimony of the witness Pardee as to his conversation, by telephone, with the defendant, referring to the sale in question, this witness was authorised by the defendant to sell the land in question, on the terms they had before discussed. It can mean that and cannot mean anything else. Meredith, J.A.

But one of the terms was that one-third of the whole price was to be paid in cash. The agreement in question provides for payment of "$200 down, balance of $1,937.50 after approval title and documents." It is contended that these terms are substantially the same; that "after approval title and documents" is the same as "cash;" and, if the whole of the one-third of the price were to be paid on approval of title and documents, there might be a good deal to be said in favour of the contention; whether enough to support it or not need not be considered; for, if it be so, then the agent has departed from the terms in accepting $200 down. If the cash payment were made on accepting title, it would come into the hands of the vendor himself if he desired it; as the agreement is made, it may never come to his hands; I can find in the evidence no

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authority for splitting the cash payment; and the objection to the agreement on that score is not altogether a fanciful one; or might not be in many cases. It is plain that the agent deliberately split the single cash payment into a "down" payment and a payment on completion of the sale, with the advantage to him of having $200 in hand, an advantage of some substantiality in case of disputation as to a right to commission upon the sale.

On this ground I would allow the appeal.

Magee, J.A.
Lennox, J.

MAGEE, J.A., and LENNOX, J., concurred.

Appeal allowed.

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REX v. HONAN.

Ontario Court of Appeal, Garrow, Maclaren, Meredith, Magee, JJ.A., and Lennox, J., ad hoc. June 18, 1912.

1. CRIMINAL LAW (§ II B—49)—SUMMARY TRIAL—ABSOLUTE JURISDICTION.

A person charged under secs. 227 and 228 Criminal Code, 1906, ch. 146, with keeping a common betting house, may without his consent, under secs. 641, 773 and 774 of the Code, as amended by 8 and 9 Edw. VII., be summarily tried by a police magistrate, absolute jurisdiction to try such offence without a jury having been conferred upon such official by secs. 641, 673, and 674 of the Cr. Code, 1906.

[*Rex* v. *Lee Guey*, 13 Can. Cr. Cas. 80, 15 O.L.R. 235, specially referred to.]

2. EVIDENCE (§ V—510)—ARTICLES OBTAINED UNDER SEARCH WARRANT—REGULARITY OF WARRANT.

Upon a trial for keeping a common betting house in violation of secs. 227 and 228 of the Criminal Code, R.S.C. 1906, ch. 146, articles for recording bets which were seized upon the premises by police officers, are admissible in evidence against the prisoner, irrespective of a claim by the accused that the alleged search warrant was illegal and that the police officers had obtained possession of the articles by means of their own trespass.

[*Rex* v. *White* (1908), 15 Can. Cr. Cas. 30, 18 O.L.R. 640, specially referred to.]

Statement

CASE stated by George Taylor Denison, Esquire, Police Magistrate for the City of Toronto, as follows:—

"On the 28th February, 1912, John Honan and Thomas Honan were charged before me, upon an information charging that the said John Honan and Thomas Honan, in the month of February, 1912, at the City of Toronto, in the County of York, did, contrary to law, keep a common betting-house at No. 125 Jarvis street, contrary to sec. 227 of the Criminal Code; upon which charge the said accused asked leave to exercise their right to elect to be tried by a jury, which I refused, upon the ground that my jurisdiction to try the accused was absolute without their consent. The defendants thereupon pleaded 'not guilty'; and I

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thereupon proceeded to try them summarily upon the charge aforesaid.

"On the said 28th February, 1912, upon hearing the evidence submitted on behalf of the Crown—the accused not having given or tendered any evidence in their defence—I found them both 'guilty' of the offence with which they were charged, and I convicted them accordingly, and sentenced them each to pay a fine of $10 and costs or to imprisonment for thirty days in the common gaol.

"Upon the arraignment of the accused before me on the said 28th February, they (by their counsel) submitted that they could exercise the right to elect to be tried by a jury upon the charge aforesaid, and stated that they desired to exercise such right and wished to be tried by a jury; but I ruled that the accused had not the right to elect to be tried by a jury, and that I had absolute jurisdiction and right under secs. 227 and 228 and clause (*f*) of sec. 773 and sec. 774 of the Criminal Code to try the accused summarily without their consent; and I, accordingly, refused the accused the right to elect.

"Upon the trial of the said accused before me, there was tendered on behalf of the Crown evidence consisting of certain articles marked as exhibits 1, 2, 3, and 4, which are forwarded herewith, and are made part of this stated case, as evidence against the accused. The said exhibits, according to the evidence, had been seized, as it was alleged, under the provisions of sec. 641 of the Criminal Code, by certain police constables of the City of Toronto, who entered the premises of the accused; and the said exhibits were, under the provisions of secs. 641 and 642 of the Code, tendered as evidence against the accused upon the charge aforesaid; and I admitted the said exhibits as such evidence, against the objection of counsel for the accused that the provisions of secs. 641 and 642 had not been complied with.

"It appeared by the evidence that the chief constable of the City of Toronto, and also the deputy chief constable, were in the city on the 13th February, 1912 (the day upon which the police constables referred to in the next preceding paragraph entered the premises of the accused and seized the said exhibits), during the whole day, and acted in the performance of their duties, but that the seizure of the exhibits aforesaid was not made by them or under their direction, or by or under the direction of either of them, but was made by an inspector of police—a police constable named George Kennedy—or under his direction, neither the chief constable nor the deputy chief constable being present.

"Counsel for the accused objected to the admission of the said exhibits as evidence against the accused, upon the ground that my warrant or order purporting to authorise George Kennedy, police inspector, to act in the absence of the chief constable and deputy chief constable, was wrongfully and improvidently issued,

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in that the persons designated by the statute were not absent, as provided by the statute, and that the seizure of the articles marked as exhibits 1, 2, and 3, was not made by or under the direction of the chief constable or the deputy chief constable aforesaid, or of any other person authorised under sec. 641 of the Criminal Code to make such seizure; but I overruled this objection, and admitted the said exhibits as evidence against the accused.

"At the request of counsel for the accused, I hereby reserve the following questions of law for the opinion of the Court of Appeal:—

"1. Had I the right to refuse to allow the accused to elect to be tried by a jury, and to try them summarily, without their consent?

"2. Had I the right, under the provisions of sec. 641, to authorise George Kennedy, a police inspector, to act in the absence of the chief constable and deputy chief constable, they being in the city attending to their ordinary police duties on the day of such authorisation and seizure?

"3. Was I right in admitting as evidence against the accused the exhibits hereinbefore mentioned so seized?

"The report in writing of the chief constable for the City of Toronto to me, the information and complaint before me, the warrant or order or authority issued by me pursuant to the said report, the conviction of the accused, and the evidence, including the said exhibits, are forwarded herewith and made part of this stated case."

The report of the chief constable, addressed to the Police Magistrate, was in these words: "I have the honour to report to you that there are good grounds for believing and I do believe that a building occupied by John Honan, in the City of Toronto, is kept or used as a common betting-place; and I hereby apply for authority to proceed against the said premises under secs. 641 and 642 of the Criminal Code."

The authority signed by the Police Magistrate was as follows: "I hereby authorise George Kennedy, police inspector of the City of Toronto deputed to act in the absence of the chief constable or deputy chief constable of said city, to enter the above-named premises and to proceed against the same under the provisions of secs. 641 and 642 of the Criminal Code."

George Kennedy, sworn as a witness at the trial of the accused, produced the articles marked as exhibits, referred to in the case, which, he deposed, were found on the person of John Honan and upon the premises. They were slips and racing forms and other papers apparently used for the purpose of recording bets.

Section 227 of the Criminal Code, R.S.C. 1906, ch. 146, defines a common betting-house.

Section 228, as amended by 8 & 9 Edw. VII. ch. 9 (schedule), provides: "Every one is guilty of an indictable offence and liable

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to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy-house, common gaming-house, common betting-house or opium joint, as hereinbefore defined."

Section 641: "If the chief constable or deputy chief constable of any city . . . or other officer authorised to act in his absence, reports in writing to . . . the Police . . . Magistrate . . . that there are good grounds for believing and that he does believe that any house, room or place within the said city . . . is kept or used as a common . . . betting-house, as defined in section . . . 227 . . . such . . . Police . . . Magistrate . . . may, by order in writing, authorise the chief constable, deputy chief constable, or other officer as aforesaid, to enter any such house . . . and to take into custody all persons who are found therein, and to seize . . . all tables and instruments of . . . betting . . . and to bring the same before the person issuing such order, or any Justice, to be by him dealt with according to law . . ."

Section 773, as amended by 8 & 9 Edw. VII. ch. 9 (schedule):—

"Whenever any person is charged before a magistrate,— . . .

"(*f*) with keeping a disorderly house under section 228 . . .

"the magistrate may, subject to the subsequent provisions of this Part, hear and determine the charge in a summary way."

Section 774, as amended by 8 & 9 Edw. VII. ch. 9 (schedule):—

"The jurisdiction of the magistrate is absolute in the case of any person charged with keeping a disorderly house, or with being an inmate or habitual frequenter of a common bawdy-house, and does not depend on the consent of the person charged to be tried by such magistrate, nor shall such person be asked if he consents to be so tried.

"2. The provisions of this Part do not affect any absolute summary jurisdiction given to Justices by any other Part of this Act."

Argument

T. J. W. O'Connor, for the defendants, argued that the Police Magistrate had not the right, under secs. 773 and 774 of the Code, to refuse the accused a trial by jury. Prior to the amendments made in 1909, this was settled by *Rex* v. *Lee Guey* (1907), 13 Can. Cr. Cas. 80, 15 O.L.R. 235, following *The Queen* v. *France* (1898), 1 Can. Crim. Cas. 321; and the amendments in question do not give the magistrate the jurisdiction which he has claimed in this case. The magistrate had no right, under sec. 641, to authorise the inspector to seize the articles marked as exhibits, as the chief constable and his deputy were not "absent" within the meaning of the section; and, as the exhibits were illegally seized, the magistrate was not authorised to use them as evidence: Roscoe's Crim. Evid., 13th ed., pp. 195, 196; *The Queen* v. *Lushington, Ex p. Otto*, [1894] 1 Q.B. 420.

J. R. Cartwright, K.C., and *E. Bayly*, K.C., for the Crown, ar-

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gued that the amendments to secs. 773 and 774, made by 8 & 9 Edw. VII. ch. 9, gave the magistrate the absolute jurisdiction which he had assumed, and that he had not erred in admitting the evidence in question: *Ex p. Cormier* (1909), 17 Can. Crim. Cas. 179.

Meredith, J.A.

June 18. The judgment of the Court was delivered by MEREDITH, J.A.:—The purpose of the amendments to secs. 773 and 774, made in the year 1909, was to make those sections applicable to such a case as this and others of the same character: to change the law in this respect from that which this Court had then recently, and a Quebec appellate Court had long before, held it to be, to that which in those cases it was contended for the Crown that it was: and the only question now is, whether Parliament has sufficiently expressed that purpose in the language used in making the amendments.

In the plainest words possible, it has made sec. 773 cover such a case as this; that is unquestionable; but it is urged that the change made in sec. 774 is not sufficient for that purpose. In that contention I am quite unable to agree.

Section 773 enumerates in detail the charges which a "magistrate" may hear and determine in a summary way; and plainly included in them is the charge in question in this case, which is described as keeping a disorderly house under sec. 228; and that section, in plain terms, comprises any common bawdy-house, common gaming-house, or common betting-house, as in previous sections defined.

Then sec. 774 proceeds to make the jurisdiction of the magistrate, conferred upon him by sec. 773, "absolute" in the case of keeping a disorderly house; that is, in the case of keeping a disorderly house, as set out in the preceding section conferring the jurisdiction, that jurisdiction is to be absolute; and the remodelling of sec. 774, in respect of inmates and frequenters, makes it quite plain also that, in framing these amendments, due regard was had to that which was, in these respects, pointed out in the case of *Rex* v. *Lee Guey*, 15 O.L.R. 235, 13 Can. Cr. Cas. 80, to which I have already adverted.

So that, in my opinion, the charge in this case is clearly one covered by sec. 774 as well as 773, as amended in the year 1909: 8 & 9 Edw. VII. ch. 9 (schedule); and, therefore, the "magistrate" had "absolute" jurisdiction.

Nor can I think that the magistrate erred in admitting the evidence objected to; the question is not, by what means was the evidence procured; but is, whether the things proved were evidence; and it is not contended that they were not; all that is urged is, that the evidence ought to have been rejected, because it was obtained by means of a trespass—as it is asserted—upon the property of the accused by the police officers engaged in this prosecution. The criminal who wields the "jimmy" or the

bludgeon, or uses any other criminally unlawful means or methods, has no right to insist upon being met by the law only when in kid gloves or satin slippers; it is still quite permissible to "set a thief to catch a thief:" see *Rex* v. *White* (1908), 18 O.L.R. 640, 15 Can. Cr. Cas. 30.

This disposes of the first and third questions adversely to the accused, and makes it unnecessary to consider the second; though I may add that, if magistrates will endeavour to give to the plain words of statutes their plain meaning, without letting that which may or may not suit their conveniences, or that which in their narrower environments may seem to be a better law, sway them, they will not find much difficulty in pursuing the right course.

Meredith, J.A.

Convictions affirmed.

WALLACE v. DAY.

Alberta Supreme Court, Walsh, J., in Chambers. August 29, 1912.

1. LANDLORD AND TENANT (§ III E—115)—OVERHOLDING TENANT—SUMMARY PROCEEDINGS.

Alberta Rule 469 (Judicature Ordinance Rules), under which summary proceedings by way of originating summons may be taken to recover possession from an overholding tenant, does not authorize the court to fix or order payment of a sum to be paid for use and occupation of the premises during the overholding period.

Statement

HEARING of an originating summons upon an application by a landlord for an order for possession of demised premises against the defendants as overholding tenants under rule 469 of the Judicature Ordinance, N.W.T. Ord. (Alta. Consol. 1911).

W. S. Davidson, for the plaintiff.

F. S. Albright, for the defendants.

Walsh, J.

WALSH, J.:—The defendants were originally in possession of the premises in question, under a lease in writing for a term which expired on the 17th May, 1912. In March of this year, negotiations took place between them whereby the defendants would take a lease of these and certain other premises, but it is admitted that nothing came of them. The defendant Harry Day swears that, when this arrangement fell through, it was verbally agreed with the plaintiff that he would give them a new lease of the premises covered by the old lease, for twelve months from the date of its expiry. The plaintiff denies this in his affidavit and upon his cross-examination before me. The onus of establishing this contention is upon the defendants, and I do not think that they have satisfied it. I find, therefore, that they have failed to prove this agreement; and it is, therefore, unnecessary for me further to consider it. The plaintiff, therefore, if nothing further had occurred, was entitled to possession on

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the 18th May last. The defendants, however, remained in possession with the plaintiff's consent until the end of July. It is admitted that they paid and the plaintiff accepted the rent to the 18th July, at the same rental as that reserved by the expired lease.

On the 17th June, a notice was given to the defendants to vacate the premises "one month from the 18th day of June, 1912."

The parties again disagree as to the circumstances under which his subsequent possession was held and this subsequent rent was paid. The affidavit of the defendant Harry Day (who is the only one of the defendants to testify) inferentially attributes the payments to the new lease of which I have spoken. The plaintiff's wife, to whom these payments were made and who looked after her husband's interests in the matter at that time, in his absence from the country, swears that, before the 18th May, she told this defendant that he could not have a new lease, as her husband required the premises for his own business, but that she was going to see her husband, and would give him a definite answer by the 27th May, and that the defendants could occupy the premises in the meantime, on their agreement to vacate at any time upon receiving notice. She says further that, about the 27th May, she told them that the plaintiff had decided to use the premises in his own business, and that they would have to vacate at an early date, but that she would give them thirty days' notice, and that the rent was accepted by her under these circumstances. She swears that she allowed the defendants to remain in possession from the 18th July until the end of that month, at their request, and upon the representation that they had secured other premises of which they could not obtain possession until the 1st August. I accept her version of these circumstances as the correct one. It is not asserted that she took any part in or had any knowledge of the alleged agreement for the new lease. The defendant admits that when he spoke to her about this new lease, she said that she was going to Spokane in a couple of weeks and would see her husband about it, and that the first of these two payments was made to her two days afterwards, before she had gone to Spokane or learned anything of the matter from the husband. He further admits that, on her return to Calgary about the end of May, she told him that her husband had not yet decided about the lease, and that she might have to tell the defendants to get out of the premises. This was followed shortly afterwards by the notice to quit to which I have referred.

The conduct of the plaintiff and his wife after the expiry of the old lease, whether viewed in the light of their own or of the defendants' version of it, harmonizes so thoroughly with their

contention as to the arrangement that was in force during that period, that I have absolutely no hesitation in accepting theirs as the correct presentment of the facts. It appears from the cross-examination of the defendant Harry Day that in July he was looking for other premises, which is some corroboration of Mrs. Wallace's evidence. I do not attach any weight to the affidavit of Kilcup, who swears that, about the 28th July, Mrs. Wallace said to Day in his (Kilcup's) presence, speaking of the alleged verbal lease, "It is no good, because you have no witness." It is not suggested that she had any personal knowledge of the matter, and her statement, which was in reply to a remark of the defendant, represented, I think, her idea of the legal effect of the defendant's contention as made by him to her, rather than a statement of fact in connection with the disputed agreement.

I find that the defendants' holding over after the 17th May was under an express agreement that they would vacate upon thirty days' notice; that notice was properly given, under which the plaintiff became entitled to possession on the 18th July; that the further holding over after that date was under an express agreement, under which they were bound, without further notice, to deliver up possession by the end of July; and that their possession since then has been wrongful and without colour of right.

An order will, therefore, go in favour of the plaintiff for possession with costs.

The summons asks for an order that the defendants pay to the plaintiff damages for their wrongful possession. Rule 469 of the Judicature Ordinance, under which this summons was issued, only authorizes proceedings by way of originating summons "to recover possession of demised premises from an overholding tenant." I do not think that I can, on this application, order the payment by the defendants of the amount to which the plaintiff is entitled for the use and occupation of the premises since the 18th July, to which date the rent was paid. The defendants will, I think, be well advised to pay, and the plaintiff will be well advised to accept payment, at the rate of $100 per month from the 18th July to the date when possession is surrendered, without further litigation.

The affidavits of I. W. McArdle and Eva Trahan, which were not used on the argument, were improperly filed after the argument, and must be removed from the files, and the plaintiff will not be allowed any costs in respect of them.

Order for possession.

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VOLCANIC OIL AND GAS CO. v. CHAPLIN.

Ontario High Court. Trial before Falconbridge, C.J.K.B. July 12, 1912.

1. WATERS (§ II B—76)—RIGHT TO LAND FORMED BY ALLUVION OR GAINED BY THE RECESSION OF WATERS—CONTIGUOUS OWNERS—BOUNDARIES—ENCROACHMENT.

Land formed by alluvion or gained by the recession of water belongs to the owner of the contiguous land, to which the addition is made, and, conversely, land encroached upon by navigable waters ceases to belong to the former owner, on the principle that one who derives an advantage should also bear the burden, but, when the boundary of the land along the shore is clearly and rigidly fixed by deed, survey, or otherwise, the principle does not apply, and the owner thereof, who cannot gain by alluvion or recession, does not lose by encroachment.

[*Re Hull and Selby Railway*, 5 M. & W. 327, discussed and followed; *Foster* v. *Wright*, 4 C.P.D. 438, distinguished; *Widdecombe* v. *Chiles*, 73 S.W. 444, not followed; see also Gould on Waters, 3rd ed., par. 155, p. 306; and Theobald's Law of Land, p. 37.]

2. PARTIES (§ I A 4—48)—NECESSITY OF JOINING ATTORNEY-GENERAL—TRESPASS—ENCROACHMENT ON LAND BY NAVIGABLE WATERS.

The Attorney-General is not a necessary party to an action for trespass to land, where the defendant sets up that the land in question, though formerly the property of the plaintiff, has been encroached upon by navigable waters and has become the property of the Crown, and justifies the alleged trespass under a lease thereof from the Crown subsequent to the plaintiff's patent.

Statement

ACTION by the Volcanic Oil and Gas Company, John G. Carr, and the Union Natural Gas Company of Canada Limited (added by order in Chambers), plaintiffs, against Chaplin and Curry, defendants, for a declaration of the plaintiffs' right of ownership of certain lands, and for an injunction and damages in respect of trespasses alleged to have been committed by the defendants thereon.

Judgment was given for the plaintiffs.

G. F. Shepley, K.C., and *J. G. Kerr*, for the plaintiffs.
O. L. Lewis, K.C., for the defendant Curry.
W. Stanworth, for the defendant Chaplin.

Falconbridge, C.J.

July 12, 1912. FALCONBRIDGE, C.J.:—The plaintiffs the Volcanic Oil and Gas Company carry on business in the counties of Essex and Kent in the production and sale of petroleum and natural gas; the plaintiff Carr is a farmer; the defendant Chaplin is described as a wheel manufacturer; the defendant Curry is an oil and gas drilling operator.

The plaintiff Carr is the owner and occupant of the westerly half of lot 178, Talbot road survey, in the township of Romney. It was granted by the Crown by patent dated the 29th January, 1825, to Carr's predecessor. The lands are described in the patent in manner following, that is to say: "All that parcel or tract of land situate in the township of Romney, in the county of

Kent, in the western district in our said Province, containing by admeasurement one hundred acres, be the same more or less, being the south-easterly part of lot number 178 on the north-westerly side of Talbot road west, in the said township, together with all the woods and waters thereon lying and being, under the reservations, limitations, and conditions hereinafter expressed, which said one hundred acres are butted and bounded or may be otherwise known as follows, that is to say: commencing at the north-westerly side of the said road in the limit between lots numbers 177 and 178 at the easterly angle of the said lot 178; thence on a course about sixty degrees west along the north-westerly side of the said road twenty chains seventy-one links more or less to the limit between lots numbers 178 and 179; thence north forty-five degrees west sixty chains more or less to the allowance for road between the townships of Romney and Tilbury East; thence east twenty-nine chains more or less to the limit between lots numbers 178 and 177; thence south forty-five degrees east 47 chains more or less to the place of beginning."

The plaintiffs claim that the original Talbot road, which formed the south-westerly boundary of the lands included in the above patent, ran near the bank of Lake Erie, which at this point is many feet above the beach, and rises perpendicularly therefrom, having a clay front facing the waters of the lake. The plaintiffs further allege that along the shore of Lake Erie, in that locality, the waters of the lake have been encroaching upon the lands, undermining the bank, causing it to subside, and then gradually washing it away; that, by reason of this encroachment of the lake, Talbot road at an early period grew dangerous and unsafe for public travel, until, about the year 1838, it was abandoned as a means of public travel, and a new road, which has for many years been known as the Talbot road, was opened up and dedicated to public travel; that this road still continues to be the travelled road known as Talbot road, but the original Talbot road across the lake front has long since been washed away by the waters of the lake, and now those waters have advanced beyond where they were at the time of the original Talbot road survey; so that they have washed away the reserve left in front of the Talbot road, also the Talbot road itself and some rods of the front of the surveyed lots; so that now so much of the lands patented to Carr's predecessor, and now owned by him, as are now above the waters of Lake Erie, border on the waters of the lake, and not on the original Talbot road.

The above statements are denied by the defendants, but I find them to have been proved, as I shall hereinafter state.

On or about the 4th July, 1908, the plaintiff Carr executed and delivered to the plaintiffs the Volcanic company a grant and demise of the exclusive right to search for, produce, and dispose of petroleum and natural gas in, under, and upon the said lands, together with all rights and privileges necessary therefor, etc.

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By instrument under the Great Seal of the Province of Ontario, dated the 1st August, 1911, known as Crown lease number 1836, the Government of the Province demised and leased unto the defendant Chaplin, his heirs, executors, etc., the whole of that parcel or tract of land under the waters of Lake Erie in front of this lot, amongst others (the particular description of which is set out in paragraph 5 of the statement of defence of Curry).

About the month of September, 1911, the defendant Chaplin made a verbal contract with the defendant Curry for putting down a well for the production of petroleum and natural gas in and upon the lands so demised by the Crown to Chaplin; and Curry, acting under such contract, entered upon what the plaintiff Carr claims to be his land, with men and teams, and constructed a derrick and engine-house, etc.

The plaintiffs, claiming that this entry was wholly unlawful, made objection thereto; and, on the defendants persisting in their operations, the plaintiffs obtained an injunction from the local Judge, which injunction was continued until the trial. The plaintiffs now ask: (1) that the injunction be made perpetual; (2) a declaration of their rights as to the ownership of the land, and as to riparian rights; and (3) damages.

The defendants claim that, if the waters of the lake have washed away the bank and encroached in and upon lot 178, the lands up to the foot of the high bank before-mentioned became the property of the Crown, and that the south-westerly external boundaries of the lot shifted as the waters of the lake encroached thereon, giving full right to the Crown to enter into the Crown lease before-mentioned.

The point involved is extremely interesting, and is one which, if I correctly apprehend the English and Canadian cases, has never yet been expressly decided, either in the old country or here.

The surveyors who were called all agree that, by reason of the original survey having been made so long ago, and of the disappearance of original monuments, etc., they could not now lay out upon the land and water, as they now exist, the old Talbot road. Numerous witnesses were called who remembered that road and could speak of its boundaries, and of the erosion of the beach causing the road to be carried away north to its present position—many rods north of its original *situs*. The evidence is overwhelming (I disregard the curious evidence of Samuel Cooper), and I find it to be the fact that the *locus* now in controversy is part of the lot 178 north of the old Talbot road.

Having come to this conclusion, it follows that, if the plaintiffs' contention in law is well founded, it is quite immaterial whether or not the construction of the derrick is entirely in the water, or partly in the water and partly on the beach—the fact being that it is on Carr's property.

In Gould on Waters, 3rd ed., para. 155, pp. 306 to 310, inclusive, after stating the general rule that "land formed by alluvion, or the gradual and imperceptible accretion from the water, and land gained by reliction, or the gradual and imperceptible recession of the water, belong to the owner of the contiguous land to which the addition is made," and that "conversely land gradually encroached upon by navigable waters ceases to belong to the former owner," quoting the maxim *Qui sentit onus debet sentire commodum*, the author proceeds (p. 309): "But when the line along the shore is clearly and rigidly fixed by a deed or survey, it will not, it seems, afterwards be changed because of accretions, although, as a general rule, the right to alluvion passes as a riparian right."

In *Saulet* v. *Shepherd* (1866), 4 Wall. (U.S.) 502, it was held that the right to alluvion depends upon the fact of contiguity of the estate to the river—where the accretion is made before a strip of land bordering on a river, the accretion belongs to *it* and not to the larger parcel behind it and from which the strip when sold was separated; citing at length the judgment in a case of *Gravier* v. *City of New Orleans*, which is in some little known report not to be found in our library at Osgoode Hall.

In *Chapman* v. *Hoskins* (1851), 2 Md. Ch. 485, the general rule is stated as follows (paragraph 2, head-note): "Owners of lands bordering upon navigable waters are, as riparian proprietors, entitled to any increase of the soil which may result from the gradual recession of the waters from the shore, or from accretion by alluvion, or from any other cause; and this is regarded as the equivalent for the loss they may sustain from the breaking in, or encroachment of the waters upon their lands."

Now, in the case in hand, the plaintiffs say that they could gain nothing by accretion, by alluvion, or other cause; and, consequently, they should not lose by encroachment of the water upon their land, to which fixed *termini* were assigned by the grant from the Crown. This doctrine seems to be well supported by decisions of Courts which are not binding upon me, but which command my respect, and which would seem to be accurately founded upon basic principles.

In *Smith* v. *St. Louis Public Schools* (1860), 30 Mo. 290, the principle is very clearly stated: "The principle upon which the right to alluvion is placed by the civil law—which is essentially the same in this respect as the Spanish and French law, and also the English common law—is, that he who bears the burdens of an acquisition is entitled to its incidental advantages; consequently, that the proprietor of a field bounded by a river, being exposed to the danger of loss from its floods, is entitled to the increment which from the same cause may be annexed to it. This rule is inapplicable to what are termed limited fields, *agri limitati;* that is, such as have a definite fixed boundary other than the river,

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such as the streets of a town or city." The reference in the judgment to the English common law is not quite so positive as the head-note states it. The Judge (Napton) in the course of a very learned opinion says (p. 300): "It will be found, indeed, that upon this subject the Roman law, and the French and Spanish law which sprung from it, are essentially alike, if we except mere provincial modifications; and it is believed that the English common law does not materially vary from them. This uniformity necessarily results from the fact that the foundation of the doctrine is laid in natural equity." In saying this he may have had in his mind the language of Blackstone, to be now found in book 2, Lewis's ed., pp. 261-2; although he does not cite him. There are some earlier English authorities to which I shall refer later.

Then there is a case of *Bristol* v. *County of Carroll* (1880), 95 Ill. 84 (para. 3 of head-note): "3. To entitle a party to claim the right to an alluvial formation, or land gained from a lake by alluvium, the lake must form a boundary of his land. If any land lies between his boundary line and the lake, he cannot claim such formation."

In *Doe dem. Commissioners of Beaufort* v. *Duncan* (1853), 1 Jones (N.C.) 234, at p. 238, Battle, J., says: "Were the allegations supported by the proof, an interesting question would arise, whether the doctrine of alluvion applies to any case where a water boundary is not called for, though the course and distance, called for, may have been co-terminous with it? We do not feel at liberty to decide the question, because we are clearly of opinion that the evidence given on the part of the defendant does not raise it."

Cook v. *McClure* (1874), 58 N.Y. 437, is a judgment of the Court of Appeals of the State of New York. The head-note is as follows: "*It seems*, the rule that, where a boundary line is a stream of water, imperceptible accretions to the soil, resulting from natural causes, belong to the riparian owner, applies as well where the boundary is upon an artificial pond as upon a running stream. In an action of ejectment, plaintiff claimed under a deed conveying premises upon which was a mill and pond. The boundary line along the pond commenced at 'a stake near the high-water mark of the pond,' running thence 'along the high-water mark of said pond, to the upper end of said pond.' *Held*, that the line thus given was a fixed and permanent one, and did not follow the changes in the high-water mark of the pond; and that defendant, who owned the bank bounded by said line, could not claim any accretions or land left dry in consequence of the water of the pond receding, although the gradual and imperceptible result of natural causes."

In *The Schools* v. *Risley*, 10 Wall. (U.S.) 91, the decision was as follows: "A street or tow-path or passway or other open space

permanently established for public use between the river and the most eastern row of blocks in the former town of St. Louis, when it was first laid out, or established, or founded, would prevent the owners of such lots or blocks from being riparian proprietors of the land between such lots or blocks and the river. But this would not be true of a passage-way or tow-path kept up at the risk and charge of the proprietors of the lots, and following the changes of the river as it receded or encroached, and if the inclosure of the proprietor was advanced or set in with such recession or encroachment."

In *In re Hull and Selby Railway* (1839), 5 M. & W. 327, the general law as to gradual accretion or recession is stated. Alderson, B., says (p. 333): "The principle laid down by Lord Hale, that the party who suffers the loss shall be entitled also to the benefit, governs and decides the question. That which cannot be perceived in its progress is taken to be as if it never had existed at all."

See also *Giraud's Lessee* v. *Hughes* (1829), 1 Gill & Johnson (14 C.A. Md.) 115.

The defendants' counsel, in the course of a very elaborate and careful argument, cited numerous authorities in support of the view that the plaintiff Carr had lost the land by the encroachment of the water. I do not cite all of these, because they are set out at large in the extended report of the argument*; but I do not think that there is any case in which it has been expressly held that a person in the position of this individual plaintiff loses his property because of the gradual encroachment of the water past the land in front of the road, past the road, and past the fixed boundary of the plaintiffs' land. He could not have gained an inch of land by accretion even if the lake had receded for a mile; and, therefore, it seems that the fundamental doctrine of mutuality, formulated in the civil law and adopted into the jurisprudence of many countries, cannot apply to him.

Perhaps the strongest English case cited by the defendants' counsel was *Foster* v. *Wright* (1878), 4 C.P.D. 438: "The plaintiff was lord of a manor held under grants giving him the right of fishery in all the waters of the manor, and, consequently, in a river running through it. Some manor land on one side of, and

* The authorities cited by counsel for the defendants were the following: Farnham on Waters, pp. 280, 281, 291, 296, 309; *Foster* v. *Wright*, 4 C.P.D. 438; Gould on Waters, 3rd ed., p. 308; *Standly* v. *Perry* (1879), 3 S.C.R. 356; Encyc. Laws of England, 2nd ed., vol. 2, pp. 143, 145; vol. 14, pp. 625, 630, 631; *Hindson* v. *Ashby*, [1896] 1 Ch. 78, [1896] 2 Ch. 1; *Point Abino Land Co.* v. *Michener* (1910), 2 O.W.N. 122; *Parker* v. *Elliott* (1852), 1 C.P. 470, 491; Michael and Wills on Gas and Water, 6th ed., pp. 409, 410, 411; Hall's Rights of the Crown in Sea-shore (1881), p. 683; *Attorney-General* v. *Terry* (1874), L.R. 9 Ch. 423; Halsbury's Laws of England, vol. 7, p. 116; *Regina* v. *Port Perry and Port Whitby R.W. Co.* (1876), 38 U.C.R. 431; *Re Sinclair* (1908), 12 O.W.R. 138; *Lyon* v. *Fishmongers' Co.* (1875), 1 App. Cas. 662, 671, 672, 679, 680.

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near but not adjoining the river, was enfranchised and became the property of the defendant. The river, which then ran wholly within lands belonging to the plaintiff, afterwards wore away its bank, and by gradual progress, not visible, but periodically ascertained during twelve years, approached and eventually encroached upon the defendant's land, until a strip of it became part of the river bed. The extent of the encroachment could be defined. The defendant went upon the strip and fished there:" *Held*, that an action of trespass against him for so doing could be maintained by the plaintiff, who had an exclusive right of fishery which extended over the whole bed of the river notwithstanding the gradual deviation of the stream on to the defendant's land."

That case goes a long way in support of the defendants' contention. But Lord Coleridge, C.J., concurs only in the result arrived at by Lindley, J. He thinks the safer ground appears to be "that the language (of the grant) conveys . . . a right to take fish, and to take it irrespective of the ownership of the soil over which the water flows and the fish swim. The words appear to me to be apt to create a several fishery, *i.e.*, as I understand the phrase, a right to take fish in *alieno solo*, and to exclude the owner of the soil from the right of taking fish himself; and such a fishery I think would follow the slow and gradual changes of a river, such as the changes of the Lune in this case are proved or admitted to have been."

There is a reference in the argument, and in the judgment in this case, to some of the old authorities: for example, "Britton, book 2, ch. 2, sec. 7, Nichol's translation, p. 218: "But if the increase has been so gradual, that no one could discover or see it, and has been added by length of time, as in a course of many years, and not in one day or in one year, and the channel and course of the water is itself moving towards the loser, in that case such addition remains the purchase and the fee and freehold of the purchaser, *if certain bounds are not found*."

Lindley, J., seems to think that in *In re Hull and Selby Railway*, to which I have already referred, the Court declined to recognise this principle.

As against the authorities in the United States which I have cited, there is a very strong case of *Widdecombe* v. *Chiles* (1903), 73 S.W.Repr. 444, a judgment of the Supreme Court of Missouri. The head-note is as follows: "Defendant was the owner of the south half of a section of land between which and the river bed there was originally a strip of 8 acres, forming the fractional north half, which had not been patented. The river changed its bed until it had washed away the 8-acre strip, and flowed through defendant's land, when it began to rebuild to defendant's land all that it had washed away, and about 200 acres additional. Plaintiff then received a patent for the fractional north half of the section as described by the original survey. *Held*, that, the

accretion being to defendant's land, plaintiff took no title by his patent." And Valliant, J., says (p. 446): "This Court has not said in either of those cases, and we doubt if any Court has ever said, that land acquired under a deed giving metes and bounds which do not reach the river—which in fact did not reach the river when the deed was made—does not become riparian when the intervening land is washed away, and the river in fact becomes a boundary."

In considering authorities which are not binding upon me, and when I have to decide "upon reason untrammelled by authority" (*per* Werner, J., in *Linehan* v. *Nelson* (1910), 197 N.Y. 482, at p. 485), I prefer those United States decisions, which I have earlier cited. There have also been cited to me authorities which it is contended dispose completely of the *Widdecombe* case, viz., the *Lopez* case, which is reported as *Lopez* v. *Muddun Mohun Thakoor* (1870), 13 Moo. Ind. App. 467; *Hursuhai Singh* v. *Syud Lootf Ali Khan* (1874), L.R. 2 Ind. App. 28; and Theobald's Law of Land, p. 37.

It was strongly contended by the junior counsel for the plaintiffs that, apart from the main question, and granting that the erosive action of the lake has encroached upon the plaintiff Carr, and that he has lost some of his land, then at any rate he only loses it down to the low water mark. But, having regard to the view that I take about the main question, it is not necessary to consider that argument.

I do not see that the statute 1 Geo. V. ch. 6 has any application to this case; nor do I see that the Attorney-General ought to bring the action or is a necessary party—the plaintiffs being concerned only with the trespass upon their lands, and not with any supposed public right.

The good faith, or the opposite of the defendants, in making the trespass, is a matter of no consequence in the disposal of the action.

I find, therefore, that there has been a trespass by the defendants upon the plaintiffs' land, and that they are entitled to have the injunction herein made perpetual, with full costs on the High Court scale and $10 damages.

Judgment for plaintiff.

ONT.

H. C. J.

1912

Sept. 17.

BOECKH v. GOWGANDA-QUEEN MINES, LIMITED.

Ontario High Court, Middleton, J. September 17, 1912.

1. JUDGMENT (§ II A—60)—CONCLUSIVENESS — REMEDY SOUGHT AGAINST JUDGMENT NOT OBTAINABLE IN SEPARATE ACTION.

If a judgment debtor against whom judgment had been rendered in a prior action between the same parties (in which original action he was defendant), proceeds as plaintiff against the judgment creditor in a new and separate action seeking in his new action, as against the judgment rendered in the original action, the identical relief for which at the trial and on appeal therefrom he had failed to plead in the original action, and had unsuccessfully sought leave to amend his pleading, such new and separate action cannot be maintained, as the prior judgment is conclusive, not only upon all matters which were actually brought forward, but also as to all matters which might have been brought forward as part of the subject matter of the contest.

[*Henderson* v. *Henderson*, 3 Hare 100; *Humphries* v. *Humphries*, [1910] 1 K.B. 796, [1910] 2 K.B. 531; *Cooke* v. *Rickman*, [1911] 2 K.B. 1125; *Re Ontario Sugar Co.*, 22 O.L.R. 621, 24 O.L.R. 332, referred to; and see Annotation to this case, p. 294.]

2. INJUNCTION (§ I J—75)—NO REMEDY BY SEPARATE ACTION TO RESTRAIN ACTION IN HIGH COURT—APPLICATION FOR STAY IN ORIGINAL ACTION.

Fundamentally, as well as under sec. 57, sub-sec. 9, of the Judicature Act (Ont.), the law is that no cause pending in the High Court of Justice or before the Court of Appeal shall be restrained by a prohibition or injunction, but that the remedy, if any, must be by an application for a stay in the original action.

3. INJUNCTION (§ I J—75)—MOTION FOR INJUNCTION TURNED BY COURT INTO MOTION FOR JUDGMENT.

Where in contravention of sec. 57, sub-sec. 9, of the Judicature Act (Ont.), a motion in a new action is made for an injunction against a judgment in a prior action between the same parties seeking the identical remedy already sought and refused in the original action, the court in dismissing the motion for injunction may broaden it into a motion for judgment and also dismiss the substantive action, where its decision of the injunction motion in effect disposes of the whole action.

Statement

MOTION by the plaintiff to continue until the trial an ex parte injunction granted by FALCONBRIDGE, C.J.K.B., restraining the defendants from enforcing a judgment obtained by the defendants against the plaintiff in the High Court of Justice for Ontario, on the 29th September, 1910.

The motion was dismissed.

J. W. McCullough, for the plaintiff.

Gordon, for the defendants.

Middleton, J.

MIDDLETON, J.:—In the original action the present defendants sued the plaintiff for $2,000 alleged to be due in respect of a subscription for stock. The defendant in that action resisted payment, setting up several grounds of defence. At the trial he endeavoured to rely upon certain other defences, but objection was taken that these defences had not been pleaded; and effect was given to this objection. An appeal was had

from this decision; and the exercise of discretion by the trial Judge in refusing leave to amend was approved both in the Court of Appeal, *Gowganda-Queen Mines Limited* v. *Boeckh*, 24 O.L.R. 293, 2 O.W.N. 1307, and in the Supreme Court; and the Privy Council has refused leave to appeal.

The defendant in that action now conceives the idea of himself bringing an action for the purpose of rescinding his subscription for the stock in question, relying upon the very grounds which he unsuccessfully sought to set up at the trial; and he seeks in this way to secure a trial of the issues which he might have raised in the earlier action had he pleaded adequately therein.

This experiment is, I think, entirely unsuccessful. From the earliest times the Court has consistently held that a judgment is conclusive, not only upon all matters which are actually brought forward, but as to all matters which might have been brought forward as part of the subject of the contest; and this view has been recently confirmed both here and in England. See *Henderson* v. *Henderson*, 3 Hare 100; *Humphries* v. *Humphries*, [1910] 1 K.B. 796, [1910] 2 K.B. 531; *Cooke* v. *Rickman*, [1911] 2 K.B. 1125; *Re Ontario Sugar Co.*, 22 O.L.R. 621, 24 O.L.R. 332.

Quite apart from this fundamental aspect of the case, it is obvious that this action is entirely misconceived. Section 57, sub-sec. 9, of the Judicature Act provides: "No cause or proceeding at any time pending in the High Court of Justice or before the Court of Appeal shall be restrained by a prohibition or injunction;" the proviso at the end of this section indicating, in accordance with the general policy of the Judicature Act, that the remedy, if any, must be an application for a stay in the original action.

I determine the matter upon the broad general ground that it is not competent for a defendant who has failed to plead any defence open to him in the original action to obtain any relief by any substantive proceeding. His only remedy would have been by application for indulgence in the original action; and that application was here made and refused.

The motion will be dismissed with costs, and, as the view I take is fatal to the whole action, I think it proper to direct that this motion be turned into a motion for judgment, and that the action be also dismissed with costs.

The amount of the judgment was, I understand, paid into Court as a term of the granting of the ex parte injunction. This may be directed to be paid to the defendants.

Motion dismissed.

ONT.

Annotation

Judgments as res judicata

Annotation—Judgment (§ II A—60)—Conclusiveness as to future action—Res judicata.

The plea of *res judicata* is good against a party who has been in any way represented in a former suit deciding the same matter in controversy: *Dingwall* v. *McBean*, 30 Can. S.C.R. 441.

It is not the recovery, but the matter alleged by the party upon which the recovery proceeds, which creates the estoppel. In an action in the High Court for trespass to land, it appeared that an issue as to the title to a part of the land had been tried by the Exchequer Court of Canada upon a record to which the plaintiff and defendant in the High Court action were parties, and found in favour of the now plaintiff by a judgment affirmed by the Supreme Court of Canada. It was held that, as the inquiry into the title to part of the land necessarily involved an inquiry into and adjudication upon the facts on which the title to the whole parcel depended, the defendant was estopped thereby: *Tait* v. *Snetzinger*, 1 O.W.N. 193 (C.A.).

In a former action on a bond as to an annuity all questions as to its validity and the question as to whether or not there had been delivery of the same, having been disposed of it is not competent to bring up anything that was or might have been set up in the former action. This is so even when the judgment is a consent judgment: *O'Leary* v. *Nihan*, 2 O.W.N. 990, 19 O.W.R. 9.

It is not now questioned that a judgment by consent may raise an estoppel *inter partes*. That it is as binding and conclusive between the parties and their privies as any other judgment (subject, perhaps, to certain exceptions in cases of fraud or mistake), is well established by the authorities: *Re Ontario Sugar Co.*, 24 O.L.R. 332; *Hardy Lumber Co.* v. *Pickerel River Improvement Co.* (1898), 29 Can. S.C.R. 211.

In *Re South American and Mexican Co., Ex p. Bank of England*, [1895] 1 Ch. 37, the trial Judge, Vaughan-Williams, J., said (p. 45): "It has always been the law that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter. The basis of the estoppel is that, when parties have once litigated a matter, it is in the interest of the state that litigation should come to an end; and if they agree upon a result, or upon a verdict, or upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end." This statement of the law was not only not questioned, but apparently was fully accepted, by the English Court of Appeal which affirmed his decision. Lord Herschell, L.C., said (p. 50): "The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end." He added: "I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action."

The rule of estoppel by judgment is simple and plain, viz., the facts actually decided by an issue in one suit and in a competent Court cannot be again litigated between the same parties or their privies, and are conclusive between them: *Re Ontario Sugar Co.* (*McKinnon's Case*), 24 O.L.R.

Annotation (*continued*) — Judgment (§ II A—60) — Conclusiveness as to future action—Res judicata.

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Annotation

Judgments as res judicata

332, 337. And while it is true that in cases where a judgment or decree is couched in general terms, the extent to which it ought to be regarded as *res judicata* can only be determined by ascertaining what were the real matters of controversy in the cause, the inquiry is not limited strictly to what is to be found upon the record and in the judgment. The Court, for the purpose of ascertaining what was actually determined in the former action, may look outside the judgment and the pleadings: *Ibid.*

In *Re Ontario Sugar Co.*, 24 O.L.R. 332, the Ontario Court of Appeal held, affirming the judgment of Meredith, C.J.C.P., 22 O.L.R. 621, that the effect of the consent judgment dismissing the action brought by the company against McKinnon for calls upon shares standing in his name, was to bar the claim of the liquidator to hold McKinnon as a contributory in the winding-up of the company. The manner in which the third party claim was dealt with in the consent judgment, the contemporaneous minute in the company's books as to the effect of the dismissal of the action and the abstention of the company from any subsequent demand for payment and from in any way treating McKinnon as a shareholder, were circumstances which might properly be regarded as throwing light upon the intention of the parties in consenting to the judgment; and, with the light afforded by the pleadings and proceedings, led to the conclusion above stated.

Leave to appeal to the Supreme Court of Canada was refused in the latter Court: *Re Ontario Sugar Co.*, 44 Can. S.C.R. 659; on the grounds *inter alia* that no public interest was involved nor was the interpretation of any public statute to be considered. Anglin, J., to whom the application was made, said further, that the judgment complained of seemed to him to be plainly right and that the facts proper to be considered in the case made it reasonably clear that by the consent judgment the parties meant to dispose finally of the issue, whether the defendant was or was not a shareholder in the company: *Re Ontario Sugar Co.*, 44 Can. S.C.R. 659, 661.

Where a defendant, when sued, under English Ord. 14, by a specially indorsed writ for the amount of certain rents due to the plaintiff from the defendant under an agreement, has filed an affidavit admitting that he owes money for rents due under the agreement, he is, if sued subsequently for further rents under the same agreement, estopped from setting up the defence that there was no consideration for the agreement, and this is so although there was no specific allegation in the statement of claim on the specially indorsed writ that there was consideration for the agreement: *Cooke* v. *Rickman*, [1911] 2 K.B. 1125, 81 L.J.K.B. 38, 55 Sol. Jo. 668.

To an action in the County Court for rent due under an agreement for a lease, the defendant set up that there was no concluded agreement for a tenancy. The Judge held that there was a concluded agreement, and gave judgment for the plaintiff for the rent in question. Upon the next quarter's rent falling due and remaining unpaid, a second action was brought by the plaintiff upon the agreement, and the defendant gave notice of the special defence that there was no sufficient memorandum or note in writing of the terms of the agreement relied upon to satisfy the requirements of sec. 4 of the Statute of Frauds. It was held that the defendant, having neglected to set up the defence of the Statute of Frauds to the first action,

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Judgments as res judicata

Annotation (*continued*) — Judgment (§ II A—60) — Conclusiveness as to future action—Res judicata.

was precluded from doing so to the second: *Humphries* v. *Humphries*, [1910] 2 K.B. 531, 77 L.J.K.B. 919, affirming *Humphries* v. *Humphries*, [1910] 1 K.B. 796, 79 L.J.K.B. 544.

In *Hunter* v. *Stewart* (1861), 4 DeG. F. & J. 168, 31 L.J. Ch. 346, the plaintiff had filed a bill in the Supreme Court of Sydney claiming to be admitted as a shareholder in respect of certain shares in a loan and banking company, and his suit was dismissed. He subsequently filed his bill in England to obtain similar relief, but upon different grounds and equities to those relied upon by him in the former suit, although he might if he pleased, have relied upon them in that suit. Lord Westbury held that the decision at Sydney was not conclusive, observing: "Admitting the identity of the two suits in other particulars the question is, whether there was, in the suit at Sydney, and in the suit before me, *eadem causa petendi*, that is to say, the same ground of claim, or one and the same case for relief. . . . In equity the plaintiff must recover *secundum allegata et probata*, but here the allegations and equity of the one bill are different from the allegations and equity of the other. . . . It is, indeed, true that the case made by the second bill must be taken to have been known to the plaintiff at the time of institution of the first, and *might then have been brought forward*, and it may be said, therefore, that it ought not now to be entertained; but I find no authority for this position in civil suits; and no case was cited at the bar, nor have I been able to find any, in which a decree of dismissal of a former bill has been treated as a bar to a new suit seeking the same relief, but stating a different case, giving rise to a different equity: *Hunter* v. *Stewart*, [1861] 4 DeG. F. & J. 168, 31 L.J. Ch. 346.

The above remarks should be read with the observations of Wigram, V.-C., in *Henderson* v. *Henderson* (1843), 3 Hare 115: "The plea of *res judicata* applies, except in special cases, not only to points on which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

This sentence as observed in an English case, *Worman* v. *Worman*, L.R. 42 Ch. D. 296, referring to *Askew* v. *Woodhead*, 21 W.R. (Eng.) 573; *Serrao* v. *Noel*, L.R. 15 Q.B.D. 549, must be read with reference to that which immediately precedes it, where the Vice-Chancellor states the rule of the Court to be that, "where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident, omitted part of their case": Caspersz on Estoppel and Res Judicata, 3rd ed., part 2, page 87; and see *Srimut* v. *Katama*, 10 W.R. 1.

In *Srimut* v. *Katama* (1866), 11 M.I.A. 73, the appellant sued to establish a will. In a previous suit he had elected to abandon any title under the will, and had rested his case on the issue whether the estate was

Annotation (*continued*) — **Judgment (§ II A—60) — Conclusiveness as to future action—Res judicata.**

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Annotation

Judgments as res judicata

separate or undivided. Lord Westbury (who decided *Hunter* v. *Stewart*, 4 DeG. F. & J. 168, 31 L.J. Ch. 346, in 1861), in delivering judgment, observed: "In the first place it is clear upon the former record, that the appellant had then the power of relying upon that document as being a valid will. He might first have insisted that it was an undivided property, and that, therefore, the plaintiff in those suits had no interest therein; and secondly, he might have pleaded, 'but if it shall turn out to be a divided property then my title arises under this instrument, and I plead and rely upon it as amounting to a valid devise in my favour.' When a plaintiff claims an estate, and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward. The present appellant might have insisted on the validity of the alleged will; but, instead of doing so when this suit came on to be heard and decided in the Court of final appeal, he in effect disclaimed all title under the instrument as a will, and insisted that it must be regarded by the Court as not being testamentary": *Srimut* v. *Katama* (1866), 11 M.I.A. 73. Their Lordships of the Privy Council, accordingly, upon the ground that the same matter was in issue in the previous suit, and that what was in issue must be taken to have been already decided, and also upon the ground of estoppel by conduct, dismissed the plaintiff's suit. See also *Woomatara* v. *Unnopoorna* (1872), 18 W.R. 163.

A statute which has the retroactive effect of giving a right of action for the class of wrong with which it deals committed prior to its enactment as well as for wrongs committed afterwards will not without explicit words to that effect confer a right of action for the wrongful act committed prior to the enactment where a final judgment against the plaintiff had been given prior to such statute and his cause of action was, therefore, barred as *res judicata: Lemm* v. *Mitchell*, [1912] A.C. 400. As stated by Lord Robson in delivering the opinion of the Privy Council: "In the absence of appeal the judgment was a final determination of the rights of the parties, and the ordinary principle that a man is not to be vexed twice for the same alleged cause of action applies, unless it be excluded by the Legislature in explicit and unmistakable terms."

BROWN v. ORDE.

ONT.

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Sept. 20.

(Decision No. 2.)

Ontario High Court, Cartwright, M.C. September 14, 1912.
Ontario High Court, Boyd, C. September 20, 1912.

1. PLEADING (§ I S—149)—STATEMENT OF DEFENCE — PARTICULARS — MOTION TO STRIKE—ALLEGED FACTS AS BASIS FOR FAIR COMMENT.

In an action for slander, upon a motion to strike out, as embarrassing, certain paragraphs of the statement of defence, and also the particulars of such paragraphs which set out as true a series of alleged facts of public interest and concern, upon which the defendant pleaded fair comment in good faith and without malice, if the defendant's pleading shew that he is prepared to rely, at the trial, on the plea of fair comment and sets out the series of alleged facts as a basis upon which to submit to a jury, the question as to whether in their

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opinion the comments so based were fair and reasonable, the defendant will not be required to change his pleading.

[*Crow's Nest Pass Coal Co.* v. *Bell*, 4 O.L.R. 660; *Digby* v. *Financial News*, [1907] 1 K.B. 502; *Hunt* v. *Star Newspaper*, [1908] 2 K.B. 309; *Peter Walkers* v. *Hodgson*, [1909] 1 K.B. 239, 251, referred to.]

2. LIBEL AND SLANDER (§ III C—110)—FAIR COMMENT—PERSONAL ATTACK MAY FORM PART OF FAIR COMMENT.

Even a personal attack may, under certain circumstances, form part of a fair comment upon given "facts" truly stated, if it be a reasonable inference from them.

[*Peter Walkers* v. *Hodgson*, [1909] 1 K.B. 239, 257; *Dakhyl* v. *Labouchere*, [1908] 2 K.B. 325, 329, referred to.]

Statement

AFTER the decisions in this case, noted in 2 D.L.R. 562, 3 O. W.N. 1230 and 1312, the plaintiff moved to strike out paragraphs 6 and 7 of the statement of defence and the particulars furnished thereunder, as being embarrassing.

The application was dismissed.

John King, K.C., for the plaintiff.
H. M. Mowat, K.C., for the defendant.

Cartwright, M.C.

THE MASTER:—The statement of defence admits publication as alleged in the statement of claim, but denies the innuendo; says that the words complained of are not actionable without proof of special damage, and pleads qualified privilege, on the ground that when the defendant spoke the words in question it was at a meeting of ratepayers in the city of Ottawa who had a common interest with him in the matters under discussion, and that the defendant was protecting his private interest in the question of the efficiency of the administration of the affairs of the city.

Then follow paragraphs 6 and 7:—

"6. During the year which preceded the holding of the said meeting, there had been great dissatisfaction on the part of the ratepayers of the city of Ottawa with the management of the affairs of the city by the board of control and city council, and the subject of the management and control of the affairs of the city and its ratepayers had become a matter of unusual public interest and concern; and the defendant says that any words used by him on the occasion in question in this action were fair comments made in good faith and without malice in respect to the management and control of the affairs of the said city and its ratepayers as a matter of general public interest and concern.

"7. In so far as the words used by the defendant on the occasion in question consist of allegations of fact, they are true in substance and in fact; in so far as they consist of expressions of opinion, they are fair comments made in good faith and without malice upon facts which are matters of public interest and concern."

The plaintiff, on the 4th April last, filed a joinder of issue and reply; and, five days later, asked for particulars of the

"specific actions of the board of control and city council referred to in paragraph 6," and "of the specific allegations of fact which are referred to in paragraph 7 and which are therein alleged to be true."

On the 10th April, particulars were given. Those under the 6th paragraph consisted of eight matters in respect of which, it was said, the ratepayers were dissatisfied, which were also those referred to in the 7th paragraph as matters of public interest and concern. Under this latter paragraph, the specific allegations said to be true were also given. These were, in effect, that the plaintiff was not as competent to be a controller as Mr. Davidson had been, he having been a very successful man of great ability and of municipal and business experience, whereas the plaintiff had been conspicuously unsuccessful in business matters of his own and in those of others intrusted to him.

The ground of the motion is, that the defendant (if I rightly apprehend counsel's argument) should have pleaded a justification of the innuendo and set out facts on which he relies as to this, and that he is attempting to evade this by the course adopted, as he has distinctly said in paragraph 7 of his particulars that he has not made nor does he make any charges of misconduct against the plaintiff as a member of the board of control or of the council.

The cases cited which are most in point are the following: *Crow's Nest Pass Coal Co.* v. *Bell* (1902), 4 O.L.R. 660; *Digby* v. *Financial News*, [1907] 1 K.B. 502; *Hunt* v. *Star Newspaper*, [1908] 2 K.B. 309; *Peter Walkers* v. *Hodgson*, [1909] 1 K.B. 239.

The last is the one nearest to the present. This seems to shew that the defendant cannot be required to change his pleading, if he is prepared to rely on the plea of fair comment, and hopes to shew that the facts given in his particulars are substantially true, and that the comments made by him and based upon those true facts were fair and such as, in the opinion of a jury, might reasonably have been made (p. 251); also (at p. 257) it was said by Kennedy, L.J., quoting Lord Atkinson's judgment in *Dakhyl* v. *Labouchere*, [1908] 2 K.B., at p. 329: "A personal attack may form part of a fair comment upon given facts truly stated if it be warranted by those facts—in other words, in my view, if it be a reasonable inference from those facts."

It, therefore, follows that the motion must be dismissed with costs to the defendant in the cause only, the point being one of some difficulty. The plaintiff may have leave to amend, if it is thought that this will be of any service.

Motion dismissed.

[An appeal from the above judgment of Cartwright, M.C., was heard before Boyd, C., in Chambers, September 20, 1912. The Chancellor dismissed the appeal, costs in the cause.]

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Sept. 19.

REX v. WOODROOF.

Nova Scotia Supreme Court, Ritchie, J., in Chambers. September 19, 1912.

1. CRIMINAL LAW (§ II A—38)—NECESSITY OF READING OVER TO, AND HAVING WITNESS SIGN DEPOSITION—CRIM. CODE 1906, SEC. 682.

The requirement of sub-section 4 of section 682 of the Criminal Code, R.S.C. 1906, ch. 146, that the depositions of a witness shall be read over to him by the magistrate, and signed by him, is directory only, and the omission to comply with this requirement does not involve loss of jurisdiction.

2. JUDGES (§ III—23)—ADMINISTRATION OF JUSTICE—DISQUALIFICATION—SUSPICION OF INTEREST OR BIAS.

In the administration of justice, whether by a recognized legal Court, or by persons who, although not a legal Court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, no person who is to take part in it should be in such a position that he might be suspected of being biased.

[*Allinson* v. *General Medical Council*, [1894] 1 Q.B. 750, followed.]

3. JUSTICE OF THE PEACE (§ I—4c)—DISQUALIFICATION—BIAS—POSSIBILITY.

In order to disqualify a magistrate from acting, on the ground of bias, it is not necessary to shew that he is in fact biased, but only that he is in such a position that he might be biased.

[*Reg.* v. *Gaisford*, [1892] 1 Q.B. 383; and *Reg.* v. *Huggins* (No. 2), [1895] 1 Q.B. 563, followed.]

4. OFFICERS (§ II C—88*a*)—BARGAINING IN REFERENCE TO ADMINISTRATION OF OFFICE.

No judicial officer should make a bargain in regard to anything connected with the administration of his judicial office.

5. JUSTICE OF THE PEACE (§ I—4c)—DISQUALIFICATION—REASONABLE APPREHENSION OF BIAS.

One who is appointed stipendiary magistrate by a municipality at an annual salary, on the condition that he shall try all cases under the Canada Temperance Act, and shall make monthly reports, returns and payments to and for the use of the municipality of all fines, penalties and forfeitures collected by him as such magistrate on account of such cases, is disqualified from hearing a prosecution under the Act, inasmuch as there is a reasonable apprehension that he may be biased.

Statement

MOTION on notice to the prosecutor who is the inspector for the town of Yarmouth, Nova Scotia, for enforcing the Canada Temperance Act on the return to orders in the nature of writs of *habeas corpus* and *certiorari* in aid thereto under chapter 181 of the Revised Statutes 1900, "Of securing the liberty of the subject" for an order to discharge Ida Woodroof from the common jail at Yarmouth where she was confined under a warrant of commitment in execution signed by C. Curtis MacKay, an additional stipendiary magistrate for the said town dated August 14th, 1912, reciting a conviction of that day for a third offence of unlawfully selling intoxicating liquors, etc., at Yarmouth, contrary to Part II. of the Canada Temperance Act and for which she was sentenced to three months' imprisonment.

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Statement

The convicting justice was appointed an additional stipendiary magistrate for the town by the Lieutenant-Governor of Nova Scotia in council on Oct. 23rd, 1911, under R.S.N.S. 1900, ch. 33, as amended by Act (N.S.) 1905, ch. 11, sec. 2, and on February 29th, 1912, the town council of Yarmouth passed the following resolution and the justice accepted his salary under it and acted on its terms:—

> Resolved, that additional stipendiary magistrate C. Curtis McKay be granted an annual salary of four hundred dollars ($400.00) on condition that he pays all fees of his said office to the town, and also on condition that he do and shall try all cases under the Canada Temperance Act which may be laid before him by the inspector appointed by this council to enforce and carry out the provisions of said Act, and also on condition that he do and shall make monthly reports and returns and payments to and for the use of the said town of Yarmouth of all fines from whatever source collected by or paid to or collectable by or payable to him as such additional stipendiary magistrate of the said town of Yarmouth, and further do and shall make monthly reports and returns and payments to and for the use of the said town of Yarmouth of all fines, penalties and forfeitures, and other moneys coming to him from whatever source, and collected by or paid to or collectable by or payable to him as such additional stipendiary magistrate of the said town of Yarmouth, and payable by him as such to the said town of Yarmouth by reason of or through or on account of any proceedings, actions, informations or complaints laid, taken, heard or tried and any conviction made, or judgment given thereon, by and under the authority of the Criminal Code, the Canada Temperance Act, the Towns Incorporation Act, and the amendments of such Acts, and any other statutes and Acts of Canada and of Nova Scotia from time to time in force in Canada and in the province of Nova Scotia, and any of the by-laws and ordinances of the town of Yarmouth, orders-in-council of Canada, orders-in-council of Nova Scotia or any other authority whatever.

The Act (N.S.) 1905, ch. 11, sec. 2, is as follows:—

> One or more additional stipendiary magistrates may be appointed for cities or incorporated towns who shall receive the prescribed fees, but any city or town council may at any time by resolution, grant to any such additional stipendiary magistrate an annual salary and receive such fees or any portion thereof as part of the revenue of the town.

Criminal Code section 1133 (1) and (2) provides as follows:—

> (1) Every justice shall, quarterly, on or before the second Tuesday in each of the months of March, June, September, and December in each year, make to the clerk of the peace or other proper officer of the Court having jurisdiction in appeal, as herein provided, a return in writing, under his hand, of all convictions made by him, and of the receipt and application by him of the moneys received from the defendants.
>
> (2) Such return shall include all convictions and other matters not included in some previous return, and shall be in form 75.

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Statement

By orders-in-council (D) dated the 29th September, 1886, and November 15th, 1886, all fines, penalties or forfeitures recovered or enforced under the Canada Temperance Act, 1878, and amendments thereto, within any city, county or incorporated town which has adopted the said Act, which would otherwise belong to the Crown, for the public uses of Canada, are paid to the treasurer of the city or county, as the case may be, for the purposes of the Act.

The Nova Scotia Temperance Act, 1910, ch. 2, sec. 57 (1) and (4), is as follows:—

(1) In every municipality in which the second part of the Canada Temperance Act is in force or hereafter comes into force, the council of such municipality shall annually appoint one or more persons to be called inspectors, for the purpose of enforcing and carrying out the provisions of such Act, and shall fix a salary of not less than one hundred dollars, to be paid to each such inspector by the municipality.

(4) Every municipality in which such inspector is appointed under this section is authorized to pay out of the funds of such municipality, all costs, charges and expenses of enforcing and carrying out the provisions of the Canada Temperance Act.

The prisoner was discharged and an order for the protection of the jailor and sheriff was made.

J. J. Power, K.C., and *J. A. Grierson*, for the motion.
W. E. Roscoe, K.C., for the prosecutor, contra.

Ritchie, J.

RITCHIE, J.:—The defendant is imprisoned for a violation of the Canada Temperance Act and seeks to be discharged under *habeas corpus* on two grounds. The first ground is that the depositions were not read over to the witnesses and signed by them as provided for by sub-section 4 of section 682 of the Code. It is claimed that the omission to comply with the statute in this regard goes to the jurisdiction. Section 682 of the Code is made applicable to cases under the summary convictions part of the Code, and it is the duty of the magistrate to read over the depositions and have them signed by the witness. Not to do so is to disobey the clear direction of the statute. The effect of a disregard of the statutes in this regard has been the subject of judicial decision in Canada, the point in issue being whether the omission goes to the jurisdiction or whether the statute is merely directory and not attended with the penalty of loss of jurisdiction. There are authorities both ways and after a careful consideration of the cases I have come to the conclusion that the sound view is that the statute is directory and loss of jurisdiction is not involved. This point must in my opinion fail. I can see strong reasons for the statute and I do not come to the conclusion which I have indicated without some doubt. So far as the magistrate is concerned it ought to be sufficient for him that the statute requires a thing to be done.

The second point raised is that in consequence of the terms under which the magistrate is paid by the town council as disclosed by the resolution of the 29th of February, 1912, the magistrate might not unreasonably be suspected of bias. The rule on this point is laid down by Lord Esher, in *Allinson* v. *General Medical Council*, [1894] 1 Q.B. 750, as follows:—

> In the administration of justice, whether by a recognized legal Court, or by persons who, although not a legal Court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position that *he might be suspected* of being biased.

It is not necessary in order to support the contention made by the defendant that the magistrate should have been in fact influenced.

Mathew, J., in *The Queen* v. *Gaisford*, [1892] 1 Q.B. 381, 383, said:—

> In order to disqualify a magistrate from sitting, on the ground of bias, it was argued on his behalf that it was incumbent on the complainant to shew that the justice was in fact influenced, but in my opinion, it is sufficient to shew as was held in *Reg.* v. *Milledge*, 4 Q.B.D. 332, that he might have been influenced, for in such a case, it is not likely that a magistrate should knowingly be under the influence of an improper bias, although he may be placed in such a position as to be influenced, or *to run the risk* of being influenced unconsciously to himself in his decision.

The resolution and the magistrate acting under it constitutes a bargain between the town and the magistrate in regard to the performance of his judicial functions. This is an exceedingly novel, and in my opinion, an improper state of affairs. It must certainly be clear that no judicial officer should make a bargain in regard to anything connected with the administration of his judicial office. It is of the greatest importance in the administration of justice by stipendiary magistrates that there should be no ground for reasonable apprehension of anything like bias in the magistrate because appeal is taken away by statute. It is important that the Canada Temperance Act and all other laws should be enforced, but nothing is more important than absolute confidence on the part of the public in the pure administration of justice. The magistrate is appointed by the Governor-in-council to perform the duties required of him by statute, the town council may grant him an annual salary by resolution and receive his fees or a portion thereof, but the council has no authority to prescribe by resolution how he shall perform his judicial duties. The town council is interested in the fines paid by violators of the Canada Temperance Act. As I have said, the question is not has the magistrate been influenced or done anything improper in this particular case, but is his

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position (in the words of Lord Esher) "such that he might be suspected of being biased," or in the words of Mr. Justice Matthews does he by reason of his position "run the risk of being influenced unconsciously to himself"? In *The Queen* v. *Huggins* (No. 2), [1895] 1 Q.B. 563, at page 565, Mr. Justice Wills said:—

> Here there is no question of Martin having had any pecuniary interest, nor is it suggested that he had any actual bias against the defendant. The question is whether there was a reasonable apprehension of bias.

Take a case to be tried before stipendiary McKay, of Yarmouth, which is a close one, evidence both ways apparently equally reliable or take a case where the weight of evidence inclines in favour of the defendant, and judgment is in favour of the prosecution, might not an independent man have reasonable apprehension that the magistrate was influenced by his position perhaps unconsciously—he might not unreasonably say here is a Judge who is under contract with the town council, which is interested in the results, to try all the Scott Act cases, to make returns which the law does not require him to make so that the town may know whether the payment of $400 a year is good business for the town. If by mistake or otherwise, he fails to make a return, he is in the hands of the town council as to whether he will get his salary or not. I think a man might reasonably have such an apprehension of bias as I have indicated; as a matter of fact there might be no bias, but the administration of justice is brought into disrepute. It is of comparatively little importance, whether this defendant remains in gaol for the balance of her term, but it is impossible to overrate the importance of having the administration of justice command the respect of the public.

I decide that the defendant must be discharged. I have not arrived at this conclusion without considerable doubt and difficulty, but I am very confident that it is in the best interests of the administration of justice that there should be no bargains or contracts of any kind in regard to the performance of judicial duties between the stipendiary magistrates of the province and the town councils or any other corporation or person.

Order for discharge with protection to jailor and sheriff.

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Oct. 4.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, Simmons, and Walsh, JJ. October 4, 1912.

1. LIMITATION OF ACTIONS (§ IV C—166)—EXPIRATION OF LIMITATION PERIOD—PART PAYMENT AFTER EXPIRATION.

In an action on a simple contract, where a six year statute of limitations is pleaded, a part payment made even after the expiration of the six years is sufficient in general to revive the cause of action, and therefore raise the implication of a promise to pay the balance and of an acknowledgment of the existence of a larger debt.

[*Re Lane, Ex parte Gaze*, 23 Q.B.D. 74, referred to.]

2. TRUSTS (§ II B—47)—LIABILITY OF TRUSTEE—MANAGEMENT OF TRUST—COLLATERAL SECURITY—OBLIGATION OF DILIGENCE—COLLATERALS STATUTE-BARRED.

Where a debtor upon his creditor's demand permits the latter to take over as collateral security certain promissory notes due the debtor, and the creditor refuses to return them to the debtor he is under obligation not to be dilatory or negligent in collecting them and not to allow them to become statute-barred by his failure to enforce payment and will be liable to his debtor for the amount of notes so barred which might have been collected had due diligence been exercised.

[Am. & Eng. Enc. Law, 2nd ed., vol. 22, pp. 899, 900; *Peacock* v. *Purssell*, 14 C.B.N.S. 728, 32 L.J.C.P. 266; *Williams* v. *Price*, 1 Sim. & St. 581, 44 R.R. 238; Lewin on Trusts, 11th ed., 316-7; *Synod* v. *De Blaquiere*, 27 Gr. 536; Cassels Sup. Ct. Digest 539, referred to.]

3. LIMITATION OF ACTIONS (§ IV C—166)—PART PAYMENT—STATUTE OF GEORGE—JUDICIAL CONSTRUCTIONS.

In an action on a promissory note where the limitation period under the statute would be held to have run but for a part payment made within the period, the fact that the Alberta Statute of Limitations is silent as to a part payment interrupting the statute and that the English statute, 9 Geo. IV. ch. 14, sec. 1, provides as regards the original English statute from which the Alberta statute was taken that nothing contained therein shall alter, take away or lessen the effect of any payment of any principal or interest, may properly be invoked in support of the long series of judicial interpretations fixing the law in relation thereto.

4. STATUTES (§ II A—96)—CONSTRUCTION—LEGISLATIVE INTENT—STATUTE OF LIMITATIONS—PART PAYMENT—JUDICIAL INTERPRETATIONS.

In an action on a promissory note which, but for part payment, would be barred by the Statute of Limitations, where a legislature re-enacts that portion of the English statute of 21 James I. which places a time limitation upon actions for simple contracts, without making any reference to established judicial interpretations of that statute, and without embodying them in the Legislative Act itself; it will be presumed that the legislature must have intended those judicial interpretations to be applied.

5. STATUTES (§ II C—120)—RE-ENACTMENT OF ANCIENT STATUTE—CONSTRUCTION—ENGLISH STATUTE—LEGISLATIVE ACT BASED UPON—JUDICIAL INTERPRETATIONS APPLIED—STATUTE OF 21 JAMES I.

In any case where an ancient English statute has been the subject of a long series of judicial interpretations, and a settled rule of English law adopted by the highest courts in England has been laid down in regard to that statute, a jurisdiction, whose legislature has enacted a statute in practically the same terms, is bound by those judicial interpretations, in the construction of its own new statute enacted in the same terms as such ancient statute.

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SAWYER-MASSEY CO. LTD. v. WEDER.

Statement

APPEAL by plaintiffs from the judgment of Taylor, District Court Judge, dismissing the action which was brought after the expiration of six years from the time the plaintiff's cause of action arose, for the balance due on a promissory note. The defendants cross-appealed for damages for negligence in the collection of certain debts assigned by them to the plaintiff as security, some of these having been allowed to become barred by the Statute of Limitations.

The appeal and cross-appeal were both allowed.

S. B. Woods, K.C., for plaintiffs, appellants.
Frank Ford, K.C., for defendants, respondents.

Harvey, C.J. HARVEY, C.J., concurred in the judgment of STUART, J.

Scott, J. SCOTT, J.:—I concur.

Stuart, J. STUART, J.:—The plaintiffs sued the defendants for the balance due upon a promissory note which fell due January 4th, 1902. The action was not commenced until June 2nd, 1909, which was some seventeen months after the expiration of six years from the time when the plaintiffs' cause of action arose. His Honour Judge Taylor who heard the case was of opinion that *Rutledge* v. *United States Saving and Loan Company*, 37 Can. S.C.R. 546, was applicable and dismissed the action. The plaintiffs now appeal.

With respect I think the learned Judge erred in applying that case to the facts here involved. There the respondent company sued Rutledge in the Yukon Territorial Court upon a judgment obtained in the State of Washington. The judgment had been obtained more than six years before the commencement of the Yukon action, but the defendant had come to reside in the Yukon Territory less than six years before the date of the writ. The plaintiffs contended that the statute began to run only from date at which the defendant entered the Territory and sought to apply the principle of the statute, 4 Anne ch. 16, which provided in effect that where the defendant was beyond the seas at the time the cause of action arose the period of limitation should not begin to run until the date of his return. The Supreme Court held that as the statute of Anne had not been re-enacted in the Yukon nor anything corresponding thereto the simple terms of the Ordinance barring the action after the lapse of six years from the time the cause of action arose must be applied, and that, as the cause of action arose as soon as the judgment in Washington was obtained, the plaintiffs could not succeed.

In the case before us the plaintiffs contended that though the six years had elapsed there had been a part payment which was sufficient to take the case out of the statute. The learned

trial Judge held that all the decisions and precedents as to the effect of part payment must be disregarded in view of what was said by the Chief Justice of Canada in the *Rutledge* case, *Rutledge* v. *United States S. & L. Co.*, 37 Can. S.C.R. 546. But that point did not arise and was not referred to in the *Rutledge* case and we have nothing to do here with the question when the defendant came to Alberta or with the statute of Anne.

The respondents contended, however, that quite apart from *Rutledge* v. *United States S. and L. Co.*, 37 Can. S.C.R. 546, the mere fact that the legislature had re-enacted that portion of the statute of James which placed a time limitation upon the action for simple contract debts without making any reference to subsequent judicial interpretations of that statute and without embodying them in the ordinance itself, and without any reference to statute 9 Geo. IV. ch. 14, sec. 1, which refers to acknowledgments in writing, must be taken as shewing an intention on the part of the legislature to repudiate such interpretations and to reject the statute of George and to leave the Court free and untrammelled to apply the words of the Ordinance as they stand. I am unable to agree with this contention. I think that it might much more truly be said that the legislature, knowing evidently the wording of the statute of James and copying it and knowing presumably the judicial interpretation that had been put upon it, must be held to have intended that that interpretation should be also applied in this jurisdiction or otherwise they would have expressly declared that that interpretation was to be rejected. In any case where an ancient English statute has been the subject of a long series of judicial interpretations and a settled rule of English law adopted by the highest Courts in England has been laid down in regard to that statute I think we are bound to apply the same rule to a statute of our own legislature which is enacted in practically the same terms. In so far as the statute 9 Geo. IV. is concerned it is to be observed that it deals mainly with verbal acknowledgments or promises and provides that these must be in writing. We have here nothing to do with a verbal acknowledgment or promise but only with the question of the effect of part payment and the promise to be implied therefrom. The statute of George provides that nothing contained therein shall alter, take away or lessen the effect of any payment of any principal or interest. Therefore, if that statute was to have no effect upon the law upon the latter subject it is difficult to see how the omission to re-enact it here can have any effect upon it.

The defendants had given the plaintiffs three separate notes of which the one sued upon was the last to fall due. A payment of $150 was made by the defendants on Dec. 29th, 1906.

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This was more than sufficient to pay up the balance on the second note, the first having been already paid off. The plaintiffs credited the balance, which, according to their calculation, though I think it was erroneous, amounted to $31 upon the note in question. On 24th September, 1908, a further sum of $102.55 was paid and on October 1st, 1908, a further sum of $90. It will be observed that these two latter payments were made after the expiration of the six year period. I should judge from the course of the discussion and examination at the trial that it must have been assumed that these latter payments having been so made after the statutory period had run could not have the effect of taking the debt out of the statute. The battle seemed to rage altogether around the effect to be given to the credit of $31. But it is clear that a part payment made even after the expiration of the six years is sufficient in general to revive the cause of action. See *Re Lane, Ex parte Gaze*, 23 Q.B.D. 74.

The only question, therefore, is whether any of these three payments were so made as to raise the implication of a promise to pay the balance and an acknowledgment of the existence of a larger debt.

In the view I take of the case it is quite unnecessary to consider the effect of the payment of $150, of which $31 was appropriated to the note in question on 2nd January, 1907. The defendant Robert Weder said in examination for discovery:—

> Q. Do you remember on the 24th September, 1908, paying $102.55? A. Yes.
>
> Q. And on the 1st October, 1908, you paid $90 cash? A. Yes, I paid that myself.

To my mind it is clearly impossible to contend, when the debtor paid $102.55 and then only a week afterwards paid $90 more that the payment of $102.55 was not made on account of a larger debt. I think we are bound to infer, in the circumstances, from the payment of $102.55 an implied promise to pay the balance. The defence of the statute therefore fails.

The defendants also allege that in the year 1901, two years after the machine for which the notes were given was bought and while they were engaged in threshing with the machine, the plaintiff took from them an assignment of a number of accounts due from various persons for threshing services amounting to something over $600 in all, that the plaintiffs notified these debtors to pay these accounts to them, that they made no effort to collect these accounts, refused to re-assign them and allowed some of them to become statute-barred.

It was disputed by the appellants that they had ever taken an assignment of the debts in question, but after reading the

evidence I am unable to see how it can be reasonably contended that there was not an equitable assignment. The evidence of the defendant Robert Weder shews that the plaintiffs' agents came along and made a very urgent demand for payment of some money, that the defendants confessed inability to make any present payment, that the agents threatened to stop their threshing operations presumably by re-taking possession of the machine, that the agents demanded some accounts, that he said to them "If you want them you take them," that they went into the house and the agents took the defendants' book in which they had a list of the accounts then due to the defendants, amounting to over six hundred dollars' worth, that the defendants demanded a receipt but that the agents refused saying that they would get a receipt when the money was collected, that he, Weder, said, "I want the receipts right now," and that the agent replied, "Well, we collect that," and walked away. The evidence also clearly shews and indeed the plaintiffs admit that they collected about $450. Clearly the plaintiffs must have notified the debtors to pay the debts to them even if there were no direct evidence to shew that they had done so, which there is. There is no suggestion that the plaintiffs ever accounted to defendants for the amounts received in any specific way by reference to the individual debtors who had made payments, although, of course, they did give credit for the amounts received. On such evidence it is impossible, in my opinion, to contend that the plaintiffs were merely collecting agents for the defendants. I think they were clearly equitable assignees of the debts, even aside from the suggested legal assignment said to have been contained in the original contract of sale which was not put in evidence.

It is clear also that these debts were not taken in payment but only as collateral security for the defendants' debt.

It appears that three of the accounts, viz., Harry Calvert's for $79.62, Robert Calvert's for $22.91, and Gustave Schreiber's for $34.27, making in all $136.80 were never collected by the plaintiffs and as they were due in 1901 they had become outlawed by 1907. McAvoy, once the plaintiffs' agent, who had charge of the collection, said he notified the debtors and collected what he could, and that when he left in 1906, there were three that had not been collected. He mentioned the two Calverts and the other name he gave is written Shuard but this is apparently meant for Schreiber. He said, referring to the debtors generally, "I notified them and when I saw them I tried hard." He also said that the defendants interviewed him a number of times and tried to get their accounts back. This was while he was still in the plaintiffs' employ and he left in 1906, so it must have been before that time. We have not the exact date at which the three debts in question were incurred

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so that we cannot tell exactly when they were outlawed nor therefore whether the defendants demanded them back before the statute had run, but I do not think that is material. What is clear is that the plaintiffs had acquired control of the debts, holding them as assignees as collateral security, and that when the period of limitation was approaching they did not take precaution to sue and so keep the debts alive as they clearly would be very careful to do in the case of their own direct debtors, as the present action itself shews, but allowed the statute to run so that the securities they held from the defendants were lost. It was open to them either to sue themselves or to place the defendants in a position to sue by re-assigning them. Nothing that can be construed into a re-assignment ever took place. They, of course, were not bound to re-assign them until the defendants paid the balance due, but if they exercised their undoubted right of retaining them as security then I am of opinion that it was their duty to preserve the security and if that security was in danger of being lost by the operation of the Statute of Limitations it was their duty to issue writs in order to preserve it.

In American and English Encyclopædia of Law, 2nd ed., vol. 22, page 899, it is said:—

> It is well settled that when a chose in action such as a bond, note or accepted order on a third person is transferred and delivered to a creditor as collateral security it is the duty of the pledgee to use reasonable care and diligence to make such collateral available; that he is bound to use proper exertions to render the collateral effectual for the purpose for which it was pledged; that if necessary he must bring an action against the maker of the collateral and that if through his negligence or wrongful act or omission the collateral is lost he is accountable and liable to the pledgor in the same manner as the pledgee of goods and merchandise is liable to the pledgor if they are lost or destroyed through the pledgee's failure to give them the necessary protection and care.

And on page 900 it is said:—

> Where by the negligence of the pledgee the collection of collateral securities has been lost by operation of the Statute of Limitations and such statutory defence has become perfect, the pledgor may by a counterclaim recover the value of his collateral even though it be not known that his debtor will, when sued on such collateral, plead the statute in defence.

For this last statement no English precedent is quoted, but the work is one of great authority and for the first statement the cases of *Peacock* v. *Purssell*, 14 C.B.N.S. 728, 8 L.T. 636, and *Williams* v. *Price*, 1 Sim. & St. 581, 44 R.R. 238, are cited. In the former case it was held that the holder of a draft, to whom it had been assigned as collateral security and who failed to present it at maturity whereby the security was lost, was liable to his debtor from whom he had received it for the amount of it. The Court, Earle, C.J., Williams, Willes, and Byles,

JJ., held that on the holder's failure to present and on the loss through this laches the bill became money in his hands in favour of the debtor from whom he received it as security. I can see no difference in principle between that case and the present one.

My brother Scott refers me also to the following authorities as supporting this view: Lewin on Trusts, 11th ed., 316-7; *Synod* v. *De Blaquiere*, 27 Gr. 536; Cassels' Digest, p. 539.

The plaintiffs through their agents by holding a threat over the defendants' heads practically forced them to place these debts in their hands. They assumed control of them and notified the debtors. The evidence shews that the debtors so understood it and refused to recognize the defendants' right to collect. Instead of doing what was necessary to keep the debts alive or permitting the defendants to do so by a re-assignment they retained them under their control and then allowed them to be barred and all remedy lost. I cannot see that in the circumstances the defendants are guilty of any negligence in not insisting on the issue of writs. It was not in their power to force the plaintiffs to sue. I think, therefore, they should be charged with the amount of the debts at the date on which they were outlawed. This was at least as early as December 31st, 1907. Allowing a credit of $136.80 on that date it is clear that the plaintiffs' claim was satisfied on October 1st, 1908, by the last payment of $90. Indeed a careful checking of the plaintiffs' calculations of interest shews that they claimed a little too much, about $3, on the first note, about $27.00 too much on the second and much more too much on the last. Possibly some small balance would be found due the defendants but I think this may be disregarded without injustice, particularly in view of the offer made in their notice of cross appeal. The result is, that the appeal and the cross-appeal should both be allowed, that the plaintiffs should have judgment entered below against the defendants and that the defendants should have judgment on their counterclaim for the same amount (it is unnecessary to specify the sum exactly as it amounts to a dismissal of the action), and that the defendants should have their costs of the action.

As to the costs of the appeal I think there should be none to either party. The plaintiffs were fully justified in appealing in order to remove a judgment against them based on an erroneous view of the law as to the Statute of Limitations which it is clearly of extreme importance to the commercial world and to the plaintiffs in particular to have corrected.

SIMMONS, and WALSH, JJ., concurred.

Simmons, J.
Walsh, J.

Judgment accordingly.

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BREAKEY et al. (appellants) v. BERNARD et al. (respondents).

Quebec King's Bench, Trenholme, Lavergne, Cross, Carroll and Gervais, JJ. June 17, 1912.

1. ABATEMENT AND REVIVOR (§ II—5)—DEATH OF PLAINTIFF — INTERVENTION—OBJECTION TO FORM—C.P. QUEBEC 272.

An intervention, filed after the expiration of the delay allowed by art. 272 C.P. for contesting a petition for the continuance of the suit after the death of the plaintiff, is not open to an exception to the form on the ground that there were not two parties to the action at the time the intervention was filed, the filing of the petition itself being an act of continuance which the adverse party may or may not contest.

2. ABATEMENT AND REVIVOR (§ II—5)—DEATH OF PARTY—SUSPENSION OF SUIT—INTERVENTION—C.P. (QUEBEC), ART. 174.

The filing of an intervention, while a suit was suspended by the death of a party, is not prejudicial within the meaning of art. 174 C.P., and is not open to an objection to the form on that ground, but it may be proceeded upon when the suspension ceases.

3. PARTIES (§ III—120)—INTERVENTION—RATEPAYERS LIABLE FOR ASSESSMENT ON OPENING UP HIGHWAY—INTEREST DIFFERING FROM MUNICIPALITY.

Ratepayers, or parties who are assessable in respect to the opening of a highway, may intervene in an action to set aside a *procès-verbal* for the opening thereof, notwithstanding the corporation of the county was a party to the action, since they had a special interest in the proceeding different from that in respect to which the municipal corporation represented them.

[*Burland* v. *Earle*, [1902] A.C. 83; *Brown* v. *Gugy*, 2 Can. P.C.N.S. 341, specially referred to.]

Statement

APPEAL from the judgment of the Superior Court, district of Beauce, Pelletier, J.

The appeal was dismissed.

L. St. Laurent, for appellant.

P. Bouffard, K.C., for respondents.

The following opinion was handed down.

Cross, J.

CROSS, J.:—The appeal is from a judgment whereby an exception to the form produced by the appellants was dismissed.

The exception to the form was directed against a demand in intervention made by the respondents. The grounds of the exception are in substance two, namely: First, that the exception was produced in violation of art. 269 C.P.,* inasmuch as the

*Articles 269, 271, and 272 of Code of Civil Procedure (Que.) are as follows:—

269. In causes which are not ready for judgment, all proceedings had subsequently to notice given, of the death or change of status of one of the parties, or of the cessation of the functions within which he was acting, are null; and the suit is suspended until its continuance by those interested, or until the latter have been called in to continue.

271. The continuance is affected upon petition, filed in the office of the Court.

The contestation of the petition is governed by the same rules and delays as apply to the action during which it is made.

272. If the continuance is not contested within the delays prescribed, it is held to be admitted.

action was suspended by the death of the plaintiff and had not yet been continued by his legal representatives, a petition in continuance of suit having been filed, but not yet adjudicated upon; and second, that the respondents were already parties, inasmuch as they were represented in the action by the corporation of the county of Beauce.

The object of the action is to set aside a *procès-verbal* for the opening of a highway from the front road of the parish of St. Gédéon to the eleventh range of Forsyth in the parish of Ste. Martine de Courcelles, including a scow-ferry across the River Chaudière.

The defendant is the corporation of the county. Upon return of the action, the defendant declared that it submitted itself to justice and would not contest.

The plaintiff having died, the present appellants, on the 15th August, 1911, filed a petition praying to be permitted to continue the suit.

This petition was granted on the 16th October, 1911, and on the 24th October the appellants declared that they took up the instance accordingly.

In the meantime, on the 8th September, 1911, the respondents produced an intervention which was received by the Judge.

In this intervention the respondents set forth that they are parties interested in the road as having petitioned for the opening of it and as being assessable for its maintenance, and complain that the defendant refuses to contest the action. They proceed to set up a defence to the action and pray for dismissal of it.

In support of the first ground of the exception, the appellants say that, when the respondents' intervention was filed, there were not two parties to the action, the plaintiff having disappeared and not having been replaced, that in terms of art. 269 C.P. all proceedings—and therefore the intervention—"had subsequently to notice given of the death are null, and the suit is suspended until its continuance by those interested, or until the latter have been called in to continue."

It is answered, for the respondents, that the petition in continuance, not having been contested, was to have been taken as admitted upon and after the delay allowed for contestation which expired on the 7th September: art. 272 C.P.

This answer appears to be well founded. It might indeed be said that, since the delay to contest is for the benefit of the party entitled to contest, there is no necessary reason why he should even wait for expiry of it.

While the Code provides that continuance of suit is effected "upon petition," the idea is that the petition is itself a declaration or *acte* of continuance "filed in the office of the Court" (art. 271), which the adverse party is given a right to contest but which is effective if not contested.

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Besides, in view of the mention in art. 174 C.P.* of "prejudice" as a ground of exception to the form, I find no infraction of law in the filing of the intervention, even if it were to be considered that the suit was suspended at the time of the filing of it, saving to the parties to proceed upon it when the suspension would have ceased.

The other ground pleaded in support of the exception is want of quality on the part of the respondents as mere ratepayers or parties assessable in respect of the road, to intervene and contest, the corporation holding municipal jurisdiction over them being already a party defendant.

If I have correctly grasped the purport of Mr. St. Laurent's argument for the appellant on this head, it is that, while the interveners have an interest in the subject matter in litigation, it is an interest in respect of which they are represented by the defendant municipal corporation, and that, being already so represented by the corporation, which is vested with jurisdiction in the matter, they are not entitled to displace their regular authorized representative by themselves intervening as defendants.

It would indeed seem necessary for the appellants to take that ground in order to make out a basis for an exception to the form.

And it was further subsidiarily argued that, though there are exceptional cases in which an individual or a minority of the members of a body corporate can be held entitled to sue upon the ground that the majority of those vested with the administration of the corporate affairs have failed or are failing to redress a wrong done to the corporation, such exceptional cases are, as was pointed out in *Burland* v. *Earle*, [1902] A.C. 83, at p. 93, "confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company"; and the appellants point out that neither fraud nor excess of jurisdiction is alleged in the intervention in this action.

Respecting the principal point of the argument so put forward, I consider it a mistake to say, as the appellants do, that the respondents are represented by the county municipal corporation in respect of the matter in issue.

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*Art. 174 Code of Civil Procedure (Que.), is as follows:—

174. The defendant may invoke any of the following grounds by exception to the form, whenever they cause a prejudice:—

1. Irregularities in the writ, declaration or service;
2. Incapacity of the plaintiff or of the defendant.
3. Absence of quality in the plaintiff or in the defendant.
4. The fact that a statement of the causes of action, is not contained in the writ or in the declaration.
5. Irregular description of the object of the demand.

The county corporation represents the inhabitants at large for those objects which are placed in its authority by the Municipal Code.

When, however, a municipal council homologates a *procès verbal*, it indicates the proportion of work to be performed by parties specially concerned (art. 799 M.C.); in other words, it provides a scheme of contribution of work charged upon particular individuals. Instead of acting for the inhabitants at large, it creates continuing burdens and charges them upon particular parties. The *procès verbal* once homologated, the subsequent administration is taken up and carried on by and between the individuals themselves, without the intervention of corporation or council. The homologated *procès verbal* is at one and the same time a title to legal rights in favour of particular individuals and an evidence of creation of obligations imposed upon particular individuals in favour of other individuals. The council has no authority in itself to repeal or destroy the *procès verbal*. Before it can take the first step to do that, the procedure must be set on foot by the requisite petition of an interested individual.

Now, in the present case, the respondents assert an interest and a subjection to assessability special to themselves arising out of the by-law. Their interest is not an interest in respect of which the municipal corporation represents them.

They are entitled in their own names to come in and plead their particular rights, whether the municipal corporation does or does not plead. Their right of action (or defence) stands upon an independent footing, just as the right of action of a private individual, who suffers damage special to himself from obstruction of a public highway, was shewn in *Brown* v. *Gugy*, 2 Moo. P.C.N.S. 341 to be independent of the right of action of the Crown to abate the nuisance.

Counsel for the interveners have made a sharp criticism of the action of the municipal corporation in not contesting the action. In view of what has just been said, I consider that to be a misplaced criticism, and I feel warranted in adding that the propensity of municipal councils to engage in costly litigation respecting *procès verbaux* in which the ratepayers at large have no interest, but which are the affairs of perhaps less than a half dozen persons specially concerned, is a thing which should not receive judicial encouragement.

It is conceivable that there may be cases in which the action or contestation should be on behalf of the corporation, but they are exceptional.

In view of the conclusion just expressed upon this ground of appeal, it is unnecessary to express an opinion upon the subsidiary argument rested upon the authority of *Burland* v. *Earle*, [1902] A.C. 83, to the effect that, even if the right of the

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respondents to intervene in consequence of the failure of the municipal corporation to defend were admitted, they have failed to set up a case for intervention on that head, inasmuch as they did not allege that the municipal corporation was chargeable with fraud in neglecting to contest.

It may, however, be said that, if a municipal council were, by mere non-feasance, about to allow a right of action vested in the corporation to be extinguished by prescription, it could not be successfully contended that a ratepayer upon setting forth the bare fact would not be held entitled to take an action in his own name to prevent prescription being acquired—though in the ordinary meaning of language it could not be said that, in such a case, the corporation was charged with fraud in express words. It was pointed out in *Brook* v. *Booker*, Que. 17 K.B. 193, at 197, that a recital of particular facts may amount in effect to a charge of fraud and collusion without either of these words being actually used.

My conclusion is that the appellants have not made out a case upon the appeal upon either of the grounds of their exception to the form, and that the judgment should, therefore, be confirmed.

Appeal dismissed.

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NIGRO v. DONATI.

Ontario High Court. Trial before Lennox, J. September 10, 1912.

1. MASTER AND SERVANT (§ II B 6—170)—LIABILITY OF MASTER—NEGLIGENCE OF FOREMAN—WORKMEN'S COMPENSATION FOR INJURIES ACT, R.S.O. 1897, CH. 160.

Where a foreman in charge of blasting operations charges a drill hole with dynamite, and, forgetting that he has done so, orders one of the workmen to clean out the hole, and the workman is injured by an explosion of the dynamite, the foreman's employer is responsible to the workman for such injuries under sub-section (2) of section 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160.

2. EVIDENCE (§ II H—810)—ADMISSION—PAYMENT OF MEDICAL AND HOSPITAL EXPENSES—WORKMEN'S COMPENSATION ACT (ONT.).

Contributions made by the employer before action towards the medical and hospital expenses of an employee who afterwards sued him for damages alleging that he has been injured by the negligence of the employer's foreman and that the employer was liable therefor under the Workmen's Compensation Act (Ont.) should not, in a subsequent action for the injuries, be taken as evidence of the payer's liability, unless expressly made upon that basis, but should count to his advantage in assessing the damages.

3. EVIDENCE (§ XI F—794)—ESTIMATED EARNINGS—WORKMEN'S COMPENSATION ACT (ONT.).

Evidence that the workman was earning a certain sum per day at the time of the injuries complained of is not relevant for the ascertainment of the "estimated earnings" during the three years preceding the injury which is an element in fixing the workmen's compensation for the injury under the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, sec. 7.

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ACTION by a workman employed by the defendant for $2,600 damages for injuries sustained by the plaintiff, owing, as alleged, to the negligence of the defendant or his foreman.

Judgment was given for the plaintiff.

A. E. Cole, for the plaintiff.

F. H. Keefer, K.C., for the defendant.

LENNOX, J.:—It is not denied that it was an explosion of dynamite that caused the injury complained of in this action. This is the contention of the plaintiff, and the evidence for the defence affords frequent reference to hole No. 3 as being charged with dynamite—the defendant himself suggesting that it must have been a very light charge.

It is not suggested that it was accidentally charged, as by dynamite dropping into it, or accident of that kind. The five holes were drilled on the morning of the accident, and the drilling was completed only a few minutes before the explosion of this hole, No. 3. The hole in question was deliberately, or at all events intentionally, charged by some one. There was only one person who had a right to do this. This was Frank Galzarino, the foreman, who came upon the works that morning, and who was expressly and distinctly put in superintendence of the works being carried on, and particularly of the blasting operations; which included, as incidents thereof, drilling, plugging, cleaning out, loading, covering, and firing. There would be other duties in connection with the blasting, of course—these are the manifest ones. The defendant put the plaintiff under the charge of the foreman, as his assistant. He assisted in exploding the first and second holes, and the foreman then set him at work cleaning out the third hole, and watched him for at least part of the time he worked at this. The defendant came along and assisted the plaintiff at this work, and had only temporarily stepped aside, to look for or to speak to the foreman, in possession of the dynamite, and swears that no one else at the works, that morning, had dynamite. The suggestion, therefore, in argument, that the plaintiff may have charged the hole, into which he was forcing a drill with a heavy sledge, is not only without a tittle of evidence, but without a vestige of reason to support it.

I am asked to infer that the plaintiff maliciously committed this crime, and deliberately exposed himself to its results, yet, in the same breath, it is argued—and it is to all intents and purposes the sole defence set up—that I cannot possibly come to the conclusion, or, in other words, find as a fact, that Frank Galzarino put dynamite in hole No. 3, and yet remained within the danger zone. I can only find it, of course, if there is direct or circumstantial evidence to support it. Juries are doing this

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thing all the time, with the approval of the Courts, on grave criminal charges. Nobody imagines that the foreman intended to do wrong or was guilty of worse than forgetfulness or negligence—in such a case criminal forgetfulness and negligence. If this accident had resulted fatally, and the foreman was charged with manslaughter, resulting from criminal negligence on his part, could I have said that the circumstances afforded no evidence for the consideration of the jury? Well, then, upon the undisputed facts and circumstances given in evidence in this case, I am not prepared to accept Galzarino's statement that he did not put dynamite in the hole in question, although it is possible that he is saying what he believes to be true; and, on the contrary, I think that the only reasonable conclusion to be reached is, and I find it as a fact, that Frank Galzarino did place dynamite in hole No. 3.

It is argued that he is a disinterested witness. So he is—in a sense—and he is an experienced man; but experienced men are forgetful and sometimes careless; and his reputation and earning power cannot be said to be unaffected by the issues in this case.

It was not contended that the defendant was not responsible for the negligence of the foreman; however, that does not relieve me from the duty of carefully considering the provisions of the Workmen's Compensation for Injuries Act; and I think it is clearly a case where the injury was caused by the negligence of a person in the service of the employer who had superintendence intrusted to him, whilst in the exercise of such superintendence: sec. 3, sub-sec. 2. It was argued that the defendant would also be liable under sub-sec. 1. I express no opinion as to this. I am, however, of opinion that the case comes within the provisions of sub-sec. 2.

Then as to the damages. They should not be extravagant. The defendant has acted well. He was not careless in the selection of his foreman; he was not negligent, so far as the evidence goes, in the carrying on of his works, and he was not ungenerous when the calamity came upon the plaintiff. There was evidence of payments, and these were argued as evidence of liability. I don't think the defendant made the contributions upon that basis; and, in every case, unless it has to be utilised to give a colour and meaning to disputed facts, I shall, as here, in the interest of humanity and decency, count contributions made for the relief of the plaintiff, not to the prejudice, but to the credit and advantage of the defendant.

I was not very favourably impressed by the plaintiff's evidence. He clearly exaggerated the result of his injuries. I am satisfied that he will be able to do some work, and earn money, though he will certainly be seriously handicapped in the

struggle. I am not disposed to accept his statement of average winter earnings of $5 a day; and, in any event, this evidence is not relevant. It is not what is earned in other occupations, or even what the plaintiff was earning at the work in question, but the average earnings for three years in that occupation, or $1,500, whichever is the larger of the two sums. There is no evidence on this heading. I know that the plaintiff was getting $2.75 a day at the time. This, with steady employment, would come to more than $800 a year, but there is no evidence as to duration of employment. It is not the class of evidence contemplated in the statute, and I am not disposed to strain to assist the plaintiff upon this point.

The utmost, therefore, that the plaintiff is entitled to is $1,500. The defendant has paid towards doctors' bills and hospital expenses, $54. I think I have power to deduct this, and it ought to be deducted.

I, therefore, direct that judgment be entered for the plaintiff against the defendant for $1,446 and the costs of this action.

Judgment for plaintiff.

Re SANDERSON and SAVILLE.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton and Riddell, JJ. June 26, 1912.

1. MINES AND MINERALS (§ I A—6)—HOLDER OF A MINER'S LICENSE STAKING OUT CLAIMS AFTER EXPIRATION OF LICENSE—RENEWAL OF LICENSE—MINING ACT, 8 EDW. VII. (ONT.) CH. 21.

Where the holder of a miner's license under the Mining Act of Ontario, 8 Edw. VII. ch. 21, stakes out a mining claim after the expiration thereof, a subsequent special renewal license obtained by him under section 85 (1) (*a*) of the Act gives no validity to the previous staking and he acquires no rights thereunder.

2. WITNESSES (§ IV—60)—CONCLUSIVENESS OF FINDING AS TO CREDIBILITY BY TRIAL TRIBUNAL.

The Master or other officer who hears the evidence of the witnesses is the final judge of their credibility. (*Per* Riddell, J.)

[*Booth* v. *Rattè*, 21 Can. S.C.R. 637; *Bishop* v. *Bishop*, 10 O.W.R. 177, and *Hall* v. *Berry*, 10 O.W.R. 954, referred to.]

3. MINES AND MINERALS (§ I A—6)—STAKING OUT CLAIM WITHOUT LICENSE—RIGHTS OF DISCOVERER—MINING ACT, 8 EDW. VII. (ONT.) CH. 21.

To stake out a mining claim without a miner's license is a crime under the Mining Act of Ontario, 8 Edw. VII. ch. 21, and the discoverer acquires by such staking no rights which will be allowed by the court or enforced against the claim of any other. (*Per* Riddell, J.)

4. CIVIL RIGHTS (§ I—10)—EFFECT OF CRIME ON PROPERTY RIGHTS OF PARTY CHARGED.

The court will not enforce property rights directly resulting to the person asserting them from the crime of that person. (*Per* Riddell, J.)

[*Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147; and *Lundy* v. *Lundy*, 24 Can. S.C.R. 650, referred to.]

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Statement

5. CIVIL RIGHTS (§ I—10)—RIGHTS OF WRONGDOER IN RESPECT TO RIGHTS ACQUIRED FROM HIS OWN WRONG.

The rule that a wrongdoer cannot acquire rights from his own wrong, while requiring the undoing, wherever possible, of the advantage gained, does not operate to deprive the wrongdoer of a right previously possessed by him. (*Per* Riddell, J.)

[*Hooper* v. *Lane*, 6 H.L.C. 443; and *Ockford* v. *Freston*, 6 H. & N. 466, referred to.]

APPEAL by Simpson Sanderson and John Sanderson from the judgment of the Mining Commissioner, reversing the decision of a Mining Recorder, and declaring that Eliza Saville, the respondent, was entitled to be recorded as the holder of two mining claims in the Sudbury mining division.

The reasons for judgment of the Mining Commissioner were as follows:—

This is an appeal by Eliza Saville from the decision of the Mining Recorder of the Sudbury mining division, by which he allowed the dispute of Simpson Sanderson, on behalf of John Sanderson, against the mining claim of the appellant, Eliza Saville, cancelling the appellant's claim, and giving the property, or rather the portion of it which was overlapped, to the disputant, under his subsequent staking.

The matter was heard before me at Sudbury, new *viva voce* evidence being put in on behalf of the appellant; and, by consent, the evidence taken before the Recorder also being used; also letters received from some of the Mining Recorders regarding the renewal of Simpson Sanderson's license.

There are two issues involved: first, the validity of Eliza Saville's staking; and, secondly, the validity of the respondents' subsequent staking over the same or part of the same ground.

Dealing with the latter first, I think I must find that on the 21st April, when Simpson Sanderson staked out the property, he had no miner's license. The Recorder for Gowganda certifies that on the 24th April, 1911, he issued to Sanderson a special renewal license. Counsel for the respondents contends that, notwithstanding this, Sanderson may have had his license regularly renewed elsewhere. The presumption, however, must be entirely against such a renewal, as sec. 29 of the Mining Act of Ontario, 8 Edw. VII. ch. 21, expressly forbids the application for or holding of more than one miner's license at the same time, and makes doing so an offence against the Act; and, at all events, upon the whole evidence, I am quite satisfied that Sanderson did not, in the interval between the 31st March and the time he got the special renewal, have any miner's license.

It was argued, however, that the provision in sec. 85 (1) (*a*) of the Act, saving forfeiture of a claim where a special renewal is taken out within the time provided, would cure the defect. This provision, however, is for an entirely different purpose, and has, I think, no application to the original staking out of the claim. The Act is very clear that no right can be acquired by discovery

or staking made by one who is not a licensee; and, in fact, a person prospecting or meddling with Crown lands, without having a license, is guilty of an offence against the Act: see secs. 22, 34, 35, and 176. It is only to licensees that the right of acquiring claims is given; and the saving of forfeiture of a claim already acquired is quite a different thing from the acquisition of a claim in the first instance. I have frequently held that, unless the staker, as well as the person in whose name the staking is done, has a license at the time of discovery and staking, no right can be acquired: see *Re Boyle and Young* (1906), 1 Mining Commissioner's Cases 1.

It follows, therefore, that the respondent Simpson Sanderson can have no rights in the property under his own staking.

As to the appellant's staking, the Recorder held it invalid, on the ground that there was disqualification under sec. 57 of the Act, by reason of the appellant's husband, who did the staking, having previously planted a post upon the property without having completed and recorded the staking within the time prescribed by the Act. Upon this point, additional *viva voce* evidence was put in before me; and, considering this with the evidence already before the Recorder, I think I must find that it was not on the property now in dispute that such prior post was planted; and that, therefore, the claim cannot be held invalid upon this account.

The appellant was not as prompt as she should have been in following up the discovery with staking; but the penalty for such delay is that prescribed in sec. 55, namely, that the lands shall be open to any one else to intervene with a proper discovery and staking; and here, as I have found, no one has really done so; and, though I am not satisfied in all respects with the appellant's actions, or rather those of her husband and agent, in connection with the matter, there seems no doubt at all that she has the merit of being the first and original discoverer; and, as no one else has a valid claim to the property, I think the disposition should not be too astute to pick flaws in the title; and, at all events, I think that there is nothing in the evidence sufficient to justify me in finding her claim invalid.

The respondents' claim must be cancelled, and the appellant's claim restored; but, as I think that the appeal was occasioned by the appellant's own fault or delinquency in not submitting her evidence fully before the Recorder, I will make no order for costs.

I find that mining claim T.R.S. 2874, recorded by Simpson Sanderson, on behalf of John Sanderson, is invalid, and I direct the same to be cancelled.

And I find that mining claim T.R.S. 2185, staked out and recorded in the name of Eliza Saville, is valid, and I direct that it be restored to record and the cancellation thereof vacated.

And I make no order for costs.

The appeal of Simpson Sanderson and John Sanderson from the judgment of the Mining Commissioner was upon the following grounds:—

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1. At the time of staking the said claim, Simpson Sanderson was entitled to obtain a renewal license, and was entitled to stake out this claim.

2. That there is no evidence to shew that Simpson Sanderson was not the holder of a license.

3. From the evidence, the Mining Commissioner should have decided in favour of the appellant.

Statement

4. The Mining Commissioner wrongfully admitted further evidence.

The appeal was dismissed.

Argument

J. W. Bain, K.C., and *M. L. Gordon*, for the appellants, argued that the Saville staking was invalid, on the ground that there was disqualification under sec. 57 of the Mining Act of Ontario, 1908, by reason of the fact that Saville, who did the staking, had previously planted a post upon the property, without having completed and recorded the staking within the time prescribed by the Act. The evidence shewed that the post had been planted upon the Saville claim; and the Commissioner was wrong in overruling the Recorder on that point. On the other branch of the case, namely, the subsequent staking by the appellants, counsel contended that the provision in sec. 85 (1) (*a*) of the Act, saving forfeiture of a claim where a special renewal is taken out within the time provided, cured any defect in recording.

G. F. Shepley, K.C., and *H. S. White*, for Eliza Saville, the respondent, argued that, although where there was a staking out there would have to be a recording, putting up a post was not staking out. The prior Saville post was not planted on the property now in dispute. The provision in sec. 85 (1) (*a*) has no application to the original staking out of a claim, and did not cure the defect in the appellants' title. No right could be acquired by discovery or staking made by one who was not a licensee. In fact, a person prospecting without a license was guilty of an offence against the Act. See secs. 22, 23, 27, 34, 35, 176, and 181.

Bain, in reply, maintained that the prior Saville post was a part staking, and not merely the planting of a post. See secs. 54, 55, and 57 of the Act.

Riddell, J.

June 26. RIDDELL, J.:—In this appeal from the Mining Commissioner there are several matters to be considered—one of them a matter of law of considerable importance though susceptible of short and simple statement.

Sanderson, who was the holder of a mining license, being at a distance from the Recorder's Office, failed to have his license renewed before the 1st April, 1911; but he went on, and on the 21st April made a discovery and staked two claims. He, on the 24th April, had his license renewed under sec. 85 (1) (*a*)

of the Mining Act; the Mining Commissioner holds that Sanderson can acquire no rights by such a discovery and staking.

The Act provides, sec. 22 (1), that "no person . . . not the holder of a miner's license shall prospect for minerals upon Crown lands . . . or stake out, record or acquire any unpatented mining claim . . . or acquire any right or interest therein." Section 176 (1) provides: "Every person who prospects . . . any Crown lands . . . for minerals otherwise than in accordance with the provisions of this Act or 6 Edw. VII. ch. 11, sec. 103 . . . shall be guilty of an offence against this Act and shall incur a penalty not exceeding $20 for every day upon which such offence occurs or continues, and upon conviction thereof shall be liable to imprisonment for a period not exceeding three months unless the penalty and costs are sooner paid." Section 181 (1) directs the prosecution before a Police Magistrate or Justice of the Peace, the Commissioner or a Recorder. This express provision apparently excludes the application of sec. 164 of the Criminal Code; but the offence is none the less a crime. If, for any reason, sec. 164 of the Code does apply, then the act was a crime, quite beyond question.

"*Nullus commodum capere potest de injuriâ suâ propriâ*," and "*Nul prendra advantage de son tort demesne*" (2 Inst. 713), "*Nemo ex suo delicto meliorem suam conditionem facere potest*," are but a few of the forms of statement of a principle recognised in our law.

This is stated by Fry, L.J., in the following words: "No system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person:" *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147, at p. 156. Maybrick had insured his life in favour of his wife, and died by poisoning; his wife was convicted of his murder, her sentence being commuted to penal servitude for life. The executors of Maybrick sued the insurance company, and it was considered that Mrs. Maybrick had no right to receive the insurance, but there was a resulting trust in favour of the estate.

This case was much canvassed in our own case *McKinnon* v. *Lundy* (1893-4), 24 O.R. 132, 21 A.R. 560; *sub nom. Lundy* v. *Lundy* (1895), 24 Can. S.C.R. 650. Mrs. Lundy had made a will devising certain lands to her husband; he killed her, and was convicted of manslaughter. Lundy's grantee claimed the land; the trial Judge (Ferguson, J.) held that Lundy could neither take under the will nor inherit, and that the lands should go as on an intestacy, except that Lundy could not inherit any interest. The Court of Appeal unanimously reversed this judgment, drawing a distinction between murder and manslaughter, "something little removed from accident, when all intent to bring about the death, and thereby bringing about the existence of the fund for

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the profit of the criminal, was necessarily absent:" *per* Burton, J.A., 21 A.R. at p. 562. Another distinction is drawn between the *Cleaver* case and the *Lundy* case by one of the Judges, namely, that in the former the plaintiff was seeking the assistance of the Court—in the *Lundy* case "the defendant Lundy is not seeking the aid of the Court. He does not require it, the validity of the will is not disputed. It is admitted to be a good will. . . . . :" *per* Maclennan, J.A., 21 A.R. at pp. 566, 567. The Supreme Court (24 Can. S.C.R. 650) reversed the judgment of the Court of Appeal and restored that of Mr. Justice Ferguson, pointing out that "the principle upon which the devisee is held incapable of taking under the will of the person he kills is, that no one can take advantage of his own wrong:" p. 652.

The principle must, of course, be subject to two qualifications: the rights in question must be property rights—Mrs. Maybrick and Lundy, after their release, could not be prevented from taking another spouse.

So, too, while rights cannot be acquired by a wrong-doer from his wrong, "the rule only applies to the extent of undoing the advantage gained where that can be done and not to the extent of taking away a right previously possessed. Thus, if A. lends a horse to B., who uses it and puts it in his stable, and A. comes for it and B. is away and the stable is locked and A. breaks it open and takes his horse, he is liable to an action for the trespass . . . and yet the horse could not be got back, and so A. would take advantage of his own wrong. So, though a man may be indicted at common law for a forcible entry, he could not be turned out if his title is good. . . :" *per* Bramwell, B., *Hooper* v. *Lane* (1857), 6 H.L.C. 443, at p. 461.

See also *Ockford* v. *Freston* (1861), 6 H. & N. 466.

In the present case, the discoverer had no rights in the land previously possessed—and he founds his claim upon acts done by himself, a trespasser, a wrong-doer, one liable to conviction for a crime. It is clear that no such claim can be allowed by any Court, nor can it be allowed to be set up against the right or claim of any other—unless, indeed, the provisions of sec. 85 (1) (*a*) of the Act save him.

Section 85 (1) (*a*) does not purport to be in any way in modification of secs. 22, 23, 27. Section 27 provides for the ordinary case of the renewal of a license "before the expiration thereof:" this renewal is to "bear date on the 1st day of April and shall be deemed to have been issued and shall take effect immediately upon the expiration of the license of which it is a renewal." But sec. 85 (1) (*a*) provides for an entirely different case, for what is, both in the section itself and in the tariff, item No. 23, called a "special renewal license." This, so far as appears, need not be dated the 1st April—at all events, it is not provided that it shall come into effect retroactively. It is only issued "to save

forfeiture" (tariff, item No. 23), a forfeiture under sec. 84. This, as will be seen, is forfeiture of "all the interest of the holder of a mining claim before the patent thereof has issued." The "special renewal license" is not operative to make that rightful which was wrongful, that innocent which was a crime, but only to exempt from forfeiture the interest already rightfully and lawfully acquired of "the holder of a mining claim."

This part of the Commissioner's judgment is undoubtedly right, and the appeal in that regard should be dismissed.

The other branch of the case is on a simple question of fact, which, in the view I take, it is not necessary to set out.

After a careful examination of all the evidence, I am not able to say that the conclusions of the learned Commissioner are not wholly justified by the evidence. Much depends upon the credibility of Saville, who gave testimony before the Commissioner in conflict with what he had previously said before the Recorder. The explanation given is—to me—not wholly satisfactory; but the Commissioner saw the witness, and he chose to give credit to the testimony before himself—we cannot, I think, interfere.

In a matter of credit to be given to witnesses the Master (or Commissioner) is the final judge of the credibility of these witnesses "according to the well-established practice in Ontario:" *Booth* v. *Ratté* (1892), 21 Can. S.C.R. 637, 643; *Hall* v. *Berry* (1907), 10 O.W.R. 954; *Bishop* v. *Bishop* (1907), 10 O.W.R. 177.

The appeal should be dismissed on all grounds taken and with costs.

Britton, J.

BRITTON, J.:—I agree that the appeal should be dismissed with costs.

Falconbridge, C.J.

FALCONBRIDGE, C.J.:—And I.

Appeal dismissed.

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CAIN v. PEARCE Co.

(Decision No. 2.)

Ontario Court of Appeal. Maclaren, J.A., in Chambers. October 2, 1912.

1. APPEAL (§ III F—98)—NOTICE OF APPEAL—EXTENSION.

Where the appellant has allowed the time for giving notice of appeal to lapse, an application made to the Court after a long delay for an extension of time for serving the formal notice should not be granted unless within the limited period the appellant has taken some step from which his intention to appeal might be inferred.

[*Ross* v. *Robertson*, 7 O.L.R. 494; *McClemont* v. *Kilgour Manufacturing Co.*, 4 D.L.R. 351, 3 O.W.N. 1351, referred to.]

Statement

MOTION by the defendants in the above and four other actions to extend the time for appealing to the Court of Ap-

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peal from the order of a Divisional Court, *Cain* v. *Pearce Co.*, 5 D.L.R. 23, 3 O.W.N. 1321.

The motion was dismissed.

D. Inglis Grant, for the defendants.

H. E. Rose, K.C., for the plaintiffs.

MACLAREN, J.A.:—The defendants move in five actions (that were tried together) to extend the time for appealing from a judgment of a Divisional Court rendered on the 23rd May last. No notice of appeal was given within the month allowed by the Rules, and it was only on the 6th September that the first step was taken towards launching the present motion, the excuse being the illness of the defendants' solicitor.

The actions were for damages and an injunction on account of the renewal by the defendants of an old dam; the defence, that an easement had been acquired by prescription. It was held that an easement had been acquired, but that the new dam, although no higher than the old one, retained the water and flooded the plaintiffs' lands for a longer time than the old one. Moderate damages were assessed, of which the defendants do not complain, if the plaintiffs are entitled to any damages. No injunction was granted.

The cases have been much litigated. The trial Judge first found that the defence of prescription was made out in part, and ordered a reference to assess the damages beyond the prescription; a Divisional Court sent the cases back to him; he held a further trial, and assessed the damages, which the Divisional Court has upheld.

The defendants complain that their easement was not defined or delimited, and urge an appeal because other actions have been taken and are threatened by other proprietors. They also complain strongly that High Court costs were given against them. They have not obtained leave to appeal on this last ground, so that it cannot be considered. Neither will such a judgment as they now seek determine future actions.

In cases where such an indulgence as is asked for in this case has been granted, the fact that the party desiring to appeal has taken some step within the month has been deemed important. See *Ross* v. *Robertson*, 7 O.L.R. 494, *McClemont* v. *Kilgour Manufacturing Co.*, 4 D.L.R. 351, 3 O.W.N. 1351. In these cases, so far as appears, no hint was given of the intention to appeal before September. I do not find any sufficient reason for depriving the plaintiffs of the rights they have acquired after having had to go through two trials and two appeals.

In my opinion, the motion must be dismissed with costs.

Motion dismissed.

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Saskatchewan Supreme Court, Wetmore, C.J., in Chambers. October 9, 1912.

1. INJUNCTION (§ I J—83)—ULTRA VIRES BY-LAW—BONUS TO RAILWAY—STATUTORY RIGHT TO QUASH—EFFECT ON RIGHT TO AN INJUNCTION AGAINST THE PASSING OF AN ULTRA VIRES BY-LAW.

Upon an application by a person (not in the name of the Attorney-General) for an injunction, restraining a city corporation from passing a certain twice-read by-law respecting an agreement between the defendant city and a certain railway company, renting to it, for 99 years at a nominal rental, a valuable portion of a city park, for hotel purposes, and granting a partial exemption from taxation, and thereby in effect bonusing the company in contravention of secs. 185 and 210 to 240 of the City Act, being ch. 84, R.S.S., the application for the injunction will be refused, in view of sec. 242 of the City Act (ch. 84, R.S.S.) which expressly provides a method available to any elector of the city, to apply to the Court within two months after the passing of any *ultra vires* by-law to quash the same.

2. INJUNCTION (§ I A—7)—OTHER EFFICIENT REMEDY.

Where a statutory proceeding to quash a municipal by-law (as under sec. 242 of the City Act, R.S.S. ch. 84) would practically serve every purpose that an injunction could serve, an injunction to restrain the passing of the by-law ought not to be granted even if the by-law is *ultra vires*.

[*Neal* v. *Rogers*, 22 O.L.R. 588; *Aslatt* v. *Corporation of Southampton*, 16 Ch. D. 143; *City of London* v. *Town of Newmarket*, 2 D.L.R. 244; Kerr on Injunctions, 4th ed., pp. 3, 4, and 5; 17 Halsbury's Laws of England 202, par. 451; Fry on Specific Performance, 4th ed., p. 502, par. 1167, referred to.]

3. PARTIES (§ I A 4—46)—ULTRA VIRES BY-LAW—INJUNCTION TO RESTRAIN THE PASSING OF—PROCESS NOT OPEN TO PRIVATE PLAINTIFF UNLESS SPECIALLY AFFECTED.

Where a city corporation is about to pass an *ultra vires* by-law and an application for an injunction to restrain is made by a plaintiff (not in the name of the Attorney-General), such plaintiff comes within the prohibition of the well-settled rule that no person may institute proceedings with respect to wrongful acts, which if of a private nature are not wrongs to himself, and if of a public nature do not specially affect himself.

4. PARTIES (§ I A 4—48)—RIGHT OF ATTORNEY-GENERAL TO SUE—RESTRAINING MUNICIPAL CORPORATION FROM PASSING ULTRA VIRES BY-LAW.

Only the Attorney-General has the right in the absence of any express statutory provision to sue for an order restraining a municipal corporation from passing a by-law which while *ultra vires* does not specially affect any citizen or class of citizens.

[*Hope* v. *Hamilton Park Commissioners*, 1 O.L.R. 477; *Boyce* v. *Paddington Borough Council*, 72 L.J. Ch. 32; *Caldwell* v. *The Pagham Harbour Reclamation Company*, 45 L.J. Ch. 796, referred to.]

5. PARTIES (§ I B—57)—JOINDER—WHEN ATTORNEY-GENERAL A NECESSARY PLAINTIFF.

Where a proceeding is defective because the Attorney-General was not added as a party plaintiff and no consent from the Attorney-General is forthcoming when the case comes on for final disposition, as upon a plaintiff's motion for judgment, a conditional amendment will not be granted subject to the plaintiff obtaining the Attorney-General's consent, but the action will be dismissed if the plaintiff has not the necessary status to maintain the action.

Statement

THIS is an application by the plaintiff for an order continuing an interim injunction granted by Wetmore, C.J., on

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September 19, 1912, restraining the defendant from proceeding to finally pass a certain by-law respecting an agreement and leases between the defendant city and the Grand Trunk Pacific Branch Lines Company, whereby the railway company were to lease for a term of ninety-nine years at a yearly rental of twenty-five dollars, a portion of Wascana Park for hotel purposes, and for fixing the assessment of the lands and buildings to be erected thereon, on the return of the application; exception to the continuing of the injunction having been taken, the counsel for all parties consenting, the application was turned into a motion for judgment, under rule 442 of the rules of the Supreme Court, 1911.

Judgment was given dismissing the action with costs.

H. V. Bigelow, for plaintiff.

S. P. Grosch, for defendants.

Wetmore, C.J.

WETMORE, C.J.:—The statement of claim herein sets forth that the city council of Regina passed two separate readings of a by-law respecting an agreement and lease between the city and the Grand Trunk Pacific Branch Lines Company by which practically they made provision that the city should enter into an agreement and lease with the company whereby they would lease for a term of ninety-nine years, commencing on the first of September last, at the rent of twenty-five dollars per annum, for hotel purposes only, and subject to the conditions of the lease, certain land, being a portion of what is known as Wascana Park, and to grant a partial exemption from taxation to the company in respect thereto by fixing the assessment upon such land and the buildings erected thereon at $100,000 for a period of twenty years from the date, providing that the said property should be liable to assessment for school, collegiate institute, public library and local improvement purposes, to as full an extent as if the by-law had not passed. The company is alleged to be a railway company incorporated under ch. 99, R.S.C. 1906, and not a street railway company. It is alleged that the property in question is worth at least $200,000, according to the valuation of surrounding property, and that the rental proposed is grossly inadequate, and that in fact it is a bonus to the company. It is claimed that the by-law is *ultra vires* of the defendants under R.S.S., ch. 84, sec. 185, and the plaintiff claims a declaration that such by-law is invalid and *ultra vires* of the defendants, and prays an injunction to restrain them from finally passing the said by-law; and it was alleged that a meeting of the council had been called for the 19th September for the purpose of finally passing the said by-law. Application was made to me, and I, on the 19th September, granted an interim injunction order restraining the defendants until the 7th October from proceeding to finally pass the by-law and

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from executing the agreement and lease, and I granted leave to serve the defendant, along with the writ of summons, with a notice of motion to continue this injunction until the trial of the action, such notice to be returnable on the 3rd October, 1912. Such notice having been given, the parties appeared before me on the 3rd October, and exception was taken by counsel for the defendants to the continuing of the injunction. The grounds of objection were:—

(1) That the application was prematurely made, as it was made before the final passing of the by-law.

(2) That inasmuch as an application to quash the by-law could be made under sec. 242 of the City Act, when the by-law had finally passed, an injunction would not lie, or ought not to have been granted.

(3) That the words "just and convenient" in sec. 31, sub-sec. 8, of the Judicature Act grant no larger powers to a Court or Judge to grant an injunction than existed, prior to the incorporation of those words, by the English Judicature Act, 36 and 37 Vict. ch. 66, sec. 25, sub-sec. 8.

(4) The action should have been brought in the name of the Attorney-General, as the plaintiff does not allege any particular damage over and above other citizens or ratepayers.

I am of opinion that all these questions are of a very grave character. They are by no means technical; they go to the root of the action; and if I should decide the questions so raised on this application in favour of the defendants I would dispose of the action. I think the questions are of importance from the standpoint of either party, and I ought not, under the circumstances of this case, on a motion to continue the injunction, to dispose of the action without the consent of counsel for the respective parties. Counsel have, however, consented that the application be turned into a motion for judgment under rule 442 of the rules of the Supreme Court, 1911, and I therefore feel at liberty to so deal with the matter. I am of opinion that in attempting to pass the by-law in question, the city council were proceeding to deal with the property in question without authority of law, and by that I mean without taking the steps provided by the City Act in such cases, that they were in effect seeking to bonus a company for the purpose of inducing it to construct an hotel on the land in question. It seems to me quite clear that a bonus may be given just as well by a transfer of land, either without consideration or for a totally inadequate consideration, as by payment of a specified sum of money or by exemption from taxation. The question of the propriety of a municipal corporation bonusing in respect to the introduction of commercial or industrial undertakings has always been one upon which the minds of people are very much divided. The

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legislature, therefore, I assume influenced to some extent at any rate by that fact, enacted by sec. 185 of the City Act, ch. 84, R.S.S., as follows:—

> Every by-law for—
>
> (*b*) Bonusing whether by way of the payment of a lump sum or periodical payments or *otherwise*, exempting from taxation beyond the current year, subscribing for stock in or guaranteeing the payment of debentures issued by any person, syndicate or corporation in respect of any industrial, commercial, charitable or engineering undertaking shall in the case of by-laws provided for in clauses (*b*) . . hereof receive the assent of two-thirds of the burgesses voting thereon in accordance with the provisions of sections 210 to 240 hereof.

The city council were proceeding to pass the by-law questioned herein without taking the steps provided by sec. 210 and subsequent sections of the Act, which I hold they had no right to do. The question arises, had the plaintiff a right to an injunction to restrain the city from so proceeding to finally pass the by-law? I do not consider it necessary, in view of the conclusion I have reached, to pass an opinion upon the first ground of objection taken by counsel for the city. As to the contention that if the city council was proceeding erroneously the plaintiff ought to have stayed his hand and waited until the by-law was passed, and then proceeded to have it quashed, under sec. 242 of the City Act, the first sub-section of which is as follows:—

> Any elector of the city may within two months after the passing of any by-law or resolution of the council apply to a Judge upon motion to quash the same in whole or in part for illegality; and the Judge upon such motion may quash the by-law or resolution in whole or in part and may according to the result of the application award costs for or against the city and may determine the scale of such costs.

The section then proceeds to prescribe the procedure, etc., to be taken on such application. *Neal* v. *Rogers*, 22 O.L.R. 588, was brought under my notice by counsel for the defendant, in which Middleton, J., dealt with the expression "just and convenient" as used in sec. 58, par. 9, of the Ontario Judicature Act, ch. 51 of R.S.O. 1897, and in which he held that

> the view that has ultimately prevailed is that the Courts should only grant an injunction now where formerly the Court of Chancery would have done so.

With the greatest deference and respect, I am not prepared to lay down the rule as broadly as that. This paragraph in the Ontario Act corresponds with clause 8 of sec. 31 of the Judicature Act, R.S.S. ch. 52, and they are both taken practically from 36 and 37 Vict. ch. 66, sec. 25, sub-sec. 8 (the Imperial Judicature Act, 1873). I am unable to discover anything in the authorities that the learned Judge referred to to warrant the conclusion I have mentioned, and it seems to me to be at variance with the opinion of the learned author of Kerr on In-

junctions, as supported by the judgment of Sir George Jessel, in *Aslatt* v. *Corporation of Southampton*, 16 Ch. D. 143 (see Kerr on Injunctions, 4th ed., pp. 3, 4, and 5), and also with the opinion of those two able jurists and authors, Lord Halsbury and Sir Edward Fry (see 17 Halsbury's Laws of England, p. 202 (par. 451), and Fry on Specific Performance, 4th ed., 502, par 1167). The provision in those Acts is not, however, to be dealt with arbitrarily, but along well-defined lines such as are pointed out in the authorities I have just mentioned; and I agree with what was laid down by Middleton, J., in *The City of London* v. *The Town of Newmarket*, 2 D.L.R. 244, 20 O.W.R. 929, that

> an injunction is an extraordinary remedy, and ought not to be resorted to when there is an appropriate remedy in a motion to quash.

I may merely add that, in my opinion, when there is a procedure provided by statute which will practically serve the same purpose as an injunction, the injunction ought not to be granted. I am of opinion that a proceeding under sec. 242 of the City Act would practically serve every purpose that the injunction would serve. If the city council acted wrongfully or without authority, and a proceeding is properly taken, under sec. 242, the by-law would be quashed (or I must assume that it would), and any act done by the city under it would fall with it. There was no necessity for proceeding before the by-law was passed that I can see.

As to the contention that the action should have been brought in the name of the Attorney-General; by that it is contended that, no right of the plaintiff having been specifically affected, he cannot maintain the action, and in this case it does not appear that any right of the plaintiff was specifically affected. This question arose in *Hope* v. *Hamilton Park Commissioners*, 1 O.L.R. 477, and was decided by a bench of exceedingly able judges. The city of Hamilton had purchased a property for a public park, and had duly adopted what was known as the Parks Act, by virtue of which the park became open to the public free of all charge, subject to such by-laws, rules, etc., as the board of park management might make as to the use thereof. The Board passed resolutions (1) declaring a portion of the park to be not required for park purposes, (2) for leasing a portion of it for baseball purposes. The plaintiffs, who were residents and ratepayers of Hamilton, brought an action seeking to have it declared that the resolutions were *ultra vires*. Armour, C.J.O., delivering the judgment of the Court, lays it down at p. 479:—

> The rule is that no person may institute proceedings with respect to wrongful acts, which if of a private nature are not wrongs to himself, and if of a public nature do not specially affect himself, and this rule applies equally to *ultra vires* transactions.

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It is unnecessary, in the view I take of this case, to determine whether, in doing what they essayed to do, the Board of Park Management were acting within the powers conferred upon them by the Legislature or within what might fairly be regarded as incidental to or consequential upon such powers, for no one of the public has any right to complain whenever parliamentary powers, such as those conferred upon this board, have not been strictly followed or are intended to be transgressed, unless he can shew that he has an interest in preventing the doing of that which may well be called a violation of their contract with the Legislature. He must not only shew that they are committing or intending to commit a wrong, *but also that the wrong complained of does occasion or will occasion loss or damage to him, that he has a special or private interest in confining them within the limits of their parliamentary powers.*

And unless he can shew this, it is only the Attorney-General who has any right in such case to complain.

I do not think that the fact of the plaintiffs being ratepayers of the city of Hamilton, which had purchased the park and had adopted the Public Parks Act, thereby constituting the board of park management an independent corporation, gave them a special or private interest in confining the board of park management within the limits of their parliamentary powers, or that their transgressing them, as it was alleged they were essaying to do, did or would occasion any loss or damage to them.

Buckley, J., in *Boyce* v. *Paddington Borough Council*, 72 L.J. Ch. 32, lays down where a person may sue in respect of a public right without joining the Attorney-General. The plaintiff has not brought himself within the rule so laid down.

Counsel for the plaintiff applied to amend his statement of claim and proceedings by making the Attorney-General a party, and he cited *Caldwell* v. *The Pagham Harbour Reclamation Company*, 45 L.J. Ch. 796. In that case the consent of the Attorney-General had been obtained, and he was added as an informant at the relation of the plaintiff. I am of opinion that the practice as laid down in the Annual Practice, 1912, at p. 2, should be followed, and that the leave of the Attorney-General must be had before I can order an amendment. This was obtained in *Caldwell* v. *Pagham Harbour Co.*, 45 L.J. Ch. 796, before the amendment was allowed. It was suggested that I should allow the amendment subject to his granting leave. It seems to me that that would not be a proper course to pursue, and therefore the proposed amendment must be refused.

At the time the plaintiff's counsel consented that this application should be turned into a motion for judgment, he asked for and obtained leave to produce testimony to establish that Wascana Park has been dedicated as a public park. In view of what is laid down in *Hope* v. *The Hamilton Park Commissioners*, 1 O.L.R. 477, and *Boyce* v. *Paddington Borough Council*, 72 L.J. Ch. 32, I cannot see that this evidence would be of

any assistance to the plaintiff, and I therefore do not consider it necessary to hold this judgment over in order that it may be produced.

There will be judgment dismissing this action, with costs to the defendant, including the costs of opposing the motion to continue the injunction.

Action dismissed.

GOLD v. MALDAVER.

Ontario High Court, Riddell, J. October 12, 1912.

1 INJUNCTION (§ I G—60)—CONSTITUTION OF CHURCH CORPORATION—SALE OF PEWS.

An injunction should not be granted to restrain the president of the board of directors of a church corporation from proceeding with a sale of pews to the church members, where plaintiffs set up as a ground for the injunction that two-thirds of the members are opposed to the proposed sale, but where the constitution of the church corporation is not being infringed by the defendant officer.

Statement

MOTION by the plaintiffs to continue an injunction granted by MIDDLETON, J.

W. E. Raney, K.C., for the plaintiffs.
L. F. Heyd, K.C., for the defendant.

Riddell, J.

RIDDELL, J.:—"The Shaare Tzedek Congregation" is a corporation formed by letters patent under the Ontario Companies Act to take over the assets and liabilities and in every way to stand in the place of a previously existing Hebrew congregation in Toronto, to maintain a place of worship for Hebrews according to the Sephardic Ritual, a school, etc. In the letters patent it was (amongst other things) ordained that the congregation should determine the conditions upon which future members should be admitted; that the officers, who should together be known as directors, should be: (1) the President; (2) Parnas; (3) Gabboh; (4) Treasurer; (5) Secretary; (6) five trustees; (7) Senior Gabboh for burial ground; and (8) Junior Gabboh for burial ground; that at any general meeting, unless a poll is demanded, a declaration by the president that a resolution has been carried, and entry to that effect in the minutes of the proceedings of the corporation, shall be sufficient evidence of the fact without any proof of the number or proportion of the votes recorded in favour of or against such resolution; that the affairs of the corporation shall be managed by the directors, who . . . may exercise all such powers of the corporation as are not by the Act or the charter required to be exercised by the corporation in general meeting, "subject nevertheless to any regulations not inconsistent with the above re-

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gulations or provisions as may be prescribed by the corporation in a general meeting. . . .'' Clause 26 has also been considered in argument material, though I think it applies only to committee meetings. It is as follows: ''26. A committee may meet and adjourn as they think proper. Questions arising at any meeting shall be determined by a majority of votes of the members present, except where otherwise provided by the by-laws.''

In general meeting a ''constitution'' was drawn up, which may be considered as containing the by-laws of the company. . .

In this ''constitution'' appear the following:—

Article 3, sec. 1: ''Any person of the Jewish creed, 18 years old and over, is eligible for membership to this congregation.''

Article 5, sec. 4: ''Each member is entitled to a seat in the Synagogue, and, if married, also to a seat for his wife; each pew to be rented for the period of one year, i.e., from one New Year's day to the other.''

Article 5, sec. 5: ''All members have a right to vote in all affairs of the congregation except on property affairs, which are to be voted on only by those members who have their pews bought.''

Article 6, sec. 1: ''The seats in the Synagogue may be sold at any regular or special meeting called for such purpose.''

Article 6, sec. 2: ''The seats must be sold by auction to the highest bidder, and are to become the property of the buyer, his executors and heirs. When there are no heirs, the seat shall belong to the Synagogue.''

As all the seats are individual, the words ''seat'' and ''pew'' are synonymous.

The subsequent provisions of article 6 make it plain that only a member can buy a seat or pew.

The result is, that the members are divided into two classes: (1) those who have ''their pews bought;'' and (2) those who have not. All may vote at general meetings, ''except on property affairs''—on these only the first class.

At a meeting of the congregation-corporation, with the defendant, the president, in the chair, it was proposed to lease the basement of the Synagogue for two years, at a rental of $200 per annum. A number of pew-owners protested, as an offer for $500 per annum had been received. It is said that the tenant in either case was to sweep out the Synagogue, also. The president, against the protest of the majority of the pew-owners, allowed the general body of members to vote, and declared the motion carried.

I am asked to continue the injunction restraining the president from acting on this resolution.

There are two arguments which might be advanced to sup-

port this resolution, but I pass over them, as the defendant does not object to the injunction being continued on this branch.

But there is another and more important matter. The defendant, the president of the Synagogue, intends, it is said, to sell pews "notwithstanding . . . that fully two-thirds of the total number of fifty-nine pew-owners in said congregation are opposed to the sale of any further pews or seats at the present time." There does not seem to have been any vote of the congregation directing such sale; and, therefore, the first ground suggested why the leasing was proper does not here appear. That was, that in the charter the declaration by the president, etc., is made sufficient evidence of the passing of a resolution without any proof of the number of the votes, etc. But, while the declaration of the president and entry in the books are sufficient evidence, they are not conclusive evidence; and there is nothing to operate by way of estoppel or otherwise to prevent the truth appearing.

What is mainly relied upon is, that the directors, including the president, are charged with the management of the affairs of the corporation; that the directors may exercise all the powers of the corporation except as specifically excepted. It is to be observed that these powers are to be "subject . . . to any regulations not inconsistent . . . prescribed by the corporation in general meeting. . . ." Regulations were made in general meeting (article 6, secs. 1, 2) as to the sale of pews; and these do not prevent the exercise by the directors of the power to sell the pews, provided the sale be: (1) at a regular or special meeting called for the purpose; and (2) at auction, to members only. It is not a matter which requires to be brought at all before the congregation, any more than the sale of part of an ordinary company's land by the board of directors of such company.

Article 5, sec. 5, then, has no application, in my view.

I do not think that the injunction as to this branch can be sustained, as I do not think the approval of a majority of the present pew-holders is necessary.

The defendant seems to be proceeding in good faith to sell so as to raise money to pay off pressing liabilities; and, if he has the authority of the directors, I do not think he can be restrained.

But, if the parties cannot agree, the injunction will be dissolved as to the last part, continued as to the first on the defendant's consent: costs in the cause, unless otherwise ordered by the trial Judge.

Order accordingly.

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MAITLAND v. MACKENZIE AND TORONTO R. CO.

Ontario High Court, Falconbridge, C.J.K.B. October 12, 1912.

1. COLLISION (§ I—8)—LIMITATION OF ACTION—PERSONAL INJURY—MOTOR VEHICLE COLLISION—"DAMAGES GIVEN BY ANY STATUTE."

An action for damages for personal injury against the owners of a motor vehicle by collision with the motor vehicle, commenced three and a half years after the cause of action arose, does not fall within the two year limitation of 10 Edw. VII. (Ont.) ch. 34, sec. 49 (*h*) upon actions for "damages given by any statute," notwithstanding the statutory provisions governing the operation of motor vehicles, and is therefore not barred on a plea of the Statute of Limitations.

[*Corporation of Peterborough* v. *Edwards* (1880), 31 U.C.C.P. 231; *Thomson* v. *Lord Clanmorris*, [1900] 1 Ch. 718, referred to.]

2. LIMITATION OF ACTIONS (§ II F—60)—DAMAGES—MOTOR VEHICLE COLLISION—STATUTE OF 10 EDW. VII. (ONT.) CH. 34—ACTION "UPON THE CASE"—SIX YEARS TO BRING ACTION.

The limitation period for commencing an action for damages for personal injury against the owners of a motor vehicle by collision with the motor vehicle is six years from the time when the cause of action arose, under 10 Edw. VII. (Ont.) ch. 34, sec. 49 (*g*) as an action "upon the case."

[*Corporation of Peterborough* v. *Edwards* (1880), 31 C.P. 231; *Thomson* v. *Lord Clanmorris*, [1900] 1 Ch. 718, referred to.]

Statement

ACTION for injuries by collision with a motor vehicle.

J. M. Godfrey, for the plaintiff.

D. L. McCarthy, K.C., for the defendants.

Falconbridge, C.J.

FALCONBRIDGE, C.J.:—The defendants plead the Statute of Limitations. If the limitation is two years, the plaintiff has brought his action too late.

Mr. McCarthy contends that the case falls under the Limitations Act, 10 Edw. VII. ch. 34, sec. 49 (*h*), "an action for a penalty, damages, or a sum of money given by any statute. . . ."

I think it clearly is not. It is an action upon the case under clause (*g*) of the same section. See *Corporation of Peterborough* v. *Edwards* (1880), 31 U.C.C.P. 231; *Thomson* v. *Lord Clanmorris*, [1900] 1 Ch. 718.

The trial is postponed until next jury sittings.

In view of the long delay in bringing the action (about three and a half years), the defendants have been unable to find the chauffeur, and I shall not order them to pay forthwith the costs of the day. They will be costs to the plaintiff in any event of the cause.

Order and ruling accordingly.

BLOMQUIST v. TYMCHORAK.

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Oct. 17.

Manitoba King's Bench. Trial before Mathers, C.J.K.B. October 17, 1912.

1. SALE (§ I A—2) — HOTEL AND CONTENTS — APPURTENANT CHATTELS — FOOD SUPPLIES.

Upon an agreement to sell a hotel premises and contents as a going concern at a fixed price to which was to be added the invoice cost price of the liquors on hand, the contract will be presumed to include quantities of wood and ice kept on the hotel premises and also the food supplies.

2. SALE (§ I B—9)—INADEQUATE DELIVERY—PART OF GOODS ARE WITHHELD BY VENDOR.

Where a contract for the sale of goods is an entire one and the vendor withholds any of them, the purchaser need not accept delivery of the remaining portion, but may repudiate the agreement and recover back any money paid on account of the purchase-price.

3. DAMAGES (§ III A 4—70)—EXPENSES INCURRED IN ENDEAVOURING TO INDUCE VENDOR TO COMPLY WITH AGREEMENT.

The measure of damages for the unwarranted refusal of a vendor to carry out the terms of an agreement to sell a hotel property, includes the expenses to which the purchaser was put in endeavouring to induce the vendor to carry out his contract or to refund the money paid on account of the purchase-price and the purchaser may be allowed his travelling expenses from his place of residence to the place where the property was situate in the same province.

4. CONTRACTS (§ VI A—411)—RECOVERY BACK OF MONEY PAID ON ACCOUNT OF PURCHASE-PRICE—VENDOR REFUSING TO CARRY OUT TERMS OF CONTRACT.

A purchaser, ready and willing to carry out the terms of an agreement for the purchase of an hotel property, at a stipulated price, who is prevented from carrying out the agreement, by the vendor insisting on payment being made, in addition to the stipulated price, for some goods and chattels, which were included in the subject-matter of the agreement for sale, is entitled to a return of the money paid on account of the purchase-price together with such expenses as he may have been put to by reason of the vendor's refusal either to carry out the terms of the contract or to repay the amount paid on account.

Statement

IN June or July, 1911, the defendant owned a hotel building and premises at Plum Coulee in the Province of Manitoba, which was being conducted by his brother-in-law for him. In the end of June or beginning of July the plaintiff began negotiations for the purchase of this hotel and its contents and about that time he went down and looked it over. After returning to Winnipeg he investigated several other properties that were offered, and finally, on the 26th of July, an agreement was arrived at between the plaintiff and the defendant whereby the defendant agreed to sell to the plaintiff the hotel premises and contents, except the stock of liquors, for the sum of $20,000. For the liquors the plaintiff was to pay the invoice price by his promissory notes at 30, 60 and 90 days. There was a mortgage on the building which the plaintiff was to assume, and the balance was to be paid $4,000 cash, a note for $1,000 at six months and the balance at the rate of $100 per month. The $4,000 was to be paid by the plaintiff giving $1,500 cash and the defendant agreed that he would arrange with Messrs. Velie and Drewry

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to advance $2,500 on the security of a chattel mortgage upon the hotel and furniture; this $2,500 to be also paid to the defendant.

These terms having been arrived at, the parties proceeded to the defendant's solicitors where a transfer of the hotel property from the defendant to the plaintiff was signed, also a mortgage securing the balance of the purchase money from the plaintiff to the defendant. A bill of sale from the defendant to the plaintiff of the contents of the hotel and premises, and a chattel mortgage from the plaintiff to Velie and Drewry for $2,500 were also signed. The plaintiff at the same time gave to the defendant his promissory note for $1,000 and a cheque, which he afterwards cashed, for $1,300. He had previously given him $200, making in all a cash payment of $1,500.

The papers were left in the solicitor's possession, and it was arranged that the parties should the next day proceed to Plum Coulee to deliver possession. Accordingly the plaintiff and his wife, the defendant, his bookkeeper and a representative of Velie's went to Plum Coulee the following day; Velie's representative going for the purpose of making an inventory of the contents of the hotel that were covered by the chattel mortgage before referred to, and taking stock of the liquors on hand.

Judgment was given for the plaintiff for $1,750 and costs.

R. A. Bonnar, K.C., and *W. H. Trueman*, for plaintiff.
R. M. Dennistoun, K.C., and *C. H. Locke*, for defendant.

Mathers, C.J.

MATHERS, C.J.K.B.:—I find that the bargain was that for the sum of $20,000 the plaintiff was to receive the hotel property as it stood with all the goods and chattels in and about it, except the stock of liquors; that the liquor stock was included in the sale, but was to be paid for in addition to the $20,000.

When they arrived at Plum Coulee the defendant refused to abide by this arrangement, and insisted that the plaintiff should pay extra for a stock of 20 to 30 cords of wood that was in the hotel yard, for a considerable quantity of ice situated in an ice house on the hotel premises, and the sawdust in which it was packed, a small quantity of coal, and also 5 or 6 cords of wood in the cellar of the hotel. He, by his manager, also insisted that all the food supplies, such as pickles, catsups, butter, eggs, flour, potatoes and articles of that kind should be paid for extra. These articles were all included in the sale for $20,000. The plaintiff refused to accede to these demands and returned with his wife to Winnipeg.

While at Plum Coulee the defendant offered the plaintiff possession of the hotel, but coupled with his offer a demand that the articles enumerated should be paid for in addition to the contract price agreed upon.

The day after returning to Winnipeg the plaintiff had

a further interview with the defendant, and endeavoured to induce him to either carry out his bargain or return the plaintiff his money, but the defendant refused to do either. From that time until the November following there were further negotiations between the parties, but they resulted in nothing.

I find that the plaintiff was, at the time he went to Plum Coulee with the defendant, ready and willing to carry out the terms of his bargain, and that the defendant's insistence that he pay extra for the articles above enumerated as a condition of their delivery, was the reason, and the only reason why the bargain was not completed by the plaintiff taking possession on that day. The bargain was an entire one and the plaintiff was entitled to unconditional possession of all the goods and chattels included in the sale. The defendant had no right to withhold any of them from him. If not given all he need not take any, and may demand a return of his money.

The plaintiff brings this action for specific performance or for a return of the $1,500 paid, together with the expense that he has been put to by the defendant's refusal to complete the sale.

After the plaintiff's return from Plum Coulee the defendant continued to operate the hotel, making use of the furniture and furnishings therein, and also using the food, fuel and ice supplies that he agreed to sell to the defendant and these are no doubt long since consumed. In January, 1912, the defendant sold the hotel, subject to the plaintiff's rights, to another, who has since that time been in occupation. Under these circumstances, I think the plaintiff is entitled to get his money back. The defendant cannot give him the property which he agreed to give him, even if the plaintiff were now willing to accept it. The plaintiff prefers this relief to specific performance, and I think he is entitled to it.

The fact that the documents of title are signed cannot make any difference. It is said that the title has passed to the plaintiff, but the defendant has acted throughout as though it were still his property. The deeds were not registered, and all the circumstances would indicate that they remained in escrow in the solicitor's hands pending the completion of the transactions by the delivery of possession.

It appears that the plaintiff was put to considerable expense in consequence of the defendant's unwarranted refusal to carry out the contract. He made two trips to Plum Coulee and back, and he was detained in Winnipeg for considerable time endeavouring to induce the defendant to either carry out his contract or refund him his money. For this expense I think the defendant must recoup him, and I fix it at the sum of $250.

There will be judgment for the plaintiff for $1,750 and costs of suit.

Judgment for plaintiff.

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STAPLETON v. AMERICAN ASBESTOS CO.

and Sir Charles Fitzpatrick. July 29, 1912.

Judicial Committee of the Privy Council, Lord Macnaghten, Lord Atkinson

1. BROKERS (§ II A—7)—BREACH OF DUTY—SECRET COMMISSION—FORFEITURE OF COMPENSATION.

Where an agent employed to make a purchase of property for his principal has taken a secret commission from the vendor, the principal is not only entitled to recover from the agent the amount of such commission but is released from his obligation to pay a commission to the agent and is entitled to recover the secret commission received by the latter.

2. BROKERS (§ II A—7)—SECRET COMMISSION—FRAUD.

Where an agent employed to make a purchase of property for his principal has taken a secret commission from the vendor, the principal is entitled to recover any commission which has been paid by him to the agent before the discovery of the fraud.

[See also *Andrews* v. *Ramsay*, 72 L.J.K.B. 865; *Manitoba & Northwest Land Company* v. *Davidson*, 34 Can. S.C.R. 225; and *Hutchison* v. *Fleming*, 40 Can. S.C.R. 134.]

Statement

HEARING of three appeals (consolidated) from three judgments of the Court of King's Bench of the Province of Quebec sitting in appeal, delivered on 22nd March, 1911. The appeals were dismissed.

By the judgment appealed from, the claim of the appellant Stapleton to recover $18,000 as the alleged balance of a commission for the sale of a certain asbestos mining property at Black Lake, Que., was dismissed, and a counterclaim by the respondent the American Asbestos Co., Limited, was allowed.

J. R. Atkin, K.C., and *Tyrrell T. Payne*, for appellant.

Atwater, K.C. (of the Canadian Bar), and *J. W. Cook*, K.C. (of the Canadian Bar), for the respondent company.

LONDON, ENGLAND, July 29, 1912.

Lord Atkinson.

The judgment of the Lords of the Judicial Committee was delivered by Lord ATKINSON:—This is an appeal into which, by order of the Court of King's Bench (appeal side) for the Province of Quebec, three appeals from three judgments of that Court, each dated the 22nd March, 1911, were consolidated for the purpose of appeal to His Majesty in Council. The action out of which these appeals arose was instituted by Charles W. Stapleton, the appellant, to recover the sum of $18,000 balance of a sum of $23,000 commission at the rate of 10 per cent. on a sum $230,000, the alleged purchase money of certain mining property situate at or near the town of Black Lake in the Province of Quebec, purchased by the respondent company from three other companies having interests in them, namely, the United Asbestos Company; the Glasgow and Montreal Asbestos Company, and the Manhattan Asbestos Company. The first

of these companies was an English company having its head office in London, of which a Mr. Fisher was the general manager; the second was incorporated by a Canadian statute and had its head office in Glasgow, one Colonel Aitken being its president; and the third was an American company having its head office in New York, of which the appellant, a resident in that city and a member of the Bar of the State of New York and also of the Supreme Court of the United States, was president and manager, as well as a creditor and a holder of its stock to a large amount.

The first-named company had leased its mining property to the last-named who had set up upon it valuable plant, and at the time of the sale worked it. These properties of the three companies adjoined or lay near each other, and the proportions in which the purchase money of $230,000 was to be divided between them respectively were as follows: To the United Asbestos Company, $100,000; to the Glasgow and Montreal Asbestos Company, $90,000; and $40,000 to the appellant's company, the Manhattan. The respondents' defence to this claim was a plea of fraud to the effect that the appellant knowing that two of these companies, the Montreal and Glasgow and the United Asbestos, were willing to accept the sums of $75,000 and $80,000 respectively for their respective interests, and that therefore these two companies, together with his own, were willing to accept a much less price than $230,000 for their combined interest, falsely represented to the respondents that this latter was the lowest price the companies would accept, and by means of that misrepresentation induced the respondents to offer to purchase the three properties for this latter sum, and further to agree to pay the appellant the commission, the balance of which, after giving credit for $5,000 already received by him upon account, he sued for in the action.

The respondents subsequently discovered that the appellant, having thus agreed to obtain from them commission on the purchase money at 10 per cent. had, unknown to them, also contracted for and obtained what was alleged to be secret commission from the vendors, the companies other than his own namely, $6,750 from the Glasgow and Montreal Company, and $12,350 from the United Company, making altogether $19,100. That is a commission of $42,100 on all, or over one-sixth of the purchase money.

On the discovery of these facts the respondents filed a counterclaim, claiming a repayment of the sum of $5,000, the portion of the commission already paid by them, and also claiming to recover the commission received by him from the vendors. They based these claims on the ground that the appellant was their agent, commissioned by them first to find out the lowest

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prices at which the two companies other than his own would sell their respective properties, and secondly to obtain the acceptance of their offer of $230,000 for the three properties, and lastly to carry through the sale on their behalf.

By the judgments appealed against the appellant's claim was dismissed and the respondents were awarded on the counterclaim a sum of $17,500.

The two main, and as the pleadings stood, crucial facts upon which the respondents' defence and counterclaim rested were, first the alleged knowledge of the appellant that the two companies other than his own would accept for their respective properties these two sums of $80,000 and $75,000, and secondly the fact that they, the respondents, had constituted the appellant their agent, not merely, as he contended, to submit their offer of $230,000 to the vendors, but in addition to endeavour to procure the acceptance of this offer by those vendors. There is a conflict of evidence on both these points, and the evidence given in support of the respondents' contention is rather vague and weak. Their Lordships prefer, therefore, to deal with the case on the admissions, oral and written, made by the appellant himself. And though they think that it is much to be regretted that when these admissions were extracted from the appellant the pleadings were not amended so as to raise clearly and precisely the real issues between the parties, they are of opinion that there is enough averred in the pleadings as they stand to enable them to dispose of the case on the materials already mentioned, namely, the admissions of the appellant himself, without taking by surprise or placing at a disadvantage either of the parties litigant.

Of the respondent company which had its head office at Black Lake, one Henry H. Whitney, of the city of Boston, was at and before the date of the transaction in controversy, president, and one Edward Slade, of the city of Quebec, was general manager and treasurer.

The negotiations for the sale of these properties of the three companies, or at least of the two of them other than the appellant's, may be taken to have opened by a letter of the appellant to Slade, dated the 8th of August, 1906, when the writer was about to visit London. The letter runs as follows:—

New York,
8th August, 1906.

Dear Sir,—

Referring to the subject of our conversation at Black Lake on Monday last, I find I shall not sail until Saturday, 18th August, instead of on the 11th as I had intended. Perhaps in the meantime you might be able to ascertain in a general way whether it would be worth while for me to get that the "rock bottom" prices for these properties when I am in Europe. I shall be entirely willing to undertake the job if it is deemed important. Of course I do not expect you

can speak "by the card" at this stage of the game, but thought perhaps you might be able to indicate whether, under reasonable circumstances, the proposition would be attractive.

Very truly yours,

Mr. Edward Slade, (Signed) C. W. STAPLETON.
Black Lake, Canada.

To this communication Slade replied by a letter, dated the 10th of August, 1906, which ran as follows:—

Black Lake, P.Q.,
Dear Mr. Stapleton,— 10th August, 1906.

I am in receipt of your letter of the 8th. As I don't want my office to know that this matter is up for consideration, I am writing you m. s.

I went all over your mines the day after you were here and made a close examination of all the rock inside. There are some very good showings and also some very bad looking rock, which is to be expected in this district. As you know the mine has been extremely badly worked and would require a large expenditure to put them in good workable order.

I can say, however, that if you could get a sort of option or promise of sale from the proprietors on easy terms and at a reasonable figure, we would be willing to consider the proposition seriously immediately you had things in shape. But please bear in mind that we would not consider any fancy price, and in the case of the Canadian property it would have to be a very attractive price, as the mine looks awfully poor, and I went all over it.

Please let me know what you think could be done in the way of price and terms. I am afraid the prices you mentioned the other day are too high.

With regards and in haste,

Yours truly,
(Signed) EDWARD SLADE.

The appellant himself appeared to consider that this correspondence clothed him, at least, with authority, to ascertain, if it did not impose upon him a duty, to ascertain, on behalf of the respondent company the lowest prices at which the companies referred to would dispose of their respective properties. He said he had interviews with Mr. Fisher and Colonel Aitken, in which he endeavoured to obtain from them this information, but that both declined on behalf of their respective companies to name any price as the lowest they would take. So far he had done the job which he stated in his letter of the 8th of August, 1906, he was willing to undertake if it was made worth his while; but the strange and questionable thing about the appellant's conduct on this occasion is this, that without communicating in any way with the respondent company, or either of their representatives, Whitney and Slade, he forthwith, on his own confession, took on hand quite another job, in conflict with the first. He arranged with Mr. Fisher and Colonel Aitken to get on their behalf, as representing their respective companies,

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offers from persons desiring to purchase these mines, and to submit them to the representative of the vendors for acceptance. The appellant's duty to Mr. Fisher and Colonel Aitken under such an arrangement would be to get and submit the best offers he could procure. That, however, is by no means all. In his deposition in rebuttal, made on the 20th of January, 1910, he volunteered to detail a conversation which he stated took place between Mr. Fisher and himself (he was not sure whether or not Colonel Aitken was present), touching his commission. It is very instructive. The account of the conversation runs thus:—

> Mr. Fisher said to me: "Now, Stapleton, you have been doing a lot of work about this and spending a lot of money, and of course, if any sale occurs we shall expect you to be paid." I said: "Of course, I shall expect to be paid, Mr. Fisher, if any combination or any sale is made, but naturally I had it in mind to look to the purchaser for that, because I thought would come more logically from the purchaser than it would from you people, whom I assume will perhaps be offered less than you think your property is worth." Then I said: "There is another thing, Mr. Fisher, about it, I am asking you to do some work and you have already been to Scotland and you have to do more work at this end and possibly come to America. If anything is accomplished it will be only right that you should have something." Mr. Fisher said: "Well, of course, I could not consider anything that come in the way of commissions from my company."

So the appellant, after having offered to the representative of one of the vendors a commission on the sale of his principal's property, an offer which Mr. Fisher to his credit refused, returned to America commissioned on behalf of the vendors to obtain and submit offers for these mines, on the understanding that he should be paid commission if a sale took place, either in what he considered the more logical course, namely, by the purchaser, or if not, by the vendors. In the sequel, however, he apparently got rid of this preference for the more logical method of procedure and took commission from both sides, thus fleecing them impartially.

The appellant on his return from England visited Black Lake on the 27th of October, 1906. He had there an interview with Slade in which he says that he related to Slade, as best he could, all the conversation which had taken place between himself, Colonel Aitken and Mr. Fisher; gave him all the facts and circumstances; and further told him that in his, the appellant's judgment, the result of his visit had been that the vendors had modified their views as to the value of their properties, and that a good substantial offer for them would be seriously considered. The appellant then proceeded to enter more into details. He said Slade stated that he would see Mr. Whitney, that perhaps they would make some sort of offer, and that the appellant thereupon said to Slade:—

"Now, Mr. Slade, this is another point that must be understood in any offer you make, viz., that it must be accompanied with ten per cent. commission for me in writing." And I said: "Now, while I have had some talk with the other side about commissions there is nothing fixed and nothing definite, and they are under no legal obligation, and I will have to look to you for the commission as I have no arrangement whatever on the other side." Of course, that was the absolute truth, because no arrangement had been made. We had merely talked about it as I have already explained. Mr. Slade said: "That's all right. Mr. Whitney has had large experience in those matters, and he understands all that, and I have already spoken to him and there won't be any question about it."

I said: "There is another point that I want to mention Mr. Slade." He said: "We may not make an offer and again if we do make an offer and it is accepted, Mr. Whitney may not take this property to the American Company. The American Asbestos Company is my company and I am interested in it as a stockholder, and as treasurer, but Mr. Whitney has various interests, and he may take it over to the King property which he owns and which adjoins you on the south, or he might take it to a new company in which he might not let me participate. Now, in the event of his taking it to any company, or if it goes to any company that is not my company and I help you sell the property then I think I should share in the commission."

I said: "You are right, Mr. Slade, and as far as I am concerned you shall. Let it be understood that if the title to this property goes as the result of your offer, and what conversation we have had and what you may do,—if it goes to anybody except the American Asbestos Company, then you are to share in the commission." That is all there was said about it.

Q. Then, there was no absolute promise of a commission?

A. There was no absolute promise of a commission. What happened is simply what I have stated.

Slade was examined as to this conversation. His evidence is wholly unsatisfactory. All he said (page 102) is that he could not remember seeing the appellant at Black Lake in October, 1906, or having any conversation with him, but that what the appellant stated might be true. He distinctly swears, however, that on the important day, the 1st of November, following upon the transaction on which so much turns in the case, he was not aware that the appellant expected to receive a commission from the United Asbestos and the Glasgow and Montreal companies if the sale went through. Mr. Whitney's evidence touching the point of the payment of this commission by the vendor companies to the appellant is to the same effect, he did not, he said, know of it until the 28th of February, 1908, and at page 101 he makes the further important statement that had he known the appellant was acting as agent for the vendors and receiving a commission from them he never would have consented or agreed to pay him the commission of $23,000. The reason why Slade's evidence in reference to this interview of the 27th of October is unsatisfactory is not far to seek. He had yielded to

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the temptation which Mr. Fisher withstood, and arranged with the appellant that he should get some share of the latter's commission of $23,000. He was in this position, therefore, when he gave his evidence, that if the appellant's claim was defeated he would lose that share, the amount of which, but the amount alone, was in controversy between them. Mr. Fisher was not examined, Colonel Aitken was. No evidence is given as to any arrangement touching commission having been made between the vendors and the appellant, other than that made with them in September, 1906, until the month of November, 1906. This latter will be hereafter referred to. Their Lordships have some doubt, therefore, whether the representation the appellant alleges he made to Slade upon the 27th of October was a candid or accurate representation. The arrangement was scarcely, they think, so undefined and contingent as he represented it to be. Now, in this state of circumstances, Messrs. Whitney and Slade called upon the appellant at his office in New York late in the afternoon of the 1st of November, 1906. The appellant says he expected them earlier, but he had not been idle while he awaited their arrival. He had during the interval negotiated with Messrs. Robinson and Hopper an offer for the purchase of the property of the United Asbestos Company and the appellant's company, the Manhattan Asbestos Company, for $140,000. It was not an unconditional offer, it was subject to two most burdensome conditions, first that the price was to be reduced by $15,000 in case the litigation in reference to the boundary line (of the property presumably) should be decided against the defendants in a suit then pending, and secondly, that the companies which the appellant represented were "to assume the costs and responsibility" and carry on the existing litigation. The offer was embodied in a letter dated the 1st of November, 1906, signed by H. H. Robinson, and addressed to the appellant. This letter contained the important paragraph following:—

> This offer is made upon the understanding that you are to proceed to London immediately and to use your best endeavours to insure the acceptance of this offer.

It was drawn up in duplicate, one copy being kept by Mr. Robinson. At the bottom of this latter is written a letter which the appellant, at page 48, practically admits he signed, their Lordships think. It ran as follows:—

> New York, 1st November, 1906.
>
> Mr. H. H. Robinson.
>
> Dear Sir,—I have received a proposition from you of which copy is hereto annexed and agree to carry out the proposition as far as I am able to do so, and I will proceed to London at once on the proposition and endeavour to carry it through.
>
> Very truly yours,
> CHARLES W. STAPLETON.

The moment these documents were exchanged, the appellant was no longer a free agent in these matters. He was bound in morals and in law to do his utmost to procure the acceptance of Robinson's offer, and by consequence the rejection of every other offer for the purchase of the properties of the United and Manhattan companies, whether by themselves or in conjunction with other properties competing with Robinson's offer. Common honesty, good faith, as well as legal contract, would have constrained any man, not indifferent to the obligations these things concurrently impose, to refuse to undertake any mission involving the defeat of the very thing he was bound to forward. This was the position of the appellant when, Robinson's deal being concluded, he interviewed Whitney and Slade. It was a long interview. During it he made a great profession of frankness and candour, calculated to win their confidence, but in their Lordships' view he concealed some important facts, misrepresented others, mislead Messrs. Whitney and Slade as to the true position of things, and by these discreditable means induced them to make an offer of purchase which, had they known the truth, they, or Whitney, at least, never would have made. Now, the appellant's statement is as follows, page 41:—

> Then, finally, when they did come I said: "You are pretty late in getting here. You have put me in an embarrassing position, because I already have an offer and have already promised to go to London and submit it and I am bound to do so, and I want to say to you frankly that I regard it as a fair offer, and you must not be deceived about it, and if you have any idea of offering a small price for this property it seems to me you will not stand very much chance with this offer in my pocket, because I am bound to submit it." I said: "You are now a little late and these other people have made me this offer."
>
> There was quite a little conversation along that line and Mr. Whitney commenced to intimate that they would like to offer about two hundred thousand dollars, and I finally said to them: "We may as well be frank. There is no use of our spending time over this matter now in further negotiations. I will say this to you, that you will have to make an offer as good or better than two hundred and thirty thousand dollars ($230,000) for those three properties, or I don't think you will stand a very good chance of getting them."

Then, after explaining how he arrived at the figure of $230,000, namely, by basing his calculation on Robinson's offer, and the option his company had obtained to purchase the property of the United Company for $100,000, he stated thus:—

> I said: "Gentlemen, I don't know whether these companies will accept the offer or not. I don't know anything about that; all I can do is to go over and submit it, and I have now to submit this other offer also. I am bound to submit both. "Finally, he said: "One or the other of them. All right, we will make an offer of $230,000."

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It would be difficult to suggest a more artful *suppressio veri* and *suggestio falsi* than this evidence discloses. The appellant never alluded to the legal contract he had entered into not only to submit Robinson's offer, but "to use his best endeavours to insure" its acceptance, and to proceed to London to carry it through. On the contrary, he impliedly represented that he was as free with regard to one offer as to the other, equally bound to submit both for acceptance, but not bound to press the acceptance of one to the necessary rejection of the other. That representation by the appellant of his position and obligations was a false representation, and he knew it to be false. It was a misrepresentation of a most important fact. It was calculated to mislead, for no one possessed of his senses would, in their Lordships' view, employ, at a cost of $23,000, an agent to submit for acceptance an offer of purchase of which that agent was in effect bound by contract with another to procure the refusal. If Mr. Whitney's evidence, which is not impeached, is to be believed, then the suppression by the appellant on this point, of the real facts, did mislead him, and did induce him to make the offer which he swears he never would have made had he known the truth. Their Lordships are therefore forced to the conclusion, which appears to them to be irresistible, that the truth was concealed and the real state of facts impliedly, if not expressly, misrepresented by the appellant in order to deceive the respondents. A gross fraud was, in their view, practised by him upon the respondent company through its representatives. It was a fraud inducing the contract, the fruits of which the appellant now seeks to gather, but it would, they think, be against every principle of justice to permit him to do so. That, however, is not all. The appellant used this offer of Robinson as a rival bid to force a higher offer from the respondents. He never suggested that there were any onerous conditions attached to Robinson's offer which despite the nominal amount of the purchase price might render it less acceptable to the vendors than the offer of a lesser price without conditions. The fair inference from the appellant's evidence is, their Lordships think, that in these negotiations with the respondents, Robinson's offer was represented as an offer unfettered by conditions which might decrease its value. That is, in their view, the natural impression which would be produced on the mind of any one who listened to what the appellant states he said. If so, it was a false impression, produced by the appellant's suppression of the truth. If he was about to use it as a means to induce the respondents to make an offer more attractive than Robinson's for the properties with which it was conversant, he ought to have either truly represented what the latter was in fact, or at least have abstained from suggesting or causing it to be under-

stood that it was something better than it was in fact. Mr. Atkin for the appellant contended that if the respondents knew that the appellants had arranged or contracted to receive commission from the vendors as well as from the purchasers and had consented to it they could not complain. That is no doubt so, but the burden of proving their knowledge and consent on this point rests upon the appellant. He made an attempt to discharge that burden in his account of the conversation alleged to have taken place between him and Slade on the 27th of October. He renewed that attempt in his account of the conversation which took place between him, Whitney, and Slade upon the 1st of November. At page 43, after describing certain alterations made in the agreement then drawn up touching the commission payable by the purchasers, he said: "I handed it" (meaning the agreement) "back to him" (meaning Whitney) smiling as I did so, "and he said you will get that" (meaning a sum of $3,000) "out of the other side." I said: "I hope to and more, but I have no arrangement with the other side. I cannot rely on them at all. We all had a laugh over it." But why could he not rely upon them at all, since, according to his own account, it was Mr. Fisher who, again and again, suggested that he should get commission from the vendors? Mr. Whitney has, at page 104, distinctly denied that this statement was ever made by him.

The appellant sailed for England on the 3rd of November, 1906. He arrived in London on the 13th. He at once placed himself in communication with Fisher and Aitken. The respondents' offer was accepted on the 13th of November. On the same day a letter was written by Messrs. Aitken, Mackenzie and Company to him to the following effect:—

13th November, 1906.

C. W. Stapleton, Esq.,
New York.

Dear Sir,—Referring to the proposed sale of the property of the Glasgow and Montreal Asbestos Company, Limited, at Black Lake, Canada, we beg to state that it is understood that your commission for carrying out the transaction shall be 5 per cent. on one half of the purchase price of $90,000, and 10 per cent. on the remaining half of the price respectively $2,250 and $4,500, in all six thousand seven hundred and fifty dollars, payment to be made in cash and bonds proportionally as and when received.

Yours truly,

(Signed) AITKEN, MACKENZIE, AND CLAPPERTON,
Secretaries, The Glasgow and Montreal
Asbestos Company, Limited.

Yet in the face of this letter he, at page 44 of his evidence, renews the vain attempt to represent that the arrangement by the vendors to pay him commission was a kind of afterthought

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of Fisher's, having no connection with the acceptance of the respondents' offer, and that till the 18th of February, when his work was done, the sale completed, and the commission actually paid, the vendors were not under any legal obligation whatever to pay him any commission. Their Lordships cannot accept this story. They think that commission was paid, most probably in accordance with the understanding arrived at with these vendors in the month of September on the occasion of the appellant's first visit to London, but they are clear on this, that he obtained this commission from the vendors through and by virtue of his position as the bearer of the respondents' offer, and equally clear that, on his own admission, he had acquired that position by means of his own fraud.

The appellant's counsel admitted, quite properly their Lordships think, that if this were the true view of the facts the appellant could not either recover the money he sued for, or retain the money he had received from either vendor or purchaser in payment of commission. In their Lordships' view this is the true conclusion upon the facts. And they are therefore of opinion that the respondents were entitled in law and justice to the relief awarded to them, though unfortunately they did not base their claim with sufficient fullness, clearness, and precision, on the ground on which their Lordships' conclusion rests, namely, the admissions contained in the evidence of the appellant himself. Their Lordships are, however, of opinion that in the averments contained in the 11th and following paragraph of the plea of the respondents, coupled with those contained in the 6th and subsequent paragraphs of the respondents' cross-demand, the true grounds on which the respondents are entitled to the relief awarded to them are sufficiently set forth to enable their Lordships to hold that without any amendment of the pleadings the judgment appealed from was right, and should be affirmed, and this appeal be dismissed; and they will humbly advise His Majesty accordingly. The appellant must pay the costs of the appeal.

Appeal dismissed.

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SALTSMAN v. BERLIN ROBE AND CLOTHING CO.

Ontario High Court, Riddell, J., in Chambers. October 5, 1912.

1. MECHANICS' LIENS (§ VIII—65)—ACCOUNTING BETWEEN EMPLOYER AND OWNER—STAY OF WORKMEN'S ACTION, AS AGAINST OWNER.

An interlocutory application to stay proceedings in an action under the Mechanics' Lien Act (Ont.), brought by workmen against both their employer and the property owner, should not be granted to enable the owner to complete the work on the contractor's default and so ascertain the balance, if any, owing by the owner under the

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contract; such a question should not be determined in Chambers but should be determined at the trial, or if the pleadings properly raise the question of law under Ont. Consolidated Rule 259, it can be determined upon a motion in Court.

Statement

AN appeal by the plaintiffs from an order of the Deputy Judge of the County Court of the county of Waterloo staying all proceedings in this action, which was brought for the enforcement of mechanics' liens.

The appeal was allowed with costs.

M. A. Secord, K.C., for the plaintiffs.

J. C. Haight, for the defendants the Berlin Robe and Clothing Company.

Riddell, J.

RIDDELL, J.:—The plaintiffs are workmen who were employed by the defendants the W. A. McNeill Contracting Company in the erection of a brick building, which that company had contracted to build for their co-defendants, the Berlin Robe and Clothing Company. The contract provides for payment of 80 per cent. of the value of the materials and labour done, on the 10th of each month, as the work progresses, and the remainder when the work is all complete and after the expiration of 30 days.

The work began under the contract in April; it was found necessary to order certain extras; and, about the 1st August, the McNeill company found themselves in financial difficulties and unable to pay their workmen: work on the building almost ceased; the workmen, being unable to get their pay, refused to work longer. Thereupon the Berlin Robe and Clothing Company took possession of the work themselves, and it is probable that they will have to complete the building by day-labour. The estimated value of the McNeill company's work and materials is $4,111, and 80 per cent. of that has been paid to the McNeill company. The Berlin Robe and Clothing Company say that it will be impossible to ascertain at the present time what will be the cost of completing the work—and that it will be impossible to ascertain what amount, if any, is justly and lawfully due until the completion of the building.

The plaintiffs having delivered their statement of claim, the defendants the Berlin Robe and Clothing Company applied, on affidavit setting out the above as the facts, for an order staying the action.

The Deputy Judge of the County Court in Chambers made an order staying the action as against the Berlin Robe and Clothing Company until the completion of the building, reserving leave to the plaintiffs to apply, if at any time it should appear to them that the company were not proceeding with the building with due diligence, and reserving the question of costs.

The plaintiffs now appeal.

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I am of opinion that the order cannot stand.

The learned Deputy Judge is said to have proceeded upon the ground that the plaintiffs can recover from the Berlin Robe and Clothing Company only the amount which, on the completion of the building, is due from that company to the McNeill company. But there are two answers to such an argument.

(1) Such a question of law should not be determined in Chambers on an interlocutory application; and I do not intend to determine it now. It should either be set down for argument as a question of law arising on the pleadings under Con. Rule 259—or preferably determined by the Judge at the trial. In either case the question can be made the subject of appeal in the regular way.

(2) Even if the law were clear, the plaintiffs are entitled to prove as against the Berlin Robe and Clothing Company the amount of their claim against their employers—quite a different thing from proving this as against the employers themselves. Workingmen must be more or less liable to change their residence: and it is nothing but simple justice to enable them to have their rights determined at the earliest possible moment.

I can conceive of no good end to be attained by the order in appeal. The parties can go to trial; the amount of the claims of the plaintiffs will be determined; if then it be considered that the amount to be recovered from the Berlin Robe and Clothing Company is the statutory percentage of the amount due and payable at the end of the contract, the Judge will so declare—or, if the view of the plaintiffs be accepted, the law will be laid down in that sense. In either case, in all probability, there will be a reference to the Master to determine the amount. How the Berlin Robe and Clothing Company can be injured by such proceeding, I cannot see.

I think the application should not have been made, and that the appeal should be allowed with costs here and below payable forthwith.

The defendants will have until Wednesday the 9th October to plead as they may be advised.

Appeal allowed.

CLARKE v. BRITISH EMPIRE INSURANCE CO.

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(Decision No. 2.)

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, Simmons, JJ. October 4, 1912.

1. INSURANCE (§ III E—76)—REPRESENTATIONS — CONCEALMENT OR NON-DISCLOSURE—GROUND FOR INVALIDATING POLICY—MATERIALITY.

The length of time a person has owned a stallion and the price paid for same, are material to the risk and any concealment or non-disclosure in connection therewith in an application for insurance on such stallion in which questions are put to the assured for the purpose of obtaining such information, will be sufficient to invalidate the policy.

[*Western Insurance Co.* v. *Harrison*, 33 Can. S.C.R. 473, applied; *Clarke* v. *British Empire Insurance Co.*, 4 D.L.R. 444, reversed on appeal; Porter on Insurance, 4th ed., 175, referred to.]

2. INSURANCE (§ III E—76)—CONDITIONS—CONCEALMENT OR NON-DISCLOSURE—MATERIALITY.

A policy of insurance which contains a condition that the insurer shall not be liable for loss when it shall be found that the material statements set forth in the application upon which acceptance of the risk was based were untrue or if the insured misrepresented or omitted to communicate any circumstances which are material to be known to the insurer, to enable it to judge of the risk it undertakes, is invalidated where the insured in answer to questions in the application for insurance on a stallion, replied that he had owned the animal three months and that he had paid $2,000 for it, and where in answer to the next following question he gave the name of the original vendor from whom he had purchased same two weeks prior to the application at a price not exceeding $500, although the assured may be shewn to have sold the stallion meanwhile for a large price and to have re-purchased from the buyer (not mentioned in the application) at the price of $2,000.

[*Western Assurance Co.* v. *Harrison*, 33 Can. S.C.R. 473, followed; *Clarke* v. *British Empire Insurance Co.*, 4 D.L.R. 444, reversed.]

Statement

APPEAL by the defendants from the judgment of Beck, J., *Clarke* v. *British Empire Insurance Co.*, 4 D.L.R. 444, 21 W.L.R. 774, in favour of the plaintiff in an action to recover $1,000 being the amount of a policy of insurance issued by the defendants upon a stallion owned by the plaintiff which died during the currency of the policy.

The appeal was allowed with costs and the action dismissed with costs.

L. W. Brown, for plaintiff (respondent).

O. M. Biggar, for defendants (appellants).

Harvey, C.J.

HARVEY, C.J.:—The plaintiff's action is for $1,000, the amount of insurance placed by the defendant upon a stallion owned by the plaintiff which died during the currency of the policy.

At the trial before my brother Beck without a jury, judgment was given for the plaintiff for the amount of the claim. See *Clarke* v. *British Empire Insurance Co.*, 4 D.L.R. 444.

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I consider one only of the several grounds of appeal since it by itself appears to me to be sufficient.

On the 7th day of October, 1910, the stallion in question, then 8 years old, was sold by auction for $175 to one A. J. Layton. On the next day Layton sold it to the plaintiff for $500 as stated by the plaintiff or $200 as stated by Layton and his agent through whom the sale was made. According to the evidence of the plaintiff and one Stevenson the horse was sold on October 12th to Stevenson for $1,500, and on the 15th October repurchased for $2,000. A few days later, apparently on the 20th or 21st, the plaintiff signed an application for insurance on the policy issued on October 27th.

The application contains the following:—

I hereby answer the following questions and the truthfulness of the answers I hereby warrant.

Then follow several questions and answers including these:—

Q. How long have you owned this animal? A. Three months.

Q. From whom was the said animal purchased? A. A. J. Layton, P.O. address, Edmonton.

Q. What did you pay for this animal? A. $2,000.

Condition 13 of the policy contains the following:—

Provided that the company shall not be liable for loss in any case, when it shall be found that the material statements set forth in the application upon which acceptance of the risk was based were untrue, or that any fraud was practised by the insured, or that the live stock was described otherwise than as they really were to the prejudice of the company, or if the insured misrepresented or omitted to communicate any circumstance which is material to be known to the company to enable it to judge of the risk it undertakes.

I say nothing as to the representation by the plaintiff that he had owned the horse 3 months, the learned trial Judge having found that this was immaterial and that the true length of time was made known to the company's agent who inserted 3 months at his own instance.

While each of the other two questions I have quoted standing alone might be held to be literally true, yet placed as they are it seems to me that the conclusion that would be drawn by any ordinarily intelligent person would be that the plaintiff had paid Layton $2,000 for the horse which of course was not the truth. The purpose of asking for the name of the vendor must be to enable inquiries to be made of him if desired and one of the most probable inquiries would be as to the price paid.

In the *Western Assurance Co.* v. *Harrison* (1903), 33 Can. S.C.R. 473, were the following questions and answers:—

Q. Have you ever had any property destroyed by fire? A. Yes.

Q. Give date of fire and if insured name of company interested? A. 1892, National and London & Lancashire.

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The fact was that he had had three fires in which the property had been destroyed.

The judgment of the Court was delivered by Nesbitt, J., who stated that this answer was untruthful and material and therefore vitiated the policy. It was a part of the truth only and in that sense an untruth. The answers I am dealing with in the present case were exactly the same. They certainly did not contain all the truth. It is almost impossible to believe that if the answer had shewn that the plaintiff had paid only $200 or $500, whichever the fact is, only two weeks before the date of the application, the company would have insured for $1,000 without at least getting some further information. There can consequently be no doubt of the materiality of the fact which was not disclosed.

Porter on Insurance, 4th ed., p. 175, states that:—

> The utmost degree of good faith is required from an assured in effecting a policy of assurance. He must not only state all matters within his knowledge which he believes to be material to the question of the insurance, but all which in point of fact are so.

Even without deciding that the answers were untruthful as seems to be warranted by the decision mentioned, there was clearly a concealment or nondisclosure of a material fact which both under the condition above in part quoted and apparently on the general law of insurance apart from an express condition is sufficient to invalidate the policy.

I think therefore, on this ground the appeal should be allowed with costs and the action dismissed with costs.

Scott, J.
Stuart, J.
Simmons, J.

SCOTT, STUART, and SIMMONS, JJ., concurred.

Appeal allowed and action dismissed.

DODGE v. WESTERN CANADA FIRE INSURANCE COMPANY.

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Alberta Supreme Court, Scott, Beck, and Simmons, JJ. October 4, 1912.

1. INSURANCE (§ III E 1—87)—BUILDERS' RISK—"IN COURSE OF CONSTRUCTION"—SUSPENSION OF WORK—WEATHER, CONDITIONS OF TRADE, LABOUR, REVERSES, JUSTIFY THE SUSPENSION—LIABILITY OF INSURANCE COMPANY.

Under a contract of fire insurance on a building, described in the policy as being "in course of construction," where the work on the building had been suspended, and it remained in an incompleted state until destroyed by fire, the risk remains in force, it being clear that the term "in course of construction" does not mean that construction must be continued from day to day or month to month without interruption but is to be construed in the light of such contingencies as weather, conditions of trade and labour, and inevitable accident, and even financial embarrassment.

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[*Dodge* v. *York Fire Insurance Co.*, 4 D.L.R. 465 (*n*), 2 O.W.N. 571, 18 O.W.R. 241, since affirmed by the Supreme Court of Canada, followed; *Dodge* v. *Western Canada Fire Ins. Co.*, 4 D.L.R. 465, reversed on appeal.]

2. INSURANCE (§ III E 1—87)—BUILDERS' RISK—"IN COURSE OF CONSTRUCTION"—SUSPENSION OF WORK THROUGH FINANCIAL EMBARRASSMENT—LIABILITY OF INSURANCE COMPANY.

In a contract of fire insurance on a building described in the policy as being "in the course of construction," where the work on the building has been suspended, and owing to financial embarrassment it remained in an incompleted state until destroyed by fire, the term "in course of construction" is ambiguous and must be interpreted not as a question of law but of fact in view of all the circumstances, including what passed between and was within the knowledge of the contracting parties.

[*Dodge* v. *York Fire Insurance Co.*, 4 D.L.R. 465 (*n*), 2 O.W.N. 571, 18 O.W.R. 241, since affirmed by the Supreme Court of Canada, followed; *Dodge* v. *Western Canada Fire Ins. Co.*, 4 D.L.R. 465, reversed on appeal.]

3. APPEAL (§ VII M—545)—PROOF OF STATUTE LAW—RECEIVING ON APPEAL—STATUTE PLEADED BY BOTH PARTIES.

In a case on appeal, where the appellate Court (Alberta) is, upon the hearing of an appeal, restricted in the receiving of evidence, to evidence "on questions of fact as to matters which have occurred after the date of the decision from which the appeal is brought," yet it has the power to grant a new trial for the purpose of enabling additional evidence to be given, and, since the Supreme Court of Canada (under Supreme Court Act, sec. 98) in the event of an appeal to it, would have power itself to receive further evidence, a case on appeal in the Alberta Court may properly be treated as though a statutory law of another province (specifically referred to by both parties in the pleadings as in force) had been duly proved at the trial.

4. EVIDENCE (§ IV B—396)—ALBERTA EVIDENCE ACT—PROVING STATUTE LAW OF OTHER PROVINCES—MARKING PRINTED STATUTE AS EXHIBIT.

Under the Alberta Evidence Act, 1910, ch. 3, the statute law of another province of Canada may be proved on a legal proceeding in Alberta by the mere production (that is, without the introduction of an expert witness) of a statute purporting to be printed by the authority of the legislature of the other province, and the marking of a copy as an exhibit is merely for convenience.

Statement

AN appeal by the plaintiff from the judgment of Harvey, C.J., *Dodge* v. *Western Canada Fire Insurance Co.*, 4 D.L.R. 465, 21 W.L.R. 558, dismissing the action which was brought by the plaintiff, a resident of the State of Massachusetts, to recover the amount of a policy of insurance. The property insured and destroyed was situate in Ontario, and the policy covering it is on the Quebec statutory form. The defendant has its chief place of business in the Province of Alberta.

The appeal was allowed.

Clarke, McCarthy, Carson & Co., for the plaintiff.

Tweedie & McGillivray, for the defendants.

Scott, J.

SCOTT, J.:—I concur in the result but merely on the ground that the insured premises were properly described as a building "under construction." I express no opinion upon the other ground stated by my brother Beck.

BECK, J.:—This is an appeal from the judgment of the learned Chief Justice dismissing the plaintiff's action on a policy of fire insurance with costs. The property in question is the same as that comprised in the policy issued by the York Fire Insurance Company dated 25th June, 1909, in question in the case by the same plaintiff against that company and in which the plaintiff on appeal to the Court of Appeal of Ontario and again on the defendants' appeal to the Supreme Court of Canada obtained judgment for the amount of his policy in the York Co.: *Dodge* v. *York Fire Insurance Co.*, 2 O.W.N. 571, 18 O.W.R. 241, not yet reported in the Supreme Court Reports.

The policy in question in the present action was issued by the defendant company on the 14th August, 1909, expiring on the 2nd November, 1909. It was issued on a verbal application by one Thompson, a clerk to a firm of insurance brokers made to one White, representing the defendant company. Mr. White was evidently mistaken in giving the name of Mr. Sweatman instead of that of Mr. Thompson. At the time of this verbal application Mr. Thompson handed Mr. White the following "wording" for the policy:—

> C. S. Dodge on his interest as second and third mortgagee—On the buildings and additions now in course of construction, including, etc., the property known as that of the North Ontario Reduction and Refining Company, and to be occupied when completed as a custom smelter, situate, etc., same being more specifically expressed as follows:—
>
> | | |
> |---|---|
> | On engine house building | $700 |
> | On the engine and its connections, spare parts and attachments, fittings and fixtures, belting, gearing, shafting, while contained in said engine building, or upon the premises adjacent thereto | 400 |
> | On the generator, switch-board, excitors, wiring, belting, fittings, and all parts and attachments in connection with said generator, while contained in engine building or upon the premises adjacent thereto | 2,000 |
> | On the main building | 4,000 |
> | On the machinery, motors, transformers, elevators, pipes, fittings, belting, pulleys, shafting, hangers, tools, implements of all kinds, fixed and movable, while contained in the said main building or upon the premises adjacent thereto | 1,000 |
> | | $8,100 |

Mr. Thompson's account of his interview with Mr. White, the substantial correctness of which is not disputed, is as follows:—

> And what took place? A. I presented the copy of the wording calling for $8,100 of insurance and asked him if he would take a

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line on that for us, the premises being in Sturgeon Falls; that I wanted $2,100. He said, "What is it, Albert?" I said, "There is the wording for it, the whole thing." He said—he looked it over; seemed satisfied with it. I said, "I only want it until the second of November; this is builders' risk, rate 3 per cent.; I want $2,100." "Well, he says, "I guess I can get the Calgary and Western to take a thousand each." "Well," I said, "you had better complete the lot offered, Arthur, and take the $2,100." Which he subsequently did. He asked me what insurance there was on the risk. I told him that there was $21,000 carried by the first mortgagee, Union Trust Company. "Oh," he says, "I don't want to know anything about that; just give me name of local company." So I gave him the York was on for $2,000. He said, "We will have to get out a permit to write this business, Albert, and it will cost you $2." I said "Alright, Arthur."

Q. Did he say he would take it? A. He accepted the business verbally between us right then and there, accepted the line.

Q. How much for the Western Canada? A. Western Canada $1,000, and the Calgary took $1,100.

. . . . . .

Q. Then you say he accepted the risk for $1,000 for the Western and $1,100 for the Calgary? A. Yes.

The policy was accordingly issued in due course in the defendant company for $1,000, adopting the exact "wording" submitted and covering the term from 14th August to the 2nd November (80 days) the premium acknowledged being $11.55.

How this premium is made up in view of the statement that the rate was to be 3 per cent., which is also the rate stated in a form of application partially filled up by some clerk of the defendant company, does not appear. It probably includes the license fee of $2.00. The balance $9.55 would, I calculate, represent a rate of 4 and one-third per cent. for 80 days. There is some suggestion that the rate of 3 per cent. which appears to have been an increased rate, was still further increased because of the withdrawal of a watchman. Perhaps, however, on a 3 per cent. rate for a year there is an established sliding scale well understood among insurance men for short terms.

The policy also has upon its face the following:—

Further concurrent insurance "York" $2,000, "Calgary" $1,100. Warranted that the premises will not go into operation during the currency of this insurance.

There being no application in writing there were no representations or concealments except such, if any, as may be involved in the conversation between Mr. Thompson and Mr. White, and the wording then presented by Thompson, both of which I have just quoted. The learned trial Judge says:—

The pleadings raise many defences, but by reason of certain admissions and of the decision in the other (York) case, most of these

are unavailable. The only defences which were raised by counsel on the argument before me are:—

(1) There was no watchman at the time of the fire;

(2) The buildings were not "in course of construction" as described in the policy;

(3) There was further insurance and it does not appear that it was consented to.

It is pointed out in the respondents' factum that there was a misunderstanding with regard to the first ground.

> Since it was not contended at the trial nor do the pleadings disclose that the defendant takes the position that a watchman should have been on the premises: The contention was that from the 28th day of February, 1909, no person occupied the premises in question, other than a watchman, and that since the watchman also took his departure on the 18th day of May, 1909, and did not return (first nailing up the building so that no one could get in), it followed that the buildings were not properly described "as in course of construction" within the meaning of art. 1 of the conditions, and further that they must be deemed to be vacant buildings and the policy void under art. 5 of the variations.

The ground last mentioned, namely, a breach of art. 5 of the variations by reason of vacancy, was argued before us and no doubt was the first ground intended to be put forward at the trial.

In considering these grounds it is proper to consider the question raised upon the argument of the appeal as to whether our decision is to be based upon the conditions actually endorsed upon the policy which are stated to be "Quebec statutory conditions" with "variations and additions and made by virtue of the Quebec Insurance Act" or (the property insured being in the Province of Ontario) by the Ontario statutory conditions, with or without the stated variations or, as a subsidiary question, whether or not the insured may elect to be bound by those actually on the policy which may appear to be more beneficial to himself, than the corresponding Ontario statutory conditions.

A comparison of the two sets of conditions discloses a number of differences evidently deliberately made.

In *The Citizens Insurance Co.* v. *Parsons*, 7 A.C. 96, the Privy Council settled it as law that under the Ontario Insurance Act

> whatever may be the conditions sought to be imposed by insurance companies, no such conditions shall avail against the statutory conditions and that the latter shall alone be deemed a part of the policy, and resorted to by the insurers, notwithstanding any conditions of their own, unless the latter are indicated as variations on the prescribed manner (p. 121).

In the course of the judgment it is also said:—

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Printing the statutory conditions is made a necessary part of the mode prescribed by the Act of shewing variations from them and is unquestionably essential to the validity of any such variations (p. 119).

It is also said:—

It may possibly have been intended to give to the assured an option, if he thought the company's conditions more favourable to him than the statutory ones, to stand upon the actual conditions; but it could not have been intended, nor does the language of the Act need such a construction, that he should be set free from both sets of conditions (p. 121).

Strictly speaking, the law of Ontario is foreign law to be proved by experts at the trial.

Our Evidence Act, Alberta statutes, 1910, ch. 3, however, modifies this to some extent.

Section 25 reads as follows:—

Copies of statutes, official gazettes, ordinances, regulations, proclamations, journals, orders, appointments to office, notices thereof, and other public documents purporting to be printed by or under the authority of the Parliament of Great Britain and Ireland or of the Imperial Government or by or under the authority of the Government or of any legislative body of any dominion, commonwealth, state, province, colony, territory or possession within the King's dominions, shall be admitted in evidence to prove the contents thereof.

This section clearly contemplates that the statute law of another province may be proved on a legal proceeding in this jurisdiction by the mere production—that is, without the intervention of an expert witness—of a statute purporting to be printed by the authority of the legislature of the other province.

The mere production therefore at the trial—for the marking of a document as an exhibit is merely for convenience—of the Ontario statutes relating to insurance would have proved the law of Ontario to the sufficient extent of shewing that in Ontario there are statutory conditions applicable to fire insurance policies and what they are. It is true that there is nothing to shew that the statutes of Ontario relating to insurance were actually produced at the trial. The defendant company itself, however, makes explicit reference in its statement of defence to "the statutory conditions of the Province of Ontario and the variations thereof." It is also true that owing to an unfortunate limitation in our rules this Court on the hearing of an appeal is restricted in the receiving of evidence to evidence "on questions of fact as to matters which have occurred after the date of the decision from which the appeal is brought"; nevertheless we have at least the power to grant a new trial for the purpose of enabling additional evidence to be given.

Furthermore, the Supreme Court of Canada in the event of an appeal would have power themselves to receive further evidence: Supreme Court Act, sec. 98. I think, therefore, we should now deal with this case as if the statutory law of Ontario relating to fire insurance policies had been duly proved at the trial. Turning then to the Ontario Insurance Act, R.S.O. 1897, ch. 203, we find the statutory conditions set out in sec. 168; the provisions with reference to variations in secs. 169, 170, all of which are referred to in the case of *The Citizens Insurance Co.* v. *Parsons*, 7 A.C. 96, already cited.

If, therefore, we have knowledge in the present case of the Ontario law applicable to this policy we must hold the policy to be subject only to the Ontario statutory conditions without variations or additions, with the result that the condition endorsed upon the policy as No. 5 under "variations on conditions," namely the condition avoiding the policy if the building be or become vacant or unoccupied, etc., was ineffective, because not in accordance with sec. 169 of the Ontario Act, and following decisions in Ontario and Quebec: *Boardman* v. *North Waterloo Insurance Co.*, 31 O.R. 525; *Mutual Fire Ins. Co.* v. *Mercier*, 14 Que. K.B. 227, held that the fact of the insured premises being or becoming vacant or unoccupied is not a breach of statutory condition 3, nor of the endorsed condition 3 against

> any change material to risk or any change in the use or condition of the property insured . . . which increases the risk.

If, however, we have not knowledge of the Ontario law I am of opinion that the 3rd endorsed condition has in any case no application in the circumstances of this case. Whether or not the description of the building as "in course of construction" was correct or incorrect or ambiguous, it was most clearly indicated that the building was incomplete and only partially constructed—not by these words only but expressly by the terms of the "wording" of the policy—"to be occupied when completed as a custom smelter," together with the warranty that the premises should not go into operation, *i.e.*, for the purpose for which it was being constructed—a custom smelter—during the currency of the policy, and also by Mr. Thompson's statement that it was a builders' risk. The rate of premium was accepted on the basis of the building being incomplete.

These circumstances, it seems clear to my mind, made the invoked condition entirely inapplicable. There was, in my opinion, the plainest implication that the building was in fact vacant and unoccupied; keeping a watchman about or even in such premises as these, intended, as was made plain, for occupation and operation as a smelter, would not, to my mind, make them "occupied" premises nor convert them from vacant into

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non-vacant premises, the watchman would be there because they were vacant. Again I think the fair meaning of the condition is that it applies only to completed buildings which either are ready, as completed buildings, for occupation or having been occupied have ceased to be occupied. This is in effect concluded by the judgment of the Supreme Court of Canada in the York Fire Insurance Co., affirming for the same reasons the judgment of the Court of Appeal for Ontario, Maclaren, J., with whom the majority of the Court concurred, saying: "I do not think the insured premises were or became vacant within the meaning of the fourth condition above quoted. These words were clearly intended to apply to buildings that were finished or occupied or ready for occupation." It is, in my opinion, a wrong principle of construction of these numerous conditions to attempt to find an application of all their provisions to a particular case, inasmuch as on their face they are so drawn as to apply to all the various situations and circumstances which may arise in respect of any risk, and so obviously it is contemplated that some of their provisions must be surplusage in many a particular case.

The next question is whether in describing the buildings insured as "in course of construction" the insured described them "otherwise than they really were, to the prejudice of the company."

In the *York Fire Insurance* case in the Supreme Court of Canada, Idington, J., with whom the majority of the Court concurred, says that he agrees with the reasoning upon which the judgment of the Court of Appeal for Ontario proceeds.

Both Courts admit that the term "in course of construction" is ambiguous and must be interpreted not as a question of law but of fact in view of the surrounding circumstances including "what passed between and was within the knowledge of the contracting parties."

In my opinion, on the facts of this case the building in question was fairly described as "in course of construction." As Idington, J., says:—

> Admittedly it never means that construction must be continuous from day to day or month to month without interruption. Weather, conditions of trade, and labour, and inevitable accident have all to be reckoned with, and why may not financial embarrassment be also an incident to be reckoned with?

Financial embarrassment was the difficulty encountered in the case in hand, but it seems to me to be an absurdity to suppose that the structure was abandoned or that the intention of completing it was for ever given up, and if not, then the cessation of work was but temporary. But even if I did not entertain this view I am bound by the decision of the Supreme Court

of Canada unless I can find, as I fail to do, any material fact or circumstance proved in the *York* case which has been omitted in the present case.

As to there being no watchman, there is no condition necessitating one, and any supposition that one might possibly make that the absence of a watchman was a circumstance material to the risk, can not justly be entertained when we know at least from the reported proceedings in the *York* case that the supposed extra risk was in fact intended to be covered by the insurance as evidenced by the increase in the premium.

As to the last ground—that there was further insurance—there is clearly nothing in it. The "wording" of the policy makes it quite plain that further insurance up to a maximum of $8,100 was contemplated and there was no further insurance beyond that amount.

I would allow the appeal with costs and with costs in the Court below.

Simmons, J.

SIMMONS, J.:—The plaintiff sued the defendant company to recover the amount of a policy of insurance of $1,000, issued on August 14th, 1909, and expiring on November 2nd, 1909, at 12 o'clock noon. The policy was one of several making up $8,100 insurance covering plaintiff's interest as second and third mortgagee on a custom smelter, situated in the town of Sturgeon Falls, Ontario. One of the policies making up the $8,100 insurance carried by the plaintiff was a policy in the York Fire Insurance Company for $2,000. The plaintiff sued on the latter policy in the Ontario Courts and succeeded and the decision of the Ontario Court of Appeal was confirmed by the Supreme Court of Canada. There was no written application in either the York or Western Canada upon which the policies issued but only a typewritten memorandum describing the property and containing in each case the words "on the buildings and additions now in course of construction." On February 8th, 1909, the York Company insured the building in the name of the owner with loss payable to the plaintiff as mortgagee for $2,500 for one month, and on the 9th of March a new policy was issued for the same amount and same terms for one month. The policies in each case were builders' risks. In June, 1909, a new application was made to the York Company and on the basis of this the policy for $2,000 was issued which was the subject-matter of the action against the York Company. The York Company were informed that the watchman had been withdrawn from the building and the premium was increased on that account.

They were also informed that the buildings had not been completed owing to financial difficulties and that the plaintiff

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expected to obtain complete control of the property before the expiry of the term.

The learned Chief Justice distinguishes the Western Canada Company's case from the York Company on the ground that the knowledge of the above facts was in possession of the York Company when their contract was entered into but was not known by the Western Canada.

The learned Chief Justice finds that

> in view of the actual circumstances of those buildings, a description which indicated that building operations were proceeding which the term "in course of construction" coupled with the statement made by the applicant for insurance did, was a misleading and inaccurate description and under the conditions avoids the policy.

And he concludes his judgment with the observation that

> I do not doubt that the insurance would have been accepted even though all the facts had been made known.

If the last observation of the learned Chief Justice is true then his application of the law to the facts as he has found them necessarily fails. The defendants' whole case rests upon the hypothesis that the description "now in course of construction" misled them and that if they had known the material facts as they were communicated to the York Company they would have rejected the proposal for insurance. Their ground for avoiding the policy is that the withholding of the information which the York Company had, has caused them to attach a meaning to the words "now in course of construction" which was misleading and this constituted a material misrepresentation forming the basis of the contract and sufficient to avoid it.

The evidence in the York Company's case so far as it applies to the conditions affecting the building during the suspension of building operations has been made a part of this case and the further evidence in the present case was taken by commission so we have the same opportunities to draw inferences of fact therefrom as the learned Chief Justice at the trial. The statement of the applicant which is referred to in the judgment was "I only want it until November; this is a builders' risk, rate 3 per cent. In regard to the statement included in the typewritten description furnished by the applicant "in course of construction" Mr. Justice Idington observes:—

> The term "in course of construction," as descriptive of property insured, is somewhat ambiguous. Admittedly it never meant that construction must be continuous from day to day, or month to month without interruption. Weather, conditions of trade and labour, and inevitable accident, have all to be reckoned with, and why may not financial embarrassment be also an incident to be reckoned with. It is said that the latter contingency was of such nature as to shew construction had forever ceased and the property

had become vacant and remained so without notice to the applicant. The evidence does not warrant this conclusion. The insurers were told the very reason for taking steps to insure for an unusual broken period and admit that much, and a good deal more, of the explanation given to financial stress.

The judgment of the Supreme Court of Canada narrows the whole question to the issue as to whether the failure of the applicant to give the company the information which the York Company had in regard to the suspension of building operations was a material circumstance going to the foundation of the contract of insurance and sufficient to avoid it.

It raises the question of the duty of the applicant on the one hand to make disclosure of material facts and the duty of the company represented usually by its agent to make usual necessary inquiry.

The policy is a form of contract prepared by the defendants and in it they have inserted an ambiguous term and such ambiguity must be construed against rather than for them.

In *Etherington and The Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591, Vaughan Williams, L.J., at p. 596, observes:—

> I start with the consideration that it has been established by the authorities that in dealing with the construction of policies, whether they be life, fire, or marine policies, an ambiguous term must be construed against rather than in favour of the company.

See also the same principle affirmed in *Joel* v. *Law Union and Crown Insurance Company*, [1908] 2 K.B. 863, *Metropolitan Life Insurance Company* v. *The Montreal Coal and Towing Co.*, 35 Can. S.C.R. 266, and *The Home Insurance Company of New York* v. *Victoria-Montreal Insurance Co.*, [1907] A.C. 59.

Arthur Owen White who accepted the proposal of the plaintiffs on behalf of the defendant company says that the same was brought to him by Mr. Sweatman of the firm of Burris & Sweatman. Mr. Sweatman denies this and he and Mr. Alfred Thompson both say that the application was brought to Mr. White by Mr. Thompson. The account of the transaction as related by Thompson is somewhat more favourable to the plaintiffs than that of White. However, for the purpose of my conclusions I am willing to take Mr. White's version which is more favourable to the defendants, and for this purpose I will quote those parts of his evidence which seem material:—

> Q. Can you tell us just what took place between you and Mr. Sweatman with regard to the risk? A. Why, Mr. Sweatman shewed me a wording of the insurance required and I asked him a few questions in relation to it and told him that the Western Canada could take a line, I think it was for a thousand dollars, I am not sure of the amount in it, and I think Calgary a line.

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Q. What was the nature of the risk as represented to you? A. Well, under——

Mr. McWhinney:—Had not you better say what was said?

Q. What was said with regard to the nature of the risk? A. After Mr. Sweatman shewed me the wording as I just said I asked him: this wording covered the interests of C. S. Dodge as second and third mortgagee of the property—it was buildings in course of construction—and I asked Mr. Sweatman how it was that buildings in course of construction were being placed with unlicensed companies. These companies I had nothing to do with were not licensed to do business in the province, and he told me that the licensed companies had a lien on the owners of the buildings, whoever they were.

Q. That is, that the owners of the property already had insurance in licensed companies? A. Yes.

Q. Now, you spoke a moment ago of the "wording of the risk," what do you mean by the "wording of the risk"? A. description of the property to be insured which would be attached to the policy and form a part or parcel of the policy or the application which was accepted.

Q. Was that in written form? A. Typewritten form.

Q. Shewn to you in typewritten form? A. Yes.

Q. And the wording was what? A. Well as near as I can recollect, it was "on buildings in course of construction" and there are possibly items there including machinery either installed or to be installed.

Mr. McWhinney:—Have not you got it; is not it attached to the policy?

Witness:—I have a copy of the wording outside if you want to look at it. I have a copy of the wording in the original application.

Q. Have you got that here? A. Yes (produced).

Q. This document that you produce and marked exhibit 1 is what? A. That is a copy of the wording; either it is original wording furnished by Mr. Sweatman or copy thereof; it looks as though made on our copy, which would be a verbatim copy, and then that just gives the policy.

Copy of wording put in marked exhibit 1.

Q. Do I understand you to say that you read this wording at the time the application was made to you? A. I don't know that I read it word for word but I knew what it was.

Q. You stated that you asked Mr. Sweatman why he was endeavouring to place a risk of this nature with an unadmitted company—is that the word? A. Unlicensed company, non-admitted or unlicensed.

Q. What prompted that question on your part? A. Well, in accepting lines for a company not licensed to do business——

Mr. McWhinney:—One minute. Would you mind letting me hear that form of question (last question read by reporter). I do not care what prompted unless there was something said, I do not care what was in his mind.

Q. You did ask him why he was placing this risk with an unlicensed company? A. Yes.

Q. Are risks of this nature good risks or bad risks?

Mr. McWhinney:—What has that got to do with it? I submit that is not evidence, and he is not giving evidence here as an expert.

Mr. McDonald:—It may or may not be.

Mr. McWhinney:—It is not evidence at all, I submit.

. . . . . .

Q. Do you know of any other licensed companies or admitted companies being on this risk? A. It was pointed out that the "York" covered the identical property.

Q. Who pointed that out? A. Well, the wording shews that.

Q. The wording of exhibit 1? A. Yes.

Q. Any other companies? A. No.

Q. Is the "York" an admitted company? A. Yes.

. . . . . .

Q. Was there anything said by Mr. Sweatman or by anyone else which would vary the description of the risk? A. No.

. . . . . .

Q. What was said or what was done as to give you an understanding of the nature of the property that was to be insured? A. The wording of this (exhibit 1) gave me that understanding.

Q. By the wording do you mean exhibit 1? A. Yes, the property insured is set forth specifically in that wording "building in course of construction."

Q. Was there anything said outside of the written wording with regard to the nature of the risk? A. Yes, because simply on that wording I would not be authorized to take the line in the Western Canada unless there was admitted companies, and by admitted companies I mean admitted tariff companies on the risk in addition, and Mr. Sweatman said they were on for the owners of the building or owners of the property, whichever way you like to put it.

Q. Was there anything else said by Mr. Sweatman descriptive of the risk? A. No; when I had his assurance that admitted tariff companies were on for the owners then I was satisfied it was all right."

It is quite clear on Mr. White's evidence that two considerations only affected him in accepting the risk. One was the typewritten description and the other was the assurance that tariff companies were on for the owners and that the York was on the same risk for $2,000. The words of the typewritten description which he now says are material are "on the buildings and additions now in course of construction." It is to be noted that this document gives the information that the York Company have concurrent insurance for $2,000.

Mr. White relied on the description "now under course of construction" apparently for the general description of the risk and relied upon the York Company being on the same risk for the applicant and tariff companies for the owners as an assurance of the particular character of the risk.

In no other rational way can I account for his failure to make even the most casual inquiry in regard to details, whereas

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those detailed inquiries by the company are one of the most common features of consideration when proposals for insurance are under way. There was nothing said or unsaid by Mr. Sweatman that would tend to throw him off his guard and I think it not unreasonable to conclude that Mr. Sweatman could form no other conclusion from Mr. White's attitude than that Mr. White accepted the fact of the other companies being on the risk in lieu of any further information and as a complete assurance of the satisfactory nature and character of the risk.

Lord Chancellor Cranworth said in *Anderson* v. *Fitzgerald*, 4 H.L. 484, at p. 503:—

> Nothing, therefore, can be more reasonable than that the parties entering into the contract should determine for themselves what they think to be material.

The insurance company, represented by Mr. White, their agent, agreed that the ingredients of the proposal for insurance were (*a*) the typewritten description and (*b*) the representation that other companies accepted the risk. The defendants now wish to take advantage of their own ambiguous term and ask for a construction of the same which is more favourable to themselves than to the plaintiff.

Much reliance is placed by the defendants on the principle enumerated in *Bates* v. *Hewitt*, 36 L.J.Q.B. 282, namely that the applicant is bound to disclose any material fact peculiarly within his knowledge which would increase the character of the risk. The proper ground in the present case seems to me to be this, that Mr. White did not consider any information as to the particular nature or progress of the course of construction as either necessary or material and he had a right to take this view if he chose. The defendants cannot come into Court now and say we might have been influenced by considerations which at the time of entering into the contract they did not consider material.

I would therefore allow this appeal with costs.

Appeal allowed.

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CHEW v. CROCKETT.

Saskatchewan Supreme Court, Johnstone, J., in Chambers. October 2, 1912.

1. REPLEVIN (§ II A—21)—WRIT OF REPLEVIN ON "AFFIDAVITS" NOT SWORN TO, SET ASIDE—ORDER RESTORING REPLEVINED GOODS—SETTING ASIDE REPLEVIN WRIT.

Where a writ of replevin for recovery of a team of horses was issued upon affidavits never actually sworn to, an application in chambers to set aside the writ will be allowed but an order to restore the personal property seized under it cannot be issued in chambers in the absence of statutory provision.

[*Anderson* v. *McEwan*, 8 U.C.C.P. 532; *Carveth* v. *Greenwood*, 3 P.R. (Ont.) 175, referred to.]

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Statement

THE plaintiff alleges that he purchased a team of horses for the sum of $400 at an auction sale held by the defendant, and that he received delivery of the said horses, and placed them in a livery stable, from which stable the defendant took them.

The defendant alleges that it was a condition of the said sale, that all goods and chattels purchased thereat were to be paid for in cash or by furnishing joint lien notes or bankable paper to the satisfaction of the defendant. This the defendant alleges the plaintiff did not furnish, and he refused to deliver the horses and subsequently sold them to David Wolfe and delivered them to him on March 6th, 1912.

On March 21st, 1912, the plaintiff issued a writ to recover the said horses, and on March 29th, 1912, issued a writ of replevin and seized the horses on Wolfe's premises.

Defendant then served a notice of motion, returnable in Chambers on May 31st, to set aside the writ of replevin and the seizure thereunder, and to have the horses returned to Wolfe on the grounds that the affidavits of H. Chew and Ernest Chew, upon which the writ of replevin was issued, were never actually sworn, and if sworn were false. (The affidavits stated that the property in question was in possession of the defendant, whereas the fact was the property was in possession of Wolfe).

The writ of replevin and all proceedings thereunder was set aside.

P. H. Gordon, for plaintiff.
T. D. Brown, for defendant.

JOHNSTONE, J.:—The writ of summons issued herein on the 21st day of March, 1912, and the writ of replevin issued on the 29th day of March, 1912. In support of the writ of replevin were used the affidavits of each of the plaintiffs, purporting to have been sworn on the 21st day of March, 1912, on the Holy Evangelists, before Peter Dubey, a justice of the peace for Saskatchewan. The plaintiffs on this application admit in their respective affidavits filed, and said justice of the peace before whom the affidavits purported to have been sworn admits that the affidavits filed to obtain the writ of replevin were not in fact sworn at all; and the issue of the writ was clearly irregular and should be set aside. The writ was also irregularly executed. The seizure under the writ of replevin of the team of horses in question was made on the premises of one Wolfe, who was a total stranger to the action. The notice of motion served to set the writ of replevin aside asks that the possession of the horses be restored to Wolfe. In the absence of a statutory provision enabling this particular relief to be dealt with in Chambers I cannot make the order: *Anderson* v. *McEwan*, 8 U.C.C.P.

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532; *Carveth* v. *Greenwood*, 3 P.R. (Ont.) 175. Moreover, the right to the property in the horses has yet to be determined in this suit. The order will be that the writ of replevin issued on the application of the plaintiffs and on what purported to be the affidavits of the plaintiffs will be set aside with costs, and all proceedings had thereunder.

Writ set aside.

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McMANUS v. EDMONTON PUBLIC SCHOOL BOARD.

Alberta Supreme Court, Harvey, C.J., Simmons, and Walsh, JJ. October 4, 1912.

Oct. 4.

1. CONTRACTS (§ II D 2—173*a*)—CONSTRUCTION—PURCHASE PRICE—UNACQUIRED TITLE—RIGHT TO CONVEYANCE—PURCHASE OF SEVERAL LOTS OF LAND.

Where an entire contract for the sale of several lots of land mentions the prices of all the lots except one, and provides that the price of that one, which the vendor has not yet acquired, shall be its cost price to him, the purchaser is not entitled to insist upon a conveyance of one of the other lots at its cost price, merely because it also had not been acquired by the vendor at the date of the agreement.

Statement

APPEAL by plaintiff from the judgment at trial in an action for the balance due to the vendor under a contract for the sale of lands.

B. Pratt, for plaintiff, appellant.
H. H. Parlee, for defendant, respondent.

Harvey, C.J.

HARVEY, C.J., concurred with Walsh, J.

Simmons, J.

SIMMONS, J., concurred with Walsh, J.

Walsh, J.

WALSH, J.:—The plaintiffs wrote to the defendants informing it that they had secured options on certain lots at amounts aggregating $37,650, the lots being scheduled in the letter and a price being set opposite each lot or group of lots. In this schedule lot 14 referred to as the Vandette lot is thus listed at $2,000. The letter further states that the plaintiffs are negotiating with the owner of another parcel, which is referred to throughout the appeal book as the Lizzie Dunn lots, which they expect to get at a fair valuation. Referring to this latter property the letter proceeds: "We believe that the same could be purchased under $2,000 but would not guarantee delivery at less than $2,500, but if purchased for less we would turn it over to the board at cost price." The letter does not in so many words say so but the plain meaning of it is that the plaintiffs offered to turn over to the defendant all of the lots first referred to for $37,650 and the Lizzie Dunn lots at their actual

cost to the plaintiffs, such cost, however, not to exceed $2,500, making the maximum cost of all of the land $40,150, such amount being subject to reduction by the sum, if any, by which the cost of the Lizzie Dunn lots should fall short of $2,500. The defendant evidently looked upon the plaintiffs' offer in this light for it immediately passed a resolution "that the offer of an upset price of $40,150 as submitted by McManus Bros. for lots 9 to 20 inclusive and lots 29 to 40 inclusive in block 24 R.L. 14 be accepted by this board provided they guarantee delivery of the whole at that amount or less, etc." The words "or less" in this resolution undoubtedly refer to the possibility suggested by the plaintiffs' letter that the Lizzie Dunn lots might be acquired for less than $2,500 with a consequent decrease in the aggregate amount of the purchase money. This resolution was at once communicated to the plaintiffs who forthwith set out to complete the purchase of the land with the result that before the commencement of the action all of the property covered by these negotiations including the Lizzie Dunn lots had been acquired by the plaintiffs for and transferred to the defendant.

The plaintiff sues to recover from the defendant a balance of $320 claimed by them in respect of this transaction. It is almost impossible to tell from the statement of claim upon what ground this claim is made, so badly is this pleading drawn. It is also very difficult to make out from the evidence upon what grounds the plaintiffs were resting their claim at the trial and one cannot but appreciate the bewilderment of Mr. Parlee when called upon to meet a claim which from the pleading and the course taken at the trial rested upon so uncertain a footing.

It was, however, with some difficulty developed during the argument of the appeal that the claim consists of two items of $250 and $70 respectively. It appears that the defendant has paid to the plaintiffs and to the parties from whom these various lots were acquired by them the total purchase price so agreed upon between them with the exception of $250, and a further sum of $29.60 to which I will refer later. The defendant refused to pay this $250 which it refused to pay because while it was scheduled in their letter to the defendant at $2,000 the Vandette lot only cost the plaintiffs $1,750 and the defendant contends that it should only pay him for this lot what it actually cost him. The fact is that when the plaintiffs submitted their offer to the defendant they did not own nor had they an option on this lot and they had no means of knowing whether or not they could deliver it to the defendant at all. They took the risk of being able to purchase it from the then owner and the further risk of being obliged to pay for it more than the price at which they scheduled it in their offer. The contract

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was an entire one for the sale of all of the lots and if the plaintiffs had been unable to procure for the defendant the title to this Vandette lot they could not have compelled the defendant to take any of the other lots from them. The price set opposite each lot or group of lots in their offer was doubtless given for the purpose of shewing how the total purchase price was arrived at but there is absolutely nothing in the correspondence to shew that there was to be anything deducted from the price of any of these lots except the Lizzie Dunn lots if they cost the plaintiffs less than his scheduled price. If the Vandette lot had cost them $250 more instead of $250 less than $2,000 they could not have added that sum to the contract price, for the agreement as I find it was that the defendant was to pay $37,650 neither more nor less for the lots comprised in the list of which the Vandette lot formed one plus the actual cost of the Lizzie Dunn lots and that amount could be neither increased nor decreased by the difference between the scheduled price and the actual cost to the plaintiffs of any but the Lizzie Dunn lots. There is absolutely nothing in the writings to suggest any variation whatever from the agreed price except in the case of the Lizzie Dunn lots and the learned District Court Judge was, in my opinion, wrong in holding that the defendant was entitled to deduct this sum of $250 from the total purchase price.

The Lizzie Dunn lots were purchased for $1,800. The plaintiffs contended that they were entitled to add to this the sum of $70 being a commission at the usual rate for their trouble in acquiring the title to it for the defendants and this is the item which makes up the balance of their claim. It is plain that this claim never should have been made. Their agreement was to deliver this property "at cost price" which means at what it actually cost them and nothing more. This claim was withdrawn by Mr. Pratt on the argument and we therefore have no further concern with it.

The judgment appealed from awards $29.60 to the plaintiffs. This, I understand, is the amount of expenses incurred by the plaintiffs in getting in the title to the Lizzie Dunn lots over and above the purchase money. No complaint has been made about this, nor I suppose could one well be made for the plaintiffs are clearly entitled to get from the defendants every dollar of money properly expended by them in getting this property.

The plaintiffs are entitled to debit the defendant with $37,650 being the scheduled price of all but the Lizzie Dunn lots and with the actual cost of the Lizzie Dunn lots and the defendant is entitled to credit for all sums paid by it either to or for the plaintiffs in respect of this purchase money. If as I take it the defendant has paid the plaintiffs all but the sum of $250 in

dispute re the Vandette lot and the $29.60 the amount of the judgment of the Court below the plaintiffs are entitled to recover $279.60 and that judgment will be increased accordingly.

Mr. Parlee submitted, however, that as the case was disposed of below on the plaintiffs' evidence alone he should be entitled to a new trial if the judgment of this Court should be against him on the question of the $250 and this, considering especially the way in which the plaintiffs case was framed and carried on, he is certainly entitled to. If the defendant files with the clerk of the District Court and serves upon the plaintiffs' solicitor on or before the 15th day of October instant a notice electing to take a new trial the order will go for the same accordingly. Failing such notice the plaintiffs' judgment will be increased to $279.60.

The plaintiffs are entitled to their costs of this appeal. In view of what I have already said as to the manner in which the plaintiffs' claim has been placed before the Court both in their pleadings and at the trial they are not entitled to any of their costs in the Court below down to and including the trial and if the defendant does not elect for a new trial in accordance with the right thereto hereby given to him the judgment in the Court below will be varied by increasing it to $279.60 without costs. If the defendant elects for a new trial the costs of such trial will of course be disposed of by the District Court Judge who will in that event also deal with the costs of the action and the former trial save as they are hereby disposed of, that is to say, that in no event shall he award the costs thereof to the plaintiffs.

Judgment accordingly.

Re BOULTON and GARFUNKEL.

Ontario High Court, Middleton, J. September 17, 1912.

1. VENDOR AND PURCHASER (§ III—39)—LESSEE'S ASSIGNEE EXERCISING OPTION OF PURCHASE—EASEMENTS CREATED BY HIS ASSIGNOR—NOTICE.

Where the assignee of a lessee's interest in a lease with option to purchase, exercises such option at a price per foot frontage agreed upon in lieu of being arbitrated, it will be presumed that, in fixing the price, regard was had to the circumstance that a "private lane" forming a part of the demised premises was subject to easements of right-of-way in favour of leaseholders of adjoining property in pursuance of a scheme of sub-division made by the original lessee and referred to in the lease; and such assignee is not entitled to call for a release of such easements nor to an abatement of price as compensation in lieu of a release.

Statement

PETITION by Garfunkel, the purchaser, under the Vendors and Purchasers Act, to have it declared that certain rights of way, existing over what was referred to as a private lane, constituted

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an objection to the vendor's title, and for a reference to determine the amount of compensation to which the purchaser would be entitled if these rights were not released.

The petition was refused.

W. C. Chisholm, K.C., for the petitioner.

R. S. Cassels, K.C., for Boulton, the vendor.

MIDDLETON, J.:—John B. Boulton in his lifetime owned a block of land extending from Henry street to McCaul street, in the city of Toronto. By his will he devised this to his wife, with power to sell.

During his lifetime, Boulton and others, whose concurrence was necessary, had, on the 1st January, 1872, leased the entire parcel to R. B. Blake for a term of nineteen years and four months, with the right to purchase at the end of the term, at a valuation, if the parties failed to agree upon the price.

Blake subdivided the parcel, and laid out certain private lanes thereon, including the one in question. He erected houses upon some of the subdivided lots, and assigned the leasehold interest of these respective houses to different purchasers.

On the 13th June, 1891, Levi J. Clark, who had become the owner of one of these houses, obtained a conveyance of it from Mrs. Boulton. This conveyance recites the lease, the right to purchase thereunder, and the devolution of the right of both landlord and tenant, and Clark's desire to exercise the right to purchase with respect to the lands upon which his house is situated, and the agreement as to the price to be paid. Mrs. Boulton then conveyed this parcel, describing the land as running to the lane in question: this description following the description contained in the assignment of the leasehold interest made by Blake, through which Clark claimed. In November, 1892, a similar conveyance was made to Melfort Boulton of a parcel in which he had acquired the leasehold interest; the land being similarly described as running to the lane.

It is conceded that these conveyances operate to give the respective grantees an easement over the lane in question. Subsequently and on the 1st May, 1893, the original lease having then expired, a new lease was made between Mrs. Boulton and Blake, reciting the original lease, the subdivision by Blake, his conveyance away of certain portions of the leasehold property as subdivided—leaving him still entitled to the McCaul street frontage, including the private lanes—and an agreement to extend the rights under the original lease as therein provided. This lease then demises the McCaul street frontage, including the private lane, for a term of twenty-one years, and confers upon Blake the right, at the expiry of the term, to purchase the lands at a price to be ascertained by arbitration if the parties fail to agree.

Garfunkel having acquired Blake's title, an agreement was made on the 1st May, 1912, reciting the lease, and that Garfunkel had agreed to purchase at the price of $116 per foot on McCaul street.

As pointed out on the argument, Garfunkel can have no greater or other right than Blake, and Blake was himself the author of the private lanes in question and party to the creation of the right of way over them, of which, as assignee, Garfunkel now seeks to complain. The term "private lane" is ambiguous; but here the parties must be taken to have used that expression with reference to the actual condition of the premises.

The agreement executed by Garfunkel calls for the payment of $116 per foot for the entire McCaul street frontage, including the lane. In the absence of any attack upon that agreement, I must assume that the parties fixed the price having regard to all the circumstances. I cannot reform that agreement, as I would be doing if I yielded to the purchaser's contention.

The order will, therefore, declare that the purchaser is not entitled to compensation by reason of the rights of way. The purchaser should also pay the costs.

Petition refused.

CRAWFORD et al. v. CALVILLE RANCHING CO.

Alberta Supreme Court, Beck, J. September 26, 1912.

1. WRIT AND PROCESS (§ II B—26)—SERVICE OF—INVALIDITY—PLAINTIFF SERVING HIMSELF AS DEFENDANT'S OFFICER.

In an action upon a promissory note against an incorporated company in which the plaintiffs are four directors, one of the four being the secretary-treasurer, of the defendant company, the secretary-treasurer (although a competent officer generally to be served with process) is not, while a party plaintiff, a competent or proper person upon whom to serve the writ of summons, and such service will be set aside.

2. JUDGMENT (§ I C 2—19)—SERVICE OF WRIT—INVALIDITY—JUDGMENT VOIDABLE.

A judgment, recovered in an action upon a promissory note against an incorporated company, in which the plaintiffs are four directors, one of the four being secretary-treasurer, of the defendant company, and in which the writ of summons was served upon the defendant company by delivering it to the secretary-treasurer while himself a party plaintiff, is voidable for want of due service of the writ.

3. WRIT AND PROCESS (§ II B—26)—SERVICE OF—CORPORATION OFFICER—WHEN COURT WILL AUTHORIZE OTHER METHOD OF SERVICE.

Where a corporation officer (competent generally under the terms of the statute to accept service of process), in a suit against the company, is himself the plaintiff, or bears such a relation to the plaintiff or to his claim as to make it to such officer's interest to suppress the fact of service, the Court will authorize some other and proper method of service.

[32 Cyc., title "Process," p. 554, referred to.]

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THIS was an application to set aside a judgment. The plaintiffs were four directors of a company. They had sold their shares to the applicant, who thereupon became the holder of a large majority of the issued shares of the company. Some time afterwards the plaintiffs commenced an action against the company upon a note of the company and served the writ upon one of themselves who was the secretary-treasurer.

The application was granted.

J. R. Lavell, for applicant.

C. F. B. Mount, for plaintiffs.

Beck, J.

BECK, J., set aside the judgment on the ground that there was in law no service. He said in effect that the secretary-treasurer being one of the plaintiffs, he was not a person whom it was competent for the plaintiffs to serve. The plaintiffs were in the position that they must find some other person competent so far as they were concerned to be served with process at their instance and if there is no such other person a Judge would under the rules have power to authorize some other method of service. The principle is the same as that which disqualifies a sheriff from executing a writ issued in a matter in which he has a pecuniary interest. He subsequently noted the following from 32 Cyc., tit. "Process," p. 554:—

> VI. Persons interested adversely to corporation. Where service is made upon an officer or agent who, although within the terms of the statute, sustains such a relation to the plaintiff or the claim in suit as to make it to his interest to suppress the fact of service, such service is unauthorised. So service will not be sustained where it is upon a person who is a party plaintiff, or plaintiff's attorney in fact, or who is plaintiff's assignor.

Application granted.

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FENSON v. SHORE.

Manitoba King's Bench. Trial before Mathers, C.J.K.B. October 11, 1912.

1. JUDGMENTS (§ III B—212)—JUDGMENTS ACT (MAN.)—REGISTERED CERTIFICATE OF—UNREGISTERED BENEFICIAL OWNERSHIP—VERBAL AGREEMENT—CERTIFICATE DEFEATED THEREBY.

In an action for the sale of lands under a certificate of judgment for a sum of money, registered in the land titles office (Man.), where the judgment debtor, prior to the registration, had entered into a verbal agreement to sell the lands in question to a purchaser for a fixed and adequate consideration contemporaneously paid, and, subsequent to the registration, conveyed to the purchaser pursuant to the agreement; the effect of the agreement and payment was to vest in the purchaser at once the beneficial ownership of the land, leaving in the judgment debtor no interest or estate that could be sold under a registered certificate of judgment.

[*Bank of Montreal* v. *Condon*, 11 Man. L.R. 366; *Entwisle* v. *Lenz*, 9 W.L.R. 317, specially referred to.]

2. JUDGMENTS (§ III B—212)—JUDGMENTS ACT (MAN.)—CERTIFICATE OF JUDGMENT—PRIOR UNREGISTERED EQUITABLE TITLE.

Under the Judgments Act (Man.), which creates in favour of a registered certificate of judgment a charge upon "all the lands" of the judgment debtor, the judgment creditor's right depends entirely upon the statute, and while his registered certificate binds the judgment debtor's lands it does not bind such lands as have already been sold by the debtor, even when the purchaser's ownership is only equitable and unregistered.

[*Case* v. *Bartlett*, 12 Man. L.R. 280, referred to; County Courts Act and Judgments Act of Manitoba compared.]

3. CONTRACTS (§ I E 4—80)—STATUTE OF FRAUDS (4TH SEC.)—VERBAL AGREEMENT FOR SALE OF LANDS—VALIDITY AS TO SUBSTANCE—STATUTE A BAR ONLY TO ENFORCEMENT.

In an action for the sale of lands under a certificate of judgment, for a sum of money, registered in the land titles office (Man.), where the judgment debtor, prior to the registration, had entered into a verbal agreement to sell the lands in question to a purchaser for a fixed and adequate consideration contemporaneously paid, such an agreement is valid at common law, and, although it is well-settled law that under the 4th section of the Statute of Frauds it cannot be enforced against an unwilling or dishonest vendor, yet it is equally well-settled law that the statute does not affect the validity of the agreement, but only the remedy upon it, the signature so required is not of the substance of the contract, but is matter of procedure only, making a particular kind of proof necessary to enable a party to bring an action upon it; hence the verbal agreement is as effective (except as to enforcement) as a written contract.

[*Leroux* v. *Brown* (1852), 12 C.B. 801; *Jones* v. *Victoria*, 2 Q.B.D. 314, 323; *In re Hoyle*, [1893] 1 Ch. 84; *Laythoarp* v. *Bryant*, 2 Bing. N.C. 735, referred to; see also Fry on Specific Performance, 5th ed., 254.]

Statement

THIS is an action for the sale of land under a registered certificate of judgment.

The action was dismissed.

W. H. Trueman, for plaintiffs.

P. C. Locke, for defendants.

Mathers, C.J.

MATHERS, C.J.K.B.:—The following facts were admitted: The plaintiffs on the 24th December, 1908, recovered a judgment in this Court against the defendant A. H. Shore for the sum of $618.45, which judgment is still unpaid. The defendant A. H. Shore is the devisee under the will of his mother, who died on the 10th day of February, 1911, of the north-east quarter of lot 141, D.G.S. 43 and 44 St. John, in the city of Winnipeg. The will was probated on the 18th April, 1911, by the executors and the above described land was by deed conveyed by them to A. H. Shore some time between the 2nd and 20th days of June, 1911. In the beginning of April, 1911, A. H. Shore was indebted to his brother R. J. Shore in the sum of $150 for moneys advanced on his account, and he had further claims against him at that time amounting to $462.50. It was then verbally agreed between them that R. J. Shore should pay this claim of $462.50, and that in consideration thereof, A. H.

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Shore should convey the lands in question to him. It is admitted that these two sums amounted together to the full value of the land.

On the 2nd day of June, 1911, the plaintiffs registered in the land titles office in Winnipeg, a certificate of their judgment. On the 20th day of June, 1911, A. H. Shore conveyed the land in question to R. J. Shore, pursuant to the agreement made in the beginning of April.

On these facts the plaintiffs contend: First, that the agreement between A. H. Shore and R. J. Shore, being verbal, was void under the 4th section of the Statute of Frauds, and was ineffectual to divest A. H. Shore of any interest which he had in the land, and when the plaintiffs' certificate of judgment was registered, it bound the land as though A. H. Shore had charged it under his hand and seal.

Secondly, if the agreement was not void under the Statute of Frauds, R. J. Shore only acquired under it an equitable interest, which was void as against the plaintiffs' registered judgment under section 72 of the Registry Act, R.S.M. ch. 150,

Admittedly a verbal agreement to sell land is valid at common law, and I cannot accede to Mr. Trueman's argument that such an agreement is rendered void by the 4th section of the Statute of Frauds. That a verbal agreement cannot be enforced because of this section is undoubtedly well-settled law; and I think it equally well settled that the statute does not affect the validity of the agreement, but only the remedy upon it.

The point was decided by *Leroux* v. *Brown*, 12 C.B. 801, in 1852, a case which has been referred to with approval several times since. For example, in *Jones* v. *Victoria*, 2 Q.B.D. 314, at p. 323, Lush, J., says:—

> The signature required by the 4th section is not of the substance of the contract. It is matter of procedure only.

And *In re Hoyle*, [1893] 1 Ch. 84, Lindley, L.J., after quoting the 4th section of the Statute of Frauds, says:—

> 'On the construction of this section certain points are settled: first, it was settled by *Leroux* v. *Brown*, 12 C.B. 801, that the statute does not affect the validity of the contract, but only makes a particular kind of proof necessary to enable a party to bring an action upon it.

And in the same case A. L. Smith, L.J., says:—

> It is settled by *Laythoarp* v. *Bryant*, 2 Bing. N.C. 735, and *Leroux* v. *Brown*, that the statute does not affect the contract, but only relates to the evidence of it.

Such being the law, the verbal agreement made between the parties in the beginning of April was as efficacious for transferring to R. J. Shore the beneficial interest in this land as if the parties had entered into a written agreement. It is true that if A. H. Shore had chosen to be dishonest and had refused to

carry out the agreement, the Courts would have been powerless by reason of the 4th section of the Statute of Frauds to compel him to do so, but there was nothing to prevent him acting in good faith and carrying out the agreement as he has done.

When the agreement was made R. J. Shore at once became the beneficial owner of the land and, having paid the full purchase-price agreed upon, A. H. Shore had no interest in it whatsoever. Under these circumstances *Bank of Montreal* v. *Condon*, 11 Man. L.R. 366, and *Entwisle* v. *Lenz*, 9 W.L.R. 317, shew that at the time the plaintiffs' certificate of judgment was registered A. H. Shore had no interest or estate in the land that could be sold under a registered certificate of judgment.

In *Case* v. *Bartlett*, 12 Man. L.R. 280, it was decided that section 72 of the Registry Act

> did not give a certificate of judgment issued and registered under the County Courts Act priority over a prior unregistered equitable charge.

It was argued, however, that *Case* v. *Bartlett*, 12 Man. L.R. 280, did not apply because by the County Courts Act then in force a certificate of judgment registered thereunder only created a charge upon "all interest or estate" of the judgment debtor in the lands, whereas under the Judgments Act it creates a charge upon "all the lands" of the judgment debtor. The expression "lands" by the interpretation clause of the Act includes

> all real property and every estate, right, title and interest in land or real property both legal and equitable and of what nature and kind soever, and any contingent executory or future interest therein and a possibility coupled with an interest in such land or real property, whether the object of the gift or limitation of such interest or possibility be ascertained or not and also a right of entry whether immediate or future and whether vested or contingent into and upon land.

I cannot see that the plaintiffs' position is in any way improved by the fact that his certificate might possibly bind an interest of his debtor in the land that would not have been bound under the County Courts Act. His right depends entirely upon the statute. He gets what the statute gives him and no more. His certificate bound the lands, as the expression is above defined, of the judgment debtor; but not lands belonging to somebody else, not lands that the judgment debtor had sold, and that were no longer his lands at the time the certificate was registered. In my opinion the reasoning of *Case* v. *Bartlett*, 12 Man. L.R. 280, applies exactly to this case.

The action will be dismissed. The parties have agreed that there should be no costs.

Action dismissed.

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Oct. 4.

REX v. CRAWFORD.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, Simmons and Walsh, JJ. October 4, 1912.

1. CRIMINAL LAW (§ II D—58)—SUMMARY TRIAL—POWER OF MAGISTRATE AS TO AMENDMENT—CRIM. CODE 1906, PART XVI.

The probable effect of Part XVI. of the Criminal Code, R.S.C. ch. 146, dealing with summary trials of indictable offences, is to give to the magistrate trying such an offence without indictment the same powers of amendment as are given to the Courts upon the trial of the same offence under an indictment.

2. CRIMINAL LAW (§ II B—49)—JURISDICTION OF SUMMARY TRIAL—ABSENCE OF SWORN INFORMATION.

The absolute jurisdiction conferred upon a police magistrate to try certain indictable offences upon summary trial without the consent of the accused is exercisable where the accused is present, whether or not an information had been sworn in respect of the offence which is the subject of the trial, if the "charge" is reduced to writing and is read to the accused and a full opportunity is given for making defence thereto.

3. INDICTMENT, INFORMATION, AND COMPLAINT (§ II F—55)—AMENDMENT OF INFORMATION—CHANGING STREET NUMBER OF ALLEGED DISORDERLY HOUSE.

Upon the summary trial of a charge of keeping a disorderly house, the magistrate has power to amend the information during the course of the trial, by changing the street number of the alleged disorderly house, without having the information re-sworn.

[*Reg.* v. *D'Eyncourt*, 21 Q.B.D. 109, referred to.]

4. INDICTMENT, INFORMATION, AND COMPLAINT (§ II F—55) AMENDMENT—APPLICATION OF CRIM. CODE 1906, SEC. 1124, TO INDICTABLE OFFENCES.

The powers of amendment granted by sec. 1124 of the Canadian Criminal Code, R.S.C. ch. 146, are not confined to summary convictions, but may be exercised in the case of convictions for indictable offences.

[*R.* v. *Randolph*, 4 Can. Crim. Cas. 165; and *R.* v. *Spooner*, 4 Can. Crim. Cas. 209, discussed; *R.* v. *Shing*, 17 Can. Crim. Cas. 463, dissented from.]

5. DISORDERLY HOUSES (§ I—10)—EXCESSIVE PENALTY—REDUCING ON CERTIORARI.

A conviction upon summary trial before a police magistrate for keeping a disorderly house may be amended in *certiorari* proceedings, if the Court is satisfied as to the proof, by reducing the illegal fine of $100 and costs to the limit provided by Cr. Code sec. 781 of $100 including costs; the amount of the costs in such case remaining in the amended conviction but the $100 penalty being reduced by the amount of the costs so that the total shall not exceed $100.

[*R.* v. *Shing*, 17 Can. Cr. Cas. 463, disapproved.]

6. CERTIORARI (§ II—20)—CONVICTION—POWERS OF AMENDMENT—CR. CODE 1906, SEC. 1124.

The word "Justice" is to be construed in sec. 1124 of the Criminal Code 1906 in a different manner from the words "justice of the peace" which were used in the corresponding section of the former Code (Cr. Code 1892, sec. 889) by reason of the statutory definition given to the word "justice" by the interpretation clause, Cr. Code 1906, sec. 4 (18) whereby police magistrates and stipendiary magistrates are included in its meaning, and also by reason of the transposition of

former sec. 889 in the 1906 consolidation from the summary convictions part to the part of the 1906 Code entitled "Extraordinary Remedies," with the result that the present section 1124 as to amendment on *certiorari* applies not only to "summary convictions" but to convictions on "summary trials" held under Part XVI. of the Code.

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Statement

THE accused was charged with keeping a disorderly house under section 228 of the Criminal Code and was tried summarily before I. S. Cowan, Police Magistrate of the city of Edmonton, convicted and fined one hundred dollars and costs, $6.50.

This is a motion for a *certiorari* to quash the conviction on the ground that the magistrate at the close of the hearing amended the information by striking out "428 Kinistino Ave." and substituting "436 and 438 Kinistino Ave." without such amendment being re-sworn and that the penalty is in excess of what the magistrate had jurisdiction to impose.

The conviction was varied and the fine reduced to $93.50 with costs $6.50, making $100, the authorized maximum fine.

L. F. Clarry, Dep. Attorney-General, for the Crown.

H. A. Mackie, for the defendant.

HARVEY, C.J.:—Considering the question of the amendment of the information first, it appears that with the record there is a sworn information in the form 3 of the Code in which the charge is that the accused "did unlawfully keep a disorderly house; to wit, a common bawdy house at 428 Kinistino Avenue, in the city of Edmonton." "428" is struck out and in its place is inserted "the Maple Leaf Rooming House, Nos. 436 and 438" with a note by the Magistrate giving the date and stating that the amendment is made by him. The record also shews that this amendment was made at the request of counsel for the prosecution after the evidence for the prosecution and for the defence had been given, but before the evidence in rebuttal and in the face of the opposition of counsel for the accused, who after it was made objected to it "without the information being re-sworn."

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No further or other objection or application appears to have been made regarding it, and the evidence in rebuttal confirmed the correctness of the particulars of the amendment. This, however, had been clearly established by the evidence of the accused herself and there appeared to be no doubt in any of the testimony as to the particular premises, the only question of doubt being as to the street number. No authority is mentioned or reason urged why the Magistrate could not make the change he did, nor does any reason suggest itself to me.

The amendment is a very trivial one and under the circumstances one which could not prejudice the accused in the least. No objection could have been taken to the charge in the information if the street number had not been given, and it is quite

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clear by section 724, that if it had been a case of summary conviction, no amendment would have been necessary. It is also quite clear that on a trial or indictment, or, in this province on a charge authorized by section 873A, such an amendment as the present one could be made. The trial in the present case was of an indictable offence though not on an indictment but in a more summary and much less formal manner. Part XVI. which relates to summary trials of indictable offences has no remedial provisions corresponding to those of the summary conviction part or of the part relating to trials on indictments. Indeed by section 798 the provisions of Part XV. as well as the provisions relating to preliminary enquiries are expressly excluded, but it is provided by section 791 that a conviction shall have the effect of a conviction upon indictment. It seems not unreasonable, therefore, to conclude that it was intended that the remedial powers given to the Courts on the trial of the offences under indictment should belong to the Magistrates trying the same offences but without indictment.

Apart from that, however, it seems obvious that an information was not required in the present case.

From sections 654 and 655 it appears that the purpose of an information is to authorize the issue of a summons or a warrant to procure the presence of the person accused, but when the person charged is before the Court without summons or warrant, as the accused was in the present case, there is no occasion whatever for an information sworn or otherwise. Where an information has been laid and the attendance of the person accused obtained in pursuance thereof, it naturally would contain the material of the charge but Part XVI. makes no reference whatever to an information but confines itself to the word charge, and in section 778 under the title "Procedure" provides that (after the prisoner has consented to be tried summarily if such course is required) "the magistrate shall reduce the charge to writing and read the same" to the accused, indicating that up to that time there may be nothing in writing and that at no time is anything relating to the charge required to be sworn. No particular formality is required but natural justice requires that any person being tried should know what he is being tried for and should have the fullest opportunity for meeting the charge. It is not and cannot be suggested that the accused in the present case had any doubt of the charge in which she was convicted or required any further opportunity for her defence.

In *The Queen* v. *D'Eyncourt*, 21 Q.B.D. 109, Field, J., at p. 117, says:—

> There is no doubt that at the hearing a charge may be preferred which has not been included in any warrant or in any charge made at the police station.

And Wills, J., at p. 124, referring to the case of a charge suggested by the evidence being there for the first time made and thereupon investigated, says:—

> Such a course is constantly taken and it is legitimate where no objection is made or where a proper opportunity is afforded of meeting any new evidence.

The facts in that case also indicate that in Police Court proceedings the charge is commonly contained in a charge sheet, made out, no doubt, by the clerk of the Court, containing presumably the names of the different persons to be tried with the nature of the charge on which each is to be tried.

The information, therefore, on the trial before the Magistrate ceases to have any signification as such and in the present case is to be treated simply as containing the particulars of the charge in writing. The amendment, therefore, as made was perfectly proper.

With reference to the jurisdiction, it appears that under section 773, par. (*f*), Crim. Code 1906, this is a charge which may be properly tried summarily, but it is provided by section 781 that in any case summarily tried under that paragraph as well as some of the others the fine which may be imposed is one, "not exceeding, with the costs in the case, one hundred dollars."

Section 777, Crim. Code 1906, confers a jurisdiction on a certain limited class of persons occupying judicial positions in certain limited areas to try summarily all cases which may be tried at a Court of general sessions of the peace, and to impose the penalty which could be imposed by such Court, and it is contended on behalf of the Crown that inasmuch as it is admitted that I. S. Cowan is a Police Magistrate of a city of over 2,500, the population specified in sub-section 2 of section 777, the conviction may be treated as being made under section 777 in which case the penalty would not be beyond the Magistrate's jurisdiction.

In *Reg.* v. *Archibald* (1898), 4 Can. Crim. Cas. 159, a Divisional Court in Ontario consisting of McMahon and Rose, JJ., supported a penalty which would have been excessive under the jurisdiction conferred by the section corresponding to present section 773, because it came within the jurisdiction given by the section corresponding to section 777, and in other cases other Ontario Judges have concurred in this view. On the other hand the Court of Appeal of Manitoba in *Rex* v. *Shing* (1910), 17 Can. Crim. Cas. 463, refused to support a penalty under section 777 in excess of the jurisdiction under 773. In the present case it is not necessary to determine which view is correct for the jurisdiction of 777 is only conferred by the consent of the accused and there is nothing to indicate nor is it suggested that such consent was given in the present case.

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A difficulty presents itself as to what consent the accused may give since sec. 774, as amended in 1909, and sec. 776 provide that no consent shall be necessary and shall not be asked for. It would seem that the only consent which would be necessary would be a consent not to be tried, but to be sentenced to an increased penalty. However that may be, it is clear that, some consent is necessary to bring the case within section 777, and such consent was present in the Ontario cases, but is not stated to have been in the Manitoba case, and was not here. Therefore, for that reason it is clear that the penalty is in excess of the Magistrate's jurisdiction in the present case.

The Court, however, is asked to amend under the authority of section 1124, Crim. Code 1906. It is urged, however, that section 1124 is limited to summary convictions and does not extend to convictions for an indictable offence, such as this was.

Originally the section appeared in connection with the summary conviction provisions and in *Rex* v. *Randolph* (1900), 4 Can. Crim. Cas. 165, Ferguson, J., held that the provisions respecting amendment in cases of summary convictions did not apply to that case which was a case of summary trial, and in *Rex* v. *Spooner* (1900), 4 Can. Crim. Cas. 209, in which the conviction was amended, in the judgment of the Divisional Court delivered by Street, J., it is stated that the powers of amending convictions under the summary convictions clauses are greater than under the summary trials clauses. Upon the revision of the statutes in 1906, this section was removed from the summary convictions part and placed in a part near the end of the Code entitled "Extraordinary Remedies" in addition to which the expression "Justice of the Peace" was altered to the word "Justice" so that it refers now not to convictions and orders made by a Justice of the Peace but to convictions and orders made by a Justice. Justice of the Peace being itself a sufficiently definite term was not, and is not, interpreted, but the indefinite term "Justice" is defined in the interpretation clause of the Code as including a Police or Stipendiary Magistrate or anyone having the authority of two Magistrates.

The expression "conviction by a Justice" therefore includes any conviction which may be made not merely on summary convictions but on summary trials.

In *Rex* v. *Shing*, 17 Can. Crim. Cas. 463, the Manitoba Court held that the change in the section was immaterial and that the power of amendment was still limited to summary convictions. With all respect I cannot agree with that view. It appears to me that in that case the alteration of "Justice of the Peace" to "Justice" must have been entirely overlooked, for the judgment states on p. 468, after referring to *Rex* v. *Randolph*, 4 Can.

Crim. Cas. 165, and *Rex* v. *Spooner*, 4 Can. Crim. Cas. 209, as follows:—

> A judicial interpretation having thus been placed upon section 889, Parliament re-enacted it in R.S.C. 1906, ch. 146, without material change, presumably recognizing and adopting such interpretation. See sec. 7 of the Act respecting the Revised Statutes of Canada, 1906. It would not be safe to draw the conclusion that because Parliament placed in the revision the sections under a different title, it was its intention that the section should receive an interpretation other than that previously adopted by the Courts.

In my opinion the change in the section which I have mentioned was material and coupled with the transposition of the section indicated an intention to change the law. Section 21, sub-sec. 4 of the Interpretation Act, R.S.C. 1906, ch. 1, is as follows:—

> Parliament shall not, by re-enacting any Act or enactment, or by revising, consolidating or amending the same, be deemed to have adopted the construction which has by judicial decision, or otherwise, been placed upon the language used in such Act, or upon similar language.

Section 7 of the Revised Statutes of Canada, 1906, Act, 6-7 Edw. VII. ch. 43, to which reference is made in the foregoing extract from the judgment in *Rex* v. *Shing*, 17 Can. Crim. Cas. 463, is as follows:—

> 7. The said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted.
>
> 2. If upon any point the provisions of the said Revised Statutes are not in effect the same as those of the repealed Acts and parts of Acts for which they are substituted, then, as respects all transactions, matters and things subsequent to the time when the said Revised Statutes take effect, the provisions contained in them shall prevail, but, as respects all transactions, matters and things anterior to the said time, the provisions of the said repealed Acts and parts of Acts shall prevail.

The second sub-section shews clearly Parliament's contemplation that there would be changes made by the revision and declares that these changes shall become effective when the Revised Statutes take effect and the first sub-section apparently means to indicate that if no changes are made the repeal and re-enactment effected by the Revised Statutes shall not make any break in the continuity of the law which shall remain as far as Parliament is concerned as if there had been no Act of revision.

I am clearly of opinion that section 1124 authorizes the amending of the conviction in the present case by reducing the

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penalty to one which is authorized by section 781 which should have been observed by the Magistrate if a perusal of the depositions satisfies the Court that the offence charged has been committed.

A perusal of the depositions does so satisfy me, and I therefore think that the fine should be reduced to $93.50 which with $6.50 costs, will amount to $100, the authorized maximum fine.

SCOTT, STUART, SIMMONS, and WALSH, JJ., concurred.

Conviction varied and fine reduced.

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Re CRAWHALL.

Saskatchewan Supreme Court, Wetmore, C.J., in Chambers. October 5, 1912.

1. ASSIGNMENTS FOR CREDITORS (§ VIII A—65)—ASSIGNMENTS ACT (SASK.)—TWO PARTNERSHIPS—CONFUSION AS TO LIABILITY OF INSOLVENT—REFERENCE TO LOCAL REGISTRAR.

Where the same two partners carry on two business concerns, hotel and hardware, and fail in both; and where some of the judgment creditors realize under their executions out of the hardware assets, and others are looking to the hotel assets, and still others to both; and where one of the partners (alleging non-liability on the hotel debts through dissolution) assigns for the benefit of creditors under the Assignments Act, R.S.S. 1909, ch. 142; and where there is confusion as to the liability of the insolvent for the hotel and the hardware claims and as to the ranking of creditors in respect thereto, an application in the insolvent estate matter on behalf of an execution creditor to have his exact rank and rights fixed may be heard in chambers under the Assignments Act (Sask.), and a reference to the local registrar may be ordered, to examine and inquire into the exact rights and obligations of the insolvent, and the creditors, in relation to each of the partnerships, and to report thereon.

Statement

APPLICATION by Marshall Wells Company, Ltd., creditors of Crawhall, who had made an assignment for the benefit of his creditors, to determine the validity of their claim, the insolvent and one Reid having been in partnership, and Marshall Wells Company, Ltd., having recovered judgment against Reid.

Judgment was given referring the matters in question to the local registrar to inquire and report.

W. H. McEwen, for applicants.

L. E. Dawson, for the assignee.

Wetmore, C.J.

WETMORE, C.J.:—Crawhall made an assignment for the benefit of creditors under the Assignments Act, R.S.S. 1909, ch. 142. The Marshall Wells Company, Ltd., filed a claim, and they now apply that a Judge proceed to determine the validity of the claim against the estate, or to have it determined. The material presented to me does not seem to me to be sufficient to enable me to determine the validity of the claim against the estate. The only evidence of the claim is a certified copy of a

judgment roll whereby it appears that the above named company recovered judgment against Crawhall and one Horace J. Reid for $4,268.85, debts, and $33.86 for disbursements, amounting in all to $4,302.71. The insolvent and Reid were in partnership and carried on business as hotelkeepers and as hardware merchants, and they seemed to have failed in each of them.

Actions were, it seems, brought against them by their creditors in respect to the hardware business and executions issued to the sheriff, who seized the hardware property and sold it and distributed the proceeds among such judgment creditors. None of the creditors in respect to the hotel business had any executions lodged. The Marshall Wells Company, Ltd., however, had an execution lodged, and they received from the proceeds of the sale $1,065.70. It would seem that Reid claims that he got out of the hotel business, but when and under what circumstances does not appear to be satisfactorily established, or whether he got out under circumstances such as to relieve him from liability for the hotel debts, and if so, to what extent. The creditors in respect to the hotel business have filed claims with the assignee, and they claim that the creditors in respect to the hardware business have no right to rank against the Crawhall estate until the creditors in respect to the hotel business are paid in full. I will refer the matter to the local registrar at Saskatoon to inquire as follows, and report:—

(1) Were Crawhall and Reid in partnership in the hardware business at the time of the seizure by the sheriff of the hardware under the executions referred to?

(2) If not, when did that partnership cease?

(3) Were they so in partnership at the time the several actions were brought in which the executions were issued, or were such actions brought in respect of partnership debts or causes of action?

(4) Were Crawhall and Reid in partnership in the hotel business at the time the assignment was made to the official assignee? Or had Reid any interest in the hotel property sold by the assignee? And what interest?

(5) If the partnership in the hotel business existing between them ceased at any time, when and under what circumstances did it determine?

(6) What amount remains unsatisfied upon the judgment of the Marshall Wells Co.?

I am prepared to consider any further questions that it may be desirable to have the local registrar inquire into.

The hotel creditors and the Marshall Wells Co. should have an opportunity to appear before the local registrar on this inquiry.

Judgment referring matter.

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MORGAN v. AVENUE REALTY CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. June 14, 1912.

1. PARTY WALL (§ I—1)—RIGHT TO USE—NEW WALL ERECTED AGAINST EXISTING WALL—JOINING TOGETHER—COMPENSATION FOR USE OF OLD WALL.

Where a building in Quebec is so constructed that the wall of the neighbouring building is used for all the purposes of an exterior wall except support, one wall of the new building being such that, without the neighbouring wall, it would not stand the weather, or afford sufficient protection, or satisfy the building regulations, and, for further protection, the two walls are joined at the top by metal flashing, and it appears that the owner of the new building expected that, when it had settled into position, it would receive support also from the neighbouring wall, the owner of the neighbouring wall is entitled to compensation for the use of his wall as a party wall.

[*Avenue Realty Co.* v. *Morgan*, 20 Que. K.B. 524, reversed on appeal; *Boyer* v. *Marson*, 15 Que. S.C. 449, discussed.]

2. PARTY WALL (§ I—1)—HOW RIGHT TO USE COMMON WALL MAY BE ACQUIRED—INTENTION.

A neighbouring proprietor may acquire a common wall either by formally indicating his intention to do so, or by performing acts which constitute on his part a desire to make use of the wall. (*Per* Brodeur, J.)

Statement

APPEAL by plaintiffs from the Court of King's Bench, Appeal Side, Province of Quebec in an action as to an alleged party wall, *Avenue Realty Co.* v. *Morgan*, 20 Que. K.B. 524.

The appeal was allowed.

The material parts of the formal judgment directed to be entered by the trial Judge in the Superior Court (Lafontaine, J.), are as follows:—

"Considering that, although making mitoyen a neighbour's wall is a faculty of which the owner of a lot, when building on his property, may make use or not, this faculty ceases and becomes an obligation, where use is made of a neighbour's wall;

"Considering that making use of a wall does not necessarily imply putting beams in it, or resting on it any construction, in whole or in part, but use is also made, in the ordinary and obvious meaning of this word, when, by resorting to devices, things are arranged in such a way, by the owner of a lot adjoining a gable wall, that all the benefit that a wall can naturally confer is obtained for a building, and that the construction of a proper wall is dispensed with;

"Considering that the defendant, on the south side of his property, has, in reality, no wall, and that his partition made of terra cotta, which is covered at the top by pieces of galvanized iron nailed in the plaintiffs' wall to prevent the water and rain from getting in it, forms really only one wall with the plaintiffs' wall;

"Considering that by the arrangement made by the defendant to make use of the plaintiffs' wall and have the benefit of it without paying for it, the defendant has enriched himself unjustly at the plaintiffs' expense;

"Doth reject the plea, maintain the action, and condemn the defendant to pay to the plaintiffs the sum of $4,165.50; and in default of paying the said sum within fifteen days from the judgment, the defendant is ordered to remove his building from the plaintiffs' wall, the whole with interest on said sum and costs."

Statement

The judgment of the majority of the Court of King's Bench, by which the judgment of the Superior Court was reversed was delivered by

LAVERGNE, J. (translated):—The appellant complains of a judgment rendered by the Superior Court on December 30th, 1909, maintaining the respondents' action for the sum of $4,165.50.

Lavergne, J.

The respondents are the owners of a building situated at the corner of St. Catherine street and Union avenue (the Morgan store). They allege that the appellant has built a store upon the neighbouring property on Union avenue and that in building it, it has made use of the gable wall of their building as a common (mitoyen) wall without their consent, in spite of their protests, and without paying their share of the value of the wall, that the value of half the common wall is $4,165.50, which they claim from the appellant and for which they have obtained judgment.

The appellant admits that it built a store on Union avenue next to that of the respondents, but that the respondents have encroached upon its land in building their own store. The appellant reserves its recourse by reason of this fact and denies all the other allegations of the demand.

The evidence shews that the appellant has built a store upon its land next to that of the respondent. This store has its four walls independently of the respondents' neighbouring wall. The wall of the appellant's store which is next to or contiguous to the wall of the respondents' store does not rest against the latter in any way or penetrate it in any fashion. The wall is built of terra cotta, that is to say, a porous brick, it is eight inches thick, it is supported from its base by iron and steel pillars and it has no need of support from the next building. The appellant has put felt-paper upon the outside of the wall; this felt-paper is a couple of lines from the respondents' store. The appellant alleging, as it has done, that the respondent had encroached upon its land, has built its building as near as possible to the respondents'. As I have said above, the building does not rest in any way upon the respondents' and no part of it pene-

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trates the respondents' wall. It is true that if the respondents' building was not there the appellant would have been compelled to cover its wall with cement or metal, because the brick which is used in the construction of the wall deteriorates rapidly when exposed to the weather. The appellant contends that it could not put such a covering on the wall because of the closeness of the respondents' store. It contends that it does not use the respondents' wall in any way although it admits that this wall serves as a shelter and protects its own wall from the weather.

It is admitted on both sides that the two buildings in question are built upon a clayey and unstable soil, and that buildings built on this land are, in spite of all precautions that may be taken, liable to be somewhat unstable. The evidence is to the effect that to-day the two buildings are touching, but none of the witnesses can say whether it is the Morgan building which leans against the appellant's or the appellant's which leans against Morgan's. It is, therefore, quite impossible to pretend that the appellant's building rests upon or penetrates in any fashion the respondents' building.

In order to prevent water from getting in between the two buildings the appellant has placed a metal strip which is fixed both to its own building and to the respondents', as is always done between neighbouring buildings whether the wall is common or not. I do not see any fault on its part in this nor do I see that the conclusion can be drawn from it that the respondents have performed an act of common ownership.

Our law does not seem to have foreseen the situation with which we are concerned and it does not determine in any way how a neighbour can compel his neighbour to acquire the common ownership in a wall.

In our jurisprudence of the Province of Quebec, I only find one case where the question has arisen with some resemblance to the case in which we are concerned; that is the case of *Boyer* v. *Marson*, 15 Que. S.C. 449. In this case the defendant had built a house beside the plaintiff's house and had made use of the wall of the latter as one of the sides of his house. He had filled the spaces between the two walls with mortar so as to make the building weather-proof and his tenants had even papered the wall of the plaintiff's house. The Court of Review decided that the defendant could not use the wall of the plaintiff's house in this manner and attach his building to it, without acquiring the common ownership of the wall.

I do not find any other case in our judicial reports which can be considered to have any analogy to the case under consideration.

It is evident that the appellant's position in the present case is very different from that occupied by the defendant in *Boyer*

v. *Marson*, 15 Que. S.C. 449, where the defendant did without a wall altogether and took one of his neighbour's walls as the side of his house; it is therefore impossible to assimilate this case with that of the parties in the present suit.

It may be said that the appellant in the basement of its building was unable to continue its terra cotta wall for a length of thirty feet because the foundation stones of the respondents' building encroached fifteen inches upon the appellant's property. I should also mention that the plans of the appellant's building were submitted to the building inspector of the city of Montreal and approved by him.

I see nothing in our law, nor in the Code Napoleon upon which ours is based, nor in the jurisprudence, nor in the authorities to be found upon the subject which can compel the appellant to acquire the common ownership of the wall built by the respondents. On the contrary, all the authorities, both those which have been cited and those which I have been able to find, are in favour of the appellant's contention. I will mention the following decisions which are by the Cour de Cessation.

Dalloz, 1859-1-277:—

> Attendu qu'il est constaté par le jugement attaqué que les constructions élevées par la veuve, Huard sur son terrain ne l'ont été qu'à proximité des murs et bâtiment de Turmeau, sans que la dite veuve ait rien appuyé contre ce mur et bâtiment, et sans qu'elle y ait rien introduit; attendu que de pareilles constructions n'impliquent en aucune façon l'acquisition d'un droit de mitoyenneté, et en sont mêmes exclusives d'où il suit qu'en déclarant que les constructions de la veuve Huard ne constituaient point un trouble à la possession du dit Turmeau, et ne pouvait, conséquemment, fonder une action en complainte, le jugement attaqué n'a violé aucune loi.

Fuzier-Herman, Code Civil Annoté, under art. 662:—

> 1o L'art. 662 détermine un des effets spéciaux de la mitoyenneté; il n'est pas susceptible d'extension par analogie. Jugé en ce sens, que celui dont le fonds est limité par un mur mitoyen peut, sans faire en cela acte de mitoyenneté, élever sur son fonds des constructions joignant ce mur ou y aboutissant, si d'ailleurs elles ne s'y appuient, ni n'y pénètre. 2o . . . Et, par suite, ces constructions ne sauraient être considérées comme un trouble à la possession exclusive du mur par le voisin ni, dès lors, donner lieu à une action possessoire.

Cassation, June 20th, 1855 (S. 59*a* 1-707, p. 59; 1151, D. p. 59, 1-277).

Notes by the reporter in Sirey and Dalloz:—

> Les murs d'une propriété, auxquels ont été simplement reliés les extrémités d'un mur construit par un voisin sur son propre terrain, ne peuvent être considérés comme soutenant un bâtiment, au sens de l'article 656, c. civ., et comme devant, à ce titre, donner lieu à une acquisition forcée de mitoyenneté.
>
> L'obligation de l'acquérir la mitoyenneté n'existe pas non plus pour le propriétaire qui ne profite des murs de son voisin qu'indirectement et en ce que les murs lui fournissent une clôture partielle.

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Basing my opinion on these authorities as well as on our Code and our jurisprudence, I consider there is error in the judgment rendered in first instance, and this is the opinion of the majority of the Court. The judgment is reversed and the respondents' action is dismissed with costs.

T. P. Butler, K.C., and *Lafleur*, K.C., for appellants.
T. Brosseau, K.C., for respondents.

Fitzpatrick, C.J.

THE CHIEF JUSTICE, (dissenting):—I agree entirely with the judgment of the Court of Appeal.

Idington, J.

IDINGTON, J.:—The question raised here is whether or not the respondent has so used the wall erected by appellant as entitles the latter to call upon it for payment of half the costs of construction.

The line between these adjacent properties has never been finally determined and seems so doubtful that their respective surveyors employed to try and determine it, found the appellant's wall in part might be upon the ground of the respondent and recommend making a party-wall of it.

But respondent instead of agreeing to that conceived the idea that it might so construct its building as to avoid perceptibly pressing upon or enjoying support from this wall yet enjoy every other benefit that an external or end wall could give it and be free from being called on to contribute to the cost of its erection.

Respondent's architect ingeniously contrived by means of an iron structure rested on the front and rear walls or foundations and on pillars in the basement at a distance of a few feet from the wall in question to avoid putting any beams into the walls as in old days was the common method of support to carry upper part of a building. The iron beams reached up to the edge of the wall in question and so as to enable respondent to say it did not touch the wall, a sheet of paper was put between the end of each of these beams and the wall.

It was thought this was not enough, but a pretence of an end wall was made by building one of eight inches consisting of terra cotta brick which I suppose could be a furring to receive the plastering on the inside. Covered over the roof by usual material the job looked well done and all the protection of any party-wall was got without the expense of paying for half of it.

There were weak spots in the scheme. In the cellar the wall in question was white washed by respondent, no doubt for purposes of light and cleanliness. The terra cotta brick only began with the ground floor and was carried on the iron frame structure I have referred to. And when it became necessary to make the roof complete the respondent used metal flashing which it found necessary to tie to the appellant's wall by nails driven into that. The respondent, therefore, had all the benefits (save the usual

extent of support) a party-wall ever gives by sheltering the occupants of its building from the inclemencies of the weather. The terra cotta unless covered by metal or cement was worthless as an external wall. This was not so covered.

The question is raised whether or not this use of a party-wall is a usage of it that entitles the appellant to compensation.

It is said that so long as the party-wall is not used for support of the building put up against it the appellant has no right to complain. It is by no means clear that this respondent's structure does not derive very substantial support from the stone wall in question. If the foundations of respondent are, as few are, absolutely solid, and can never settle and its structure has been built absolutely plumb, its structure undoubtedly can never rest for support on the party-wall. But if as shewn it rests on a blue clay, liable to give up and produce a settlement, then assuredly the party-wall of stone may become not only a great support and stay, but also a perpetual safeguard that the settlement will on that side be kept nearly plumb. I hardly think the sheet of paper, now most likely ground to powder by the pressure, will help much.

It seems asking rather too much, indeed, to require a good deal of assurance, to obtain such an assurance against the possibilities of the consequences of such settling tendencies and yet to say that this party-wall is of no use to respondent and hence that it does not use it.

But there is more than that; it made, as bound by law, an application to the civic authorities for a permit to build, and in that represented its proposed building to be of four stories in height and the thickness of its external party-wall as follows:—

> Thickness of external walls: 1st, 20 2nd, 16. 4th, 16. 5th..... 6th.....7th.....8th.....9th.....10th..... Thickness of party walls: 1st, 24. 2nd, 20. 3rd, 16. 4th.....5th..... 6th.....7th.....8th.....9th.....10th..... Are the party walls solid or vaulted: *Solid.* External walls.....

Either it was intended to use this wall now in question or it was not.

Certainly if it was intended to use this appellant's wall as a shield against prosecution the respondent ought not to be heard to say it did not use it. And if it was not intended to use it but to rely on the terra cotta structure as an external wall then that was something like fraud upon the authorities. I prefer believing respondent's application and intention were honest. Indeed I hardly think it should be allowed to say otherwise.

The inspector says:—

> Q. In other words, they used M. Morgan's wall as their outside wall, is that the case? A. Well, I do not know if I can answer that way. But what I know is that there was a wall there, and they came to my office to ask me if I would accept a terra cotta wall hanging on steel joists and beams. I told them it was unnecessary, as there was a strong

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wall there. They said that they did not want to use this strong wall, but wanted a terra cotta wall independent of Morgan's wall. I said if Morgan's was not there you would have to build according to your application, because it would not answer the purpose of the by-law.

Q. You could not have a terra cotta wall without anything outside? A. No, you cannot have an exterior wall built of terra cotta only eight inches.

Q. That would not have been a wall? A. No, not an external party wall.

Q. As a matter of fact there was no wall built by them at all that would be allowed as an exterior wall? A. No, there was none.

Even without more than using the wall to nail the roof to and finish the protection against the weather which this wall in question gave respondent, I incline to think it made that use of the wall that requires it should pay for it.

The mere accidental shelter a wall gives, say to a tent, though beneficial as sheltering from the wind, can give no right of compensation. But this design shews a great deal more. It is a use of a wall for all the purposes for which an external or party-wall is needed and the very effort put forth to avoid, by the design adopted, giving compensation, shews a desire to use the wall in the common acceptation of the term.

It is not the mere support involved and usually referred to that determines the limit of the law in this regard. The law gives the right to use such a wall and implies the corresponding obligation to pay for it. It saves wasting money, and he thus saved (as the respondent was) must pay for the use he has made of the privileges the law gives.

Modern ingenuity and skill may enable a dispensation of the use of the old devices as to support, but does not avoid the application of the principle the law always carried in it and which when applied here seems to me to bind the respondent to pay for the benefits it enjoys thereunder. Without this wall it would have had to build another such as specified by itself for external walls.

The appeal should be allowed with costs here and in the Court of Appeal and the judgment of the learned trial Judge be restored.

Duff, J.

DUFF, J.:—The evidence is sufficient to establish the conclusion that the appellant's wall serves the purpose of an exterior wall in the protection of the respondents' building. The respondents' architect admits as much, and the municipal inspector makes it clear that it was because of the juxtaposition of the appellant's building that the respondents were allowed to proceed with the erection of their building without constructing an exterior wall on the south side. It is really not disputed that the respondents have intentionally and deliberately availed themselves of the appellant's wall for all the purposes of an exterior wall except

support; and there can be little doubt that they constructed the building in the full expectation that when it had settled into its permanent position it should receive support also from the appellant's wall. The respondents have no doubt struggled hard to avoid the burden while enjoying the benefit, but I think they have not succeeded. I agree with reasons given by Mr. Justice Trenholme and by the trial Judge.

ANGLIN, J.:—Although the evidence is probably insufficient to establish that it was the intention of the defendant company that its building should receive lateral support on its southern side from the north wall of the plaintiffs' building, or that it in fact receives such support, the use made by the defendants of the plaintiffs' in my opinion constituted it a party wall. By an ingenious method of construction the defendants have, perhaps sufficiently, provided for the support of the eight inch terra cotta structure, which they call the south wall of their building, without without its receiving actual support from the plaintiffs' north wall. But the latter wall is none the less made use of by the defendants in many respects as an external wall of their building.

But for its contiguity the by-laws of the city of Montreal, if enforced as we must assume they would have been, would have prevented the erection of the defendant's building, having for its south wall merely an eight inch terra cotta structure. The evidence indicates that the civic authorities permitted the building to be constructed as it was solely because it was represented to them that the plaintiffs' north wall would be used as a party-wall. The defendants have in fact no other south wall of any kind in their basement. They have whitened the face of the plaintiffs' wall which serves as the south side of their cellar rooms. They have actually connected the top of their terra cotta structure with the north wall of the plaintiffs' building by the use of metal flashing. Without the covering afforded by the plaintiffs' wall, the defendants' terra cotta structure would not at all have answered the purpose of an external wall. It is in fact the plaintiffs' wall which partially at least serves that purpose. In these circumstances I am satisfied that the defendants have taken such possession and have made such use of the plaintiffs' wall that they should not be allowed to escape liability to pay one-half the cost of so much of it as they have thus taken advantage of.

In an attempt to evade this liability—noteworthy for its cunning rather than for its honesty—they have, no doubt, not made the full use of the plaintiffs' wall which they might have made of it as a party-wall. But they have made and are making a use of it which they cannot honestly enjoy without assuming the obligations incident to its existence as a party-wall. It is gratifying to me that the law, as I understand it, does not require us to reach a conclusion not consonant with common honesty, which would be the result of upholding the respondents' contention.

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Brodeur, J.

For these reasons and those stated in the opinions of the learned trial Judge and of Mr. Justice Trenholme, who dissented in the Court of Appeal, I would respectfully allow this appeal with costs in this Court and in the Court of Appeal, and would restore the judgment of the trial Judge.

BRODEUR, J. (translated):—The question is whether the respondent has made use of the wall erected by the appellant upon the division line between their properties and whether it is obliged to pay him half the value of it.

It is quite evident that under the municipal by-laws the respondent's building would be illegally constructed if the respondent did not utilize the wall in question.

The municipal authorities when they issued the building permit understood that this wall would be used and the respondent for that reason was relieved from building one as required by the by-laws of the city of Montreal. But when it was put in default by the appellant to pay half the value of the wall it replied that it had no need for it.

The ingenious proceedings to which the respondent had recourse violate the elementary principles of justice and equity and it cannot be permitted to enrich itself at the expense of another.

It placed in the upper storey of its building a terra cotta wall which as is proved could only serve for an interior wall and could never be used for an exterior wall unless it was covered with metal or a layer of cement.

The respondent did not see fit to continue the terra cotta wall in the basement and there the wall of the plaintiff, appellant, forms the division between the two properties.

The respondent left between its terra cotta wall and the plaintiff's wall a space hardly wide enough to admit a sheet of paper. As the ground is not very solid in this locality the thing which was bound to happen occurred, the two buildings came together and they rest one upon the other.

The respondent, however, could not be content to remain in such a position because rain water would inevitably have entered between the two walls and have disintegrated the terra cotta and rendered its house uninhabitable. Therefore it joined the upper part of the terra cotta wall with the plaintiff's wall by a metal strip which it nailed down firmly. It therefore performed an act of ownership upon the wall by introducing into it these nails and the metal strip.

The law declares that walls are presumed to be common (art. 510 C.C.).

It seems clear to me that if at a later date the Courts had to pronounce on the nature of the wall in question they would consider it common. The use the respondent has made of it

in the basement, the metal strip which has been introduced and nailed to it above would cause the wall built by the plaintiff to be taken as a common wall serving both houses inasmuch as the terra cotta wall which was there could no more be considered as the exterior wall of the respondent's house than could the plaster placed by the plaintiff, appellant, on his own side.

The respondent could indeed acquire the right of common ownership (*mitoyenneté*) by agreement with the appellant. That is a right which the law gives it (article 518 C.C.). But if, instead of proceeding in this manner it makes use of the wall which was built entirely by its neighbour, it is clear that in such a case the latter can sue for damages and demand the destruction of the bad job, to make use of the expression of Fuzier-Hermann (Repertoire, Vo. Mitoyenneté, No. 222). Can he not also, if he prefers it, consider the respondent as having tacitly shewn a desire to acquire the common ownership, and claim from it the payment of half the value of his wall? The jurisprudence and the authorities do not hesitate to go as far as this (Fuzier-Hermann, Vo. Mitoyenneté, No. 223).

A neighbouring proprietor may then acquire a common wall either by formally indicating his intention to do so or by performing acts which constitute on his part a desire to make use of the wall.

The authors call this latter case usurpation of common ownership and the person who resorts to it becomes equally responsible as if he had formally demanded the forcible cession of the wall.

The act is equivalent to the contract of cession itself (Dijon, January 21, 1880; Recueil, arrêts de Dijon 1880, 151).

When is a wall usurped? This is a question of fact of which the Court of first instance should be the sovereign judge especially if as in the present case the evidence is somewhat contradictory.

The learned judge who heard the case in the Superior Court found that the respondent was making use of the wall of the plaintiff, appellant. It is not necessary in order that a wall should be common that beams should be introduced into it; but it may be made use of and the person using it rendered responsible when by recourse to methods which are more ingenious than honest the owner of a lot adjoining the wall gets all the advantage he can from it and thereby avoids the necessity of building one himself.

The Canadian jurisprudence only gives one case where this question was raised: This is the case of *Boyer* v. *Marson*, 15 Que. S.C. 449, where it was decided that the defendant who had built close to the plaintiff's house without making a wall but who had filled the space between his roof and the neigh-

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bouring wall with mortar was obliged to pay for half the wall. There, there was also the fact that the defendant's lessees had papered the wall. The situation was almost the same as in the present case. In fact the upper part had been filled with mortar whereas in our case a metal strip was nailed to the plaintiff's wall. The wall there had been papered. In our case the part of the wall in the basement had been white-washed.

The respondent cited before this Court two decisions which were rendered by the French tribunals and which are reported in Dalloz, 1859-1-277, and Sirey 1898-1-503.

The first of these decisions is to the effect that the erections had only been made near the neighbour's wall and they had not *penetrated it or used it for support* and that the possessory action which had been instituted by the neighbour should not be maintained as the erection did not constitute a disturbance in his possession.

The second of these decisions was rendered under the provisions of article 656 of the Code Napoleon which differs appreciably from our corresponding article 513 C.C. This judgment, moreover, rests not upon the obligation of the neighbouring proprietor to contribute to the cost of the wall of which he made use by usurpation, but upon the right which the owner has to renounce or abandon the common ownership. These decisions of the French Courts, therefore, do not decide the point which arises in the present case.

Moreover, the two articles as may be seen are by no means the same. Article 656 of the Code Napoleon and article 513 of our Code are as follows:—

> Article 656 C.N. Cependant tout co-propriétaire d'un mur mitoyen peut se dispenser de contribuer aux réparation et reconstructions en abandonment le droit de mitoyennété, *pourvu que le mur mitoyen ne soutienne pas un bâtiment qui lui appartient.*
>
> Article 513 C.C. Nevertheless every co-proprietor of a common wall may avoid contributing to its repair and re-building by abandoning his share in the wall *and renouncing his right of making use of it.*

These judgments recognize the right of the neighbouring proprietor to abandon the common ownership when the wall does not support his house. In our Code, on the contrary, it is stated that the abandonment cannot be made if the neighbour is using the wall.

I should add that, furthermore, the jurisprudence in France is unanimous on this point as can be seen by a decision reported in Dalloz, 1870-2-217.

I have italicized the portions of the two articles which differ. I recognize that the difference is not very great but it shews that our law renders the co-owner responsible more easily than does the French law. Under the Code Napoleon the right

of abandoning can only be exercised in the case where the wall does not support the neighbouring building; while under our Code the simple utilization of the wall prevents the exercise of such a right.

For these reasons I have come to the conclusion that the plaintiff's action should be maintained and that the defendant, respondent, should pay him for half the wall in question.

The appeal should be maintained with costs both in this Court and in the Court of Appeal and the judgment of the Superior Court should be confirmed.

Appeal allowed.

PIGEON et al. v. PRESTON.

Saskatchewan Supreme Court, Wetmore, C.J., in Chambers. October 5, 1912.

1. INJUNCTION (§ III—160)—DESCRIPTION OF LANDS ERRONEOUS—AMENDMENT CORRECTING—FORCE OF, SUSPENDED FOR INTERVAL.

Upon an application to amend an injunction, in an action in which the plaintiff (a sub-lessee) claimed against the defendant (assignee of the fee in the demised premises) damages for wrongful distress, and an injunction limiting the right to distrain, and where the injunction, statement of claim, lease, and sub-lease, all erroneously described the demised premises as "lot 7, block 150" instead of "lot 7, block 152"; leave to amend will be granted, but with the proviso that no process for contempt shall lie against the defendant for any act in the interval between the service of the original injunction order and the amendment, with respect to "lot 7, block 152."

Statement

AN application by the plaintiffs to amend the injunction order granted, and to continue the injunction as amended, and also to amend the statement of claim and adding a further claim thereto.

The application was granted but with costs to the defendant of opposing the application.

J. N. Fish, for plaintiffs.

H. V. Bigelow, for defendant.

F. G. Wheat, for the Starland Limited.

Wetmore, C.J.

WETMORE, C.J.:—The statement of claim in this action sets forth that one Thomas Wesley Buckley leased to the Starland Limited, lot No. 7, in block 150, according to a plan of record in the land titles office for Saskatoon; that the Starland Limited entered into possession; that Buckley subsequently sold the property to the defendant, who is now the owner; that the Starland Limited assigned the lease from Buckley to the plaintiffs, who went into possession; or in the alternative, that the Starland Limited sub-let the lot to the plaintiffs, who went into possession; it being a term of the assignment, or sub-lease, as the case might be, that the plaintiffs should pay the rent to the defendant.

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The claim then goes on to set forth a number of acts on the part of the defendant claimed to be unwarranted in law, and that the defendant has notified them that the lease is at an end; and it seeks a declaration that the lease is valid, damages for wrongful distress, and other wrongs, and an injunction to restrain the defendant from distraining. An injunction order was granted by my brother Johnstone on the 27th July last, restraining the defendant and his agents until the 17th September from distraining the goods and chattels on this lot 7, block 150, for any greater sum than $175 a month, being the rent reserved under the lease between Buckley and the Starland Limited. It is claimed that this property was wrongly described in all these documents to which I have referred, beginning with the agreement or lease from Buckley to the Starland Limited. It should have been described as lot No. 7, block 152, and this mistake is carried through the statement of claim.

An application was made to me in Chambers under notice of motion to amend the injunction order by substituting "block 152" for "block 150," and to continue the injunction as so amended until the final determination of the action or further order. At the same time an application was made to amend the statement of claim by substituting block "152" for "150," and adding to the prayer for relief an order for rectifying the agreements and documents of title in question, and to add the Starland Limited as party defendant. In so far as amending the statement of claim is concerned, practically a new statement of claim was drawn, which it is asked to substitute for the original, but it really does not practically differ from the original statement of claim except as I have above set forth. No objection was raised to the amendment of the statement of claim, and I do not understand that any serious objection was raised to the amendment of the injunction order. No objection was raised to the adding of the Starland Limited. Under such circumstances I do not see that any injustice will be done in allowing the amendment. The injunction order will, therefore, be amended accordingly as applied for, and continued as amended until the termination of the action or further order of the Court or Judge, but with the understanding that no process for contempt is to be brought against the defendant for anything done by him between the date of service of the injunction order and the date of this amendment with respect to lot No. 7, block 152. The statement of claim will be amended as applied for, and the plaintiffs will be at liberty to amend by making the Starland Limited a party defendant. The plaintiffs, however, must pay the defendant's costs of opposing the application to amend the injunction order, and statement of claim, to be paid forthwith after taxation.

Judgment accordingly.

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Ontario High Court. Trial before Mulock, C.J.Ex.D. September 11, 1912.

1. Logs and logging (§ I—2)—Compensation for driving—Levying tolls—Rights of boom company—Absence of implied contract.

Where a lumber company in the course of its logging operations banked its logs on the ice during the winter season, and in the spring the logs were floated down to a river and then driven down the river to the mills where they were to be sawn, the character of the river being such that it would be impracticable to float or drive the logs in cribs or boomed together, the fact that the lumber company, in common with other operators, floating and driving their logs in single pieces allowed them to become intermixed and in this intermixed condition to pass into certain works erected in the river, which did not in any way improve its floatable character, by a boom company incorporated under the laws of a foreign country, does not constitute an implied request to separate the logs; and the lumber company, deriving no benefit from the interference with the logs by the boom company, and having forbidden the boom company from so interfering, a contract will not be implied to pay the tolls fixed by the boom company, although under its powers as amended, the boom company had authority to construct the works and to collect tolls and charges for such services.

2. Logs and logging (§ I—8)—Compensation for sorting—Rights of boom company—One log owner requesting sorting—Liability of log owner who forbids meddling with his logs.

Where as the result of common action, logs of different log owners become intermixed in their course down a floatable stream, the cost and expense of separating and securing the same, shall be paid by each individual log owner, and if one log owner requests a boom company to separate his logs from the intermixed logs, no implied contract with another log owner can be presumed on the part of the boom company to entitle it to recover for services rendered in connection with this separation of the logs especially where such last-mentioned log owner had forbidden the boom company from interfering or meddling with his logs.

[See the Saw Logs Driving Act, R.S.O. 1897, ch. 143, secs. 9 and 10.]

3. Boundaries (§ I—2)—River forming international boundary—Right to use—Ashburton treaty, 1842.

The right to navigation of the Rainy river is free and open to the use of the subjects of both Canada and the United States, as provided by the terms of the Ashburton Treaty of the ninth of August, 1842, entered into between Great Britain and the United States, by which the said river was established as an international waterway, its *thalweg* constituting the boundary line between the Dominion of Canada and the United States of America.

[*Namakan* v. *Rainy Lake River Boom Corporation*, 132 N.W. Rep. 259, specially referred to.]

4. Constitutional law (§ II A 2—194*a*)—Rights and liabilities of a foreign boom corporation — Construction of works on Canadian side of international boundary — Diversion of property in possession of foreign company.

A foreign boom company is not entitled to construct or maintain its works or any portion thereof within Canada and the construction by a boom company, whose amended articles of incorporation by the State of Minnesota purported to confer upon it powers for "the improvement of the Rainy river from its mouth at the Lake of the Woods to the falls of the said river at International Falls . . . and to drive, tow, boom, assort, hold, distribute and otherwise handle

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logs . . . in said river and to collect tolls and charges for such services," etc., of a sheer boom and part of its main boom wholly on the Canadian side of the boundary line between Canada and the United States by means of which logs of a Canadian log owner were diverted into the possession and control of the foreign boom company, is illegal.

5. EVIDENCE (§ II B—105)—ONUS OF PROVING AFFIRMATIVELY ALLEGATIONS —UNLAWFUL WORKS IN INTERNATIONAL RIVER—CLAIM FOR SERVICES.

The onus is upon a boom company whose unlawful operation in the wrongful construction of works in an international river causes confusion in connection with the driving of logs down the said river and which claimed the right to recover for services rendered in respect to the booming, sorting, rafting and driving of the logs, to shew affirmatively the quantity of such logs which lawfully came into its possession.

[*Warde* v. *Eyre*, 2 Bulst. 323, applied.]

6. TROVER (§ II—33)—DEALING WITH GOODS WRONGFULLY HELD—COMPENSATION FOR IMPROVEMENTS.

If a person wrongfully takes possession of chattel property belonging to another and, whilst in possession thereof, alters, improves or otherwise deals with it, he is not entitled to payment for such services.

[*Hiscox* v. *Greenwood* (1803), 4 Esp. 174; *Cheshire Railroad Co.* v. *Foster* (1871), 51 N.H. 490; *Purves* v. *Moltz* (1867), 5 Robertson (N.Y.) 653; *Silsbury* v. *McCoon* (1844), 6 Hill (N.Y.) 425; *Bryant* v. *Ware* (1849), 30 Me. 295, specially referred to.]

7. TOLLS (§ I—15)—RIGHT OF PERSON MAKING IMPROVEMENTS IN HIGHWAY TO CHARGE TOLLS TO USERS—WATER OR LAND.

In the absence of the authority to exact tolls and in the absence of a contract express or implied on behalf of the users of improvements on a highway to pay tolls, the person erecting improvements has no right to exact tolls from the users thereof whether the highway be on water or on land.

[*Tanguay* v. *Price*, 37 Can. S.C.R. 657, specially referred to.]

8. TREATIES (§ I—10)—THE ASHBURTON TREATY—EFFECT ON CHARTER OF CORPORATION WITH POWERS CONTRAVENING PROVISIONS OF TREATY —ULTRA VIRES.

A charter granted by the Legislature of the State of Minnesota empowering a boom company to construct works in the Rainy river and granting permission to collect tolls from the users of the said works is *ultra vires* and null and void, as being contradictory to the provisions of the Ashburton Treaty, and this, notwithstanding that the boom company had secured a permit for the extension of their operations from the War Department of the United States Government.

Statement

ACTION to recover certain sums of money from the defendant company for booming, sorting, rafting, and driving the defendant company's logs down the Rainy River during the years 1906 and 1907.

The action was dismissed with costs.

G. F. Shepley, K.C., for the plaintiff company.

G. H. Watson, K.C., and *Strafford Watson*, for the defendant company.

Mulock, C.J.

September 11, 1912. MULOCK, C.J.:—It may be convenient to refer to the plaintiff company as the Boom company and to the defendant company as the Lumber company.

The Boom company was incorporated by articles of incorporation issued under the laws of the State of Minnesota and dated the 23rd February, 1889, which articles purported to empower the Boom company to construct and maintain booms and other works on the Rainy River, to drive and sort logs passing through its booms, and to charge tolls for the services so rendered. Thus authorised, the Boom company, in or about the year 1889, constructed a portion of its works. On the 27th February, 1905, amending articles were issued declaring that the general nature of the Boom company's business should be "the improvement of the Rainy River from its mouth at the Lake of the Woods to the falls of said river at International Falls . . . by cleaning, deepening . . . the channel . . . and so keeping and maintaining said river and the said improvements and works in repair as to render driving logs and floating timber thereon reasonably practicable and certain, and to drive, tow, boom, assort, hold, distribute, and otherwise handle logs . . . in said river . . . and to collect tolls and charges for such services," etc.

On the 6th April, 1905, the War Department of the Government of the United States granted a permit to the Boom company to extend, and thereupon it did extend, its works easterly.

The general nature of these works may be described as follows. Piles were driven along the stream at places sometimes in the middle and at others near to but not in the middle of the stream, and booms connected by chains were secured in a continuous line along these piles up the stream, except where at one place towards the easterly end an opening was left for the purpose of enabling vessels to pass through. To the east of this opening was erected a sheer-boom, which ran in a north-easterly diagonal direction across and up the stream to the Canadian shore. At the lower or westerly end of the main boom were cross-booms, sorting-gaps, and pockets, whereby logs could be held and sorted.

The Lumber company is a corporation incorporated under the laws of the Province of Ontario, and carries on its lumbering business in that Province. Its saw-mills are situate in Ontario, on the northerly shore of the Rainy River, some distance below the westerly end of the Boom company's works, and the logs in question were cut on Canadian limits for the purpose of being manufactured into lumber at the Lumber company's mills in the said Province of Ontario. In connection with its mills, the Lumber company had also erected a boom, some two and a half miles in length, along the Rainy River, for the purpose of catching and securing its logs as they floated down the river. This boom was in existence and in effective condition in the years 1906 and 1907, and was then sufficient to enable the Lumber company to separate from the logs of other persons all its own logs as they floated down the river and to take proper care of them.

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The Rainy River commences at the foot of Rainy Lake, being separated therefrom by the International Falls, and flows westerly some eighty miles into the Lake of the Woods. Throughout its whole length it is a navigable river, floatable for logs from shore to shore, and is several hundred feet wide, with a current of from two to three miles an hour, and its floatable character was not improved by the Boom company's works.

A number of lumber companies, including the defendant company, conduct lumber operations on the upper waters tributary to the Rainy River, floating their cuts of logs down to their respective mills, situate along the river bank. Their practice is to cut logs in the winter and haul them on the ice. Then in the spring the logs mix together and float down the river towards the mills, each mill having certain boom accommodations of its own. One of these companies is the Rat Portage Lumber Company, which owns two mills; one situate higher up the river than are those of the defendant company and other of the mill-owners. Its other mill is at Kenora, at the foot of the Lake of the Woods. At the westerly end of the Boom company's boom it is necessary to separate the logs of the Rat Portage Lumber Company from those of the other owners operating lower down the river.

The Rat Portage Lumber Company controls the Boom company, and it would seem that the original object for which the latter's boom was constructed was to enable the Rat Portage Lumber Company to separate its logs from those of other companies.

The Rainy River runs between the Province of Ontario and the State of Minnesota, and under the Ashburton Treaty it is established as an international river, and its thalweg constitutes the boundary-line along its course between Canada and the United States.

The Lumber company erected its mills and booms in the year 1904, and in the years 1906 and 1907 continued lumbering operations on its limits in the vicinity of Rainy Lake, watering its logs in that lake and its tributaries, in common with the logs of other lumbermen, all of which, mixed together, floated down the lake, over the falls and into the Rainy River. At this point, if uninterfered with, the logs would have distributed themselves over the whole river on their way down, although probably the greater proportion would have been carried by the current towards the southerly side of where is now the Boom company's boom, but the sheer-boom caused all the logs to pass to the south of and inside the main-boom, thereby preventing a substantial portion of them floating down (which they otherwise would have done) in Canadian waters along the north side of the boom. The Lumber company, being prepared to separate its logs from the rest, objected to the Boom company handling or in any way

interfering with them. The Boom company, however, at the westerly end of its works, required to separate the logs of the Rat Portage Lumber Company from those of the other mill-owners, and did so by allowing, during the years 1906 and 1907, all the logs except those of the Rat Portage Company to pass unsorted through the sluiceways, each company, including the Lumber company, separating its logs from the others as they floated down the river, after having passed the westerly end of the plaintiff company's works. The Rat Portage Company's logs thus separated amounted to about one-third of the whole quantity, and the only service rendered to the Lumber company by the works and operations of the Boom company in respect of the logs of 1906 and 1907 was this separation of the Rat Portage Lumber Company's logs from the rest of the logs. There is no evidence shewing that the Boom company's works and operations benefited the Lumber company by preventing its logs of 1906 and 1907 coming to its works in undesirable quantities. There is a conflict of testimony as to whether the Boom company sorted the logs of 1906 and 1907 into separate pockets for the respective owners; but I accept Mr. Matthieu's evidence that the only sortation was in respect of the Rat Portage Lumber Company's logs. The extent, however, of the sortation does not determine the question of liability, but merely goes to that of the damages, if any, to which the Boom company may be entitled.

The Boom company rests its right to payment for whatever services it may have rendered to the Lumber company on two grounds: first, implied contract; and second, legal authority to maintain the works and to charge and collect reasonable tolls for services rendered.

As to the first ground, Mr. Shepley's argument is, that, the Boom company having erected its works, the Lumber company, by allowing its logs to be mixed with those of other owners and to pass into the Boom company's works, rendered a separation necessary, and thus impliedly requested the Boom company to make that separation for reward. It is true that the Lumber company caused its logs to be deposited on the ice during the two winters in question. Other operators having acted similarly, the whole cut became mixed and required separation; but such action on the part of the Lumber company did not, I think, constitute an implied request to the Boom company to make that separation. The destination of the Lumber company's logs was its mills on the Rainy River. There it had erected booms, pockets, and other devices, whereby, if permitted to use the river uninterfered with and unaided by the plaintiff company's works, it could have separated and taken care of its own logs. All the witnesses agree that, having regard to rapids and other conditions above Rainy River, it was impossible to float the

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Lumber company's logs in cribs or in any other way than as separate single pieces. Unless, therefore, that method of floating was adopted, the Lumber company would have been unable to make use of its standing timber. Thus it was necessary to float its logs loose from the limits by the route pursued to the Rainy River. This necessity, and the fact that the Lumber company was deriving no benefit from the unauthorised interference of the Boom company with its logs on the way to the mill, and had forbidden it to interfere with them, negative the inference of an implied contract.

Mr. Shepley argued the case as if the Lumber company was solely responsible for the mixing of its logs with those of other owners, and, therefore, was liable to the other owners for the cost of unmixing. Such, however, is not this case. The mixing was the result of common action. If the Boom company had been one of the owners, it would have had to share the responsibility for such mixing; and its only right, I think, would have been to remove its property at its own expense; but, whether such be the law as between different owners, I fail to see how a stranger can step in, and, against the protest of an owner, meddle with his property, and then in his own name maintain an action for such services. If, at the request of the Rat Portage or any other company, it performed any service, it may have a cause of action against such moving company, but not, on an implied contract, as against the present defendant company.

For these reasons, I am of opinion that the defendant company is not liable to the plaintiff company on any implied contract.

The other ground on which the Boom company rests its claim is, that it is legally entitled to maintain its works as a whole, including the sheer-boom, which is wholly within Canadian territory, and, by means of its works, to take and retain possession and control of the Lumber company's logs as they float down the stream and until they are caught by the cross-booms and sorted into pockets, and to charge the company for such service. The Lumber company denies the right of the Boom company to interfere with its logs or to payment for such services.

Much the same question as is involved here came before the Circuit Court of the State of Minnesota, and was there determined adversely to the Boom company, and that decision is pleaded in bar to the present action.* By the treaty between Great Britain and the United States of the 9th August, 1842, commonly known as the Ashburton Treaty, the Rainy River

*See *Namakan Lumber Co.* v. *Rainy Lake River Boom Corporation*, 132 N. W. Rep. 259; *Shelvin-Mathieu Lumber Company* v. *Rainy Lake River Boom Corporation*, 132 N. W. Rep. 263, and *International Boom Company* v. *Rainy Lake River Boom Corporation*, 97 Minn. R. 513, 112 Minn. R. 104.

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is made part of the boundary-line between Canada and the United States, the treaty declaring that it "shall be free and open to the use of the subjects and citizens of both countries." The middle of the channel, or thalweg of the river, marks the line of separation between the two countries (Wheaton's Elements of International Law, 4th ed., p. 297), this treaty confirming the presumption of law that the right of navigation is common to them both.

The sheer-boom is a necessary and material part of the Boom company's works. Without it, a substantial portion of the logs in question would have floated down the river on the north side of the boom. This sheer-boom, however, diverted many (although what quantity cannot be determined) from their natural course into the Boom company's works. The sheer-boom, built wholly on the Canadian side of the dividing line between the two countries, has no legal authority for its existence. No legislation of a foreign power could entitle the Boom company to erect or maintain this sheer-boom, and by means of it to divert the property of a Canadian citizen from Canada into the United States, and there to cause it to pass into the custody and control of a foreign corporation. Such was the practical effect of the maintenance of the sheer-boom, as regards a substantial portion of the logs in question. Thus the Boom company illegally acquired possession of a portion of the Lumber company's property, removed it from Canada, and now claims compensation for services in respect thereof. If a person wrongfully takes possession of a chattel property of another, and, whilst in such possession, alters, improves, or otherwise deals with it, he is not entitled to payment for such services: *Hiscox* v. *Greenwood* (1803), 4 Esp. 174; *Cheshire Railroad Co.* v. *Foster* (1871), 51 N.H. 490; *Purves* v. *Moltz* (1867), 5 Robertson (N.Y.) 653; *Silsbury* v. *McCoon* (1844), 6 Hill (N.Y.) 425; *Bryant* v. *Ware* (1849), 30 Me. 295.

The evidence shews that, without the sheer-boom, some of the Lumber company's logs would have floated down the river on the north side and others on the south side of the boom, but what proportion in each case is quite uncertain. The direction and velocity of the winds, the quantity of logs in the river at one time, also the proportions of the Lumber company's logs and other owners' logs then floating together, are all factors which would have affected the course taken by the logs. There is no evidence shewing to what extent these influences affected the direction taken by the Lumber company's logs in the seasons 1906 and 1907.

The Boom company claims at the rate of thirty-five cents per thousand feet, board measure, of logs of the Lumber company passing through its works during those years; but, even if entitled to payment at that or any other rate for

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such logs as, if uninterfered with, would have floated inside its works, it seems to me impossible to determine the proportion not affected by the wrongful action of the Boom company in taking possession of a portion of the Lumber company's logs by means of the sheer-boom. To do so, it would be necessary to deduct from the mixed mass of logs that passed through the boom of the company's works in the two years in question the quantity of the Lumber company's logs wrongfully taken possession of by means of the sheer-boom. To say what that quantity was would be the merest guess-work. There is no reasonable evidence whereby to determine it.

Even if the Boom company were otherwise entitled to recover for services in respect of logs lawfully in its possession, inasmuch as the confusion was caused by its unlawful acts, the onus is upon it to shew affirmatively the quantity of the defendant company's logs which lawfully came into its possession. For reasons already given, there is no evidence from which this can be shewn; and, therefore, the Boom company cannot recover: *Warde* v. *Æyre* (1615), 2 Bulstr. 323; *Anon.* (1594), Poph. 38.

On another ground I think the plaintiff company's action must fail. All the works in question constituted one structure. It may have facilitated the flotation of logs; but, treated as a whole, it was in the river without legal authority. A bridge along a public road may be a necessity; but, if erected without legal authority, its mere construction does not authorise the person building it to exact tolls from the public, who in using the bridge are still exercising their right to travel, free of tolls, along the highway. In the absence of authority to exact tolls, or in the absence of a contract, express or implied, on the part of users of improvements on a highway to pay tolls, the person erecting such improvements has no right to exact tolls from such users. The principle is the same whether the public way be on the water or on the land. Here, in spite of the illegal works on the river, it remained *publici juris*.

As said in *Tanguay* v. *Price* (1906), 37 Can.S.C.R. 657, 667: "The defendant's logs were lawfully in the river while on their way down, and until they were stopped by the plaintiff's barrier, and they continued to be lawfully there after they were stopped. . . . The service rendered to the defendant by the plaintiff's boom, although of great value, was involuntary and accidental, and could afford no ground of action."

Thus far I have dealt with the question in the view that the sheer-boom is an inseparable part of the Boom company's works; but, assuming that it is not, then the question is, can the plaintiff company recover in respect of the remainder of the works? The main-boom, beginning at the west end of the gap below the sheer-boom, extends westerly down the river some

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two and a half miles, when it reaches the catch booms, pockets, etc.

I accept the evidence of Euclid I. Bourgois as to the position of this main-boom in its relation to the thalweg, and find that the easterly one-half mile of this main-boom is wholly within Canadian territory, its easterly end being three hundred and ten feet north of the thalweg, and it being at the point marked "2" on exhibit 17 (being a point about half a mile further westerly), three hundred and forty feet north of the thalweg.

This portion of the main-boom, like the sheer-boom, is unlawfully in the river. If it and the sheer-boom had not existed, it is reasonable to suppose that many more logs would have passed down the river on the Canadian side of the boom. Witnesses speak of the logs coming over the falls, at times, in quantities sufficient to cover the river from bank to bank.

There was some opinion evidence as to what proportion of logs was diverted by the sheer-boom inside the plaintiff company's works, but it is valueless, there being no reliable data from which to form such opinion; there is an entire absence of evidence as to the effect of the illegal half mile of boom structure.

What I have said in respect of the legal consequence of the existence of the sheer-boom applies also to the case of the unlawful half mile of main-boom.

But, apart from the question whether the works of the plaintiff company, in whole or in part, are lawfully in the river, it is to be observed that the right to erect and maintain them is quite different from the right to collect tolls, which is the only issue involved in this action. The defendant company is asking no relief, but simply resisting a money claim. The works may or may not improve the navigability of the river; they may or may not be lawfully there; but, so far as the defence is concerned, the sole question is, whether the plaintiff company is entitled to recover money damages in respect of the defendant company's logs which passed through the works in the years 1906 and 1907.

The legislation of the State of Minnesota is the only legislative authority upon which the plaintiff company relies as authorising it to impose tolls. Had the State Legislature power to grant such authority?

Under the Ashburton Treaty, the citizens of the two countries became entitled to the free use of the river. The Legislature of the State of Minnesota has purported to deprive them of that right by granting permission to the plaintiff company to exact tolls. The undisputed evidence is, that the State Legislature had no jurisdiction so to repeal that clause in the treaty.

I, therefore, think that the provision in the plaintiff company's charter purporting to entitle it to impose tolls or other charges is *ultra vires* the State Legislature and null and void.

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The permit granted by the War Department does not assist the plaintiff company; it merely sanctions an extension of its works, subject to the condition that "the company shall not exact tolls or charges for the passage of logs or rafts or other forms of navigation."

Mr. Shepley sought to shew that this condition was void. It is not, however, necessary to determine that point; but it is sufficient to say that nothing in the permit authorises the imposition of tolls or other charges.

I, therefore, think that the plaintiff company has no legislative authority to exact tolls or other charges.

Notwithstanding the existence of the plaintiff company's works, the navigation of the river for all purposes remains free to each citizen of the two countries, unless he shall by contract, express or implied, deprive himself of such right.

The defendant company has not so deprived itself; and, therefore, the plaintiff company is not entitled to maintain this action, which is dismissed with costs.

Action dismissed.

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BANK OF OTTAWA v. ADLER.

British Columbia Supreme Court, Murphy, J. September 9, 1912.

1. JUDGMENT (§ I F—46)—MOTION FOR SUMMARY JUDGMENT—LEAVE TO DEFEND.

Upon a motion for summary judgment upon a specially endorsed writ in an action by the endorsee of a promissory note against the maker, the latter is entitled to unconditional leave to defend on shewing by affidavit that it was obtained from him by fraud on the part of the original payee.

[*Flour City Bank* v. *Connery*, 12 Man. L.R. 305; *Fuller* v. *Alexander*, 52 L.J.Q.B. 103, 47 L.T. 443, and *Millard* v. *Baddeley*, W.N. (1884) 96, applied.]

Statement

MOTION for judgment under order XIV., marginal rule 115, of the B.C. Supreme Court Rules 1906.

J. K. Macrae, for plaintiff.

W. A. Macdonald, K.C., for defendant.

Murphy, J.

MURPHY, J.:—Plaintiffs sue as *bonâ fide* holders for value of a promissory note and now move for judgment under order XIV. Defendant, the maker of the note, swears it was obtained from him by fraud. These being the facts I am bound by authority to hold that defendant is entitled to unconditional leave to defend: *Fuller* v. *Alexander*, 52 L.J.Q.B. 103; *Millard* v. *Baddeley*, W.N. (1884) 96; *Flour City Bank* v. *Connery*, 12 Man. L.R. 305.

Application dismissed; costs to be costs in the cause to the party successful in the action.

Motion refused.

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Quebec Superior Court, Charbonneau, J. February 22, 1912.

1. MARRIAGE (§ II A—6) — VALIDITY — FORM OF CEREMONY — PROVINCIAL LICENSE IN QUEBEC—ABSENCE OF PUBLICATION OF BANNS—TWO ROMAN CATHOLICS MARRIED BY METHODIST MINISTER.

A marriage of two Roman Catholics performed by a Protestant minister of the Methodist Church, under the authority of a license, sealed with the great seal of the Province of Quebec and signed by the Lieutenant-Governor of that Province authorizing the omission of a previous publication of the banns, as permitted by arts. 59 and 59*a* Civil Code, was declared to be valid and binding in law in proceedings by *opposition* in a civil action in the Province of Quebec brought by the man to declare its invalidity in conformity with an ecclesiastical decree made by the Roman Catholic Archbishop of Montreal declaring the marriage null and void upon the ground that the Methodist minister was incompetent to perform the marriage in view of a decree known as the *Ne Temere* Decree proclaimed by the congregation of the council of the Roman Catholic Church that only those marriages of Roman Catholics could be valid which had been contracted before the curé of the place, where in such civil action the court maintained her claim made upon an *opposition* on her own behalf and upon a *tierce-opposition* in her capacity of tutrix to her minor child to vacate the default judgment entered therein upon the husband's claim on the ground of fraud and undue influence.

[*Laramée* v. *Evans* (upon demurrer) 24 L.C.J. 235, (on the merits) 25 L.C.J. 261, not followed.]

2. RELIGIOUS SOCIETIES (§ IV—38)—DECREE DECLARING MARRIAGE NULL AND VOID—NE TEMERE DECREE—MARRIAGE OF TWO ROMAN CATHOLICS BY A METHODIST MINISTER.

Where an ecclesiastical decree which a Roman Catholic secured from the Roman Catholic Archbishop of Montreal declared that the former's marriage with a Roman Catholic woman performed by a Protestant minister of the Methodist persuasion was null and void, on the ground that the Protestant minister was incompetent to perform the marriage, the ground being based upon a provision of a general decree of the Roman Catholic Church known as the "*Ne Temere* Decree," which declared that only those marriages of Roman Catholics could be valid which were contracted before the curé of the place it is not necessary for the court to have regard for such decrees in a civil action brought by the man asking for a pronouncement of the invalidity of the marriage as regards the civil rights of the parties as neither of such ecclesiastical decree has any legal effect in the Province of Quebec.

3. EVIDENCE (§ IV C—404) — CHURCH DECREES — CIVIL ACTION TO ANNUL MARRIAGE BETWEEN TWO ROMAN CATHOLICS WHEN CEREMONY PERFORMED BY A METHODIST MINISTER.

The civil power alone gives validity to a marriage and the action of the civil courts, as far as marriage is concerned, is independent of the religious authority; therefore an ecclesiastical decree, of the Roman Catholic Archbishop of Montreal, declaring null and void a marriage betweeen two Roman Catholics, performed by a Protestant minister of the Methodist persuasion, on the ground that the minister, being a Protestant, was not competent to perform such marriages in view of the provision of the "*Ne Temere* Decree" proclaimed by the congregation of the council of the Roman Catholic Church, has no legal value whatsoever even as evidence of one of the juridical facts necessary to establish a civil action brought by the husband who secured the decree for the purpose of having the marriage declared null as regards its civil effects and of having the Archbishop's decree ratified and confirmed for the purposes of the civil law, as such decree

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is neither in the form of a document to which the law attaches in any way the weight of an authentic writing nor in the form of evidence given under oath by an expert upon the subject.

[*L'Heureux* v. *Budgess*, cited in *Durocher* v. *Degré*, R.J.Q. 20 S.C. 456, specially referred to.]

4. JUDGMENT (§ VII C—282)—RELIEF AGAINST—OPPOSITION AND TIERCE-OPPOSITION TO JUDGMENT—QUEBEC PRACTICE.

A *désistement* from a judgment by default and from his action "*sauf recours*" will be refused the plaintiff in a civil action in the Province of Quebec, brought against a woman to whom he was married by a Protestant minister, for the purpose of having the marriage declared legally null and void, the plaintiff being encouraged to bring his action by his having secured a declaration from the Roman Catholic Archbishop of Montreal to the effect that the minister was incompetent to perform the marriage because of an article of the earlier "*Ne Temere* Decree" proclaimed by the congregation of the council of the Roman Catholic Church declaring that only those marriages of Catholics would be valid which had been contracted before the curé of the place, where the wife after the default judgment brought an *opposition* thereto on her own behalf and a *tierce-opposition* as tutrix of her minor child, on the grounds that her default had been caused by fraud, undue influence and threats from her husband and other persons, and asked that the judgment rendered be declared unfounded and set aside and that the principal action of her husband be dismissed.

5. MARRIAGE (§ IV A—50)—ANNULMENT—CIVIL EFFECT—QUEBEC CIVIL CODE 1904, ARTS. 163, 164—ABSENCE OF EVIDENCE OF BAD FAITH.

Under art. 163, Civil Code (Que.) 1904, which provides that a marriage, though declared null, produces civil effects with regard to the husband and wife as well as with regard to the children if the contract of marriage is made in good faith and under art. 164 of the Civil Code which provides that if good faith exists on the part of one spouse only, marriage produces civil effects in favour of such spouse alone and in favour of the children born to the marriage, a marriage cannot be annulled as to its civil effects in the absence of any evidence of bad faith on the part of the defendant.

[*Tremblay* v. *Déspâtie*, R.J.Q. 40 S.C. 429; *De Grandmont* v. *Société des Artisans*, R.J.Q. 16 S.C. 532, referred to.]

6. MARRIAGE (§ IV A—46)—ANNULMENT—QUEBEC CIVIL CODE, ART. 156—JURISDICTION OF COURT—DISQUALIFICATION OF FUNCTIONARY—PROHIBITION OF CLANDESTINE MARRIAGES.

The wide discretion left to the court by art. 156, Civil Code (Que.) 1904, whereby it is enacted that every marriage which has not been contracted openly or solemnized before a competent functionary may be contested by the parties themselves and by all those who have an existing and actual interest, "saving the right of the court to decide according to the circumstances," must be applied only to facts constituting clandestinity or to certain irregularities, which, while absolutely disqualifying the functionary, leave him, nevertheless, a colour of office and give him a *de facto* authority which would prevent either consort from having the marriage declared of no effect against the other who had contracted it in good faith, and this discretion cannot be extended so far as to deprive any functionary of the authority incontestably conferred upon him, or as so far as to do away with the force which the law accedes to a dispensation or a license exempting from the publication of banns.

7. MARRIAGE (§ II A—9c)—MODE OR FORM—COMPETENCY OF PERSON PERFORMING MARRIAGE CEREMONY—QUEBEC LAW.

The result of the Civil Code (Que.) as to the competency of the functionary, legally authorized to solemnize marriages, is not to create a jurisdiction which is special, respective and inclusive, but rather to confer a general jurisdiction common to all such function-

aries and concurrent in its nature, that is to say, the competency of Roman Catholic priests, under the law is not restricted to the solemnization of the marriage of Roman Catholics, nor is the competency of Protestant ministers restricted to the solemnization of the marriage of Protestants, but that all priests, curés, ministers and other functionaries are collectively and concurrently competent to celebrate marriage.

[Civil Code (Que.) 1904, arts. 42-48, 65, 128 and 129, specially considered.]

8. MARRIAGE (§ II A—9a)—PLACE OF SOLEMNIZATION—CIVIL CODE (QUE.) ART. 63.

Article 63, Civil Code (Que.) 1904, enacting that a marriage must be solemnized at the place of the domicile of one or other of the parties and that "if solemnized elsewhere, the person officiating is obliged to verify and ascertain the identity of the parties," shews clearly that the marriage need not necessarily be celebrated by the curé of the parish and in the church of that parish, but that, within the territory of the domicile, all functionaries entitled to keep registers of civil status are competent to receive a declaration of marriage, the only thing essential to the formation of the contract, and that marriage may be celebrated outside the domicile by any officer of civil status whatsoever in all cases without distinction as to religious belief.

9. MARRIAGE (§ II A—6)—FORM—RIGHT OF CROWN TO EXEMPT PUBLICATION OF BANNS—CIVIL CODE (QUE.) ARTS. 59 AND 134.

The Crown has, under the Civil Code (Que.) 1904 (respectively providing as shewn below under each number), the undoubted right to exempt from the publication of banns for marriages where both parties are Roman Catholics, its license for that purpose having universal effect as to all publications of banns, and concurrent effect with the dispensation of a bishop as to publication of banns for Roman Catholics; such result following from art. 57, which enacts that before solemnizing a marriage, the officiating person must be furnished with a certificate that the publication of banns required by law has been duly made unless such person has published them himself; art. 130 that the publication of banns, required by the above article is to be made by the priest, minister or other officer in the church to which the parties belong or if they belong to different churches, to be made in each of the churches; art. 59 that the marriage ceremony may be performed without this certificate if the parties have obtained and produced a dispensation or license from a competent authority, authorizing the omission or publication of the banns; and art. 134 that the authority that had hitherto held the right to grant licenses or dispensations for marriage may exempt from such publication, and from the further circumstance that, at the time of the codification as well as afterwards, the bishop granted dispensations and the Crown issued licenses.

10. MARRIAGE (§ II A—6)—FORM—LICENSE—ABSENCE OF PUBLICATION OF BANNS—CIVIL CODE (QUE.), ARTS. 57 AND 59(a).

Article 59(a) of the Civil Code (Que.), 1904, providing that as to the solemnization of marriage by Protestant ministers of the Gospel, marriage licenses are to be issued by the Department of the Provincial Secretary under the hand and seal of the Lieutenant-Governor, who for the purposes thereof is the competent authority under art. 59 of such Code, permitting the marriage ceremony to be performed without a certificate of the publication of banns under art. 57 C.C., if the parties to the ceremony have obtained and produce a dispensation or license from a competent authority, is not limited in its effect to marriages of Protestants, but is applicable to the marriages celebrated by Protestant ministers of the Gospel, whatever may be the religious belief of the parties to the marriage.

11. MARRIAGE (§ IV A—50)—ANNULMENT—FAILURE TO PUBLISH BANNS—CIVIL CODE (QUE.) ART. 157—IMPOSITION OF FINE.

The effect of ch. 4 of title V., "Of Marriage," Civil Code (Que.)

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1904, where everything recognized as a cause of nullity by law should be found, is not to treat as a cause of nullity an irregularity in, or even an omission of, the publication of the banns or the failure to obtain the issue of the license or dispensation, the legislature having limited itself by art. 157 of the Code to imposing a fine upon the officer celebrating a marriage under such circumstances.

12. EVIDENCE (§ IV D—409*e*)—OFFICIAL RECORDS—MARRIAGE REGISTERS—CONTENTS—CIVIL CODE (QUE.) ART. 65.

The provisions of art. 65 of the Civil Code (Que.) 1904, enumerating what is to appear in the *acte* of marriage in the registers of civil status and thus shewing the essential elements of this contract, shew the intention to exclude differences of religion from any rule of law regulating the jurisdiction of functionaries competent to celebrate marriage, there being nothing to shew that the *acte* should contain a declaration of the religion which the parties to the marriage profess, or that of the functionary.

13. MARRIAGE (§ II A—9*c*)—MODE—INCOMPETENCY OF PERSON PERFORMING CEREMONY—CIVIL CODE (QUE.) ART. 127.

The incompetence of the functionary performing the ceremony of marriage, or the non-observance of the required formalities in the solemnization of the marriage, is not one of the impediments provided for by the words "from other causes" used in art. 127 of the Civil Code (Que.) whereby certain invalidating impediments to marriage are declared and whereby it is provided that other impediments, recognized by the different religious persuasions as resulting from relationship or affinity, or "from other causes," remain subject to the rules hitherto followed in the different churches and religious communities.

14. RELIGIOUS SOCIETIES (§ IV—35)—SIGNING MARRIAGE REGISTER—CIVIL CODE (QUE.) ART. 64.

Article 64 of the Civil Code (Que.) 1904, providing among other things that the entries made in the registers should be signed by the person who performed the marriage and by the contracting parties, confers upon all rectors, priests and ministers of every religion, whether Catholic or Protestant, without distinction, the right to give the seal of authenticity to the consent to be married, that being what constitutes the marriage itself from the point of view of the civil law.

15. MARRIAGE (§ II A—6)—VALIDITY OF—LICENSE—OMISSION OF PUBLICATION OF BANNS—TWO ROMAN CATHOLICS MARRIED BY PROTESTANT MINISTER.

Two Roman Catholics on presenting a license from the Crown which dispenses with previous publication of banns can be validly married before a minister of a Protestant religion.

16. MARRIAGE (§ II A—9*d*)—NECESSITY OF ENTERING MARRIAGE IN REGISTER—PERFORMANCE OF CEREMONY PURSUANT TO LICENSE—MIXED MARRIAGES.

The jurisdiction of all functionaries authorized to keep registers of civil status is not particular and limited in each case to the co-religionists of each functionary, but is a general jurisdiction embracing every person without distinction and a license may be granted by the Crown for the purpose of dispensing with the publication of banns for the marriage of Roman Catholics as well as for the marriage of members of other religious denominations.

17. MARRIAGE (§ II A—9*c*)—MIXED RELIGIOUS BELIEFS—WHO MAY PERFORM CEREMONY.

All officers of registers of civil status, without distinction of religious belief, can validly celebrate the marriage of two Roman Catholics as well as of two Protestants and of two persons belonging to different religious denominations as well as those of the same belief.

18. MARRIAGE (§ II A—9c)—WHO MAY PERFORM—PUBLIC CELEBRATION—SUFFICIENCY OF LICENSE—CIVIL CODE (QUE.) ARTS. 59 AND 59(*a*).

In order that any marriage should be considered publicly celebrated it is sufficient if celebrated by any officer of registers of civil status under the authority of a license dispensing with the previous publication of banns issued by the Crown as permitted by arts. 59 and 59(*a*) of the Civil Code (Que.) 1904.

Statement

HEARING upon proceedings by way of *opposition* and *tierce-opposition* at Montreal as to the validity of a marriage. The principal question at issue was whether a Protestant minister had authority to solemnize a marriage under the civil law of the Province of Quebec when one or both of the contracting parties were Roman Catholic.

L. J. Lefebvre, attorney for plaintiff; *P. Saint Germain*, counsel.

G. V. Cousins, attorney for opposant and tierce-opposant; *A. Wainwright*, counsel.

Charbonneau, J.

CHARBONNEAU, J. (translated):—The plaintiff and the defendant in this case were baptised in the Roman Catholic religion,—the wife at Fall River on the 7th June, 1883, and the husband in the Parish of St. Valentin on the 28th May, 1880. They were married on the 14th July, 1908, at Montreal, their domicile, before the Rev. William Timberlake, a Protestant minister of the Methodist religion, who witnessed their consent to be married and gave them *actes* of the same in virtue of a license dated the 9th day of July, 1908, and issued under the Great Seal of the Province and signed by the Lieutenant-Governor. Of this marriage was born Catharine Blanche Eva. The mother, as tutrix to her child, has brought a *tierce-opposition* by means of the proceedings which will be mentioned later.

On the 12th of November, 1909, His Lordship the Archbishop of Montreal, acting upon the petition of the husband, declared this marriage null and void on the ground that the Rev. William Timberlake being a Protestant minister was not competent to celebrate the marriage, in view of art. 3, of the *Ne Temere* Decree, which declares that only those marriages of Catholics are valid which have been contracted before the curé of the place. On the 13th June, 1910, the husband brought an action as plaintiff before this Court, with conclusions to the effect that this marriage

> having been annulled by the religious authority, be now declared null and be annulled as regards its civil effects, and that the said decree of the ecclesiastical authority declaring the marriage null so far as the marriage tie was concerned, be ratified and confirmed for all legal purposes, and that the same be given full force and effect from the point of view of the civil law.

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An initial judgment was rendered by default on the 23rd of March, 1911, adopting verbatim the conclusions of the plaintiff. On the 25th of April, 1911, the defendant made an opposition to this judgment, rendered against her by default, alleging that she had been prevented from appearing and from making a defence to the action by fraud, undue influence and threats on the part of the plaintiff and other persons (grounds upon which her opposition was ordered to be received) and alleging, as to the merits, that the marriage of two Catholics can be validly celebrated by a Protestant minister; that the ecclesiastical decree is void as such; and, further, that it can have no civil effect whatsoever in so far as it pretends to annul the marriage, since, under the law, there is no ecclesiastical tribunal or other organization of this kind which can have jurisdiction to declare a marriage to be null or to make it so; lastly, that the marriage of the parties has always been and still is valid and binding in law; and concluding that the marriage be declared so by the Court, and that, in consequence, the judgment rendered by this Court on the 23rd of March, 1911, be declared unfounded and set aside and the action of the plaintiff dismissed. At the same time the wife made a tierce-opposition in her quality of tutrix to her minor child, complaining of the decree of the Catholic authority which had declared the marriage of the father and mother of this child to be null and void, and also of the judgment of this Court which had confirmed this decree and had given to it civil effect, and alleging as the interest of this child in asking to have this ecclesiastical decree and this judgment set aside, the fact that the child's rights and civil status are affected by these two decisions, particularly by the judgment of this Court, the immediate effect of which is to render its birth illegitimate.

The plaintiff joined issue upon the opposition to the judgment, as well as upon the tierce-opposition, and, after a number of incidental proceedings, when the cause was ready for proof and hearing upon the issue joined by and between plaintiff and defendant opposant in her personal quality, the plaintiff desisted from the judgment rendered by this Court on the 23rd of March, 1911, as well as from his action "*sauf recours.*" He desisted at the same time and in the same manner as against the tierce-opposition *ès qualité*.

On inscription before the prothonotary, *acte* was given to the plaintiff of this *désistement*, but as the defendant-opposant, (who is also tierce-opposant in her quality of tutrix to her child), claimed the right to have a definitive ruling as to the validity of the marriage, she re-inscribed this cause as defendant-opposant and as tierce-opposant *ès qualité* respectively, in order to obtain a final judgment upon the two oppositions, a judgment

which the Prothonotory had not rendered and which he had no jurisdiction to render.

When the case was called, counsel for the plaintiff objected to these re-inscriptions, alleging that, in view of the fact that plaintiff had desisted from the judgment rendered by default, and also from the action taken by him, there was no occasion to render any further judgment in the matter and that the Court was disseised of the suit, the reception of the opposition to the judgment having put an end to the judgment, and the *désistement* having put an end to the action.

This preliminary objection was taken under advisement and it was provisionally ordered that the parties proceed to final proof and hearing, subject to the right of the Court to dismiss the action on account of the *désistement*.

Upon this preliminary objection the Court is of opinion that there is occasion to decide the case on the merits and to render a final judgment upon the oppositions, notwithstanding the *désistement* of the plaintiff.

The first ground invoked by the defendant-opposant, that this matter is one of public policy, and that the plaintiff could not in consequence validly desist from his judgment, is open to much discussion. It is true that in cases of separation from bed and board an express disposition of our Code forbids the invoking of the consent of the parties as might be done in an ordinary case. It is also true that the contract of marriage (and by contract I mean the marriage itself, that which is known as the marriage-tie and not the notarial contract or ante-nuptial agreement) is a matter of public policy in this sense, that society in general has the right to be informed of it, to preside over it, to assure its publicity, its legality, its good faith and its indissolubility, independently of, and preferably to all private rights that can result therefrom; but our Code, differing in this respect from the Code Napoleon, makes no provision for the intervention of state lawyers and seems to have left to the private individual and to the Courts the duty of watching over these public interests. As, in most cases, the two parties are agreed in seeking the annulment of their marriage, the Court finds itself the sole person charged with the duty of defending the matrimonial tie, and this is often an unpleasant and ungrateful task for the Judge who presides at the trial.

In this case, however, one might say that the plaintiff has placed himself upon the side of public policy by desisting from the action which he had taken, and it would seem that it would be sufficient for the Court to give him *acte* of his *désistement*. But the question still remains to be determined, keeping always the same point of view, whether the plaintiff can, by his simple consent, reconstitute the marriage which he has caused to be

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declared null; in short, whether the Judge is an officer competent to receive a consent to be married. I have doubts as to this new jurisdiction, and I believe it to be preferable to decide, first of all, if the marriage is valid or not, and that within the limits of my ordinary and incontestable jurisdiction.

The plaintiff has contended that the opposition, once it is received, becomes a defence to the action (art. 1173, C.P.) and that the order which authorized it to be filed has set the original judgment aside once and for all (article 1168 C.P.).

It is argued, on the other hand, that the opposition cannot be considered as a defence except for purposes of procedure, since the same article, 1173, shews that this opposition must be contested. Had it been intended to treat the opposition as a simple defence, without taking any further account of the judgment, it would have been simply stated that it was not necessary to contest such a pleading but to reply to it.

In any event I think that I must, in the present case, dismiss this preliminary objection of the plaintiff for the following reasons:—

1. Because upon an anterior incidental proceeding but in the same cause, it has been adjudged by this Court, and that contrary to the conclusions of the defendant-opposant, that the judgment had not been completely set aside, and that the order authorizing the opposition to be received by the Court is susceptible of being revised by the final judgment. This decision, whether well or ill-founded, must remain binding upon the parties until the end of the suit.

2. Because the plaintiff in desisting from the judgment and from this action, did not desist at the same time from the ecclesiastical decree in so far as it may have civil effect, which decree according to his pretensions annuls the marriage, and of which in fact he only requires the confirmation.

3. Because even were this desistment valid as against the defendant-opposant, it could not be so as against the tierce-opposant *ès qualité*,—the tierce-opposition, or rather the intervention, for it is really an intervention in this case, not being governed by the same rules as the opposition to the judgment so that the reception of the tierce-opposition does not set aside the judgment. This point of procedure is incontestible.

4. Because the plaintiff has desisted "*sauf recours*" and because the defendant-opposant, as well as the other party, the tierce-opposant *ès qualité*, have concluded for judgment declaring the marriage to be valid, and setting aside the decree and the judgment rendered by default, and because these conclusions have not been attacked either on the merits or by demurrer, so that both of said parties are entitled at this state of the proceedings to obtain a final and definitive adjudication as to the

validity of the marriage and as to the validity of the decree, and also as to the validity of the judgment rendered by this Court,—the woman to have it declared whether she is or is not the wife of the plaintiff for her lifetime, the child to have her legitimacy and her civil status established. Observe that the plaintiff has not admitted the truth of these oppositions and that even upon the opposition to judgment there must be rendered a final judgment in accordance with the provisions of arts. 1169, 1172, 1174 and even of article 1173 on which the plaintiff relies to support the contrary pretention.

In any event for the purposes of the present suit, the order to proceed to the merits and to final hearing, can have no effect, except from the point of view of costs. If, therefore, the Court comes to the conclusion upon the merits that the marriage is null and dismisses the defence, of the defendant-opposant and of the opposant *ès qualité*, the plaintiff has nothing to complain of. If, on the other hand, the Court comes to the conclusion that the marriage is valid, since the judgment confirming the ecclesiastical decree setting aside the marriage has been abandoned by the plaintiff, the latter cannot suffer any prejudice from the setting aside of this judgment as ill founded other than the obligation to pay the additional costs incurred upon this last proceeding. The Court having discretion in the matter of costs, this part of the question is easy to regulate, especially in a case between husband and wife.

The preliminary objection of the plaintiff to the two inscriptions for final judgment made respectively by the defendant-opposant and by the tierce-opposant *ès qualité*, is dismissed without costs.

Were it not for the special conclusions taken by the defendant-opposant and by the tierce-opposant to the effect that the marriage be declared valid, the whole case upon the merits might be decided without following counsel for the opposant in the long and detailed study which they have made of the question. In short, as mentioned above, the plaintiff in his action does not ask that the marriage be declared null, nor that it be annulled so far as he is concerned, but simply that the decree of the Bishop which rendered the judgment of nullity, be recognized by the Court and confirmed and given the weight of *res judicata*, and, in consequence, that the marriage be annulled as regards its civil affects.

In order to reject the last part of these conclusions, it is only necessary to quote art. 163 and 164 of the code and to observe that in the evidence made by the plaintiff for the purpose of obtaining this judgment by default there is no proof of bad faith on the part of the defendant.

These articles which are perfectly clear, read as follows:—

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Article 163. "A marriage, although declared null produces civil effects as well with regard to the husband and wife as with regard to the children, if contracted in good faith."

Article 164. "If the good faith exists on the part of one of the parties only, marriage produces civil effects in favour of such party alone and in favour of the children, issue of the marriage."

It is perfectly clear that a marriage cannot be annulled as to its civil effects in the absence of any evidence of bad faith on the part of the defendant. As to the first part of the plaintiff's conclusions, which were followed word for word by the judgment, it must be observed that the setting aside of marriages is the exercise of a judicial power. Whether this exercise be called a decree or a judgment it is the same thing. The judicial power is part of the public authority, and can only be conferred either by the law, which attributes certain functions to certain classes of citizens acting *ex officio*, or by the Crown acting in accordance with certain laws passed by the Legislature to this end. This authority is nowhere given in the Code or in the laws which preceded it, going back as far as the Conquest. Since all judicial authority disappeared by reason of the change of allegiance, it would be useless to go back any further than the Cession in order to find what might have been the jurisdiction of the Bishops in these matters according to the old French law. This question is now hardly disputed and has already been decided in this sense by the Court of Review, presided over by the Honourable Judges Tait, Fortin and Mercier, in the case of *Tremblay* v. *Déspâtie*, on the 20th March, 1911, R.J.Q. 40 S.C. 429. The record in the case was sent back to the Superior Court, because the judgment annulling the marriage on the ground of an impediment of relationship, was based only on the decree of the Ordinary, without any evidence having been made before the Civil Court of the facts constituting the impediment or of the rules applicable in this case. The same point was decided in the same sense by the Court of Review, Taschereau, Archibald and Langelier, Judges: *De Grandmont* v. *Société des Artisans*, R.J.Q. 16 S.C. 532.

In a case of *L'Heureux* v. *Budgess*, Mr. Justice Casault, whose unreported notes were incorporated by Mr. Justice Lemieux in his judgment rendered by him in the case of *Durocher* v. *Degré*, R.J.Q. 20 S.C., p. 456, makes a brief but clear analysis of all the principles which govern this matter.

> "Ce mariage," dit-il, "ou si l'on vent ce contrat n'a d'existence que celle que lui reconnait la loi humaine; c'est la justice civile qui prononce se validité. L'action des tribunaux civils est, quant à lui, parfaitement indépendante de toute autre autorité, même de l'autorite religieuse."
>
> "This marriage," says he, "or if you prefer this contract, has no other existence than that which has been attributed to it by human

law. It is the justice of the civil power which gives it validity. The action of the civil Courts, in so far as it is concerned, is perfectly independent of all other authority, even of the religious authority."

This decree has therefore no legal value whatsoever. It has no value even as evidence of one of the juridical facts necessary to establish the plaintiff's case, since it is neither in the form of a document to which the law attaches in any way the weight of an authentic writing, nor in the form of evidence given under oath by an expert upon the subject. One must therefore conclude that the first part of the recital of the judgment confirming the ecclesiastical decree is ill-founded in law, and that the second part concerning the civil effects of the marriage is not founded in fact, since there is no evidence of ill faith, and that this second part is also ill-founded in law, since the marriage has not been annulled or declared null either by the religious authority which was not competent, nor by the Court from whom this had not been required.

These reasons would justify the setting aside of the judgment and the dismissal of the action, but, as mentioned above, the conclusions of the defendant-opposant and of the tierce-opposant to have the marriage declared valid, oblige me to decide the whole merits of the case without considering the insufficiency of the conclusions of the plaintiff's declaration.

The question in this case is to decide whether two Catholics on presenting a license from the Crown which dispenses from the previous publication of banns, can be validly married before a minister of a protestant religion, or whether they can only be united by the curé of their parish after publication of banns in that same parish, or under a dispensation from these publications granted by the authorities of the Catholic religion. In short, is the jurisdiction of all functionaries authorized to keep registers of civil status particular and limited in each case to the co-religionists of each functionary; or is it a general jurisdiction embracing every person without distinction as to religious belief, and can a license granted by the Crown dispense with the publication of banns as regards Roman Catholics as well as regards other religious denominations?

Before reviewing the arts. of the code concerning the matter, it is perhaps well to make a distinction between the functions which the priest or minister exercises in relation to marriage. D'Aguassault in one of his Plaidoiries, vol. 1, p. 169, points out the three elements of marriage:—

"Le mariage," dit-il, "doit son institution à la nature, sa perfection à la loi et sa sainteté à la religion."

"Marriage," says he, "owes its institution to nature, its perfection to the law, and its sacredness to religion."

That which constitutes the essential part of marriage is the

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consent of a man given to a woman to be united together for the purpose of leading a life in common and for the conservation of humanity. That is not only the basis of the contract, but it is the contract itself; the sacrament is only a form which gives to it the seal of solemnity, and the ministerial functions of the civil law are only another form giving it publicity, authenticity and civil effect. One must therefore distinguish between the two functions exercised by the priest or minister in this matter. When he blesses the marriage he fulfills his religious ministry. When he witnesses the consent of the consorts and gives to the consent the form of authenticity by recording it in the registers of civil status in virtue of the authority which the law has conferred upon him, he exercises certain purely ministerial functions which could only have been attributed to him by the civil power. There can hardly be any question as to the nature of the authority exercised by these functionaries. It is certainly not for any fault or negligence in the exercise of their religious duties that arts. 152, 153, 157 and 158 make them liable to certain penalties so that willy-nilly they are obliged to remain under the direct and absolute control of the law in order to enjoy the privilges of that civil function which they claim. They are, for this purpose, as is said in the Codifiers Report, vol. 1, p. 180 "civil officers."

This authority which the code gives them, is found and must be found in title 2, which treats of *actes* of civil status, and in title 5 which treats of marriage. These two titles are inseparable, marriage being an act of civil status which must be recorded in the registers of civil status in the same way as a birth or as a death, these three matters constituting the subjects of the three essential acts recording the life of a human being.

In the present case the marriage is attacked on the grounds of clandestinity and of lack of competence in the officiating officer, hence we must look for the jurisdiction of this Court to declare the nullity of the marriage in art. 156 of the code, the only article which confers jurisdiction in such matters. This is how this article reads:

> Article 156. Every marriage which has not been contracted openly or solemnized before a competent functionary, may be contested by the parties themselves and by all those who have an existing and actual interest, saving the right of the Court to decide according to the circumstances.

The latter part of this article, which leaves to the Court such wide discretion, must only be applied to facts which constitute clandestinity or to certain irregularities, which, while they absolutely disqualify the functionary, leave him nevertheless a colour of office and give him a *de facto* authority which would prevent either consort from having the marriage declared

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of no effect against the other consort who had contracted it in good faith, but this discretion cannot be extended so far as to deprive any functionary of the authority incontestibly conferred upon him by law or as to do away with the force which the law accedes to a dispensation or license exempting from the publication of banns.

Since, in the present case, no bad faith can be imputed to the defendant, as this has not been proved, and since the defendant must therefore be presumed to be in good faith, and since the marriage was publicly celebrated under the authority of a license from the Crown exercising its power to exempt the consorts from the publication of banns and since the marriage was celebrated before a functionary exercising these powers under the eye of the law without any restriction as to religious denomination, it would seem that one could logically conclude that the good faith of the parties, the public exercise of the charge by the minister and the sanction of the Crown, rendered it impossible to declare such a contract invalid without its being necessary to examine the effect legal and actual of the license and of the powers of the functionary who celebrated this marriage. This doctrine could be supported by numerous authorities, but it would be doing a wrong to our code to let it be supposed that one might assume under colour of its articles an authority or privilege which did not really exist. Let us therefore consider the case, following the simplest method, which is moreover the best, viz., by the reading of the law itself, and let us see whether the functionary who had witnessed the declarations of marriage made by the parties was competent to do so, and whether the license from the Crown authorizing the marriage without publication of banns was valid.

Although separate, these two questions are one at bottom, as may be seen by reading together the articles which must govern the point.

> Article 128. Marriage must be solemnized openly, by a competent officer recognized by law.
>
> Article 129. All priests, rectors, ministers and other officers authorized by law to keep registers of *actes* of civil status are competent to solemnize marriage.
>
> But none of the officers thus authorized can be compelled to solemnize marriage to which any impediment exists according to the doctrine and belief of his religion and the discipline of the church to which he belongs.
>
> Article 44. The registers are kept by the rector, curate, priest or minister having charge of the churches, congregations or religious communities, or by any other officer entitled so to do.
>
> In the case of Roman Catholic Churches, private chapels or missions, they are kept by any priest authorized by competent ecclesiastical authority to celebrate marriages or administer baptism and perform the rites of burial.

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Article 42 indicates what these registers are and discloses that they must be kept in duplicate.

Article 45 shews the formalities by which they must be authenticated, and arts. 47 and 48 the manner in which they should be examined by the prothonotary, a purely civil officer.

Article 63. The marriage is solemnized at the place of the domicile of one or other of the parties. If solemnized elsewhere, the person officiating is obliged to verify and ascertain the identity of the parties.

For the purposes of marriage, domicile is established by a residence of six months in the same place.

That is all which concerns marriage properly speaking. From the standpoint of the competence of the functionary the result of these articles is clearly not to create a jurisdiction which is special, respective and exclusive, but rather a general jurisdiction common to all such functionaries and concurrent in its nature. As to the place where the marriage should be celebrated, the article last cited shews that it may be elsewhere than at the domicile of the consorts, since in this case, the functionary is bound to assure himself of the identity of the parties, a fact which, in the opinion of this Court, shews still more clearly that the marriage need not necessarily be celebrated by the curé of the parish of the domicile and in the church of that parish, but rather that within the territory of the domicile all functionaries entitled to keep registers of civil status are competent to receive that declaration of marriage, the only thing essential to the formation of the contract; and this fact further shews that marriage may be celebrated outside of the domicile by any officer of civil status whatsoever, and this in all cases, without distinction as to religious belief. It is therefore clear, from the point of view of the competence of the officer and of the place of celebration, that there are none of the restrictions which certain commentators of our code and even certain precedents have found therein. It is not said in these articles that the priest and curé shall be competent to celebrate marriages of Roman Catholics, and protestant ministers to celebrate marriages of protestants, respectively and exclusively, but it results clearly from the reading of the law itself that all priests, curés, ministers and other functionaries are collectively and concurrently competent to celebrate marriages.

The following are the essential articles which relate to publication:—

Article 57. Before solemnizing a marriage the officer who is to perform the ceremony must be furnished with a certificate establishing that the publication of banns required by law has been duly made; unless he has published them himself in which case such certificate is not necessary.

Article 130. The publication of banns, required by articles 57 and 58, are made by the priest, minister or other officer in the church, to

which the parties belong, at morning service, or if there be no morning service, at evening service, on three Sundays or holidays, with reasonable intervals. If the parties belong to different churches, these publications take place in each of such churches.

Up to this point it must be admitted that the publications are required to be made in the respective churches of the contracting parties, but it must be observed at the same time that no provision was made for the case of persons who belonged to no belief regularly organized or whose services did not take place on Sunday,—the Jews, for example, before the amendment, 3 Edward VII. ch. 47,—necessarily these persons could not have the required publications made and were obliged to have recourse to certain dispensations of the law which are common, general and concurrent, in order to be exempted from these publications. These dispensations are found in the following arts. 59 and 134:—

Article 59. The marriage ceremony may, however, be performed without this certificate, if the parties have obtained and produce a dispensation or license, from a competent authority, authorizing the omission of the publication of banns.

Article 134. The authorities who have hitherto held the right to grant licenses or dispensations for marriage, may exempt from such publications.

At the time of the codification, as afterwards, the Bishops granted dispensations and the Crown issued licenses. It is not necessary for the decision of this case to go back to the origin of these privileges. It is sufficient to notice that the code gives a value which is equal, concurrent and general to the license issued by the Crown. If the legislator had had a contrary intention, it would have been so easy to add the word "respectively" or some other expression to the same effect, that one can reasonably conclude that such was not his will. It is not said that the dispensation from the Bishop would exempt Roman Catholics from publications or that the dispensations of the Crown would exempt persons of all other religious beliefs, from publication of the banns, but the legislature has contented itself with saying that the marriage may be performed if the parties produce a dispensation or a license. Surely in the eyes of the Legislature a license from the Crown which is given upon good security that there is no impediment to the marriage must have equal value with a dispensation from a Bishop who takes the risk of assuring himself of the fact, either on his own authority or on that of the curé, who marries the parties. The Crown, which is the source and dispenser of all privileges, exemptions and communications and which has the control of all official appointments, whether ministerial or judicial, must have as much right as any other of its subjects to the privilege of exempting from the publication of banns even for Roman

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Catholics. This license has, therefore, universal effect as to all publications of banns and concurrent effect as to publication of banns for Catholics.

When by the 37 Viet. ch. 3, art. 59*a* was added to the code in order to declare in what manner these licenses should be issued, the same fundamental idea which regulates the whole of this marriage question was followed.

The article in question does not concern the celebration of the marriage of Protestants but rather the celebration of marriage by Protestant ministers of the gospel, whatever may be the belief of those whom they marry.

As regards this part of the case which concerns the publication of banns, it might be as well to observe *en passant* that the fourth chapter [Title V., "Of Marriage"] of the code, where we ought to find everything that the law recognizes as a cause of nullity, does not treat as such any irregularity or even omission of the publication of banns or of the issue of the license or dispensation. The Legislature has limited itself to imposing a fine upon the officer who celebrates a marriage under any such circumstances. (Article 157.) See the report of the codifiers, vol. 1, p. 184, which shews clearly that these are not causes of nullity. "As to the formalities previous to marriage (such as publication of banns or in its place the issue of the license or dispensation required to replace them or the inobservance of the required intervals) their omission does not render the marriage null; it only gives rise to a fine against the functionary who celebrates the marriage."

If we now proceed to the form of the *acte* of marriage itself, the authentic document of the registers of civil status, we find, in the dispositions of art. 65, which gives the essential elements of this contract, the same intention clearly expressed of excluding differences of religion from any rule of law regulating the jurisdiction of functionaries competent to celebrate marriage. In fact there is nothing to shew that the *acte* should contain a declaration of the religion to which the parties belong, a declaration which would have been essential in order to establish the jurisdiction of the officer, if, in reality, this jurisdiction were respective and exclusive, a declaration which would have been absolutely useless if that jurisdiction were intended to be concurrent. Since, on the one hand, art. 39 forbids the insertion in these *actes* of civil status of anything other than that which must be declared by the parties, it must be concluded, I think, that, there again, the Legislature has clearly shewn that it is not necessary, in order to give jurisdiction, to the functionary by whom the marriage is celebrated, that he should be a minister of the religion to which the consorts belong. Art. 57*b* has been omitted from this study of the subject because its effect would not be to

remove the jurisdiction of the functionary who celebrated the marriage in this case. Who is the marriage-functionary contemplated by this article? Whence does he obtain the authority that this amendment to the code recognizes him to have held retroactively as far back as 1860? What was the object of the Legislature in making such a law? There is nothing to shew this. The Act 57 Vict. ch. 44 has no preamble and all that one can conclude from it is that far from restricting to a single civil officer the competence to celebrate any particular marriage as determined by the precedents followed by the judgment now attacked, the jurisdiction given by the codifiers to officers of civil status has been extended to another class of persons who are not specifically named, thus augmenting almost to infinity the number of persons who are competent in the matter.

There is another article which has been voluntarily omitted from these considerations. It is art. 127, and that for the very simple reason that, in the opinion of the Court, it has nothing to do with the present case: This is how this art. 127 reads:—

> Article 127. The other impediments recognized according to the different religious persuasions, as resulting from relationship or affinity or from other causes, remain subject to the rules hitherto followed in the different churches and religious communities.
>
> The right, likewise, of granting dispensations from such impediments appertains, as heretofore, to those who have hitherto enjoyed it.

At first sight one cannot well see how this article can affect the jurisdiction of the functionary who witnesses the marriage or the publicity of the ceremony, and there would have been no necessity to enter upon this discussion if one of the precedents upon this question were not based almost exclusively upon this article, and especially if it had not served for a pretext for the intervention of the religious authority in this case and for the application of the *Ne Temere* decree which is, in this case, the sole ground of the religious judgment confirmed by the judgment of this Court.

I am of opinion that the incompetence of the functionary or the inobservance of the required formalities is not an impediment within the meaning of the code and is not one of the impediments provided for by the words "from other causes" used in art. 127, and lastly that the code having elsewhere made provision as to the formalities required for the celebration of marriage and as to the authority of the functionary who celebrates marriage, neither incompetence nor want of formality can be included under this head. The code has not defined impediment, but following the method of Pothier and of the Code Napoleon, the code has divided the subject into a number of separate chapters:—

1st: of the qualities required in order to contract marriage; 2nd: of the formalities relative to celebration; 3rd: of oppositions

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to marriage; 4th: of actions to annul. We naturally find the impediments in the first chapter, of which art. 127 forms a part, and not in the chapter regarding formalities where we find in particular arts. 128 and 129, which regulate the question now at issue.

Pothier defines the absolute impediments as follows:—

Volume 6, p. 38. Les empechments diriments de mariage qui se rencontrent dans des personnes, et qui sont absolus, c'est-a-dire, qui empechent la personne en qui ils se recontrent, de contracter aucun mariage, sont au nombre de six. Les empechements ralatifs sont definis a la page 57. Nous appelons empechements diriments relatifs, ceux qui empechent deux personnes en qui ils se rencontrent, de pouvoir se marier valablement ensemble, quoiqu'elles puissent se marier a d'autres.

Invalidating impediments to marriage which are found in persons and which are absolute, that is to say, which prevent the person in whom they are found from contracting any marriage at all, are six in number. The relative impediments are defined on page 57. We call relative invalidating impediments those which prevent two persons in whom they are found from validly marrying each other although they are capable of being married to other people.

As may be seen from the above, by whatever name one calls these impediments, they are always a disqualification, subjective and inherent in the person of the consorts or of one of them, and existing at all times, anterior to, and independently of, the contract itself and of the formalities relating thereto or of the authority which consecrates the marriage, either from the religious or from the civil point of view. It seems clear to me therefore that the intention of the codifiers was not to consider these matters as constituting impediments. Even if one is to judge by the extract hereinafter cited from their reports (vol. 1, p. 178) and by the first form given to art. 127 (11*a*) one would be justified in concluding that, in their intention, these other causes mentioned in art. 127 would be relationship and affinity to a degree other than those mentioned in arts. 125 and 126. Here is the extract:—

There are in the collateral line, as resulting from relationship and affinity, other impediments which are not general in character but applicable only to members of the churches or religious congregations which recognize them as forming part of their doctrines and beliefs: such is relationship to the degree of cousins-german, and other degrees more remote in which marriage is forbidden according to the doctrine of the Catholic church, although it is not so according to those of the Protestant churches.

Since this kind of impediment cannot be regulated by general provisions, it has been left subject to the rules followed by the different churches which recognize it.

If, however, this passage of the report must be interpreted as only applying to the first part of the article and not to the

modification which it afterwards underwent, if it is absolutely necessary to determine what are these causes other than affinity or relationship, to a degree more remote than the law has forbidden, it will only be necessary to read Pothier at the volume already cited and the first author of canon law who may come to hand, to discover a whole series of impediments given effect to by the code. One can find there in addition to all imaginable degrees of relationship or affinity other causes of impediment, some of which were even then considered as constituting an absolute invalidating impediment, such as holy orders, perpetual vows, etc., but of which the greater part only constitute relative impediments such as rape, seduction, murder, adultery, relationship, impotency, public scandal, spiritual relationship, and even difference of religious belief on the part of the future consorts and not on the part of the officer who should have celebrated the marriage. These are all causes other than kindred or affinity which might at the time of the codification constitute an impediment, and these and no others are clearly the additional causes referred to by art. 127.

I have not thought it necessary to hunt for such special causes of impediment among the various other religious beliefs of our population, being of opinion that it is sufficient to shew what they are according to one such belief in order to shew that it was easy to find such impediments without including under this head the question of the competence of the various functionaries.

Is it necessary to limit this list to the impediments existing at the time of codification or extend it to all the impediments of the same kind which might be created by religious authority in the course of its natural evolution? This is a question which it is perhaps not absolutely necessary to resolve in this case, but which has been clearly decided in the sense that one should not go further than the code by the late Chief Justice Cassault, in the case of *L'Heureux and Budgess*, mentioned above, unreported, the Judge's notes being incorporated in *Durocher* v. *Degré*, R.J.Q. 20 S.C. 456, *supra*. Moreover, it is this interpretation which the article in question seems to me to clearly shew. These impediments "remain subject to the rules hitherto followed in the various churches and religious societies."

However it may be, it seems altogether illogical to include in this article under the name of impediment, that is of some disqualification inherent in the future consort, matters of irregularity in the publication of the banns or in the form of the marriage ceremony, or some disqualification in the officers by whom this ceremony is performed, whether these formalities or these disqualifications were required or brought into force before or after the coming into force of the code. An impediment can

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only be a subjective disqualification, that is to say, one attached to the person of the consorts, a disqualification which cannot depend upon the accomplishment or non-accomplishment of certain formalities, and still less upon the qualifications of the officer before whom the parties present themselves as a witness of their declarations of marriage.

The order followed by the codifiers is absolutely a juridical one and their arrangement is homogeneous. The code is clear if it is left in the logical order in which it has been drawn up, if we read together the conditions and qualities required for the capacity of contracting marriage, which are only subject to the rules which apply in those cases, and the formalities relative to the celebration of marriage given in the second chapter, which has amply provided for this matter in all its details.

Can one believe that after having conferred ministerial authority to witness declarations of marriage upon every priest, curé, minister and other functionary of the registers of civil status, and after having provided for the manner in which the publications should be made and in which the *acte* of marriage should be drawn up and executed, after having provided in another chapter for the nullities and penalties which should result from the inobservance of these formalities or from the incompetence of the officers, that the codifiers would have in a vague and illogical manner provided a means to render all these dispositions illusory and useless, by leaving the whole to the good pleasure and to the necessary variations, to the very hazards of a legislative power which was already, at the time of the code, absolutely incontrollable, without speaking of a judicial jurisdiction which was not recognized and which was not authorized?

There are already sufficient openings for divorce hidden in those three words of art. 127, especially if one admits the theory of an imprescriptible action in these cases, without adding thereto at pleasure for the sole purpose of contradicting and rendering null other dispositions of the code which are precise, complete and clear. Even if it were possible to consider a difference of religion between the consorts and the functionary who performs the marriage ceremony as an impediment which falls within the category of those for which provision is made by art. 127, hardly any more progress would be made towards obtaining the annulment of the marriage. There is nothing to authorize the Court to declare this nullity. Chapter 4 contains all the provisions which concern and justify actions to annul marriages. The codifiers introduce this chapter in their report in the following words:—

(Codifiers' report, p. 182.):

> The inexecution of the conditions imposed by the law as regards marriage give rise to actions in annulment.

The present chapter sets forth these nullities, those who may take advantage of them, and the manner of bringing suit. All possible grounds of annulling marriages should be found in this chapter.

One sees with what jealous care the Legislature has limited these grounds of nullity both as to the causes which give rise to them and to the persons who are entitled to invoke them and even as to the limit of time during which recourse may be had to an action for this purpose. Provision is made for the nullity arising from the fact that the consent of the consorts has been vitiated by error, by fraud or by force; nullities arising from minority and from want of consent of parents have also their special rules; a marriage may be set aside by reason of the impediments recognized by the law as shewn in arts. 124, 125 and 126; provision is made for an action to annul every marriage not publicly contracted and which was not celebrated before a functionary who is competent according to the dispositions of arts. 128 and 129; but it is nowhere stated in these chapters that marriages vitiated by any of the impediments of art. 127 shall be null or may be attacked as such, neither is there any article authorizing the Court in general terms to pronounce a judgment of nullity on account of any impediment whatsoever except those expressly mentioned in art. 152. It is said that art. 127 would be useless and without sanction if these impediments were not causes of nullity, but there is art. 158 which provides a penalty against the functionary who infringes the rules established by the title of marriage. It is possible that that was all the sanction which the Legislature wished to give to this art. 127, as to many others besides, particularly those which have to do with the publication of banns. It is possible, too, that these impediments could serve as a ground for an opposition to the marriage, without, however, justifying an action for annulment once the marriage had taken place. However it may be, the law nowhere declares that these impediments shall be a cause of nullity and there are no causes of nullity other than those which the law has decreed as a penalty for disobedience to its provisions. With what right could the Court create haphazard an action to annul retroactive and imprescriptible, as it is made out to be, where there is no text whatever that authorizes this proceeding? Moreover, it would be in this case a curious form of logic which would allow us to leave to one side a cause of nullity declared by the law as regards the celebration of marriage and a jurisdiction given, and even a certain measure of discretion carefully limited according to the circumstances, in order to seek in a very small corner of an article where it had been carefully hidden in an amendment made before the Houses an absolute jurisdiction, not only inflexible but even leaving no discretion to the Judge.

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It is of little importance to ascertain the reason which led the Legislature not to visit with nullity a marriage vitiated by the impediments of art. 127. At the same time this reason is not difficult to find. The Legislature did not wish to visit with nullity a contract which it had taken the trouble to declare indissoluble by art. 185 because of impediments for which it would have been easy to obtain a dispensation upon payment of some fee or other. The Legislature did not wish to leave such a contract so solemn and so important in a person's life, both as to morals and as to property, to the mercy of these dispensations of which often no trace can be found, since some are necessarily given verbally, and are not susceptible of proof in cases of secret impediment. The Legislature did not wish to permit a consort bound by a lifelong tie to come before the Court and ask that this tie be broken by invoking the want of a dispensation which it was his duty to obtain himself, and for which he was bound to pay as the future head of the community, that is to say, by invoking his own negligence and his own turpitude, and this, perhaps, after twenty years of cohabitation. In one word, the Legislature did not wish to create an irremittable and absolute nullity on account of a relative impediment that might be removed by dispensation. This would have been going further than the old French law and even further than the greater number of the decisions of the *officialité;* above all it would have been contrary to the ordinary law of contracts, even the most unimportant ones,—contrary to natural law and to equity.

Another consideration which shews clearly how this separation of the formalities relating to the celebration of marriage from the qualities required in the future consorts, is essentially in the spirit of the Legislature, and how important it is not to confound these two matters, is the difference in legislative jurisdiction introduced by the Confederation Act, secs. 91 and 92, one of which places marriage within the attributes of the Federal Parliament and the other the celebration of marriages under the jurisdiction of the Provinces. There is no occasion to decide in this case the respective extent of these two jurisdictions, but one must not forget that the Federal Parliament has already twice at least legislated on the subject of impediments to marriage and no one has seriously doubted its right to do so. In 1882 marriage between brother-in-law and sister-in-law was legalized (45 Vict. ch. 42, Canada). Later on this amendment of the code was incorporated in our Revised Statutes of the Province, although no special Act had been passed for this purpose, the Commissioners simply referring to the Federal statute, 45 Vict. (Revised statutes of Quebec 88, art. 6230). In 1890 the Federal statute, 53 Vict. ch. 36, made possible a marriage with the niece of one's deceased wife. If it was possible almost without dispute to put

an end to the arts. 125 and 126, who would say that one cannot do the same thing for the impediments of arts. 127? Why should impediments of affinity or relationship, spiritual or carnal, difference of religious belief on the part of the consorts and a number of other minor impediments hidden under this article be any more excluded from this jurisdiction than the disqualification of brother-in-law towards sister-in-law or uncle towards niece by marriage? If the federal legislature should declare, that, notwithstanding any law to the contrary, or any rules pronounced by or followed in, the different religious beliefs, there should be no impediments to marriage other than minority, error and a previous marriage, still existing and undissolved, still subsisting relationship and affinity, to such and such a degree, on what could one rely to test its jurisdiction? And what then would become of our art. 127 with the powers of the religious authorities both legislative and judicial that it has been attempted to read into this article? It is a very uncertain shelter for the theory of a marriage exclusively religious. It would be better to leave the celebration of marriage under the ægis of chapter 2 of title 5 of our code, whose articles we have already analysed and to come to a conclusion in support of the essential distinction adopted by the codifiers between the qualifications of consorts and the celebration of marriage, a distinction which has been recognized and followed by all constitutional legislation subsequent to the code, both federal and provincial.

I believe that I have conscientiously considered all the articles of the code which can have any application to the question now under examination. It clearly follows from this analysis that all officers of registers of civil status, without distinction of belief, can validly celebrate the marriage of two Catholics as well as of Protestants, of consorts belonging to different religious denominations, as well as those of the same belief, and that, in order that a marriage should be considered publicly celebrated, it is sufficient that it should be celebrated by such a public officer under the authority of a license from the Crown which is sufficient for all marriages, or even without any dispensation, if one considers the question only from the simple point of view of the validity of the *acte* drawn up and recorded in the public registers which are the registers of acts of civil status. It has been said that this organization is not an ideal one as a system to prevent clandestine marriages. It has been said, and rightly so, that the law in force before the Conquest, that is to say, the law established by the "Ordinance de Blois" and some other subsequent ordinances (including the Ordonnance of 1667 which organized the registers of civil status), were superior from this standpoint: only one place to publish the banns, one single place to celebrate the marriage, the Roman Catholic church of the

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parties' domicile, only one functionary authorized to witness the consent of the parties and to make a record thereof, the curé of that parish, one single register evidencing that *acte* which register could not be kept elsewhere than in the parish where the marriage was celebrated. It has been concluded, therefore, that the codifiers should have adopted this old law as regards the marriage of Catholics, and had in fact adopted it and had declared at the same time a separate legislation for all other religious denominations. This deduction does not seem to us to be logical. It is a false method of interpretation to set out from an ideal which one has formed for one's self from a single and often exclusive point of view in order to discover what might have been the intention of the Legislature, without taking into consideration the ensemble of the already existing laws, the needs of different factions, or the abuses which might have grown from long custom; in a word, the state of the country at the time when the law was passed. Even this point of view of the general interest, although not so false, is still a very uncertain criterion. The Legislature does not always do what it would but what it could. What is pretentiously called the intention of the legislator is the result of so many different wills often contradictory, of so many unknown and indeterminable factors, that it is impossible to say what was his intention, and it is still more impossible to affirm that the law as made, is truly the expression of this intention.

Such a labor is almost useless if performed in order to confirm the literal interpretation; it is absolutely hurtful if it is made in order to contradict it. I cannot, however, avoid entering on this ground, because one of the contrary precedents seems to be based almost exclusively upon this theory. There is no doubt that, from the point of the clandestinity of marriages, the law of the old French régime, as also the English law, was preferable to the system of the codifiers, which, with its multiplicity of jurisdictions, makes it more possible, perhaps, to keep certain marriages hidden from the public; but it was necessary to solve certain other problems equally important which demanded the attention of the legislators. There was Catholicism, with its liberty of existence and action, which has been assured to it by the Capitulation, by the Treaty of Paris, and by the Quebec Act; Catholicism which pretended to have retained along with this liberty under the new régime all the farrago of privileges and exclusive jurisdiction which had been conferred upon it as the state religion by the French rule. There was also the Church of England, the State religion of the conqueror, which laid claim to keep that predominating authority along with all the rights and privileges which had been conferred upon it in this country by the new Sovereign. There were also, for this is

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the characteristic trait of this period of our legislation which followed from the Cession downwards until the codification of our laws, the independence acquired by the other Protestant denominations at the expense of the Church of England by means of hard struggles against that which was considered to be an intolerable yoke, struggles which were one of the chief causes of the rising of '37 in Upper Canada, and by means of which these different denominations obtained, among other things, the yielding to their ministers of the right to keep registers of civil status, a privilege which necessarily brought with it the authorization to witness the *acte* of marriage and to give to it the authenticity required by the law, that it to say, to celebrate marriage from a civil point of view at the same time as they performed the religious ceremony.

There were also certain customs which had been introduced, probably by the Colonists, of New England, who had come to settle in this country after the Conquest, so that we find marriages made before justices of the peace and other officers who had no real authority given by the law. One finds traces of these different customs in the remediary laws which were passed in several instances during this period.

There was all the previous legislation which it was necessary to collate, to co-ordinate, to revise and above all to respect. When I say previous legislation I do not speak only of the law existing before the Conquest, which if it must be considered as remaining in force notwithstanding the subsequent laws and the codification, would give to the Catholic curé of the domicile the exclusive authority to celebrate all marriages not only of his own flock but of those of all the inhabitants of his parish, whatever might be their religious belief. This power being the exercise of of a public authority, would cease at the Conquest just as any other ministerial power, which is a branch of the sovereign power. The Roman Catholic priests continued to exercise this power as officers *de facto* at the same time as the ministers of the Church of England, and even those of the other religious denominations, up to and until the 35 George III. ch. 4, which seems to be the starting point of the re-organization of this part of the public authority. In the preamble of this statute the purpose of the law is indicated:—

> The authentic and uniform registration of baptisms, of marriages and of burials,

to assure

> the peace of families and to establish the different civil rights of His Majesty's subjects.

In the first section it is provided that in each parochial church of this province belonging to the Roman Catholic communion and also in each Protestant church or congregation, in the said

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province, there shall be kept by the rector, curé, vicar or other priest or minister having charge of the same, two registers of the same tenor, each of which shall be deemed authentic, ... in each of which the said rectors, curés, vicars or other priests or ministers shall be bound to register all baptisms, marriages and burials, etc. Section 4, dealing with the *acte* of marriage is reproduced in substance in art. 63 and 64 of the code. It is there said, among other things, that the entries made in the registers shall be signed by the person who has "celebrated the marriage" and by the contracting parties. This, in the opinion of this Court, confers upon all rectors, priests and ministers of every religion, whether Catholic or Protestant, without distinction, the right to give the seal of authenticity to the consent to be married, that which constitutes the marriage itself from the point of view of the civil law.

From this moment the power exercised by the ministers of the different religious beliefs as officers *de facto* became a lawful authority. Observe that from this moment also this authority became universal for all functionaries and was not respective and limited. The authority of the Roman Catholic priest is universal, as it was before the Cession. He is still able to make an official record of the birth of a child by celebrating its baptism, of the consent of the consorts to be married by celebrating the religious marriage, and also of the death of a person by holding burial services and this for all persons who may present themselves before him no matter what their religious belief may be. The only difference between his civil jurisdiction under the present law and that which he had before the Cession is that his power is no longer exclusive. All the ministers of the other beliefs are absolutely upon the same footing. It is true that the question remains as to what were the particular Protestant congregations which this statute had in view, but this has nothing to do with the point at issue in this suit. As to marriage, it is to be observed that in the form which is given for the *acte* of marriage there is no mention made of the religion of the parties any more than in the arts. 64 and 65 of the code. It has been said that the section of this statute which revokes that part of the Ordinance of 1667 which concerns the form and the method in which the registers of civil status are to be kept and that only, shews that it was the intention of the Legislature to leave in force the provisions of the old French law concerning marriage and its functionaries while changing the provisions concerning the registers. On examination of this Ordinance of 1667, which was well known to former practitioners as an ordinance concerning civil procedure, it appears that no part of the ordinance deals with the question of marriage except the articles which concern the form of the registers. Hence, there was no disposi-

tion concerning marriage in the ordinance to be left in force. There was naturally no intention to revoke the whole of that ordinance which was retained as a general code of procedure for our civil Courts, and that was all, but, as for allowing the curé of the parish to retain the exclusive privilege of giving the seal of authenticity to the consent to be married, this could not be done since the Legislature placed the ministers of other religions upon the same footing with the same extent of powers, without any restriction, and, in consequence, with concurrent jurisdiction.

Lastly, and most important of all, there is the statute 14 and 15 Vict., which declares in its first section:—

> That the free exercise and enjoyment of religious worship and profession without distinction or preferance, but in such a way as not to be an excuse for acts of license nor the justification for practices incompatible with the peace and safety of the province are permitted by the constitution and by the laws of this province to all subjects of Her Majesty who may be therein.

This law put an end to both state religions at the same time, the old one which no longer had any authority as such and the new one which laid claim, with more or less right, to exercise such an authority. Not only did this statute confirm to the Catholics the freedom which had already been assured to them, but it extended this freedom to all dissenting Protestant denominations and to all religions present or future whatever they might be. This statute thereby consecrated the great principle of liberty, of equality and of independence of religion in the eyes of the law, that is to say, a full and entire freedom of conscience equal for all and respected by all. This law should be engraved in letters of gold on the portals of all our temples as evidence of the faith, the tolerance and equity of our fathers and as a future guide for ourselves and for our children.

Under such conditions the codifiers could not have intended to leave to a single religion or even to two religions the exclusive custody of acts of civil status. On the other hand, they could not follow the Code Napoleon on this point and separate the religious ceremony from the civil *acte* so as to entrust this *acte* to any purely civil ministerial authority. It would have been too great a shock to the feelings of the majority, as well Catholic as Protestant. Being obliged therefore to leave the civil function to the religious officers of whom there were necessarily a good many acting within the same territory, and at the same time to respect the individual freedom of every person, which had been so solemnly established, it was absolutely necessary for them to adopt a complex multiple system of concurrent competence of all functionaries entitled to celebrate marriage. This is in fact what the codifiers have done and they have given

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to this system as great a unity and as great a publicity as was possible by means of the return of the registers to the office of the Court. By means of this organization each denomination which desires to take upon itself the duty of furnishing a civil functionary for the registration of the different acts of civil status is entitled to do so; the act of marriage remains joined to the sacrament, as the act of birth to the baptism and the act of death to the burial service; marriage retains its ancient solemnity which rightly gives it the respect with which it is treated; at the same time, however, the free citizen to whom certain ceremonies are displeasing or who, by reason of certain decisions of the ordinary of his church which he believes to be unjust, but from which he cannot be relieved, finds himself hindered from marrying or being married before the ministers of his own religion, is entitled to go to any other functionary of the registers of civil status whatsoever; the future consorts who respectively belong to the different religions are entitled to be married by the clergy of one or other of these religions and neither of them may come provided with a decree of nullity to unbind that which the law has bound by the ministry of the other one's religion, and those whose religion is not regularly organized in this country, in such a way as to entitle them to keep registers of civil status, as well as those who are so unfortunate as not to have any public religious belief, will not be deprived of the incontestible right of validity making the most important civil act of their life; so that, if, when the candidates present themselves to be united in marriage, the functionary has either lawful or arbitrary scruples which authorize him to refuse the door of his temple, instead of commencing quarrels and lawsuits on the threshold of conjugal life the parties may go quietly to a neighbouring functionary who will give to their consent the legality, authenticity and publicity required by law.

To resume, if one properly understands the spirit of the times when the codification was made, one cannot but admit that there was no other possible system which would meet the situation and that our code is still after all of the highest ideal as far as this subject is concerned. If the law were not so, it is thus that it should be made. The authors of this great national work will hardly gain by this tribute to their achievement, but their work has been so much cried down, especially as to the chapter of marriage, it has been so much tortured and twisted in order to discover there what was not there in fact and what was never intended to be placed there, that I feel it somewhat necessary to make this statement before proceeding to the examination of the jurisprudence and the doctrine upon this subject.

One must not disguise the fact that the majority of the commentators and several decisions of the Courts appear to give

a contrary solution to the question, but as each one has come to this conclusion by following different roads, it must be fully admitted that the value of this doctrine when all the opinions are taken together, is not the same as if all the authorities and precedents had been arrived at by starting from the same premises in order to come to their conclusions. Each one of these theories thus finds itself contradicted by all the others and as a whole the result is not very satisfactory.

The first commentator who was nearest in point of time to the codification, J. Roy, "Explication du Code Civil," page 3, expressly admits, as being in accordance with the new code, that the marriage of two catholics celebrated by a protestant is legal.

The Hon. Mr. Justice Loranger, in his second volume published in 1879, page 278, only goes half way.

> "Il n'est pas douteux," dit-il, "que quoiqu'il s'expose aux peines canoniques, le pretre catholique peut, d'apres l'un at l'autre droit, celebrer validement le mariage des protestants. Le Code le dit implicitement en donnant a tous les pretres et ministres le droit de celebrer le mariage, sans restreindre leur competence a leurs co-religionnaires."
>
> "It is beyond doubt," says he, "that although he exposes himself to canonical penalties the Catholic priest is entitled according to both the old and the new law to validly celebrate the marriage of protestants. The Code declares this expressly in giving to all priests and ministers the right to celebrate marriage without restricting their competence to their co-religionaries."

That which, according to this author, would hinder us from extending the same interpretation of the code, and consequently the same competence to Protestant ministers with regard to Roman Catholic consorts would be the decree of the Council of Trent in virtue of which marriages "must be contracted before the curé of the parties." Were it not for the authority of this decree, he adds, the marriage of Catholics celebrated before Protestant ministers would be valid, although illicit. This theory is solely based on the presumption that the decree of the Council of Trent is in force in this country "in spite of the fact," says the commentator, "that one cannot in every case shew clear evidence of its publication." The objection has been raised to this doctrine that the decrees of the Council of Trent were never published in France or in Canada during the French dominion, since this publication could not be made without the authorization of the Sovereign under the régime of the state religion, an authorization which was always refused, and, in support of this argument the imprecations of the Casuists against the French kings on this account have been cited. It is therefore not surprising that it should be impossible to shew any evidence of this publication before the conquest of the country, and if this publication had been made before the code,

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which is possible, it could only have been done under the new laws which established the freedom of religion, but at the same time abolished the state religion, thus taking away all civil effect from those rules tolerating their existence as rules of conscience. The question of this publication remains therefore without interest from the point of view which we must consider, and moreover it seems illogical to set aside an article of the present law which is perfectly clear upon the authority of a legislation whose authority is denied, whose application was impossible and whose promulgation is at least problematical.

The theory of Mr. Justice Langelier, as well as that of Mr. Mignault, in their commentaries on the civil law, takes it for granted that marriage cannot be celebrated otherwise that by the curé of the domicile and at the domicile of the parties, and that, consequently, no other functionary of the registers of civil status than the curé of the parish is competent. That was the law existing before the Conquest, but as an interpretation of the present law this point of view is in absolute contradiction to art. 63 of the Civil Code, which clearly allows marriage to take place otherwise than at the domicile and by another functionary than the priest or minister of the domicile, since it requires in this case that the functionary who is charged with the marriage should verify and assure himself of the identity of the parties. It must be observed *en passant* that Mr. Mignault as well as Mr. Justice Loranger admits the validity of mixed marriages before a Protestant minister, (Loranger 2 No. 223, Mignault 1, p. 376), a theory which it is hard to reconcile either with the marriage necessarily celebrated before the curé of the domicile or with the decrees of the Council of Trent. The precedents in favour of concurrent jurisdiction which are to be found in our reports are first of all a judgment of Mr. Justice Torrance (*Burn* v. *Lafontaine*, 2 Revue Légale, p. 163). In this case the marriage was annulled because of a previous marriage which was declared valid although the consorts were Roman Catholics and the marriage had been celebrated by a Protestant minister.

In the case of *Delpit* v. *Coté*, 20 S.C., p. 338, Mr. Justice Archibald made a long and complete study of the question and came to the logical conclusion that the marriage must be upheld. One might add to these precedents the judgment of Mr. Justice Lynch in the case of *Durocher* v. *Degré*, had it not been reversed by the Court of Review presided over by the Hon. Judges Mathieu, Curran and Lemieux, 20 S.C., p. 456. Mr. Justice Lemieux was the only Judge to read his notes, which are very elaborate and very complete, I might almost say superabundant. However, in examining the facts of the case it must be admitted that the question was different from that which is at present under discussion, in fact in this case there were two minors sub-

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ject to the laws of Lower Canada who without consent of their parents and without any publication of banns whatsoever or any dispensation therefrom went to the United States to be married before a minister who called himself "minister of the gospel" and returned on the following day to their domicile. This "minister of the gospel" of the United States could not be one of the functionaries competent to keep registers of civil status for our province. The question was therefore to determine from the point of view of competence and of publicity if the marriage celebrated outside of Lower Canada had been performed with the formalities usual in the place of celebration, and if the parties had not gone to that place with the fraudulent intention of evading the law. It was therefore a question of applying art. 135 of the code. Curiously enough the case does not seem to have been discussed from this point of view, which, however, was the only possible one. The facts above mentioned would make it easy to concur in the dispositif of this judgment by simply declaring that those two minors who went away without the consent of their parents to be surreptitiously married in a foreign country, had done so with the fraudulent intent of evading the law, which is probably the conclusion to which the other two Judges, who have not expressed their personal opinion, had come.

If we go a little further back into the previous jurisprudence, we find the case of *Laramée* v. *Evans*, in which the Hon. Mr. Justice Papineau first of all upon a demurrer (24 Lower Canada Jurist, p. 235) and afterwards the Hon. Mr. Justice Jetté on the merits (25 Lower Canada Jurist, p. 261) decided that the functionary was incompetent in a case almost identical with this one. It is true that a different question was raised, viz., that Joseph Laramée was a person of feeble mind. There was also another question as to the religion of the woman, but these two points were set aside by the final judgment, and the matter was treated both in law and in fact as being the marriage of two Catholics capable of giving a valid consent who were married before a Protestant minister. So that these two decisions are absolutely to the point and contrary to the opinion which I think should be adopted. The judgment of Mr. Justice Papineau is not very long but in it are to be found all the arguments in favour of the theory which he has accepted and also the greater part of the statutes which have reference to the matter, except however, the 14 and 15 Vict. mentioned above, which in my opinion throws so much light upon the subject. This judgment is based on the special consideration that our law has not established a civil marriage but that it only gives civil effects to the religious marriage, the religious marriage being the marriage properly so called, and requiring to be annulled by the ordinary, the civil Court having no jurisdiction to do so.

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It seems to me that the distinction made above between the marriage properly so-called, the sacrament and the civil acte of marriage should put this theory in its true light. The code has certainly not created civil marriage, neither has it been content to give civil effects to the religious marriage. The code has legislated upon the civil side of marriage; it has adopted the ministers of the sacrament as functionaries of the civil law, subject in this respect to the jurisdiction of the civil Courts. Far from declaring that the civil courts are not competent to annul the marriage, it has consecrated a whole chapter to establishing the causes and to limiting the grounds of this nullity, and the code has neither organized nor recognized any religious jurisdiction to hear and judge causes of this kind. In order to arrive at the same conclusion, the Hon. Mr. Justice Jetté goes to the origin of our legislation on the subject, acting on the theory that one of the most certain methods of understanding a law is to go back to its origin, to consider the circumstances which produced it and to take into consideration those circumstances which might modify it; in short, to fall back upon history. If it can be said with Lord Herschell in the case of *The Bank of England* v. *Vagliano*, [1891] A.C. 107, 144, cited by Mr. Justice Archibald, that it is a bad method of interpretation

> to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

This opinion has application to the present case where the articles of the Code concerning the competency of a civil functionary to perform marriage are so clear that there is no possibility of serious doubt.

It is a rule, acknowledged to be absolute in the interpretation of laws as in the interpretation of contracts, that anything which may have been agreed upon or declared before the final contract which makes the law for the parties or before the law which has come into force, cannot be invoked as against this contract or to contradict that law. Moreover this is expressly declared by art. 2613 of the Civil Code:—

> The laws in force at the time of the coming into force of the Code are abrogated in all cases where the Code contains an express provision upon the particular subject of any such law.

In face of this article and of the express provisions of the code as to the competence of a civil functionary to perform marriages, provisions which are both clear and complete, I do not believe that it is necessary to consider the old law, or to have recourse to the study of the circumstances in which the country found itself at the time of the passing of the code, either to contradict these articles, or to do away with their effect.

Leaving to these provisions all their legal force, I am therefore of opinion that I must declare the marriage of the parties

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in this case both valid and indissoluble from the point of view of the civil law. But the opposant to the judgment, tierce-opposant *ès qualité*, has gone much further than this first conclusion, which is the only essential one to her cause. She has asked for a judgment annulling the religious decree, which pretended to annul this marriage, and also annulling the decree "*Ne Temere*" upon which the religious decree is founded, and this, not only from the point of view of the civil law, but even as a religious ordinance. Considering first the decree of the Ordinary, she has shewn that it is contrary to the essential element of all judicial procedure, viz., that she, the defendant in the case, was not summoned to reply to her husband's petition asking that the marriage be annulled, and that she was not heard upon the subject. She then points out that this decree is based exclusively upon the decree *Ne Temere*, proclaimed by the congregation of the council on the 2nd of August, 1907, and published in the Diocese of Montreal, by circular of 16th March, 1908, and she contends that this decree is unjust, oppressive, contrary to public order, to good morals, and to the welfare of the country, that this decree is not purely and simply a religious ordinance, a rule without binding effect, except upon the conscience, but that the real intention of the authorities who drew up the decree was to give it civil effect, that the religious authorities of this Diocese have endeavoured and still endeavour to give it that civil effect by pretending to annul marriages, in general, absolutely of their own authority, upon grounds exclusively based upon this decree, just as they have done in the present case. In order to establish the intention to give civil effect to the decree, counsel for the defendant have cited paragraphs 2 and 3 of art. 11 of the decree, where it is declared that these laws will apply in case of mixed marriages if there has been a dispensation allowing them to be celebrated, but that they shall not apply to non-Catholics who marry among themselves. The defendant even complained with a certain amount of indignation of the first paragraph of art. 11 which takes away from those who have been baptised in the Roman Catholic religion or who have been converted to it, the power and the right to leave it at any time, and this contrary to the liberty of religion and freedom of conscience.

Other points of secondary importance have also been brought to the attention of the Court. I did not think it necessary to consider these points because they can only be of slight importance from a judicial point of view and are to be considered rather as religious or political polemics. The defendant was even shocked by the words "law" and "legislation" used by the decree, by the circulars of promulgation and by the commentaries of the ecclesiastical authorities. I think it necessary to

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call to the attention of the brilliant counsel for the opposant that they have misunderstood the intention and the effect of this ordinance. That which has been treated as an affirmation of authority in civil matters to be found in the decree is nothing more than a matter of style. Roman Catholicism is a matter of tradition; its principles, its habits, its education are impregnated with tradition; everything is immutable; invariability is one of the strongest proofs that can be shewn in support of the infallibility of any doctrine, hence it is not surprising if the very language used has kept the form of other days. The whole misunderstanding is there and it seems to the Court comparatively easy to put an end to it.

If the article in question is understood as having this tendency to affirm civil authority in the ordinary language of our times, it is easily seen that what is meant to be said is simply that the decree in question shall only be binding for catholics and as catholics only. That is to say, that the only authority laid claim to by this decree is a spiritual authority over the members of the Roman Catholic church; moreover it is in this sense that the article has been interpreted by well-meaning dignitaries of the Catholic Episcopate and the learned counsel for the defendant have only to glance at the newspapers of the last few months in order to convince themselves of this. It is not the function of this Court to follow them upon this ground or even to direct them towards it. Personally I cannot believe that the Roman Catholic Congregation which decreed this law had the serious intention to give it any civil effect whatsoever. Whatever this intention may have been, it is not the duty of the Court to look for it; it is sufficient for the purposes of this case to declare for the reasons which have been already analysed in the judicial consideration of the question, that this decree is absolutely without any effect as regards the civil celebration of the marriage in this case, or rather, as regards the qualifications of the functionary before whom the consent to be married was given.

This view would be the correct one, even adopting the theory of those who wish to give to art. 127 of our code some bearing upon these matters, since, even in this case, and according to the same authorities this article could only give civil effect to the religious regulations existing at the time of the codification. This is only a religious decree, very wise in many of its dispositions, but only binding upon the conscience of the members of the Roman Catholic church, and, as such, is absolutely outside of the jurisdiction and competence of this Court. The existence and exercise of Catholicism even to its fullest extent, with all its spiritual absolutism must be respected. These rights are founded not only upon the goodwill of the legislators but upon the faith of the most solemn treaties and charters. The Courts

have no jurisdiction in the matter and it may be added without being wanting in respect that even the legislator would not dare to touch upon it, for this would be to violate the faith of treaties and the law of nations.

As for the decision of the Ordinary, it has the same force but no more than the decree *Ne Temere* upon which it is based. It is not necessary in my opinion to examine this document from a judicial point of view. Considered in the light in which it is placed by the consideration which has just been made of the case, this decree confines itself to declaring that there was no catholic religious marriage, a fact which was already sufficiently clear, and counsel for the opposant should be able without much effort to admit its validity. One of the consorts having thought right to lay the case before the Ordinary this question is settled for them, saving appeal, if any exists within this same jurisdiction, but there is no longer the "*appel comme d'abus*" before the civil Courts. This recourse has disappeared at the same time as the "*officialité*" having power over civil matters, and at the same time as the state religion which was the source, cause and origin of these two jurisdictions. It is only in this sense that one must interpret the dictum of the Privy Council in the case of *Brown* v. *La Fabrique de Notre Dame*, L.R. 6 P.C. 157.

The bishops have over their flock the powers which the discipline of their church gives to them in matters of conscience. Their decisions, given within the limits of this jurisdiction, are *res judicata* for the civil Courts.

For the reasons mentioned above I annul the judgment of the 23rd March, 1911, and declare the marriage of the said Eugene Hébert and Dame Emma Clouâtre, celebrated on the 14th July, 1908, before the Rev. William Timberlake, under the authority of a license dated the 9th July, 1908, good and binding in law; declare that the decree proclaimed by the Congregation of the Council of the Roman Catholic Church on the 2nd August, 1907, commencing with these words, "*Ne temere Inirentur*," has no civil effect upon the said marriage; that the decree of the ordinary of the Diocese of Montreal, 12th November, 1909, filed in this case by the plaintiff has no judicial effect in the said case; and dismiss the opposition of the defendant-opposant and of the tierce-opposant *ès qualité*, as to the other conclusions therein mentioned. Each party will pay its own costs, dating from the two inscriptions of the defendant-opposant and of the tierce-opposant *ès qualité* bearing date respectively the 5th day of December, 1911.

Opposition maintained and default judgment annulled.

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Dallas V. PRINGLE v. P. O. DWYER and The Northern Investment Agency, Ltd.

Alberta Supreme Court, Stuart, Simmons, and Walsh, JJ. October 4, 1912.

1. ACTION (§ II D—60)—JOINDER—CLAIM AGAINST PURCHASER OF LAND AND AGENT EFFECTING SALE—ALLEGATIONS OF FRAUD.

Where a vendor seeking rescission of an agreement for the sale of lands is unable to ascertain the exact legal relations existing between the two defendants against whom he makes his claim alternatively and pleads that he was induced to sign the agreement of which he asked the rescission by the fraud of both defendants, one of the defendants being a company dealing as real estate agents which had acted as agents for the vendor and the other defendant being the person in whose name the land was purchased, who was also vice-president of the defendant company; the cause of action is a single one, viz., the breach of trust arising out of the alleged fraud, and the statement of claim is not irregular as for misjoinder of two causes of action.

[*Smurthwaite* v. *Hannay*, [1894] A.C. 494, 10 Times L.R. 649, followed; *Thomas* v. *Day*, 4 D.L.R. 238, distinguished; *Phosphate Sewerage Co.* v. *Hartmont*, 5 Ch. D. 394, and Kerr on Fraud and Mistake, 14th ed., 412, specially referred to.]

2. PLEADING (§ II P—290)—AVERMENT OF FRAUD—OMISSION TO USE WORD "FRAUD" IN PLEADING FRAUDULENT TRANSACTION.

In an action for the rescission of an agreement for the sale of lands, and the return of moneys retained by the defendant, allegations of fraud are sufficiently made without actual mention of the word "fraud" in the statement of claim, where the allegations, if sustained, shew that the defendants were guilty of the perpetration of a fraud on the plaintiff.

[*Marshall* v. *Staden*, 7 Hare 728, 19 L.J. Ch. 57, 68 English Rep. (Reprint) 177, followed.]

3. ELECTION OF REMEDIES (§ I—4)—SEPARATE TORTS—JOINDER NOT PERMITTED.

Two or more distinct causes of action for separate torts cannot properly be joined in one action; if joined the plaintiff must elect against which defendant he will proceed.

[*Edinger* v. *McDougall*, 2 A.L.R. 345; *Nyblett* v. *Williams*, 6 Terr. L.R. 200; *Saddler* v. *Great West Railway*, [1896] A.C. 450; *Thompson* v. *London County Council*, [1899] 1 Q.B. 840; *Hinds* v. *Town of Barrie*, 6 O.L.R. 656, followed; see also Underhill on Torts, 9th ed., 49, 50*a*.]

Statement

THIS was an appeal from an order of the Chief Justice whereby the plaintiff's claim was ordered to be stricken out and it was ordered also that the plaintiff elect which of the defendants he wishes to proceed against or that he elect which cause of action he wishes to prosecute against either or both defendants. The plaintiff in his statement of claim alleged as follows:—

1. The plaintiff purchased lot 158 in river lot 6, in the city of Edmonton, in the Province of Alberta, as the same is shewn on the map or plan of record in the land titles office for the North Alberta land registration district as plan "F" from McDougall & Secord, Ltd., of the said city of Edmonton, by agreement of sale dated the 25th day of January, 1911.

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2. The defendant, the Northern Investment Agency, Ltd., carries on the business of a real estate agent in the said city of Edmonton. The defendant P. O. Dwyer is the vice-president thereof and an officer active in the business of, and in the direction of the affairs of the said defendant company, and shares in the commissions received by it for sales of land.

3. A short time prior to the 20th day of June, 1911, the plaintiff listed the said lands with the defendant company as his agent for the purpose of sale.

4. At or about the time of listing the said land as aforesaid, the defendant Dwyer was active in the business of the defendant company and dealt and consulted with the plaintiff as an officer of the company in the matter of the said land as one interested in the agency and having the position as agent for the sale of the said land, and the plaintiff so dealt and consulted with the said Dwyer by reason of the latter's position and connection with the defendant company and with the said agency.

5. On or about the 20th day of June, 1911, the defendant the Northern Investment Agency, Ltd., represented to the plaintiff that the land in question had been sold by them to a purchaser whose name the defendant, the Northern Investment Agency, did not disclose to the plaintiff, alleging as a reason therefor the fact that the alleged purchaser was purchasing other lots in the said city of Edmonton and did not wish the fact that he was buying certain property to be known at that time.

6. The defendant, the Northern Investment Agency, Ltd., further represented to the plaintiff that the alleged purchaser would not purchase the said lot unless he could pay cash in full for the said lot, and that McDougall & Secord, Ltd., the registered owners, refused to accept payment of the amount unpaid to them under the said agreement of sale of the said lot unless there was paid to them at the same time a bonus of $400.00.

7. At the time of the said representations the said defendant company forwarded to the plaintiff an assignment in blank of the aforesaid agreement of sale, which assignment is dated on or about the 20th day of June, 1911.

8. On the faith of the aforesaid representations the plaintiff executed the said assignment in blank and forwarded it to the defendant company, and instructed them to deduct from the amount of the purchase price the said sum of $400.00 stated by the defendant company to be the bonus required by the said McDougall & Secord, Ltd., as aforesaid.

9. The said Northern Investment Agency, Ltd., deducted the said sum of $400.00 out of the purchase price and also the sum of $475.00 which they charged as commission upon the sale.

10. The defendant the Northern Investment Agency, Ltd., did not sell the land in question to a *bonâ fide* purchaser but sold it to the said defendant, P. O. Dwyer.

11. The defendants did not disclose to the plaintiff the name of the purchaser, but on the contrary, made every effort to conceal from the plaintiff the name of the purchaser.

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12. In the alternative the plaintiff says that the defendant, P. O. Dwyer, in fact purchased the said land for the benefit of the defendant, the Northern Investment Agency, Limited.

13. The defendant Dwyer did not, nor did the defendant company, nor did any one pay to the said McDougall & Secord, Ltd., or to any other person, the amount unpaid under the said agreement and did not pay to the said McDougall & Secord, Ltd., or to any person the said sum of $400.00 or any other sum as a bonus or otherwise; nor did the said McDougall & Secord, Ltd., ever require or stipulate for such bonus or for any bonus as represented by the defendant company to the plaintiff.

14. The defendant Dwyer has obtained the benefit of the said sum of $400.00 obtained or retained from the plaintiff in the manner above set out.

15. In the alternative to the plaintiff's claim as to the liability of the said Dwyer as an officer of the defendant company, the plaintiff says that the defendant company, unfairly to the plaintiff, acted as the agent and in the interests of the defendant Dwyer in obtaining the said sum of $400.00 and the said land for the said defendant Dwyer and made the representations as aforesaid on behalf of, and for the benefit of, and as agent of the said Dwyer.

16. The plaintiff as soon as he became aware that the said Dwyer was the purchaser of the said land, informed him that he rescinded the sale thereof and at once filed the caveat against the said land to protect his interests.

17. The plaintiff has offered and is still ready and willing to repay to the said Dwyer the money which he has received as the purchase price of the said land and any money which the said Dwyer has paid to the said McDougall & Secord, Ltd., on account of the said agreement of sale, but the defendant Dwyer has refused to accept the said money or to consent to the said rescission.

The plaintiff therefore claims:—

(*a*) Rescission of the said assignment executed by him as aforesaid and of the sale from him to the defendant Dwyer.

(*b*) In the alternative judgment against the defendants for the sum of $400.00 and interest thereon from the 20th day of June, 1911, at the rate of 8 per cent. per annum (the rate of interest payable under the said agreement of sale of the said land).

(*c*) Judgment against the defendant the Northern Investment Agency, Ltd., for the sum of $475.00 together with interest thereon at the rate aforesaid from the 25th day of June, 1911 (being the date on which the said amount was retained for commission).

(*d*) Damages.

(*e*) An order continuing the caveat filed by the plaintiff against the land in question.

(*f*) Costs of this action.

(*g*) Such further and other relief as the nature of the case may require or as to this honourable Court may seem right.

Frank Ford, K.C., for plaintiff, appellant.
C. C. McCaul, K.C., for defendants, respondents.

STUART, J.:—I think the only reasonable inference to be drawn from the allegations contained in paragraphs 2, 3 and 4, is that what the defendants the Northern Investment Agency, Ltd., is alleged in paragraphs 5, 6, 9, 10 and 11, to have done were done by that company through the defendant Dwyer as the agent of the company, which, of course, could only act through an agent. If the allegations contained in the statement of claim are true then the defendant company through its agent Dwyer and the defendant Dwyer himself were guilty of the perpetration of a fraud upon the plaintiff. It is not necessary to use the word "fraud" in order to make sufficient allegations of fraud. See *Marshall* v. *Staden*, 68 English Rep. 177, 7 Hare 728, 19 L.J. Ch. 57. It is true that the plaintiff in paragraph 15 pleads alternatively that the company who was his agent acted also as an agent for Dwyer in whose name the purchase was made but when we read paragraph 12 we see that there is an allegation that Dwyer really bought for the benefit of the company.

It is clearly a case where the plaintiff cannot possibly know what the exact legal relations between the company and its vice-president may have been in respect to the transaction. It is obviously open to the two defendants to represent those relations in any aspect they choose; and the plaintiff has endeavoured by his alternative allegations to cover both possible aspects. But, in my view, that is only a matter of detail. The statement of claim does plainly assert that a fraud was committed on the plaintiff in which both defendants participated and from which both defendants derived benefit.

Now it is true that the plaintiff claims a rescission of the agreement obtained in Dwyer's name and also a return of the two different sums of money but it seems to me to be impossible to call each particular item of specific relief to which the plaintiff may be found entitled a distinct cause of action. No doubt the decision in *Smurthwaite* v. *Hannay*, [1894] A.C. 494, 10 Times L.R. 649, does prevent the joinder of distinct causes of action against different defendants in one suit. A number of other decisions were also quoted to us in which the same principle was enforced. But it is noteworthy that in nearly, if not quite all of them, the cause of action was a pure tort, such as libel, trespass or negligence or the like as in *Edinger* v. *McDougall*, 2 Alta. L.R. 345; *Nyblett* v. *Williams*, 6 Terr. L.R. 200; *Sadler* v. *Great West Railway Co.*, [1896] A.C. 450, 65 L.J.Q.B. 462; *Thompson* v. *London County Council*, [1899] 1 Q.B. 840, 68 L.J.Q.B. 625, and *Hinds* v. *Town of Barrie*, 6 O.L.R. 656.

These were all common law actions.

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The present case is really an appeal to the equitable jurisdiction of the Court. The plaintiff says to the defendant company:—

> I placed my property in your hands for sale, you were my agent and were therefore a trustee for me, you bought the property for yourself or for your chief officer, your vice-president the defendant Dwyer. In effect he was also my agent as you could only act through an agent and you acted through him. You took from me a commission. You, through him, represented to me that I had to make a payment of $400 for a certain purpose and you retained that out of my moneys with which you were entrusted though you never made such a payment. Whether you or he have that $400.00 I do not know, and cannot know, till the case is tried. But I want that whole transaction set aside and a refund made of my moneys which you have misappropriated. Whether you the company, or you the company's vice-president and agent, have those moneys I do not know but whichever of you have them I demand them back.

To my mind it is absurd to say that there are here two causes of action. All cases of libel, trespass, negligence, resulting in physical injury, are beside the question. There is only one cause of action, viz., the breach of trust, the fraud alleged to have been committed. The retention of a commission and the retention of the $400 may, no doubt, be separate items of wrongful advantage alleged to have been gained by the agents of the agents' agent, Dwyer, by means of the alleged fraudulent conduct but that does not create two separate cause of action. In Kerr on Fraud and Mistake, 14th ed., p. 412, it is said:—

> All persons who lend themselves to a fraud and receive money from the defrauded party may be made parties to an action to set aside the transaction and to recover the moneys they have received. . . . So also a man who has been guilty of a fraud in concert with one of several trustees may be joined in an action against the trustees generally. All persons concerned in the commission of a fraud are to be treated as principals. No person can be permitted to excuse himself as the agent or servant of another.

See *Phosphate Sewage Co.* v. *Hartmont*, 5 Ch. D. 394, and *Weir* v. *Bell*, 3 Ex.D. 248.

I think in taking this view it is not necessary for us to override the decision in *Thomas* v. *Day*, 4 D.L.R. 238, because there, there was a joinder of an action against a trustee for an account, which was originally a common law as well as a chancery action, with an action to set aside a conveyance by the trustee for fraud.

It is, perhaps, unnecessary to add that although I have used the word fraud a good many times that word refers only to allegations which are yet to be proven and which may never be proven.

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The appeal should be allowed with costs, the order vacated and the original application dismissed with costs in the cause to the plaintiff.

SIMMONS, and WALSH, JJ., concurred.

Appeal allowed.

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Alberta Supreme Court, Harvey, C.J., Scott, Simmons, and Walsh, JJ. October 4, 1912.

1. EVIDENCE (§ IV G—422)—DEPOSITIONS—FOREIGN COMMISSION—USE AT TRIAL—PHYSICAL INABILITY TO ATTEND—FRAUDULENT NOTES—ASSOCIATION WITH FRAUDULENT PAYEE—SUSPICIOUS CIRCUMSTANCES.

Where an action is brought on a promissory note made by the defendant to a payee who endorsed to the plaintiff, and an application is made to the trial Judge by the plaintiff to use at the trial his own evidence, taken upon commission on an examination for discovery out of the jurisdiction, leave having been given to have the evidence taken as for use at the trial, subject to any order to be made by the trial Judge as to its admission, the trial Judge may properly examine and consider the testimony so taken on the commission as well as the affidavits for and against the application and if fraud vitiated the original transaction and many other similar ones in which the plaintiff admittedly was, and with knowledge of the fraud is now continuing to be, a beneficiary associated with the fraudulent payee of the note in question and of similar notes, the court may, in its judicial discretion, refuse to admit such depositions, even against strong affidavits of physical disability preventing his attendance at the trial.

[*Re Boyse, Crofton* v. *Crofton*, 20 Ch. D. 760, 46 L.T. 522; *Berdan* v. *Greenwood* (1880), 20 Ch. D. 764*n*, 46 LT. 524*n*; *Peters* v. *Perras* (1908), 1 Alta. L.R. 1 and 201, and *Peters* v. *Perras*, 42 Can. S.C.R. 244, referred to.]

2. EVIDENCE (§ IV G—422)—DEPOSITIONS—COMMISSION—USE AT TRIAL—PHYSICAL INABILITY TO ATTEND—IF ALLEGED MATERIAL EVIDENCE PROVABLE OTHERWISE—PLAINTIFF'S REMEDY AGAINST PAYEE—JUDICIAL DISCRETION—SUSPICIOUS CIRCUMSTANCES.

In an action on a promissory note made by the defendant to a payee who endorsed to the plaintiff, upon an application by plaintiff to use at the trial his own evidence (taken on an examination for discovery, leave having been given on such examination to have the evidence taken as on a commission for use at the trial, subject to any order in respect to the use thereof which the trial judge might make, the trial judge, on the motion, while giving due weight to strong affidavits of physical inability, will, in his judicial discretion, consider whether plaintiff has an adequate legal remedy for the recovery from the payee upon his endorsement of the note, the obtaining of which from the defendant maker was tinged with fraud, particularly where the plaintiff with knowledge of many such fraudulent notes continues to associate himself with the payee by buying from him notes of other makers similarly obtained and tinged with fraud.

[*Cock* v. *Allcock and Co.*, 21 Q.B.D. 178; *Hunt* v. *Roberts* (1892), 9 L.T. 93, referred to.]

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3. EVIDENCE (§ IV G—422)—DEPOSITIONS—COMMISSION—USE AT TRIAL—PHYSICAL INABILITY TO ATTEND—PROVING BY OTHER WITNESSES—SUSPICIOUS CIRCUMSTANCES.

Upon an application to use at the trial the evidence of the plaintiff taken on a commission, upon the ground of physical inability to attend, the fact that plaintiff is associated with a fraudulent payee of the note sued upon, and can introduce his alleged material evidence through that fraudulent payee, will be considered by the trial Judge on the motion.

[*Berdan* v. *Greenwood* (1880), 20 Ch. D. 764*n*, 46 L.T. 524*n*, referred to.]

Statement

APPEAL by the plaintiff from the order of Stuart, J., at the trial, refusing the application of the plaintiff to use his evidence taken on an examination for discovery, leave having been given on such examination to have the evidence taken as on a commission for use at the trial, subject to any order in respect to the use thereof as the trial Judge might make, the application being supported by affidavits shewing that the plaintiff's physical condition was such that he could not attend the trial without danger to his health.

The appeal was dismissed with costs, WALSH, J., dissenting.

O. M. Biggar, for plaintiff, appellant.

Frank Ford, K.C., for defendant, respondent.

HARVEY, C.J.

HARVEY, C.J.:—This action is on a promissory note made by the defendant for $625, with interest at six per cent. dated 26th April, 1907, and payable on 1st July, 1908, to McLaughlin Bros., and by them endorsed to the plaintiff, who claims to be a holder in due course. The defendant alleges fraud in the procuring of the note and that he recovered a judgment against McLaughlin Bros. in respect thereof in May, 1908, in an action begun in November, 1907, and denies that the plaintiff is the holder in due course. The plaintiff in reply admits the fraud and the fact of the judgment. This being the state of facts under sec. 58 of the Bills of Exchange Act the burden is on the plaintiff of proving that he is the holder in due course, which is defined by sec. 56 as meaning that he became the holder before the note was overdue and that he took it in good faith and for value without any notice of any defect in the title of the person who negotiated it.

The plaintiff lives in Columbia, Ohio, and commenced the action in November, 1908. It does not appear on the record but on the argument it was stated to be the fact that an application was made to me on behalf of the plaintiff for a commission to take his evidence for use at the trial which was refused. Subsequently as does appear by the record an application was made to me to dismiss the action for want of prosecution upon which by consent an order was made for the examination of the plaintiff for discovery with leave to the plaintiff on

such examination to have his evidence taken as on a commission for use at the trial but without the right to so use it at the trial unless a Judge should otherwise order. An application was made to my brother Stuart to use the evidence so taken at the trial supported by affidavits shewing that the plaintiff's physical condition was such that he could not attend the trial without danger to his health and perhaps his life. The application was refused and this appeal is from that refusal.

There is no absolute right on the part of a party to give his evidence or that of any witness otherwise than in open Court before the Judge or jury which tries the case, but the rules provide that "a Judge may in any cause or matter where it shall appear necessary for the purposes of justice make an order" for a commission, etc. In *Re Boyse, Crofton* v. *Crofton*, 20 Ch. D. 760, 46 L.T. 522, Fry, J., refused a commission to take the evidence of a witness on the ground that he could not be properly cross-examined under such commission. In *Berdan* v. *Greenwood* (1880), 20 Ch. D. 764n, 46 L.T. 524n, reported as a note to the foregoing case the Court of Appeal refused to allow the evidence of the plaintiff to be taken on commission though it was sworn that his coming to the trial might cause his death. The evidence which the plaintiff desired to give was that of certain transactions between himself and members or officials of the Russian Government. The Court, notwithstanding the sworn statements, was not satisfied that the plaintiff could not stand the trial without danger or that the facts his evidence was required to prove could not be proved by other witnesses but the statements made by the Judges indicated that even if they had been so satisfied they would have refused the commission and the first part of the headnote appears to me to be entirely warranted from their reasons. It is as follows:—

> In deciding upon an application by one of the parties to an action for the issue of a commission to take his evidence abroad the Court must consider whether having regard to all the circumstances of the case, it is necessary for the purpose of justice, and in the interest of all parties to the action, and not of the party applying only, that the commission should issue. In so considering the matter the possibility of the witness not being a credible witness must be assumed and regard must be had to the importance of cross-examination before the Court by which the case is to be tried, and if the Court is satisfied that the non-appearance of the witness in Court would place the other parties to the action at a disadvantage the commission should not issue, even though the result may be to prevent the evidence from being given at all.

Baggallay, L.J., on p. 525, says:—

> I think that even in the extreme case, even if the refusal to allow the commission might prevent the evidence of the witness from being

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given, yet if the Court was satisfied that the not having that witness in Court before the tribunal which had to decide the case would lead to injustice to the defendants, the commission ought still to be refused,

and Cotton, L.J., on the same page, says:—

> But we must consider not what the plaintiff's case requires, but what justice to the defendants as well as to the plaintiff requires; and in such a case as this it is, in my opinion, eminently important that the demeanour and precise answers of the witness to the questions put to him should be seen and heard by the Judge, or Judge and jury, who have to decide the case, and that there should be the fullest opportunity given to the defendants to cross-examine him, they being really only able to do so effectually when the witness is in Court, and his demeanour and the way in which he answers the questions can be judged of by the Judge and by the jury.

Accepting this statement of the principle upon which the commission should be allowed or refused, viz., that of justice to the defendant as well as the plaintiff, it is important to consider what would be the result of allowing or refusing the commission evidence. In *Peters* v. *Perras* (1908), 1 Alta. L.R., at 201, the plaintiff was as in this case the endorsee of a note and somewhat singularly that note like the one in the present case was given to McLaughlin Bros. and another somewhat singular coincidence is that in that case as in this there was fraud in the obtaining of the note and in that case as in this an application was made to have the plaintiff's evidence given on commission but there the similarity ends up to the present for the evidence was permitted to be given. The trial Judge, however, was not satisfied that the plaintiff had taken the note *bonâ fide*, the circumstances which were disclosed by the commission evidence being such as in his opinion to cast discredit on the statement of the plaintiff. On appeal to this Court that judgment was confirmed but on a further appeal to the Supreme Court of Canada, *Peters* v. *Perras*, 42 Can. S.C.R. 244, it was reversed and judgment ordered to be entered for the plaintiff. Although that judgment was dissented from by two of the learned Judges of that Court it is binding on this Court and makes the law of this province on the point involved. The official report of that case is found, *Peters* v. *Perras*, 42 Can. S.C.R. 244, which is, however, only the reporter's digest of the reasons. I have, however, before me the reasons given by the learned Judges for their conclusions and Mr. Justice Duff, speaking for the majority of the Court, says:—

> The sole question raised is the question of fact—whether the appellant took the note sued upon (which, for the purposes of this judgment, may be assumed to have originated in the fraud of payees) in good faith. On that question the onus is upon the appellant.
>
> The whole of the evidence bearing upon it was taken upon com-

> mission and the point to be determined is whether the circumstances justify the refusal of the Courts below to accept the denial by the plaintiff and his brother, who purchased the note for him, of any knowledge or information concerning the transaction in which the note originated; or any suspicion touching the validity of it. On two grounds, with great respect, I am unable, on this point, to accept the decision under review. In the first place, on the record as it stands, these circumstances relied upon are, in my opinion, wholly insufficient to support a successful impeachment of the testimony in question; and in the second place, there was no notice in the pleadings or otherwise shewing the circumstances upon which the respondents rely as sustaining or pointing their imputations of bad faith; and no opportunity was given to the witnesses for the appellant to explain or to qualify the facts or conduct on which the respondents mainly based their attack upon the veracity or honesty of those witnesses.

I quote this because in the official report only one of the grounds appears to be given, and that too not with the clearness of the words of Mr. Justice Duff.

Now, applying the law as laid down there, I am unable to come to any other conclusion than that this evidence being taken on commission if the plaintiff has stated that he acted in good faith and had no notice of fraud the trial Judge must accept that as an established fact unless the facts or circumstances which would tend to cast discredit upon it are such as have been notified to the plaintiff by the pleadings or otherwise as being relied on by the defendants for that purpose. I do not quite understand what is meant by an opportunity being given to the witness to explain or qualify the facts or conduct since he was being examined by his own counsel who had the opportunity to question him about anything, so as to explain anything that came out in cross-examination, unless it means that he must have such opportunity after it has been argued that such facts or conduct are evidence of bad faith, which, of course, could not well be unless the witness were present at the trial.

In the defence in the present case no notice is given of any facts or circumstances from which bad faith is to be inferred and it would seem to follow that if it appears by the evidence that the plaintiff has distinctly sworn that he took the note in good faith and without notice of fraud that would be conclusive of the fact.

There is no doubt that a Judge seeing and hearing a witness give such evidence would be quite entitled to consider, not merely the circumstances disclosed, but also the demeanour of the witness and his manner of answering the questions and to draw a conclusion from them the reverse of what the witness swears to. Such being the powers of a trial Judge when the evidence is given before him it is evidence that the defendant would be placed at great disadvantage if he could not have the

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plaintiff give his evidence formally in Court. In other words, it would be an injustice to him to allow the plaintiff's evidence to be given on commission, and as the above case points out, justice to him is as important as justice to the plaintiff if not indeed more so. It is argued, however, that the refusal will be an absolute denial of justice to the plaintiff as he will simply have to abandon his claim.

The evidence taken on my order was read by the learned Judge below though not put in by the plaintiff's counsel who objects to its having been used or to its being used now. It is to be observed, however, that the examination was by the terms of the order primarily one for discovery though permitted to be taken in such a way that the plaintiff could use it by leave of a Judge. The defendant, however, does not require the leave of a Judge to use it either at the trial or on any application (see rule 224) and as he wishes it to be used he has a right to have it read.

It appears from the plaintiff's examination that he has been for some time and is still purchasing notes from McLaughlin Bros., that they are still liable to him on the note sued on in this action, and that they are financially able to pay. It is clear, therefore, that even though he might be deprived of his right to make the defendant pay something which could not be recovered from him except on the principle of protecting an innocent person he can recover the amount of his claim from McLaughlin Bros., who, if the defendant paid it to the plaintiff, would be liable to reimburse him. Such a result it appears to me would be one of substantial justice to all parties and would work no injustice to the plaintiff though possibly depriving him of his remedy against the present defendant. However, I am not satisfied after reading the affidavits and what the plaintiff in his examination states as to the condition of his health that he would be unable to attend the trial. In *Berdan* v. *Greenwood*, 46 L.T.N.S. 524n, 20 Ch.D. 764n, the evidence was that the crossing from France to England would produce sea-sickness which might cause syncope which would probably end in death. The evidence in the present case is no stronger than it was in that case. The affidavits of the medical men and of the plaintiff himself state very distinctly, as in that case, that it would be dangerous for the plaintiff to make the journey but from the cross-examination it appears that the plaintiff—a man of 48—is transacting his regular business as a banker, that his general health is fair but that his powers of locomotion are restricted by an affection of the spinal system as well as the joints of the knees and shoulders so that he uses a cane and is unable to walk more than a square or two at a time, in addition to which he also suffers from asthma. With that evidence before

me I find myself quite unable to say that I am satisfied that the plaintiff cannot attend the trial, so that in this respect I find no distinction even in fact between this case and *Berdan* v. *Greenwood*.

The only other suggested ground of distinction is that in that case the facts desired to be established by the plaintiff's evidence could be established by other evidence. Now, can it be said that the only way in which the good faith and knowledge of the plaintiff can be established is by his own evidence? There is no doubt that it would be the most satisfactory evidence and perhaps the only absolutely conclusive evidence but surely it would not be impossible to prove these facts in any other way, *e.g.*, if the endorsee of the note so attached were dead the person through whom the negotiation of the note was affected could give evidence of the particulars of the transaction from which the Court could infer, at least, in the absence of any evidence to the contrary, good faith and want of notice in the endorsee. No doubt if the plaintiff were living and no explanation were given of his failure to give evidence himself it would be some circumstantial evidence against him but that explanation could be given in this case and in any event I have no doubt that the plaintiff's evidence is not the only evidence by which the facts could be established. In this respect, therefore, also this case is scarcely to be differentiated from the other.

For all the reasons stated I am of the opinion that the refusal of my brother Stuart to allow the evidence to be given was just and that the appeal should therefore be dismissed with costs.

SCOTT, J.:—I concur. Scott, J.

SIMMONS, J.:—An order was obtained herein for examination for discovery of the plaintiff, who lives at Columbus, Ohio, and the order provided that the evidence of plaintiff might be taken in chief as though upon a commission to take his evidence for use at the trial, but provided that the plaintiff should not have leave to use the examination at the trial unless a Judge should otherwise order. The action came on for trial before me and the plaintiff's counsel applied for leave to read the plaintiff's evidence taken on commission. This application was not supported by any material and was refused by me and I enlarged the hearing of the case until the next sitting, with the intimation that the plaintiff's counsel might then if he wished make a substantive application upon proper material. At the next sitting of the Court in Edmonton the plaintiff applied to Mr. Justice Stuart for leave to use the evidence taken on commission and in support of his application read the affidavits of Simmons, J.

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plaintiff and two physicians at Columbus, Ohio, setting out plaintiff's physical condition, and that he was unable to come to Edmonton for the trial. Mr. Justice Stuart on this application read the depositions taken in Columbus, Ohio, on commission of the plaintiff and drew inferences therefrom as well as from the affidavits read in support of the application and from admissions by plaintiff's counsel and refused the application. These inferences were:—

(*a*) That the plaintiff was holder as endorsee of a note made by the defendant to McLaughlin Bros. and by them endorsed to the plaintiff and by a judgment of this Court McLaughlin Bros. had obtained the note from the defendant by fraud.

(*b*) That McLaughlin Bros. had waived protest and were liable to the plaintiff on the note and that the plaintiff could recover from them.

(*c*) That he was not satisfied upon the affidavits read that plaintiff was unable to come to Edmonton.

(*d*) The circumstances surrounding the transaction were such that it would be unfair to the defendant if the trial Judge did not have an opportunity to judge of the credibility of the plaintiff unless the plaintiff appeared in person to give his evidence.

Plaintiff's counsel raised no objection on the argument in appeal as to the inferences (*a*) and (*b*) but took strong objection to (*c*) and (*d*), chiefly relying on the argument that the result of the decision to refuse the commission evidence would be to prevent the plaintiff giving evidence at the trial and practically preventing plaintiff getting to trial, or, as plaintiff's counsel put it on argument: "Whether the plaintiff is to be denied justice in this Court by reason of his physical condition."

It is quite clear that the ground taken by counsel for plaintiff is too narrow and that the Judge in determining whether he shall grant the application should "consider whether, having regard to all the circumstances of the case, it is necessary for the purpose of justice, and in the interest of all parties to the action." *Berdan* v. *Greenwood*, 20 Ch.D. 764n, 46 L.T. 524n, rule 224 Judicial Ordinance provides that

> Any party may at the trial of an action or issue, or upon any application or motion, use in evidence any part of the examination (for discovery) of the opposite party.

This was a substantive application and the defendant quite properly used the examination of plaintiff on discovery as part of his material in opposing the motion. The granting of a commission is a matter of judicial discretion to be exercised according to the particular circumstances of each case: *Coch* v. *Allcock and Co.*, 21 Q.B.D. 178.

Lord Esher, M.R., in *Coch* v. *Allcock*, 21 Q.B.D. 178, says:—

> The Court must take care on the one hand that it is not granted when it would be oppressive or unfair to the opposite party, and on the other hand that a party has reasonable facilities for making out his case, when from the circumstances there is difficulty in the way of witnesses attending at the trial. With regard to the case of the plaintiff asking for a commission to examine himself, that also appears to me to be a matter of discretion but the discretion will be exercised in a stricter manner, and the Court ought to require to be more clearly satisfied that the order for commission ought to be made.

In *Berdan* v. *Greenwood*, 20 Ch.D. 764n, 46 L.T. 524n, before Baggallay and Cotton, L.JJ., on an appeal from an order of the Divisional Court of the Exchequer Division, Baggallay says:—

> What therefore the Court or Judge is called upon to adjudicate on, or rather to consider, in a matter of this kind, is whether it is necessary or whether it appears to the Court to be necessary, for the purposes of justice, to so direct. Of course, for the purposes of justice, does not mean in the interest of either party to the litigation, but in the interest of all parties to the litigation.

The application then under consideration shewed that the application of the plaintiff was supported by evidence that he lived in France and was suffering from fatty degeneration of the heart and that crossing from France to England produces sea-sickness and that sea-sickness might cause syncope probably causing his death.

The Lord Justice Baggallay observes:—

> Now, of course, if that were the only question to be considered, and the evidence shewed that state of circumstances to exist, it could perhaps hardly be said that justice required that the plaintiff should be compelled to come over at the risk of his life to give evidence in support of his case. At any rate it would be a *primâ facie* case in his favour that instead of coming over to this country, he should give his evidence on commission. But as I have said we must regard the interests of justice, the interests of the defendants as well as the interests of the plaintiff, and of course when we consider that we must consider the nature of the issues which are raised by the pleadings. . . . Now, certainly, the alleged character of the services rendered in respect of which the commission is claimed is suggestive of very considerable doubt as to whether those particular services have been rendered and as to how they have been rendered. One can very well imagine the extreme importance it must be to the defendants in a claim of this kind to have the fullest opportunity of thoroughly investigating and testing by cross-examination the witnesses who are called to prove those services were rendered. . . . As I say the fact that the case is to be supported mainly by the evidence of the plaintiff himself when it appears so very probable that other witnesses could be called to establish the fact, if fact it be, makes it still

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more important that those who are to be affected by the decision of the case should have an opportunity of fully cross-examining the witnesses in the case before the tribunal which is to decide upon it.

The Lord Justice further observes that we must assume the possibility of the witness sought to be examined not being a credible witness.

In *Crofton* v. *Crofton*, 46 L.T. 522 [*Re Boyse, Crofton* v. *Crofton*, 20 Ch.D. 760], to which is appended as a note the case above referred to, *Berdan* v. *Greenwood*, 46 L.T.R. 524n, Fry, J., says in regard to an application for a commission to issue to the French Court to examine one Gautier who declined to make an affidavit or to appear before a commission of more ordinary description: "I have not the least doubt that it would discharge its duties in the best way but the habits and practice of the French Courts are different from ours and a stringent cross-examination of the witness would alone be satisfactory to me."

The examination for discovery of the plaintiff which was used by defendant in opposing the application discloses that the plaintiff had been purchasing notes from McLaughlin Bros. for a number of years and that a considerable number of these were contested on the ground of fraud. It seems to me the defendant has a very strong case indeed for his plea that in his interest it is necessary that the trial Judge should see, hear and observe the witness, and have this material assistance in judging of his credibility.

The plaintiff's ground that he will be practically denied the right of getting to trial is not one that he can urge very strongly yet. Surely McLaughlins can give evidence of the transaction in regard to the note. He has not availed himself of his admitted opportunity to sue them and recover, although that would not entail the trouble of travelling to a foreign country.

The defendant is not going far afield when he suggests that there may be collusion between McLaughlins and the plaintiff and that the plaintiff may be using a subterfuge in order to avoid personal evidence at the trial. The Judge before whom the application was made was not satisfied that it was physically impossible for him to come by easy stages. The Court of Appeal does not readily interfere with the exercise of the discretion of the Judge who hears the application: *Hunt* v. *Roberts* (1892), 9 T.L.R. 92. The plaintiff admits that he knew the notes were taken by McLaughlin Bros. on payment of horses sold by them, and that he expects to make more money from McLaughlin Bros. in the future and says, "and I do not want to kill the goose that lays the golden egg." I can not refrain from observing that Mr. Park seems to be a very energetic business man

notwithstanding the severe physical ailments which he says prevent him from travelling. From whatever standpoint one views this application so many suspicious circumstances arise that it seems of the utmost importance that the trial Judge should have plaintiff's evidence in person. He makes a business of purchasing notes of makers who admit, in this Court at least, the fraudulent obtaining of same and he declares he hopes to continue purchasing these notes although he must reasonably expect that the makers will in many cases contest their liability. He admits the endorsers are good and he can recover from them but elects his remedy against the maker who lives in a foreign country and a considerable distance from plaintiff's home. His illness, he wishes us to believe, does not interfere with the business of buying these foreign notes and conducting litigation in a foreign country to recover but does not permit of travelling. His allegations in this regard might be true, but surely they are properly to be scrutinized very closely and surely he should not expect to obtain the concession of being relieved from the necessity of allowing the trial Judge to form an opinion of his credibility from his personal demeanour until he has at least exhausted his other remedies.

The application should be dismissed with costs.

Walsh, J.

WALSH, J. (dissenting):—Two elements concur in support of the plaintiff's application which, in my opinion, make it irresistible.

The first of these is that his evidence is not only material but absolutely indispensable to the fair and proper trial of the action. Without it he cannot possibly succeed. The note was admittedly affected with fraud in the hands of the payees. The onus is therefore on the plaintiff to prove that he is a holder in due course. Some of the facts which go to make him so could undoubtedly be established by the evidence of the payees if such facts exist, although their evidence would rest under the very disadvantage, of which so much was made in support of the order appealed from, of being taken under commission. But how they or any one but the plaintiff could prove that he took it in good faith and without notice of the fraud is something that I cannot imagine. If the evidence offered to satisfy this onus consisted simply of that of these men who are the only parties other than the plaintiff who it is suggested can give it, counsel for the defendant would undoubtedly in the proper discharge of his duty move for the dismissal of the action and I do not see how his motion could be refused.

The other element is the plaintiff's physical inability to come to Alberta from his home in Ohio. The evidence satisfies me that he cannot come. He and two physicians swear unre-

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servedly to a state of health on his part which is absolutely prohibitive of this journey. I did not understand Mr. Ford on the argument to seriously question the accuracy of their statements. At any rate no material is filed in contradiction of them. The defendant was represented by counsel on the plaintiff's examination in Columbus, at a time when it was known that an application would be made for leave to use the same at the trial on the grounds now urged. If his physical condition was otherwise than as sworn to by himself and his physicians, some evidence of that fact would undoubtedly have presented itself to the examining counsel and affidavits meeting those filed by the plaintiff could easily have been procured. I have no doubt but that if applied for by the defendant an order could and would have been made compelling the plaintiff to submit himself to a physical examination at the hands of any medical man or men of the defendant's selection, but no such application seems to have been made. The entire absence of anything advanced by the defendant even by way of suggestion to cast doubt upon the accuracy of the sworn statements upon which the plaintiff's application rests leaves us no choice but to accept them as true. That being so there is not, in my mind, any doubt whatever but that it is a physical impossibility for the plaintiff to come to this country.

In short then the plaintiff cannot have his case fairly and properly tried, and in fact will not, I think, even attempt to have it tried at all, unless he is in a position to give in evidence his own testimony and this, through physical infirmity, he is not and never will be able to give *viva voce* in this country. And under these circumstances it is suggested that he should not be allowed to give his evidence under commission. And why?

The strong argument is that it would be an injustice to the defendant that a witness so important as the plaintiff is, should give his evidence otherwise than under the eye of the Judge who tries the case, as it is essential that he should have an opportunity to observe his demeanour and thus be able the better to give to his testimony its proper weight. Well, all commission evidence is subject to the same objection, but an order goes almost as a matter of course upon the usual proof for the examination under commission of a mere witness resident beyond the jurisdiction, because his presence at the trial cannot be compelled. No objection such as that which I am now considering would avail to defeat the application for the unanswerable reply to it would be that the party through no fault of his own could not procure the personal attendance of the witness and as a matter of right, and of justice, he should be allowed to secure his evidence in the only other way open to him. Here practically the same condition prevails. The plain-

tiff wants himself as a witness. He cannot get this witness before the Court in the flesh, not because he is unwilling to come nor because urgent business reasons detain him elsewhere, but because Providence has placed him under a physical disability to do so. This, in my opinion, places him on the same plane as a witness who not being a party to the action declines to come within the jurisdiction. I am not attempting to minimise the importance, specially in such a case as this, of having such evidence as that which the plaintiff will be called upon to give taken before the Judge who tries the case. I readily agree that no ordinary reason for a plaintiff's inability to give his evidence at the trial should be accepted as an excuse for permitting it to be taken under commission and if this was a case of mere inconvenience or of some not insurmountable difficulty, I would unhesitatingly say that his application must be refused. But where, as here, I am forced to choose between the absolute injustice which will undoubtedly result to the plaintiff from a refusal of his application and the possible injustice which may be done the defendant by granting it, I prefer the latter.

Then it is suggested that the remedy which the plaintiff is attempting to pursue in this Court is not his only remedy, he having apparently retained the liability of the payees who are men of substance. It surely is a strange argument to make in a country like this whose Courts are supposed to be open to every one whether alien or British subject, who has, or thinks he has, a right of action within their jurisdiction, that a man should be turned away from them, not because he has no cause of action against him whom he would sue but because he has just as good a cause of action against some other person residing elsewhere. The plaintiff undoubtedly thinks that he can hold the endorsers of the note liable but he may be mistaken in this, for men who are so resourceful as these endorsers were represented on the argument to be, may perhaps find some loophole of escape after this action has been ended by the dismissal of this appeal. Whether or not this is so he has an undoubted right to pursue here his remedy against the defendant regardless of the fact that he has a right to sue the endorsers in his own country.

In *Berdan* v. *Greenwood*, 46 L.T. 524n, 20 Ch.D. 764n, upon which so much stress has been laid, it is quite apparent that the order was refused because the Court was not satisfied that the plaintiff could not come to England and because in the opinion of the Court the evidence which he wanted to give might be supplied by other witnesses. It is true that some expressions occur in the judgments which lend strength to the argument that upon the facts of the present case the Court of Appeal would have made the same order as that with which we

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are dealing. But there are on the contrary, expressions which support the opposite view, and I regard that case as decisive of nothing more than this, that a plaintiff whose physical inability to attend the trial is not absolutely established or who can establish by the evidence of others all that he could prove himself, is not entitled to have his evidence taken under commission. Upon facts so widely different from those established in the *Berdan* case I do not consider it an authority against the present plaintiff's application.

I am not so much concerned about the effect of a dismissal of this appeal upon the present action, although I feel strongly that it will work a great injustice upon the plaintiff, as I am about the application of the principle which will be thereby established to future motions of the same kind. I gathered from what Mr. Ford said in argument that this particular case is an unmeritorious one, the ending of which by the summary method now proposed will do no one an injustice. That may perhaps be so, but as the action has not yet been tried, I do not know whether it is or not. It seems to me, however, that the dismissal of this appeal must inevitably result in this, that under no circumstances can a plaintiff give his evidence otherwise than *viva voce* before the trial Judge. This will apply to a bed-ridden plaintiff within the jurisdiction as well as to such a man as the present plaintiff. It is said that the making of such an order is a matter of discretion in the Court to which the application is made and that in a proper case this discretion would be exercised in favour of the applicant.

But upon what grounds is that discretion to be thus exercised if it is not so exercised in this case? Given a case in which the plaintiff's absolute inability to attend the trial is indisputably established and in which the fact is undeniable that without his evidence he cannot succeed, what is the Court to look at to determine whether his evidence should be taken under commission or not? Is it to enquire into the merits or demerits of his case? Is it to decide whether his action is one which is deserving of a fair trial or whether it is one in which the defendant should be protected from all possibility of risk, by having it ended without a trial? Surely not. If the Court is not to be influenced by such considerations as these and others of a kindred character, by what considerations is it to be moved in the exercise of this discretion? Candidly, I do not know. And because I believe that the dismissal of this appeal will not only do the plaintiff a grave wrong but will create a precedent which will work injustice upon many an honest and deserving litigant I think that the appeal should be allowed.

Appeal dismissed,
WALSH, J., *dissenting.*

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Ontario Divisional Court, Falconbridge, C.J.K.B., Teetzel and Middleton, JJ. March 4, 1912.

1. HUSBAND AND WIFE (§ I A 2—16)—LIABILITY OF HUSBAND TO SUPPORT AND MAINTAIN WIFE LIVING SEPARATELY—ABSENCE OF RENUNCIATION OF RIGHT TO SUPPORT.

A husband by the act of marriage undertakes to support and maintain his wife so long as she remains faithful to him, and where the wife is living separate from the husband under circumstances which justify her so doing, the husband is bound to support her unless she has expressly renounced her rights to such support and maintenance or has means of her own which renders it unnecessary for the husband to maintain her.

2. DIVORCE AND SEPARATION (§ VIII—80)—RIGHT OF WIFE TO ENTER INTO AGREEMENT FOR SEPARATE MAINTENANCE—ABSENCE OF FRAUD OR DURESS.

Upon a separation of husband and wife, the wife is competent to make her own terms and her agreement to accept a stipulated allowance for her maintenance will be deemed valid in the absence of any shewing that fraud or duress was practised upon her.

3. HUSBAND AND WIFE (§ I A 2—16)—LIABILITY OF HUSBAND—SEPARATION DEED—COVENANT NOT TO TAKE PROCEEDINGS FOR RESTORATION OF CONJUGAL RIGHTS.

Where a deed of separation entered into by a husband and wife contains no covenant on the part of the wife to maintain herself and no covenant not to institute alimony proceedings against the husband, the wife not having released her right to be maintained the mere agreement to live separate, and the payment of the sum of $250 by the husband to the wife, together with several debts referred to in the deed, does not relieve the husband from his liability to support and maintain the wife, even though the deed stipulated that each party should not take any proceedings against the other for the restoration of conjugal rights and each agreed not to annoy or interfere with the other in any manner whatsoever, the wife further agreeing to pay her own debts and support the two children.

4. EVIDENCE (§ II K 1—314)—PRESUMPTION AS TO PAYMENT TO WIFE IN A SEPARATION DEED—ABSENCE OF ALIMENTARY PROVISION—RIGHT TO ALIMONY.

Where $250 is paid by the husband to his wife on the execution of a deed of separation which did not contain any alimentary provision and did not stipulate that such sum was intended for the wife's maintenance, it cannot be presumed that such payment was intended to relieve her husband from his duty to support her as, apart from its inadequacy, the payment may have been made for other purposes, and the wife is, therefore, entitled to an alimentary allowance.

Statement

APPEAL by the plaintiff from the judgment of CLUTE, J., at the trial, on the 13th December, 1911, awarding the plaintiff alimony.

The marriage took place on the 16th May, 1904. The parties cohabited until the 16th November, 1906, upon which day a separation agreement was entered into, since when the plaintiff had been maintaining herself and her two children.

The trial Judge found, upon conflicting evidence, that the plaintiff was justified in leaving her husband by reason of his cruelty and misconduct.

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Argument

The appeal was dismissed.

G. H. Watson, K.C., for the defendant, argued that the separation agreement entered into between the plaintiff and the defendant was a complete bar to the action: *Bishop* v. *Bishop*; [1897] P. 138, at p. 149; *Clark* v. *Clark* (1885), 10 P.D. 188, *Barry* v. *Barry*, [1901] P. 87. The payment of the $250 by the husband to the wife freed the husband from any obligation for maintenance; and the adequacy or inadequacy of this sum made no difference: *Eastland* v. *Burchell* (1878), 3 Q.B.D. 432; *Biffin* v. *Bignell* (1862), 7 Ex. 877. The wife's maintenance having been provided for, she cannot sue, any more than could a creditor for necessaries supplied to her, she having no authority to pledge his credit. Counsel referred to *McGregor* v. *McGregor* (1888), 21 Q.B.D. 424; *Hart* v. *Hart* (1881), 18 Ch.D. 670; *Atwood* v. *Atwood* (1893-4), 15 P.R. 425, 16 P.R. 50; Lush on Husband and Wife, 3rd ed, p. 417 *et seq.*, p. 487 *et seq.*; *Wood* v. *Wood* (1887), 57 L.J.N.S. Ch. 1.

R. McKay, K.C., for the plaintiff, cited *Lafrance* v. *Lafrance* (1898), 18 P.R. 62, and *Beatty* v. *Beatty* (1909), 1 O.W.N. 243.

Watson, in reply.

Middleton, J.

March 4. The judgment of the Court was delivered by MIDDLETON, J.:—The sole question argued before us was as to whether the provisions of the separation deed preclude the action.

By the terms of this deed, the parties agree to live separate from each other, and each agrees not to take any proceedings against the other for restitution of conjugal rights or to annoy or interfere with the other in any manner whatsoever. The husband agrees to pay the wife $250—$50 in cash and the balance secured by forty promissory notes for $5 each, payable monthly. The wife agrees to pay her own debts, save three named accounts, and to support the two children.

It is to be observed that there is no provision in this deed relating to the maintenance of the wife. She does not covenant not to claim alimony from her husband, nor does she covenant to maintain herself. The learned trial Judge has taken the view that the mere agreement to live separately does not relieve the husband from his obligation to support and maintain his wife. With this we agree.

A husband, by the act of marriage, undertakes to maintain and keep his wife, unless she commits adultery; and, when she is living apart from him under circumstances which justify the separation, he is bound to maintain her, unless she has expressly renounced her rights, or she has such means of her own as make it unnecessary for him to maintain her. If the husband fails to maintain her, she has what has been called "authority of necessity" to pledge her husband's credit. Mr. Watson is probably right when he takes the position that the same test can be applied to determine the wife's right to alimony as in the

case of an action brought against the husband by one who has supplied his wife with necessaries; the creditor in the latter case deriving his claim entirely from the wife's implied authority.

The earlier cases made the adequacy of the provision of the husband for his wife's maintenance the test of the limit of her authority. The later cases have departed from this rule; and, unless the wife is entitled to relief by reason of fraud or duress, she is now regarded as able to make her own terms, and to agree to accept a stipulated allowance as being adequate for her maintenance.

In this case there is no provision whatever for maintenance, and there has been no release by the wife of her right to be maintained. The wife is entitled to be separately maintained, not merely because the husband has agreed to her living apart, but also because the misconduct found by the Judge justifies a separation.

The case falls within the words of Lush, J., in *Eastland* v. *Burchell*, 3 Q.B.D. 432, at pp. 435, 436: "If he wrongfully compels her to leave his home, he is bound to maintain her elsewhere, and if he makes no adequate provision for this purpose, she becomes an agent of necessity to supply her wants upon his credit. In such a case, inasmuch as she is entitled to a provision suitable to her husband's means and position, the sufficiency of any allowance which he makes under these circumstances, is necessarily a question for the jury. Where, however, the parties separate by mutual consent, they may make their own terms; and so long as they continue the separation, these terms are binding on both."

Here the parties have not made their own terms for the separate maintenance of the wife. The husband has made no adequate provision for her, and she is justified in resorting to the Court for an alimentary allowance.

This case differs from any reported decision; as in all the reported cases where there was separation, either voluntary or on account of the husband's misconduct, the separation deed did contain an alimentary provision. It is impossible to regard the lump sum of $250 as being intended for the maintenance of the wife. The deed does not so stipulate; and, apart from the fact that that sum is clearly inadequate for this purpose, it may have been a payment made to induce the wife to assume care of the children.

In *Atwood* v. *Atwood*, 15 P.R. 425, the Chancellor says: "A separation deed may be well upheld by the payment of a sum in gross, and a provision to arise *de anno in annum* is not essential." (See also the same case in appeal, 16 P.R. 50.)

No authority is referred to, and I can find no case in which such a provision was made. A lump sum so paid, enough to produce an adequate income or to supplement the wife's own in-

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come, might well be sufficient; but a sum such as that paid here would be so grossly inadequate as to afford in itself conclusive evidence either of duress or improvidence.

In this case it is sufficient to say that upon the deed itself the sum is not accepted in lieu of alimony.

The appeal should be dismissed with costs.

Appeal dismissed.

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DUNLOP v. BOLSTER.
(Decision No. 2.)

Alberta Supreme Court, Harvey, C.J., Stuart, Beck, and Walsh, JJ. June 22, 1912.

1. SPECIFIC PERFORMANCE (§ I A—14)—DEFAULT OPENED—ABANDONMENT—RESCISSION.

Under an agreement to sell lands, where the purchaser, by his continued default on an instalment of the purchase price, placed upon the contract the earmarks of abandonment, and thereby entitled the vendor to cancel the contract, but, instead of cancelling, the vendor brought action to compel payment of the purchase-price under the terms of the agreement, this election by the vendor entitled the purchaser (had he acted promptly) to have the sale carried out.

2. SPECIFIC PERFORMANCE (§ I E—30)—PRIOR ACTION FOR PURCHASE-MONEY UNDER ACCELERATION CLAUSE—TENDER OF DEFAULTED INSTALMENT ONLY—ABANDONMENT.

Under an agreement to sell lands, where the vendor after default on an instalment of the purchase-price brought action demanding, under an acceleration clause, payment of the full balance of purchase-money, and the purchaser tenders only the amount of the defaulted instalment when the vendor was entitled to the full balance, this shews on the purchaser's part a want of readiness and eagerness to carry out the contract and is in effect an abandonment of it, and when followed up by notice of rescission from the vendor, a subsequent action by the purchaser for specific performance must fail.

[*Dunlop* v. *Bolster*, 4 D.L.R. 451, reversed on appeal; *Harris* v. *Robinson*, 21 Can. S.C.R. 404, applied.]

Statement

APPEAL by the defendant from the judgment of Simmons, J., 4 D.L.R. 451, 20 W.L.R. 561, in favour of the plaintiff in an action for specific performance of a contract for the sale and purchase of land.

The appeal was allowed, and the action dismissed with costs.

R. B. Bennett, K.C., for the defendant.

H. H. Parlee, for the plaintiff.

The judgment of the Court was delivered by

Walsh, J.

WALSH, J.:—The agreement in question was, I think, on foot on the 30th November, 1911, on which day the tender of the overdue instalment was made, and this by reason of the action brought by the vendor, the present defendant, to recover from the purchaser, the present plaintiff, the purchase-money called for by it.

It seems to me immaterial whether this particular form of action was resorted to by mistake or purposely. The fact remains that it was resorted to, and this gave to the present plaintiff the right to complete the contract by doing what the present defendant in so many words asked him to do, namely, pay the balance of the purchase-money. But for this it would seem to be reasonably clear that the plaintiff could not then have had the right to insist upon the performance by the defendant of this contract. He had paid but $50 on account of the purchase-price of $20,000, for property which was manifestly being dealt with speculatively; he had made default for more than four months in the payment of the first real instalment of the purchase-money, $4,950; he had ignored the defendant's letter of the 16th September, which, while the only one in evidence, shews, upon its face, the sending of at least one prior letter of similar tenor; and he had, so far as the record shews, done absolutely nothing to indicate the slightest intention on his part to complete the purchase of this land. In short, he had placed upon this contract all of the ear-marks of abandonment. Notwithstanding this, I think that, when the present defendant invited him to carry through this purchase, as he unquestionably did by the commencement of his action, he could have insisted upon performance of the contract by the defendant by performing on his part everything that the defendant could, under the terms of his contract, have then compelled him to do. In my view, had he on the 30th November tendered to the defendant the full amount then unpaid for principal money and interest, the defendant could not have successfully resisted his right to specific performance of the contract.

Instead, however, of doing that, he simply tendered the overdue instalment of the purchase-money with interest, notwithstanding the fact that the agreement provides that,

> in the event of default being made in the payment of principal, interest, taxes, or premiums of insurance, or any part thereof, the whole purchase-money shall become due and payable.

In my conception of the case, the next point for decision is, whether this tender is all that was then required of the plaintiff. In the circumstances, I do not think that it was.

The Chief Justice in *Harris* v. *Robinson*, 21 Can. S.C.R. 404, says that a plaintiff seeking specific performance must shew that he has been always ready and eager to carry out the contract on his part. If these words are to be applied literally to the facts of this case, the circumstances to which I have referred, as opening the door again to the plaintiff, could not have that effect, for between the date of the maturity of the first instalment and the date of the tender, four months of unreadiness and lack of eagerness on the plaintiff's part inter-

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vened. I do not think, however, that this language should be thus applied to the events preceding the time when the defendant gave the plaintiff the opening of which he now seeks to avail himself. The defendant practically forgave these months of delay, although perhaps inadvertently, and the Court should not guard his rights more jealously than he himself did. The plaintiff's readiness and eagerness must, I think, be judged at the time when, through this act of the defendant, he was given the opportunity to complete his agreement.

The defendant's right then undoubtedly was to insist upon payment of the full balance of his purchase-money, and this he was doing. The plaintiff knew this, for in the action brought against him the allegation was made that the whole of the purchase-money was then payable, and judgment was asked against him for it. He had, by his own default, placed himself in a position in which the defendant was entitled to say and did say to him that only by the then payment of every dollar of purchase-money still unpaid could he get the land covered by the agreement. This is what he should have then been ready and eager to pay, and this is what he was then neither ready nor eager to do.

It may be neither unfair nor improper to consider in this connection the plain evidence of his earlier intention to abandon this contract to which I have referred, as they form some sort of guide to the spirit which actuated him throughout the transaction. It certainly is proper to consider his later conduct. If he did not know it before, he certainly knew on the 20th December, eight days after this action was commenced, of the contention that the defendant was making, that his right was to receive the whole of the unpaid purchase-price, and that, if it was not paid within twenty days from that date, the agreement would be determined and put an end to. The statement of defence, although dated on the 10th January, 1912, was delivered on the 20th December, 1911, and in it this position was taken. On the same day, a notice, in alleged conformity with the provision to that effect contained in the agreement, was sent to the plaintiff, intimating the defendant's intention to terminate the agreement. The plaintiff disregarded this very plain intimation of the defendant's contention that it was payment of the full amount of the unpaid purchase-money and not simply of the amount of the overdue instalment, that was requisite to preserve the plaintiff's rights, and, by refusing this second invitation, again closed the door which the defendant for the second time had opened to him.

In my judgment, the plaintiff's appeal to the equitable jurisdiction of the Court must fail, for the reasons which I

have endeavoured to give. The appeal should be allowed with costs, and the action be dismissed with costs.

The plaintiff's counsel asked that, in the event of this appeal being allowed, the $50 paid by the plaintiff on the making of this agreement should be returned to him. I understood Mr. Bennett, counsel for the defendant, to consent to this; and, on this consent, the order should be made. This amount will be credited upon the defendant's costs taxable under this judgment. The balance of these costs will be paid to the defendant's solicitors out of the money paid into Court by the plaintiff, and the balance of the money in Court will be paid out to the plaintiff.

Appeal allowed.

MALOUGHNEY v. CROWE.

Ontario High Court. Trial before Middleton, J. June 24, 1912.

1. SPECIFIC PERFORMANCE (§ I E—30)—CONTRACT FOR SALE OF LAND—STATUTE OF FRAUDS—PAROL VARIATION.

Where a completed agreement for the sale of land, of which there is a sufficient memorandum in writing to satisfy the Statute of Frauds, is varied by a subsequent parol agreement, the parol variation may be ignored, and specific performance may be granted of the original agreement; but, if the plaintiff admit the parol variation and the defendant insist upon it, specific performance may be refused, unless the plaintiff allows to the defendant the benefit of the variation.

[*Goss* v. *Lord Nugent*, 5 B. & Ad. 58; *Stowell* v. *Robinson*, 3 Bing. N.C. 928; *Noble* v. *Ward*, L.R. 2 Ex. 135, specially referred to; see also, Halsbury's Laws of England, vol. 7, p. 422; and Leake on Contracts, 6th ed., 583.]

2. CONTRACTS (§ I E—65)—FORMAL REQUISITES—STATUTE OF FRAUDS, 4TH AND 17TH SECTIONS.

The effect of the 4th and 17th sections of the Statute of Frauds is the same; they do not render contracts within them void, still less illegal, but they render the kind of evidence required indispensable, when it is sought to enforce the contract.

[*Maddison* v. *Alderson*, 8 A.C. 467, referred to.]

Statement

ACTION by the purchaser for specific performance of an agreement for the sale of land.

Judgment was given for the plaintiff for specific performance and costs.

G. D. Kelley, for the plaintiff.

J. E. Caldwell, for the defendant.

Middleton, J.

June 24, 1912. MIDDLETON, J.:—I accept the plaintiff's evidence in this case, and where there is a conflict between the parties I give it the preference.

The plaintiff called at the residence of the defendant, for the purpose of purchasing, if possible, the property in question.

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He asked the defendant's price. The defendant said $5,500. The plaintiff unsuccessfully endeavoured to beat this price down; but, being informed that $5,499.99 would not buy the place, agreed to purchase it for the sum demanded, and paid $10 on account.

I think this was a completed agreement.

Thereafter, the defendant suggested the giving of a receipt, and he prepared exhibit 1. This receipt, I think, correctly states the terms of the bargain, and is sufficient to answer the Statute of Frauds.

After the receipt had been given, the plaintiff—not realising that he would as a matter of law be entitled to possession, upon payment of the price as stipulated, *i.e.*, within ten days—asked the defendant when he would be given possession. The defendant then stated that he did not intend to give possession for a month; whereupon some discussion took place as to the unfairness of this intention, the plaintiff thinking it unreasonable that he should have to pay the whole price in ten days and not receive possession for thirty days. Finally, the parties agreed that, upon the plaintiff paying "a substantial sum" within the ten days, he should not be called upon to pay the balance of the price until the defendant was ready to yield possession.

This agreement constituted, I think, a subsequent parol agreement, modifying the former arrangement in the manner indicated.

When the parties met in Mr. Scott's office later for the purpose of closing the transaction, the defendant demanded $1,000 as the "substantial sum" to be paid; and the plaintiff assented to this.

A new difficulty had in the meantime arisen. A real estate agent, in whose hands the property had been, appeared upon the scene and wanted commission. The defendant insisted on this commission being assumed by the plaintiff. The plaintiff would not assent. This, I think, was the real bone of contention.

The defendant then sought to recede from the parol agreement giving the extension for the payment of the balance of the purchase-money, in consideration of the delay in giving possession; and, although the plaintiff stated that he was ready to pay the whole price if need be, the parties parted; and, at a subsequent meeting, when the controversy was renewed and carried through practically the same phases, nothing was done. The plaintiff throughout adhered to the position that he should have possession when he paid the whole price. The defendant throughout adhered to the position that, apart from all other difficulties, he would not convey unless the plaintiff would indemnify him against the claim of the agent.

The plaintiff was able to pay, as he had a substantial sum of money in his own possession, and his father was a man of means, and stood ready to advance all that was necessary to complete

the bargain. The defendant had no foundation whatever for his claim that the plaintiff should pay the real estate agent's commission; and his whole conduct in attempting to repudiate the bargain is discreditable. He has, however, for his refuge the last refuge of many dishonest men—the Statute of Frauds.

Upon the argument no authority was cited by either side directly dealing with the question which now arises. This is not a case of attempting to enforce an agreement some of the terms of which only are disclosed in the written evidence of the agreement. It is a case of an agreement complete and sufficient in all respects, fully evidenced by the subsequent written receipt or memorandum, with a subsequent parol agreement dealing with some of the terms.

The result of the authorities is, that where by law a written contract is necessary or a parol contract is required to be evidenced by writing, the subsequent parol variation may be ignored, and that specific performance may be granted of the original agreement; or, if the plaintiff admits the parol variations, and the defendant desires to avail himself of these variations if specific performance is awarded, the Court will withhold specific performance unless the plaintiff assents to yield to the defendant any advantage which he is entitled to under the modification.

In the earlier cases a distinction was attempted to be drawn between the 4th and the 17th sections of the statute: the 4th providing that "no action shall be brought;" and the seventeenth, that "no contract . . . shall be allowed to be good." But the tendency is now to construe the sections as being substantially equivalent in this respect. As put by Lord Blackburn in *Maddison* v. *Alderson* (1883), 8 App. Cas. 467, 488: "It is now finally settled that the true construction of the Statute of Frauds, both the 4th and the 17th sections, is not to render the contracts within them void, still less illegal, but to render the kind of evidence required indispensable when it is sought to enforce the contract."

Statements contained in some of the earlier cases, in which the expression used is that the contract is void, or that writing is necessary to make the contract, must be treated as not being strictly accurate, and the cases must be read in the light of the passage quoted.

Noble v. *Ward* (1867), L.R. 2 Ex. 135, states the principle applicable, although it is a decision upon the 17th and not the 4th section. There there was a complete contract for the sale of goods above £10 in value, to be delivered at a future time. Before the time for delivery arrived, the parties made a parol agreement extending the time. It was held that the parol agreement, being invalid under the statute, did not effect an implied rescission of the former contract. This judgment was based upon the principle that the parties could not be taken to have intended to destroy

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the contractual rights under the first agreement save by the substitution of an enforceable modification of the original agreement.

The language of Parke, B., in *Moore* v. *Campbell* (1854), 10 Ex. 323, 332, is quoted with approval where he says: "If a new *valid* agreement substituted for the old one before breach would have supported the plea, we need not inquire, for the agreement was void, there being neither note in writing, nor part payment, nor delivery, nor acceptance."

Stowell v. *Robinson* (1837), 3 Bing. N.C. 928, is a case where the same principle was applied to an action on a contract within the 4th section. By written agreement an interest in land was to be sold. A day was definitely fixed for the completion of the purchase. By a parol agreement made subsequently, the parties undertook to substitute a new day for the completion. It was held that this attempt to engraft a modification upon the written contract was abortive. Tindal, C.J., stated (p. 937): "Can the day for the completion of the purchase of an interest in land, inserted in a written contract, be waived by a parol agreement, and another day be substituted in its place, so as to bind the parties? We are of opinion that it cannot . . . We cannot get over the difficulty which has been pressed upon us, that to allow the substitution of a new stipulation as to the time of completing the contract by reason of a subsequent parol agreement between the parties to that effect, in lieu of a stipulation as to time contained in the written agreement signed by the parties, is virtually and substantially to allow an action to be brought on an agreement relating to the sale of land partly in writing signed by the parties, and partly not in writing, but by parol only, and amounts to a contravention of the Statute of Frauds."

In that case the plaintiff could not succeed unless he could rely upon the variation; so the case differs in that respect from the case now in hand; but, I think, the principle applies: for the statute is available to either party, and prevents the new contract being given in evidence at all, save for the purpose of affecting the conscience of the Court, which may in its discretion refuse to give specific performance if the party seeking its aid withholds from his opponent the benefit of the parol variation. Save as to this, the operation of the statute is the same in law and in equity. See *Emmet* v. *Dewhurst* (1851), 3 Macn. & G. 587.

Goss v. *Lord Nugent* (1833), 5 B. & Ad. 58, is a case very similar to *Stowell* v. *Robinson*. The contract was a contract with respect to real estate; it was duly evidenced by writing; there was a parol variation, on which the plaintiff, the vendor, had to rely for success. It was held, on the same principle, that he failed.

In Halsbury's Laws of England, vol. 7, p. 422, the situation is thus summed up: "If the original contract is one which is required by law to be made in writing, it cannot be varied by a new verbal agreement, even if the variation relates only to a part of

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the contract which, if it stood by itself, would not be required to be in writing. But in such a case the contract can be rescinded altogether by a verbal agreement. If the original contract, though made in writing, is one which is not required by law to be made in that form, it can be varied by a verbal agreement."

Where this paragraph speaks of a contract "required to be in writing," the learned author clearly means a contract "required to be evidenced by writing;" as the cases shew, and as a reference to this paragraph in a later portion of the same treatise indicates. On p. 528 it is said that parol evidence may be admitted "to prove that a written contract has been rescinded or varied by a subsequent oral agreement, provided that proof of the oral agreement is not excluded by any statute: *e.g.*, by the Statute of Frauds (29 Car. II. ch. 3).

Leake on Contracts, 6th ed., p. 583, after examining the authorities at law, states: "Where a plaintiff claims specific performance of a written contract, at the same time stating and offering to submit to subsequent parol variations, the Court will decree specific performance with the variations if the defendant is willing to accept the same; and if not, according to the original contract;" citing for this *Robinson* v. *Page* (1826), 3 Russ. 114, 121—a case which abundantly justifies the text.

Under these circumstances, I think the plaintiff is entitled to judgment for specific performance, with costs. If any difficulty arises in working out the details, I may be spoken to; and, if necessary, a reference may be directed; but I desire to avoid all unnecessary expense.

Judgment for plaintiff.

IMPERIAL PAPER MILLS v. QUEBEC BANK.

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Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. June 28, 1912.

1. MORTGAGE (§ I C—13)—TO SECURE BONDS—WHAT PROPERTY COVERED—LOGS ON WAY TO MILL—EXCEPTION.

Where a mortgage is made to secure bonds upon the whole property, assets, etc., of a company, present and future, except logs on the way to the mill, such exception applies to such logs as may be on the way to the mill, not only at the date of the mortgage, but also at any future time.

2. MORTGAGE (§ I C—13)—EXPRESS EXCEPTION—LOGS ON WAY TO MILL.

Where a mortgage to secure bonds excepts from its operation logs on the way to the mill, logs which have once been started on the way to the mill do not cease to fall within the exception because they are delayed through lack of water to float them or from any other cause.

3. BANKS (§ VIII C 1—181)—STATUTORY SECURITY—CONSTRUCTION OF BANK ACT—R.S.C. 1906, CH. 29, SEC. 90.

Section 90 of the Bank Act, R.S.C. ch. 29, should be construed liberally and not strictly or critically.

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4. BANKS (§ VIII C 2—202)—STATUTORY SECURITY—"RECEIPT" UNDER BANK ACT—PRIOR WRITTEN PROMISE—IDENTITY OF ARTICLES CHARGED.

A security under section 88 of the Bank Act, R.S.C. ch. 29, upon some part of a larger number of similar articles is not invalid under sec. 90 of that Act because the antecedent promise or agreement in writing, in pursuance of which it is given, does not state the precise amount of the debt to be secured or identify the precise articles to be charged.

5. BANKS (§ VIII C 1—181)—CONSTRUCTION OF STATUTORY SECURITIES.

Commercial documents, such as securities under the Bank Act, R.S.C. 1906, ch. 29, should not be scrutinized with the same particularity as those of the class usually prepared and examined by solicitors and executed only after having been carefully settled as to form.

Statement

ACTION by the Imperial Paper Mills of Canada Limited and E. R. C. Clarkson against the Quebec Bank and George Gordon & Co., to restrain the defendants from interfering with certain logs in McCarthy creek, and for other relief. The action was tried before Britton, J., without a jury, and judgment was given dismissing the action with costs; the plaintiffs appealed from this judgment.

The appeal was dismissed.

C. A. Masten, K.C., *J. H. Moss*, K.C., and *R. B. Henderson*, for the plaintiffs.

F. E. Hodgins, K.C., and *D. T. Symons*, K.C., for the defendants.

The judgment appealed from was as follows:—

Britton, J.

August 11, 1911. BRITTON, J.:—E. R. C. Clarkson was appointed receiver of the assets of the above named company, comprised in or covered by a mortgage securing debentures of that company. This appointment of Mr. Clarkson was made by an order of the Court dated the 7th October and 16th November, on which judgment was entered on the 22nd November, 1907, in an action of *Diehl et al.* v. *Carritt et al.* Carritt *et al.* were mortgagees in the mortgage mentioned—this action at the instance of Clarkson, the receiver, was commenced on the 9th day of May, 1908. Prior to that date, there were spruce and balsam logs in the water, upon the bed, and upon the banks of McCarthy creek. This creek is only a creek in spring and fall—a marsh and quite dry in summer. Water is required to be stored at times to get the logs out, even in spring-time. These logs were cut and brought from the bush to McCarthy creek by the company during the season of 1905-6, and the Quebec Bank claimed to hold these as security for certain moneys advanced by the bank to the company. There was also a quantity of jack-pine in the Sturgeon river and other adjacent waters, in

reference to which there was an agreement between the bank and the company; but by an order of the Court dated the 14th day of May, 1908, this jack-pine was excluded from the operation of the injunction order.

By reason of these spruce and balsam logs remaining so long in the condition mentioned, they were daily becoming of less commercial value. Why they were not dealt with in the years 1906-7 does not clearly appear, but in 1908 all seemed to realise that, if anything of money value could be gotten out of them, they should be brought down to Sturgeon Falls, and, in my opinion, even below the Falls, if necessary, in order to find a market for them or get them cut up. Negotiations were entered upon between the receiver and the bank before the Official Referee, having in view the bringing of the logs to Sturgeon Falls and determining the rights of all in respect of them.

From what took place at the trial, one would suppose that reasonable efforts would have resulted in an arrangement by which further litigation would have been avoided. The property is of small value, considering the large transactions between the defendant bank and the plaintiff company. It is said that these negotiations before action were without prejudice, and I so treat them.

When the attempt to come to an amicable arrangement failed, the Quebec Bank employed the defendant Gordon to take these logs from McCarthy creek and drive them to Sturgeon Falls. Gordon and his men took possession of the logs in pursuance of that agreement. The receiver, upon leave, commenced this action, and obtained an interim injunction. The endorsement upon the writ is as follows: "The plaintiffs' claim is for an injunction restraining the defendants, or either of them, their servants, etc., from taking possession of or in any way interfering with the logs of the plaintiff company in the McCarthy creek, the Sturgeon river, Lefrois lake, or in any other portion of the concession of the plaintiff company, which logs are claimed by E. R. C. Clarkson, now in his custody and possession as receiver of the said company."

In the plaintiffs' statement of claim, they allege an agreement and intention on the part of the defendants to take these logs down the Sturgeon river and over the Sturgeon falls, for the purpose of preventing these logs being purchased for or used at the plaintiffs' mill. Then the plaintiffs attack the securities held by the bank, and ask an adjudication in this action in reference to these. At the trial, counsel for defendants thought the statement of claim went too far, and contended strongly that the only judgment should be: (1) a declaration that the interlocutory injunction was properly granted; (2) that the logs in question prior to the date of the writ were in

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possession of the receiver; (3) that the bank wrongfully disturbed the receiver in his possession; and (4) that damages have resulted, and directing a reference to determine the amount of such damages. The plaintiffs' counsel however, argued that, if the rights of the parties should be considered further in this action, the claim of the bank should be declared invalid, and the proceeds of the McCarthy creek logs should be paid over to the receiver. The plaintiffs, in the alternative, asked that, if the validity of the bank's securities, the amount and priorities, be not determined now, the defendants be restrained from interfering with the property until they have made a proper application to the Court in *Dichl* v. *Carritt* for leave to do so; and that in the meantime, and until they have established the validity of their securities and their priority as against the bonds, etc., the proceeds of the logs in question in this action be paid into Court in the action of *Dichl* v. *Carritt*, to abide the result of such application by the bank.

In view of the issues raised by the plaintiffs, and having regard to the respective orders of the 14th and 28th May, 1908, it is my duty to deal with the whole matter, and I do so in the hope at least of saving some time and money to the parties.

On the 14th May, 1908, the injunction order was amended by allowing the bank to continue to manufacture and deal with jack-pine in the Sturgeon river and other waters, and to continue the drive of the McCarthy creek logs until they should reach Sturgeon falls.

On the 28th day of May, the Court made a further order that the receiver proceed with all despatch and sort out and place on the bank of the Sturgeon river all the spruce and balsam in question in this action, etc. It was stipulated that all that was to be done was to be without prejudice to the rights which the parties may be found to have therein, and such rights, if any, were not to be considered as changed by such sorting out and placing on the bank. And it was further provided by that order that the trial should proceed, and that, in case the Quebec bank is found entitled to the spruce and balsam, or portions of it, then the plaintiff company and receiver are to be liable for damages to the bank in respect of such portion, and such damages are to be a charge on the assets of the company, in priority to the claims of the bondholders. It was further ordered that, if the bank was held not to be entitled to the logs in question or any portion thereof, it should be reserved for the trial Judge to determine whether any order should be made in respect to the expenses incurred by the bank in driving the logs, to which the said bank may not be entitled. By that order, not only jack-pine, but all logs other than spruce and balsam, were made exempt from the injunction herein.

On the 26th September, 1908, and before this action was brought on for trial, an order was made for winding-up the plaintiff company, and in the winding-up proceedings the plaintiff Clarkson (receiver) was appointed liquidator, and on the 19th November, 1908, he was added as such liquidator a party plaintiff in this action. Up to the time of Mr. Clarkson's appointment as liquidator in the winding-up of the plaintiff company, his only pretence or claim of right to interfere with the spruce and balsam logs in question was as receiver of the assets of the company covered by the mortgage dated the 18th November, 1903. This is a mortgage to Carritt and Sinclair as trustees to secure an issue of £200,000 of debentures, and it covers vast areas of properties particularly described in the mortgage, and also all the rights, privileges, and concessions to cut pulp and other wood given by a certain agreement by Her Majesty the Queen, 6th October, 1898, to the Sturgeon Falls Pulp Company, assigned to the plaintiff company, which agreement was confirmed and extended by His Majesty the King, 15th December, 1901, and genrally it covers all the assets of the company "excepting logs on the way to the mill." This mortgage is, however, made subject to a mortgage made by the Sturgeon Falls Pulp Company to the Toronto General Trusts Corporation, dated the 1st May, 1899.

It was not argued that anything in that mortgage affected the matter now in controversy. It was also subject to a mortgage deed of trust, given by the company to "The Trustees Executors and Securities Insurance Corporation Limited," dated the 22nd September, 1903, to secure an issue of bonds to the amount of £100,000 stg. This mortgage covers practically all the properties mentioned in the later debenture mortgage, and it also exempts "logs on the way to the mill." Both mortgages clearly contemplate and provide that what was desired, and what the mortgagees might do, was subject to this, that the mill should continue as a going concern. That was in the interest of all the parties. The fair inference is, that, apart altogether from money raised by loan upon debentures, the mill might require to borrow money from banks or other lenders, in order to get out pulp-wood. It was in the interest of the mill that wood, so got out, should get to the mill, be sold to and used at the mill, free from any interruption or interference by mortgagees—while wood was on the way to the mill. The exception of logs "on the way to the mill" is not only from the grant (see p. 14 of the mortgage), but also from the charge (see top of p. 15), so that, even if the logs were not excepted, the company was not to be prevented from dealing with such assets in the ordinary course of and for the purpose of carrying on its business. That, of course, is not the question here; but it aids in inter-

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preting the exception, as applying not only to logs on the way to the mill, at the date of the mortgage, but applying as excepted from the class of future assets such as mentioned on p. 14 of that mortgage. The spruce and balsam logs in question here were logs on the way to the mill; they were cut for the mill, if the mill paid for them. They were started for the mill and hauled to McCarthy creek as part of the journey "on the way to the mill," and halted there for want of water or money, for the time being, to take them further.

The plaintiff receiver was appointed by the order mentioned above, on which judgment was signed the 22nd November, 1907. See clause 8. He was appointed receiver on behalf of Diehl *et al.*, holders of the mortgage debentures. The action was brought by them as debenture-holders, and on behalf of all other debenture-holders, and as such receiver he could deal only with the property covered by the mortgage. The debenture-holders under either mortgage had not, by virtue of such mortgage, any right to interfere with the spruce and balsam logs. The receiver was never in actual possession of the logs at any time before the commencement of this action. Constructive possession would be with the owner. The Quebec Bank, prior to the issuing of the writ herein, made an arrangement with their co-defendant Gordon by which he was to drive these logs down the Sturgeon river, still farther on the way to the mill. Gordon entered upon the work, took actual possession, and was in such possession when the injunction order was obtained. On these grounds, the plaintiff receiver must fail in his action.

If that conclusion is right, the contention of the plaintiffs that the question of the validity of the bank's securities and their priorities must be fought out as to these logs in the suit of *Diehl* v. *Carritt*, is answered.

Then the contention of the plaintiff liquidator is, that, even if the debenture-holders have no standing, the claim of the bank must be proved in liquidation proceedings in the winding-up of the plaintiff company.

No doubt, the bank has had, and will have, to deal with claims in the winding-up proceedings; but this claim, in reference to particular spruce and balsam logs which were cut and brought to McCarthy creek by the bank's advances, should be dealt with now and determined once for all in the present action. Any assistance the Court can give to the parties to have the questions determined with as little additional expense as possible should be given.

I am of the opinion that the defendants were right in defending this action and in continuing its defence, without leave, in order to have the right of the bank, under the securities mentioned, determined herein; but, should leave be necessary, I grant it *nunc pro tunc*, so far as I have power to do so.

See *In re David Lloyd & Co.* (1877), 6 Ch.D. 339; *In re Joshua Stubbs Limited*, [1891] 1 Ch. 187.

The fact of a winding-up order does not prevent a security-holder from bringing an action to realise his security: *In re Longendale Cotton Spinning Co.* (1878), 8 Ch. D. 150.

The logs in question were got out in the winter of 1905-6. I accepted the evidence of John Craig, and the extract from his evidence was written out. He stated that these logs were probably cut from August, 1905, to the end of March or the beginning of April, 1906; and he said that the advances made for getting these logs out were evidently correct, and included in three bills—he called them bills—February 23, April 6, April 7, all of 1906.

These bills could not have been given for anything else. No other bank than the Quebec Bank was getting securities on the logs during the season of 1905-6. The Quebec Bank was the only bank getting securities on logs in the bush, and the McCarthy creek logs in question here were the logs in the bush, got out that season with the money of the Quebec Bank.

Mr. Craig was evidently mistaken or there is an error in the copy of the note put in. The demand notes were: February 23, 1906, $120,000; April 7, $15,000; and, on the same date, April 7, $30,000. There is no date of April 6, but the two mentioned, viz., Nos. 67 and 68, are both of the same date.

During 1905, the Quebec Bank was advancing large sums of money upon the promises, in writing, of the company that security would be given upon the logs cut and to be cut, and to be brought to the plaintiffs' mill.

The advance was to the extent of $3 a cord—that was afterwards increased.

The correspondence is interesting as shewing the sublime faith of the bank in the mill.

Of the promises in writing are the letters of the 23rd August, 1905, and the 23rd February, 1906.

The letter of the 23rd August, in part, is a request for the advances, and a promise to give a warehouse or cove receipt, or other security under the Bank Act. The letter gives to the bank, so far as a letter can, the most ample power, in case of default in payment of the note, to take possession and sell, etc., etc.

On the 23rd February, 1906, the company wrote to the manager of the bank at Sturgeon Falls, giving a statement in part and an estimate of part of the logs cut and hauled, and on the same day the security was given on 40,000 cords of logs—and in the body of that security is written, "As promised in our letter of 23rd August, 1905;" and on the 23rd February the demand note for $120,000 was given. Without referring in detail to the advances and to the notes and securities given, I have no diffi-

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culty in arriving at the conclusion that, for the identical spruce and balsam logs in question in this action, the money was advanced by the Quebec Bank, and these logs are in part the logs mentioned and intended to be mentioned in the securities given by the company to the bank, and the money was advanced by the bank because of the promises in writing that the securities would be given. See sec. 90 of the Bank Act.

In fine print on the blank forms of these securities, are the words: "For loans to owners in possession—Bank Act, sec. 74." That section of 54 & 55 Vict. ch. 17 is the same as sec. 86 of ch. 29, R.S.C. 1906. I find that the securities held by the Quebec Bank upon these spruce and balsam logs are valid. The company has admitted all through, except in this action, that these logs were the Quebec Bank logs—and the company is not now in a position to dispute the validity of the bank's claim. Upon all the facts in this case, the liquidator is in no better position than the company if not in liquidation: *Rolland* v. *La Caisse d'Economie Notre-Dame de Québec* (1895), 24 Can. S.C.R. 405.

The objection that the description in the securities is insufficient, even if the plaintiffs are allowed to raise it, cannot prevail. Very little care was taken in making out these securities; they were prepared by the company and accepted by the bank without question or revision or suggestion.

The security for 40,000 cords of logs has in it the statement that it is given as promised in the letter of the 23rd August, 1905. By reference to the letter, the logs from which the pulpwood was to be obtained are mentioned. One security on the 7th April, 1906, is upon 1,000,000 pieces. The estimate is given of 15 pieces to the cord, making in round figures 66,000, and it mentions that, of the 66,000 cords, 61,000 cords are needed in former securities, leaving only 5,000 cords as specially applicable to this as a matter of book-keeping or accounting.

Applying the rules deduced by Falconbridge, in his book on Banking, pp. 188 and 189: (1) that the description need not be such that without other inquiry the property could be identified; (2) that it is not necessary that the property should be so described as to enable a person to distinguish the article without having recourse to extrinsic evidence; and (3) that the written descriptions are to be interpreted in the light of the facts known to and in the minds of the parties at the time; the description should be held sufficient.

Upon the evidence, I find against the plaintiffs upon the allegations as set out in the statement of claim, and I find in favour of the defendants upon their statement of defence. There is no evidence of any fraudulent intent on the part of the company in giving, or of the bank in taking, the securities mentioned.

I find that, even if the logs did not belong to the defendant bank, the bank, holding these as security, would be entitled to the reasonable costs of bringing the said logs down from McCarthy creek, and the bank would be entitled to a lien on such logs for salvage.

It was absolutely necessary, in order to get anything from these logs, that they be brought down at least to Sturgeon Falls, as the nearest place for sale and conversion of the same.

Even if the securities are not valid, the defendant bank is entitled to and should be paid the amount of Government dues upon the said logs, the bank having paid the same to the Province of Ontario, and the bank has been subrogated in the rights of the Province in the said logs as to the amount so paid. The company was a consenting party to the payment of these dues by the bank, and it was fully understood by the said company and the bank that the logs were liable therefor.

The amount in the whole paid to the Province of Ontario by the bank was $21,017.28. It did not clearly appear how much of this sum was applicable to these particular spruce and balsam logs.

As to the question of the necessity of hauling out the logs at Sturgeon Falls, the order of the 28th day of May, 1908, was properly made, upon the evidence before the learned Chief Justice; but the weight of evidence at the trial, in my opinion, was, that there was booming space on the river where the logs could have been kept; there was, however, the danger of some of the logs sinking, if kept too long in the water.

Judgment should be for the defendants, dismissing this action with costs.

I assess the damages to the defendant bank by reason of the injunction, at the amount of cost to them of hauling out the logs upon the bank, and cost and loss that naturally resulted from such hauling out. If the parties can agree, the proper amount may be, at once, inserted in the judgment. If the bank does not accept the cost of hauling out and occasioned thereby as the whole amount to which the said bank is entitled, the bank may have a reference, at its own risk as to costs, to the Master in Ordinary.

In case the bank desires a reference, it must elect within twenty days, and in that case the costs of the reference only will be reserved.

Such damages in accordance with the order herein made on the 28th May, 1908, are to be paid by the plaintiff company and receiver; and, as between the bondholders and receiver, such damages are to be a charge on the assets of the company in priority to the claims of the bondholders. If damages are fixed by me, and if the plaintiffs desire a reference, it may be had at their own risk; twenty days to elect.

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The plaintiffs appealed from the judgment of BRITTON, J.

A. W. Anglin, K.C., and *J. H. Moss*, K.C., for the plaintiffs. The question is one as to the possession and protection of certain logs known as the McCarthy creek logs. It is submitted that these logs were subject as a first charge to the mortgages under which the appellant Clarkson was appointed receiver, and any rights which the respondents may have acquired were subsequent to the rights under these mortgages. The main point in this connection is as to whether or not the logs in question are to be considered "logs on their way to the mill." The appellants submit that the natural construction of this exception would make it to refer to logs that were, at the time the mortgages were taken, "on their way to the mill," and not to such logs as might thereafter be on their way to the mill. The evidence shews that such was the intended construction of the exception, which, as a matter of fact, applied to logs that could not be made the subject of mortgage, as they had already been pledged: Norton on Deeds, p. 119, and cases there cited; *Bullen* v. *Denning* (1826), 5 B. & C. 842, 850; *Savill Brothers Limited* v. *Bethell*, [1902] 2 Ch. 523, 537; *South Eastern R.W. Co.* v. *Associated Portland Cement Manufacturers* (1900) *Limited*, [1910] 1 Ch. 12. The respondents' contention involves the introduction of the word "while" before "on their way to the mill," which is not required by the construction for which we contend. Apart from the question of title, if, as the appellants allege, the securities of the defendants are void, they are strangers, and have no right to maintain their claim. These securities were not made in accordance with the provisions of sec. 90 of the Bank Act, which requires that the precise amount of the debt to be secured should be stated in the antecedent promise: *Toronto Cream and Butter Co.* v. *Crown Bank* (1908), 16 O.L.R. 400, *per* Maclaren, J.A., at p. 412. They also referred to *Richardson* v. *Alpena* (1879), 40 Mich. 203; *In re Tewkesbury Gas Co.*, [1911] 2 Ch. 279, affirmed [1912] 1 Ch. 1.

F. E. Hodgins, K.C., and *D. T. Symons*, K.C., for the defendants, relied upon the facts found and the reasons given by the learned trial Judge. The evidence shews that this action was begun under a mistaken idea of the facts, as the receiver had no possession of the logs either in fact or in law. The mortgages under which he claimed did not include the logs, and he could not legally take possession of them: *McGuin* v. *Fretts* (1887), 13 O.R. 699; *Dickey* v. *McCool* (1887), 14 A.R. 166; *Mones* v. *McCallum* (1897), 17 P.R. 398; Kerr on Receivers, 5th ed., p. 202, and cases there cited; also at pp. 158, 160, 175, 181, 219; *Crow* v. *Wood* (1850), 13 Beav. 271; *Evelyn* v. *Lewis* (1844), 3 Ha. 472. These cases shew that the receiver must have actual as well as constructive possession. The mortgages must be con-

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strued in the light of the circumstances of the parties when they were made. The exception, in its proper and ordinary meaning, implies a continuous operation, and should not be construed in a way that would limit it to logs, none of which were then in existence or on the way to the mill. The exception is wide enough to cover logs in transit at any time, and they are in transit when they are cut with the intent to send them to the mill. Any other construction would be absurd, and repugnant to ordinary business common sense. The respondents' securities are valid under the Bank Act, and give them the same rights that the owners would have to deal with the logs in the ordinary course of business: *In re Victoria Steamboats Limited*, [1897] 1 Ch. 158; *Cox Moore* v. *Peruvian Corporation Limited*, [1908] 1 Ch. 604; *In re Yorkshire Woolcombers Association Limited*, [1903] 2 Ch. 284. The plaintiff Clarkson is bound to elect whether he shall claim as receiver or liquidator: *Stroud* v. *Lawson*, [1898] 2 Q.B. 44. Reference was made to *Swan* v. *North British Australasian Co.* (1863), 32 L.J. Ex. 273; *Wilson* v. *Kelland*, [1910] 2 Ch. 306; *Rolland* v. *La Caisse d'Economie Notre-Dame de Québec*, 24 Can. S.C.R. 405; *In re Rainy Lake Lumber Co.* (1888), 15 A.R. 749; *In re Marine Mansions Co.* (1867), L.R. 4 Eq. 601, 610; *Ayers* v. *South Australian Banking Co.* (1871), L.R. 3 P.C. 548; *National Telephone Co.* v. *Constables of St. Peter Port*, [1900] A.C. 317, 321. The view urged on behalf of the appellants, that there was no definite ascertainment of the bank's securities, is too narrow, and not justified by the authorities: Maclaren on Banks and Banking, 3rd ed., pp. 186, 187, and cases there cited; Falconbridge on Banking, pp. 146, 178, 188-190, 197, 203. The *Toronto Cream and Butter Co.* case, *supra*, relied on by the appellants, is distinguishable, as there was no such evidence in that case as there is here that the promise was acted upon. As to the description of the goods, we rely upon the judgment of the trial Judge—as to the omission of the word "particular" in the schedule to sec. 88, see Falconbridge *op. cit.*, p. 188. They also referred to the following cases: *In re Valletort Sanitary Steam Laundry Co.*, [1903] 2 Ch. 654; *Brunton* v. *Electrical Engineering Corporation*, [1892] 1 Ch. 434; *Illingworth* v. *Houldsworth*, [1904] A.C. 355; *Edward Nelson & Co.* v. *Faber & Co.*, [1903] 2 K.B. 367; and (as to the respondents' right to claim by way of salvage) *Clarke* v. *Sarnia Street R.W. Co.* (1877), 42 U.C.R. 39; *Athenæum Life Assurance Society* v. *Pooley* (1858) 3 De G. & J. 294.

Anglin, in reply. The descriptions of the goods must be such as will identify them, and distinguish them from others of the same kind, or of a different kind. The respondents can have no equity beyond what is shewn by the facts and documents in the case. As to the question of exception, he referred to *Farquhar-*

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son v. *Barnard Argue Roth Stearns Oil and Gas Co.* (1911), 2[illegible] O.L.R. 93. The *Rolland* case, *supra*, was only a matter of *ultra vires*, not as here; and, as in the case of *Bank of Toronto* v. *Perkins* (1883), 8 Can. S.C.R. 603, a matter of absolute prohibition.

June 28, 1912. MACLAREN, J.A.:—The plaintiffs, the Imperial Paper Mills of Canada Limited and Clarkson, as receiver for the bondholders of the company and as liquidator of the company, appeal from the judgment of Britton, J., dismissing their action for an injunction and for the recovery of certain spruce and balsam logs which the Quebec Bank claimed under certain securities purporting to be executed by the company under sec. 88 of the Bank Act.

Counsel on both sides spent some time in the discussion of certain minor and technical points as to the effect of the winding-up order, the conduct and intentions of the parties, the constitution of the action, etc.; but these were not very strongly pressed, and may be properly passed over, and the contest decided upon the merits.

On the 6th October, 1898, and the 15th December, 1901, the Sturgeon Falls Pulp Company in consideration of the expenditure of large sums for the erection of pulp mills, the payment of Government dues, etc., acquired from the Provincial Government the exclusive right for twenty-one years to cut spruce and other timber on a large area of Crown lands. These rights were subsequently assigned to the plaintiff company on the 7th May, 1903.

On the 22nd September, 1903, this company executed a mortgage deed of trust in favour of the Trustees Executors and Securities Insurance Corporation, for £100,000, upon "the whole property, assets, rights, privileges, and undertaking of the company, present and future (excepting logs on the way to the mill)," to secure bonds of the company to that amount.

On the 18th November, 1903, it executed another debenture mortgage in favour of Messrs. Carritt and Sinclair for £200,000, "upon the whole property, assets, franchises, and undertakings of the company, present and future (excepting logs on the way to the mill)," to rank after the mortgage-deed of the 22nd September, 1903.

Counsel for the plaintiffs argued that the above exceptions applied only to logs on the way to the mill at the respective dates of the mortgages. I cannot accede to this argument, as I do not consider it the natural meaning of the document, and think it was properly construed by the trial Judge. The words are, in my opinion, used in their normal and natural sense. In each instance, they immediately follow the words "present and future;" and, if they were intended to have the restrictive

meaning suggested, I think the phrase would have read "logs now on the way to the mill," or some equivalent expression would have been used. Besides, the whole tenor of the instruments shews that these mortgages were to be mere "floating securities," and that it was the general intention that the company, while meeting its obligations under these instruments, was to be allowed to carry on its business in the usual manner. It is common knowledge that the carrying on of such operations as the cutting of these logs in the bush, and drawing them to the banks of the streams in the winter, and floating them down the streams to the mills in the spring, necessitates very large expenditures within a very limited time during these seasons, and that the ordinary way of financing these is to secure advances from banks on the security of the logs, under the exceptional provisions of the Bank Act, which overrides the ordinary laws of the Provinces in this regard, in order to enable those carrying on these lumbering operations to raise such moneys as were obtained from the bank by this company on this very security. To my mind, there can be no doubt that this is what all the parties had in contemplation when the exception in question was inserted in these agreements.

It is not necessary for us to determine in this case precisely when these logs were on their way to the mill. It may be argued that, when they were severed from the land and became logs, the exception applied, and continued so long as the mill was their destination; but it is not necessary for the defendants to go so far. It is sufficient that the words of this exception properly applied to them when the bank made its advances and took the securities in question, and continued to be applicable up to the institution of the present action. Their being delayed on the way, either on account of the want of water to float them or for any other reason, did not alter their character or prevent them from coming within the terms of the exception.

The appellants further contend that the securities of the bank are invalid on account of the requirements of the Bank Act not having been complied with. The transactions in question were prior to the coming into force of the Revised Statutes; but, as the trial Judge and the parties have referred to the various sections by the numbers they now bear, it will be convenient to continue this method, as no changes have been made in the sections themselves.

By sec. 76 of the Act, it is enacted: "2. Except as authorised by this Act, the bank shall not, either directly or indirectly,— . . . (c) lend money or makes advances . . . upon the security of any goods, wares and merchandise." One of the exceptions is found in sec. 88, which provides: "3. The bank may lend money to any person engaged in business as a whole-

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sale manufacturer of any goods, wares and merchandise, upon the security of the goods, wares and merchandise manufactured by him, or procured for such manufacture." The security is to be in the form set forth in schedule C, or to the like effect; and the bank is to acquire the same rights and powers in respect to the goods, etc., covered thereby, as if it had acquired them by virtue of a warehouse receipt.

Section 90 provides that the bank shall not acquire or hold any such security to secure the payment of any bill, note, debt, or liability, unless such bill, note, etc., is negotiated or contracted —(*a*) at the time of the acquisition thereof by the bank; or (*b*) upon the written promise or agreement that such security would be given to the bank.

Counsel for the appellants contended before us that the letters of the company promising that such securities would be given were not sufficiently precise and definite to meet the requirements of the Act. Most of the cases that have been before our Courts have been under the Act of 1871, where the word used was "understanding," or under the Act of 1886, where the word used was simply "promise." The present language, "written promise or agreement," was introduced in 1890, but, so far, does not appear to have been judicially construed. See *Royal Canadian Bank* v. *Ross* (1877), 40 U.C.R. 466; *McCrae* v. *Molsons Bank* (1878), 25 Gr. 519; *Re Central Bank* (1891), 21 O.R. 515; *Suter* v. *Merchants Bank* (1876), 24 Gr. 365; and *Tennant* v. *Union Bank* (1892), 19 A.R. 1, where a liberal construction was given to the language.

The language of the Act is very similar to the corresponding provision regarding chattel mortgages in this Province, which has long been in force, and is now to be found in 10 Edw. VII. ch. 65, sec. 16, which provides that "every covenant, promise or agreement to make, execute or give a mortgage of goods and chattels shall be in writing," and has often been construed by our Courts. See *Allan* v. *Clarkson* (1870), 17 Gr. 570; *McRoberts* v. *Steinoff* (1886), 11 O.R. 369; *Clarkson* v. *Sterling* (1888), 15 A.R. 234; *Embury* v. *West* (1888), 15 A.R. 357; *Lawson* v. *McGeoch* (1893), 20 A.R. 464. In none of these was a critical or strict construction of the language favoured. In the last-named case, Maclennan, J.A., at p. 475, says: "It is said that the agreement was too vague and uncertain to be attended to, as it is not shewn that any particular goods were mentioned, which were to be mortgaged. I am not pressed with this objection. The debtor was a farmer, and the mortgage was to be a chattel mortgage. I think that means a mortgage of the debtor's chattels; and that the defendant could have selected a sufficient quantity of the debtor's goods and have required a mortgage upon them." See also the language of Proudfoot,

V.-C., in *Suter* v. *Merchants Bank*, 24 Gr. 365, at p. 374 *et seq.*, to the same effect.

I do not think that such commercial documents as these should be scrutinised with the same particularity as those expected to be prepared and examined by solicitors, and only executed after having been carefully settled. The goods were sufficiently marked, and could be readily identified, as found by the trial Judge; and the officers and servants of the company appear to have spoken of them as the logs of the bank.

All the logs in question appear to be fully covered by the securities in the form prescribed by the Bank Act and given contemporaneously with the contraction of the debt and the negotiation of the promissory notes of the company to which they are respectively annexed.

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In addition to this, as pointed out by the trial Judge, the bank has paid to the Ontario Government large sums due by the company for the logs cut by them, and has been subrogated in the rights of the Government with respect to the same, and would have a lien in the nature of salvage for the moneys advanced to float the logs from McCarthy creek to Sturgeon Falls.

I am of opinion that the appeal should be dismissed.

Meredith, J.A.

MEREDITH, J.A.:—The real question in this action is, which of the parties is entitled to the proceeds of the logs in question?

Originally they were the property of the paper company, being cut by them under a lease from the Province.

The defendants claim title under certain charges made upon the property by the company in their favour.

The reply is, that the charges are invalid in law; and that, if not, they are subsequent to charges in favour of the bondholders, who are represented in this action by their receiver, the plaintiff Clarkson.

The first question for consideration is, therefore, whether the charges in favour of the defendant the bank are invalid because not made in accordance with the provisions of the Bank Act, sec. 90. But, in all things substantial, they seem to me to have been so made. They were made under and in accordance with the antecedent agreements, in writing, to give such security—one of them expressly so. The contention that the precise amount of the debt to be secured must be stated in the antecedent promise in writing is not well-founded; the enactment does not require it; nor does the case of *Toronto Cream and Butter Co.* v. *Crown Bank*, 16 O.L.R. 400, 419, give reasonable encouragement to the contention. In that case the security was not shewn to have been given upon a previous promise to give it. The promise in this case was of security for the amounts to be advanced to enable the company to get out a quantity of pulp-

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wood logs estimated at 15,000 cords in the first transaction, and in like manner as to the other transactions; a promise which, in my opinion, comes within the provisions of sec. 90. Nor are the securities invalid for want of compliance with the provisions of the Act in regard to the description of the goods. I see no reason why a certain number or quantity of pulpwood logs, out of a greater quantity, may not be so charged without severance, just as, I think, would be the case in regard to wheat and other things in which all parts are alike, and so greater certainty is not required for any purpose, so far as any one affected, or who might be affected, is substantially concerned. No creditor, or subsequent transferee of the property, would be a whit better off if each particular log had been ear-marked.

Then are the logs in question excepted from the general security given in favour of bondholders? The exception, as expressed in the first mortgage, is in these words, "logs on the way to the mill," the mortgage being a "floating security" covering everything presently owned as well as to be acquired by the mortgagors. It is said that the exception does not apply to the future, that it must be confined to logs then on the way to the mill; but I am quite unable to agree in that contention; indeed, it seems to me to be quite plain that such was not the intention of the parties; and that neither strict grammatical construction, nor ordinary understanding, of such words, favours it. The business was to be carried on; that is fully provided for in the mortgages; it could not be carried on without pulpwood; pulpwood could not be obtained without payment of transportation charges, charges which are, in the case of common carriers, a lien upon the goods carried; pulpwood would be needed in future years quite as much as at the time when the mortgages were given. I cannot think that among business men any one would have thought of raising such a contention.

There was power, therefore, to charge logs on the way to the mill; but the further contention is made that the logs in question were not on their way to the mill when the defendants took possession of them; but, again, I am quite unable to see anything in the point. From the time the logs were cut in the forest until they reached the mill, they were on their way to the mill; the purpose of cutting them was, that they should go to the mill and there be converted into paper-pulp. Every step taken towards that destination was a step on the way to the mill, whenever taken; it was part of the necessary transportation.

It was suggested that the later mortgage might be wider in its scope than the earlier; but the contrary is so; there is in it the words "excepting logs on the way to the mill," and, in addition, the plainest liberty to mortgage or charge for the purpose of carrying on the business; the subsequent covenant, not to

mortgage or charge without the consent of the bondholders, does not affect the preceding exception or liberty; it comprises mortgages and charges for other purposes.

Needless technical obstruction ought not to be put in the way of honest mercantile transactions such as those here in question. Such enactments as that in question are best interpreted when given the meaning which business-men generally would attach to them.

MOSS, C.J.O., and GARROW and MAGEE, JJ.A., concurred.

Appeal dismissed.

CORDINER v. ANCIENT ORDER OF UNITED WORKMEN (ONT.).

Ontario High Court, Riddell, J. October 11, 1912.

1. BENEVOLENT SOCIETIES (§ III—11)—AMENDMENT RAISING ASSESSMENTS —NOTICE OF—INTERIM INJUNCTION.

Upon a motion by the plaintiffs for an interim injunction to restrain the defendant (a fraternal benevolent society) from taking any proceedings under a certain amendment to the constitution of the defendant society, where it appeared that the amendment in question greatly increased the assessments (or premiums) on the insurance of the plaintiffs, as aged members of the society; and where its constitution required that a copy of all proposed amendments should be forwarded to the Grand Recorder on or before a certain fixed date each year, in order that the Grand Recorder, in turn, might send a copy to each subordinate lodge in time for a full discussion of the proposed amendment before selection of a Grand Lodge representative; and where the constitution also provides that in all important matters the representative in Grand Lodge of a subordinate lodge has as many votes as his lodge has members; the interim injunction will be granted, where such notice has not been given to the Grand Recorder, as provided by the constitution of the society.

2. BENEVOLENT SOCIETIES (§ IV—17*a*)—DISPUTE BETWEEN SOCIETY AND MEMBER—"DOMESTIC REMEDIES."

Under the maxim "*interest reipublicae ut sit finis litium*," the Court will refuse to entertain a dispute between a benefit society and a member until the remedies provided by its constitution for the determination of the differences by a trial or appeal within the society itself have been exhausted.

[*Zilliax* v. *Independent Order of Foresters*, 13 O.L.R. 155, referred to.]

Statement

MOTION by the plaintiffs for an interim injunction restraining the defendants from taking any proceedings under an amendment to the constitution of the defendant society, passed by the Grand Lodge at a meeting held on the 21st June, 1912.

The plaintiffs were persons affected by the change, and the action was brought for a permanent injunction in the same terms.

The defendants were a fraternal and benevolent society.

Section 63 of the constitution contained a tariff indicating the amount to be paid monthly by each member by way of assess-

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ment, running from 74 cents per $1,000 of benefit at the age of 16 to $2.69 at the age of "49 and over." This assessment corresponds to the premium payable for a life insurance; and failure to pay it voids the member's insurance.

The amendment adopted was as follows:—

"Amend section 63, sub-section 1, by striking out all of that part of the said sub-section on pages 39 and 40 and substituting therefor the following:—

"From and after the 1st day of October, 1912, each and every member of this Order, who joined prior to the 1st day of May, 1905, shall, without notice, pay to the Financier of the Lodge a monthly assessment of the amount designated opposite the age of the member on the 1st day of May, 1905; members over 65 years of age to be taken as at age 65; and each and every new member, commencing with the month of receiving the Workman Degree, shall, without notice, pay to the Financier of the Lodge a monthly assessment of the amount designated opposite the age of the member at the date of admission to the Order, according to the following graded plan."

The "graded plan" set out ages and amounts from 16 to 49, the same as in the original, and then continued from 50 to 65 inclusive, according to the figures recommended by the executive committee, but stopping at the age of 65 years.

The recommendation of the executive committee was that the tariff should be increased year by year till 82 years and $16.12 monthly instalment—"provided that any member who shall have joined the Order prior to the said 1st day of October, 1912, shall have the option of having his or her certificate rated at his or her attained age as of the 1st day of May, 1905, or at his or her attained age at date of joining, if he or she shall have joined the Order subsequent to the 1st day of May, 1905, upon either paying an additional assessment, consisting of the difference between the rate hereinbefore provided for and the rate theretofore paid by such member, which is according to the following schedule." The schedule set out ages and rates as in the original.

The constitution required (sec. 169) that a copy of all proposed amendments should be forwarded to the Grand Recorder on or before the 31st October, in order that he might send a copy to each subordinate Lodge in time for a full discussion of the proposed amendment before selection of a Grand Lodge representative.

In all important matters the representative in Grand Lodge of a subordinate Lodge has as many votes as his Lodge has members.

No notice of the amendment which was adopted was forwarded to the Grand Recorder.

I. F. Hellmuth, K.C., for the plaintiffs.
E. F. B. Johnston, K.C., for the defendants.

RIDDELL, J. (after setting out the facts):—It must be perfectly manifest that this amendment never was submitted to the subordinate Lodges for the consideration of their members, and that the members of the Order at large have had no opportunity of considering and discussing the same and of instructing their representatives in respect thereof. This, of course, would—or might—be no objection where the representative was a representative, as in the Dominion and Province, of the whole Dominion or Province, and not of a particular constituency.

It may perhaps not be a prerequisite, taking sec. 169 strictly, for the Grand Recorder to send a copy of the amendment to the Lodges; but it is, in any reading, necessary that the amendment shall be forwarded to the Grand Recorder on or before the 31st October before the meeting at which it is to be considered.

There are other objections to the amendment upon which I do not pass.

Were it the case of an incorporated company, and were it certain that the proper number of votes would be secured to carry the amendment, the Court might not—probably would not—interfere; but this is quite a different case.

I do not lose sight of the principle laid down in many cases that the Court will not interfere unless and until all the domestic remedies are exhausted. There are many provisions for appeal in the constitution of this Order, but none for an appeal from the action of the Grand Lodge itself—and that is what the plaintiffs complain of.

Zilliax v. *Independent Order of Foresters*, 13 O.L.R. 155, is perhaps the latest case in which the principle is applied—and the numerous decisions need not here be cited or discussed. There is no doubt of the general principle.

I cannot entirely disregard the consideration of the evil effects upon the Order which may result from this order—any more than I can disregard the hardship on old and on aging men arising from the amendment if held valid. That the Order may suffer if the present plan is retained, is clear enough. Life insurance does not differ from any other matter to which the inexorable truths of mathematics can be applied. Assumptions of antiquity, a euphonious, well-sounding name, the enthusiasm of fraternity, are well enough; but, when it comes to paying a death claim, they are found wanting. The cold gray light of a failing bank account makes perfectly manifest that cheap insurance is a sin against actuarial science—and the wages of this sin, too, is death.

On the other hand, these aged and aging men have paid for years money which went to pay for the support of those left be-

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hind by their comrades, believing that so long as they, during their own lifetime, paid their fees as fixed for them, their widows and orphans would in like manner be provided for: they now are told that they must pay an increased amount, which many of them will find it most difficult, some impossible, to pay, or lose all the benefit of their past payments of money which they could ill spare. It would be hopeless for them to expect to be admitted to another benevolent society—their lot is a hard one. Truly those who organise such societies undertake a tremendous responsibility—the failure of any such always results in tragedy.

On a balancing of convenience I cannot but think that these individuals have the higher claim to consideration. I cannot think the Order is so rotten, so near bankruptcy, that it will go to pieces before a regular meeting can be held at which will appear delegates fully instructed—while, if I permitted the new rates to go into operation, very great hardship might result.

An injunction will go as asked, but all parties must speed the trial. Costs to be in the cause unless otherwise ordered by the trial Judge.

If all parties consent, this may be turned into a motion for judgment, in which case judgment will go as asked with costs.

Interim injunction granted.

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PARISH v. PARISH.

Ontario High Court, Riddell, J., in Chambers. October 12, 1912.

1. DIVORCE AND SEPARATION (§ V B—50)—INTERIM ALIMONY—OBJECTIONS.

An order for interim alimony will not be refused nor its operation stayed upon the ground that the plaintiff should first return to the defendant the child and certain chattels alleged to have been wrongfully taken away by her where the matter of the objection should properly be determined at the trial.

[*Karch* v. *Karch*, 3 D.L.R. 658, 3 O.W.N. 1032, followed.]

2. DIVORCE AND SEPARATION (§ V B—50)—INTERIM ALIMONY—DELAY IN APPLYING FOR ORDER.

Where an application for interim alimony was not made in an alimony action until long after the delivery of plaintiff's statement of claim the Court may refuse to order interim alimony computed from the delivery of the statement of claim and direct payment to be made only from the date of the order until the trial.

[*Peterson* v. *Peterson*, 6 P.R. (Ont.) 150; *Howe* v. *Howe*, 3 Ch. Ch. R. 494; *Thompson* v. *Thompson*, 9 P.R. 526, referred to.]

Statement

AN appeal by the defendant from an order of the Local Judge for the County of Elgin directing the defendant to pay $104 as arrears of interim alimony since the service of the statement of claim up to the date of the order and $8 a week thereafter; also $40 for interim disbursements.

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Joseph Montgomery, for the defendant.
Shirley Denison, K.C., for the plaintiff.

RIDDELL, J.:—The appellant asks that the order be not effective unless and until the plaintiff returns their child to the defendant and chattels of his which she has; and, in any event, that the amount be reduced; and, moreover, that the sum of $113 taken away by the plaintiff from the defendant's house, part of his money, be taken into account.

In *Karch* v. *Karch*, 3 D.L.R. 658, 3 O.W.N. 1032, I discussed the circumstances under which interim alimony should be allowed; and do not now depart from the conclusions there arrived at. I think that I cannot stay the operation of the order until the plaintiff does something which it may turn out she is not bound to do.

But as to the amount—while it is clear that interim alimony may be and often is granted from the service of the writ (or statement of claim), that is only if there has been no delay in making the application: *Howe* v. *Howe*, 3 Ch. Ch. R. 494; *Thompson* v. *Thompson*, 9 P.R. (Ont.) 526; and a claim for interim alimony is endorsed on the writ: *Peterson* v. *Peterson*, 6 P. R. (Ont.) 150. Here the second requisite is found—the writ is properly endorsed; but the writ was served on the 20th April; and, for some reason, the statement of claim was delayed till the 29th June, thereby allowing the statement of defence to be delayed till the 9th September. Even then, notice of motion for interim alimony was not served for two weeks, *i.e.*, the 21st September, and for the 27th September. The delay has not been accounted for; and I think the interim alimony should run only from the date of the order.

In this view, I do not direct the $113 to be taken into account, as it otherwise should or might. Probably the possession of the money accounts for the delay in making application.

In view of the short time to elapse before the trial may be had, I do not at present, at least, weigh in apothecaries' scales the means of the defendant and the amount which the plaintiff should receive as interim alimony. If, for any reason, the case is not tried at the coming St. Thomas non-jury sittings, the matter may be brought before me again, either on the same or other material.

No costs.

Order for interim alimony.

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READER v. CALUMET METALS CO.

Quebec Superior Court, Weir, J. March 20, 1912.

1. SET-OFF AND COUNTERCLAIM (§ II—40)—JUDGMENT ANNULLED BY PORTION OF ASSIGNED ACCOUNTS—CONTRA JUDGMENT FOR EXCESS.

Where plaintiff obtains a judgment for a sum of money against defendant, and where, on an opposition to annul same, the defendant opposant sets up two certain accounts against plaintiff contestant exceeding in amount the judgment, and the opposition is maintained and the judgment declared compensated and extinguished; the right of the defendant opposant, in recourse against the plaintiff for the excess, will be adjudged in the same proceeding.

2. EVIDENCE (§ VI F—544*a*)—AGREEMENTS — NON-TRADERS — NON-COMMERCIAL MATTER—PAROL EVIDENCE.

Where a debtor alleges payment and satisfaction of a claim against him in the hands of an assignee, and tenders parol evidence of an alleged agreement made between himself and the assignor under which the debtor joined the assignor in a promissory note and agreed to pay the note to the extent, and in satisfaction, of the assigned claim, and where it appears that neither the debtor nor the assignor was a trader, and that their agreement was therefore not a commercial matter, parol evidence of the agreement is not admissible.

3. EVIDENCE (§ XII J—965)—PHYSICIAN'S BILL—CONFLICTING AND UNSATISFACTORY TESTIMONY—PHYSICIAN'S EVIDENCE—ART. 2260 OF CIVIL CODE (QUE.).

In an action for the recovery of a physician's bill for services, where the nature and duration of the services are in issue, and where the physician testifies in detail supporting the claim, and the other testimony is conflicting and unsatisfactory, the evidence of the physician should be given credence, under sub-sec. 7 of art. 2260.

4. ASSIGNMENT (§ I—2)—ACCOUNT—FORM OF ASSIGNMENT—CONSIDERATION NOT SHEWN ON FACE OF ASSIGNMENT.

In an action for the recovery of a physician's bill for services, where the bill had been assigned by attaching to an ordinary statement of the account a written assignment with an attesting witness of "this claim of $1,500" the assignment, however, not shewing any consideration, such an assignment is sufficient in form, no technical form being required by the laws of Quebec.

[*Walker* v. *Bradford Old Bank* (1884), 12 Q.B.D. 511, referred to.]

5. ASSIGNMENT (§ III—30)—ACCOUNT—NOTICE OF ASSIGNMENT OF—SERVICE OF WRIT OR PROCESS COMMENCING THE ACTION, SUFFICIENT.

Where a physician assigned to another his bill against a patient for services, and no notice of the assignment was given to the debtor, before action brought by the assignee; the service of the writ or process commencing the action, in the name of the assignee, is a sufficient notification of the transfer.

[*Bank of Toronto* v. *St. Lawrence Fire Insurance Co.* [1903] A.C. 59, 2 Com. L.R. (Can.) 42, followed.]

6. SET-OFF AND COUNTERCLAIM (§ II—40)—JUDGMENT AND ACCOUNT IN COMPENSATION—CIVIL CODE (QUE.). ART. 1188.

A judgment may be extinguished by set-off (*compensation*) under the Civil Code (Que.), by an account when both are equally liquidated and demandable where the subject of each is a sum of money.

[Art. 1188 of the Civil Code (Que.), and *Fisher* v. *Sheridan*, 17 Que. K.B. 296 referred to.]

Statement

HEARING of opposition to annul.

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WEIR, J.:—This matter is before the Court on the merits of the opposition to annul. The opposition is based on the ground of the extinction of the debt (C.P. 645).

It sets forth that various claims against the plaintiff have been assigned to it, of which only two were discussed at the hearing. The first assignment was of the sum of $165.00 and interest due by the plaintiff to Charles Bulpit for moneys loaned and advanced by the said Charles Bulpit to the plaintiff and transferred by the former to defendant opposant. In answer to this allegation of the opposition, plaintiff contestant alleges that the said debt has long been extinguished and paid to the said Bulpit by a transaction which took place between the plaintiff and said Bulpit on January 31st, 1911, by which transaction plaintiff signed a note with said Bulpit in favour of one C. McNally for $200.00, which plaintiff agreed to pay to the extent of $165.00 in satisfaction of his indebtedness to said Bulpit.

At the trial, plaintiff contestant attempted to prove the agreement implied in this statement by his own evidence, to which objection was made by opposant. The evidence was allowed in under reserve.

As any agreement between plaintiff and Bulpit is not a commercial matter, neither of them being traders, verbal evidence of the agreement is clearly inadmissible, and the objection at enquête is maintained.

The second assignment set up by the opposition is of the sum of $1,500.00 and interest, due by plaintiff to Reynold Webb Wilcox, of the city and State of New York, physician and surgeon, for professional services rendered to the plaintiff at the said city of New York, at the times mentioned in the account to be filed, and assigned and transferred by the said Wilcox to the defendant.

This transfer is evidenced by opposant's exhibit O-2, which reads as follows:—

February 1st, 1911.

I hereby assign this claim of $1,500.00 against A. B. Reader to the Calumet Metal Co.

(Signed) REYNOLD WEBB WILCOX.

Witness: SARAH TRAVIS.

To this is attached an account, dated January 1st, 1912, "for professional services rendered from January, 1908, to date: $1,500.00." A copy of these claims was filed with the prothonotary on the 7th February, 1912, on the return of the opposition, for the plaintiff.

At the enquête, the account for the professional services in question was produced in detail by Dr. Wilcox, and the nature and extent of the services rendered by him to the plaintiff

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were sworn to by him, as well as the value of his services. Under art. 2260 of the Civil Code, it is provided that the oath of a physician or surgeon makes proof as to the nature and duration of the services.

No evidence was received contradicting the estimate placed by Dr. Wilcox upon the value of these services, and his charges, according to him, are the ordinary charges of New York physicians in such matters.

By his contestation, plaintiff alleges that the account is "disputed, exaggerated and unfounded." The only evidence, however, that he has produced is his own testimony, in which he swears that Dr. Wilcox never gave him his professional services beyond two days in February, 1908, and maintains that he owes him nothing. He admits that Dr. Wilcox is "a very distinguished man." It is impossible for the Court to doubt the veracity of Dr. Wilcox, while, on the other hand, the evidence of the plaintiff did not create a very agreeable impression as to his veracity. Under cross-examination he was forced to admit that, in the summer of 1908, he filed an affidavit in the Court of New York that he was too ill to attend, and that this affidavit was accompanied by a certificate of Dr. Wilcox to that effect. He also made the admission that his wife had implored him to give up the use of pernicious drugs, thereby corroborating to that extent the testimony of Dr. Wilcox as to the nature of his services to plaintiff in part. Moreover, Dr. Wilcox is also corroborated in part by the evidence of Helen Leahy, who testified that, at plaintiff's request, she had summoned Dr. Wilcox to his bedside, and that, during a long period, Dr. Wilcox was in attendance upon him. Her evidence also is flatly contradicted by the plaintiff in every particular. There is no reason to doubt her veracity. I consider that the account of Dr. Wilcox has been established.

Plaintiff contestant raises three other objections in connection therewith by his contestation that the written transfer and assignment produced in this case are null, void and illegal:—

1. Because they are not made in the form required by law;
2. Because no mention is to be found therein of any consideration;
3. Because no notice thereof was ever given to the plaintiff contestant.

By his conclusions he does not ask that the transfer and assignment be declared null, void and illegal and set aside, but prays purely and simply for the dismissal of the opposition. As regards the form of the assignment from Dr. Wilcox to the opposant, no reasons were given as to its insufficiency. There are no sacramental terms required by our law for such a transfer, and the form used in this case is sufficient. As to the fact that no consideration is mentioned in the assignment,

that is a matter which might have some force and effect in a contestation based thereon between the assignor and the assignee, but it is difficult to see the interest of plaintiff therein.

Art. 1570 of the Civil Code provides that the sale of debts and rights of action against third persons, is perfected between the seller and buyer by the completion of the title, if authentic, or the delivery of it, if under private signature. In this case, the delivery of the assignment, with the accompanying account of the indebtedness of the plaintiff, was complete prior to the filing of the opposition as between Dr. Wilcox and opposant. The above cited article is further supplemented by art. 1494 of Civil Code, which reads as follows:—

> The delivery of incorporeal things is made by the delivery of the titles, or by the use which the buyer makes of such things with the consent of the seller.

In this case, we have the opposant using the assignment from Dr. Wilcox for the purpose of its opposition and, apparently, with his knowledge and consent, as he is a witness on the part of the opposant. It is true that, under cross-examination, Dr. Wilcox admits that, as yet, he has not received anything as the price or consideration of the transfer of the assignment, and is contradictory in his views as to the legal effects thereof. This cannot detract from opposant's rights under the written assignment, accepted and acted upon by it with the knowledge and consent of Dr. Wilcox.

Opposant's rights are to be interpreted from the assignment in writing itself, and not from subsequent views or statements of the assignor. Here again it is difficult to see what interest the plaintiff has in attacking the assignment for reasons of informality or technical defects, inasmuch as, if the opposant succeeds under it, the result would be the extinguishment of the indebtedness of the plaintiff himself and the assignment is, strictly speaking, a contract between the assignor and assignee only. See *Walker* v. *Bradford Old Bank* (1884), 12 Q.B.D. 511.

The remaining ground of nullity raised by plaintiff, viz., that no notice of the assignment was ever given to him, is disposed of by the holding of the Privy Council in *The Bank of Toronto* v. *St. Lawrence Fire Insurance Co.*, 12 Que. K.B. 556, [1903] A.C. 59, where it was held that the service upon the debtor of the action in the name of the transferee is a sufficient notification of the transfer.

Service of the opposition herein is of the same effect as of the action between the parties.

Plaintiff contestant also urges that the Wilcox account assigned to opposant cannot be pleaded in compensation of the judgment in his favour against the defendant opposant, because it is not certain, demandable and liquidated. Art. 645

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permits of the debtor demanding the nullity of the seizure of moveable property in execution "on the ground of the extinction of the debt." Debts may be extinguished by compensation and are compensated when, according to art. 1188, they are equally liquidated and demandable and have each for object a sum of money or a certain quantity of indeterminate things of the same kind and quality.

As to what debts are equally liquidated, the authorities applicable herein are well summarized by Mr. Beauchamp under the caption "Doctrine Français," at the end of art. 1188:—

> La jurisprudence concède que la compensation admise entre dettes liquides s'étend aux dettes faciles à liquider, ou plutôt une dette facile à liquider doit être réputée liquide en ce qui touche la compensation. Une dette est réputée liquide et susceptible de compensation si elle peut être liquidée sans retard préjudiciable à celui à qui elle est opposée. 28 Demolombe, n. 522, 523; Merlin, Rép., vo. Compensation, par. 2. n. 1; 7 Toullier, n. 411, 412; 8 Laurent, n. 404, 405, 472; 5 Colmet de Santerre, n. 242 bis-5; 3 Massé et Vergé, sur Zachariae, par. 751, note 7.

In addition, I may refer to the case of *Fisher* v. *Sheridan*, 17 Que. K.B. 296, where the following ruling was laid down:—

> Jugé: Une dette formée d'items pour pension, fourniture de vêtements, frais de voyage, argent prêté et frais funérairies, que le créancier peut justifier promptement, n'est pas de celles prévues à l'art. 1194 C.C., mais est compensable de plein droit aussitôt qu'elle existe.

For all these reasons I am of opinion that the opposition should be maintained and the contestation dismissed, and the Court doth declare that the claim of the plaintiff under the judgment rendered in his favour herein, is paid, compensated and extinguished by:—

> 1. The sum of $165.00 heretofore due by the plaintiff to Charles Bulpit of Calumet Island for moneys loaned and advanced by the said Charles Bulpit to the plaintiff, and transferred by the said Charles Bulpit to the defendant opposant on the 17th January, 1912; and,
>
> 2. The sum of $1,500.00, heretofore due by plaintiff to Reynold Webb Wilcox, of the city and State of New York, one of the United States of America, physician and surgeon, for professional services rendered to the plaintiff at the said city of New York, and assigned and transferred by the said Reynold Webb Wilcox to the defendant opposant by a writing dated February 1st, 1912, herein filed;

And does reserve to defendant opposant its recourse against the plaintiff for the excess of the sum so assigned to it over the claim of the plaintiff in virtue of the judgment herein in his favour; doth annul the seizure practised herein, and doth condemn plaintiff contestant to pay the costs of defendant opposant from and after the 7th day of February, 1912, the date of the filing of the exhibits herein, distraits to Mr. T. P. Foran, attorney for opposant.

Opposition maintained.

WALKER AND WEBB v. MACDONALD. GRAHAM v. MACDONALD.

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Sept. 4.

Ontario High Court. Trial before Falconbridge, C.J.K.B. September 4, 1912.

1. BROKERS (§ II B—12)—AGENCY—COMMISSION—SALE OF LANDS—CAUSA CAUSANS—LIABILITY OF VENDOR FOR TWO COMMISSIONS.

Where two actions are brought by two separate land agents each claiming, as against the vendor, commission on the same sale of the same property, the right to commission is his who was *causa causans* or the efficient cause of the sale to the exclusion of the other agent so claiming.

[*Burton* v. *Hughes*, 1 Times L.R. 207, specially referred to.]

2. BROKERS (§ II B—13*a*)—AGENCY—COMMISSION—SALE OF LANDS — PURCHASER INDUCING VENDOR TO LOWER PRICE BY MISREPRESENTING THAT VENDOR'S AGENT HAS EARNED NO COMMISSION—INDEMNITY BY PURCHASER—THIRD PARTY.

Where a purchaser of real estate, in assuming to be making the deal entirely without the intervention of the vendor's agent, misrepresents to the vendor that the vendor's agent has earned no commission on the sale, and thereby misleads the vendor and induces him to lower his price by the amount of the commission which would otherwise be payable, in an action subsequently brought by vendor's agent against the vendor (adding the purchaser as a third party) establishing the claim for commission, the purchaser may be held bound to make good to the defendants the amount of such commission.

Statement

ACTIONS by land agents for commission on the sale of properties of the defendants to G. J. Foy Limited, brought in as third parties.

The plaintiffs Walker and Webb and the plaintiff Graham each claimed a commission on the same sale.

Judgment was given in favour of the plaintiff Graham, the action of Walker and Webb was dismissed with costs.

W. E. Raney, K.C., and *H. E. Irwin*, K.C., for the plaintiffs Walker and Webb.

D. Inglis Grant, for the plaintiff Graham.

G. F. Shepley, K.C., and *G. W. Mason*, for the defendants.

E. J. Hearn, K.C., and *R. J. Maclennan*, for the third parties.

Falconbridge, C.J.

FALCONBRIDGE, C.J.:—The plaintiff Graham is entitled to the commission. There will be judgment for him for $1,750 and costs.

The plaintiffs Walker and Webb are not so entitled. Their action is dismissed with costs.

As to the third parties (G. J. Foy Limited), R. T. Blachford was a most unsatisfactory witness, both in demeanour and judged by the other ordinary tests of credibility. I hesitate to brand him as deliberately untruthful. He was apparently a sick man, and perhaps his recollection was at fault. But I prefer to accept the evidence of Macdonald and Glanville, wherever he contradicts them or either of them.

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WALKER AND WEBB v. MACDONALD.

Falconbridge, C.J.

Macdonald had shewn him Graham's card, and Blachford expressly repudiated Graham. Yet when he ascertained (if he did not know it all along) that Graham was, to put the case mildly, busying himself about the matter, it never occurred to him, as a proper thing to do, to tell Macdonald. He assured the defendants that he came to close the deal himself, that no one but Williams was in any position to look for commission, and that he would look after Williams. The clause in exhibit 5, "No agent introduced buyer and seller," was read over to him, and he well knew the object of its insertion. He must be taken to have intended the vendees to act on it and on his silence as to what he knew about the action of those who now claim commissions.

The vendors acted on these representations and reduced their price from $72,000 to $70,000.

Therefore, the third parties, G. J. Foy Limited, are bound to make this good to the defendants, and the defendants will have judgment against the third parties for $1,750, plus the plaintiff Graham's costs, plus the defendants' costs in the Graham suit, and costs of making G. J. Foy Limited third parties and of the trial. In other words, the defendants are entitled to complete indemnity as to Graham, and to their own costs.

The same result would follow as to the third parties if Walker and Webb were adjudged entitled to the commission, instead of Graham.

It behooves the man who has property for sale, to walk and talk warily.

It was suggested in this case that the defendants would be liable for two commissions. See *Burton* v. *Hughes*, 1 Times L.R. 207; *Paton* v. *Price* (Co. C. York), 21 O.W.R. 753.

Judgment for plaintiff Graham; Walker and Webb's action dismissed.

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HALE v. TOMPKINS.

New Brunswick Supreme Court, Barker, C.J., Landry, McLeod, White, Barry, and McKeown, JJ. April 19, 1912.

1. APPEAL (§ VII J—390)—POINT NOT RAISED BELOW—ORAL ARGUMENT.

Where an appeal is brought from the refusal of a motion for a new trial, a ground of such motion which had been stated in the notice of motion but which was not argued or mentioned on the hearing of the motion upon oral argument and upon which the Judge was not asked to pass and concerning which, therefore, he expressed no opinion, will not be considered on an appeal from the denial of such motion.

2. APPEAL (§ M 3—545)—REJECTION OF EVIDENCE—SUBSTANTIAL WRONG NEGATIVED.

The rejection in an action for a breach of a warranty of soundness on the sale of a horse, of testimony tending to shew that the horse

was sound prior to and at the time of sale, does not occasion any substantial wrong or work a miscarriage of justice sufficient, under the N.B. Judicature Act, 1909, to justify the reversal of a judgment in favour of the plaintiff, where the defendant admitted that at the time he sold and warranted the horse, he had notice that the intermittent attacks to which the horse was subject were of a serious nature although he then declined to believe that the trouble was of more than a trifling character.

3. APPEAL (§ VII L 2—475)—JURY'S FINDINGS—APPEAL FROM REFUSAL OF NEW TRIAL.

The Supreme Court of New Brunswick will not, on an appeal from an order of a County Court refusing a new trial on the ground that the verdict of the jury was against the evidence, interfere with the finding of the Court below. (*Per* Barry, J.)

[*Sheraton* v. *Whelpley*, 20 N.B.R. 75, specially referred to; see also *Hilland* v. *Hamm*, 17 N.B.R. 289.]

4. EVIDENCE (§ XI O—857)—DEFENCES—GENERAL ISSUE.

Under the statute C.S.N.B. 1903, ch. 116, sec. 41, sub-sec. (2), a plea of the general issue in an action for a breach of warranty of soundness of a horse, will permit the defendant to adduce evidence to shew that it was sound prior to and at the time of the sale. (*Per* Barry, J.)

Statement

APPEAL by defendant from the judgment of the Carleton County Court in favour of the plaintiff in an action of warranty as to the soundness of a horse.

The answers of the jury to questions submitted were as follows:—

1. Did Hale say to Tompkins that he would trade if the horses were all right? A. Yes.

2. Did Tompkins answer they were all right? A. Yes.

3. If Tompkins did say "They are all right," was it a mere opinion or a misrepresentation? A. Misrepresentation.

4. Was the horse in question in good condition at the time of the barter and sale? A. No.

5. If there was a warranty, what damage would you allow for a breach of it? A. One hundred dollars.

On these answers the Judge directed a verdict to be entered for the plaintiff for $100.

A motion had been made before the County Court Judge, for a new trial, the grounds as stated in the summons for such motion being (1) Improper rejection of evidence in excluding evidence of the condition of the horse before the alleged exchange or sale; and (2) Verdict against the weight of evidence. The Judge refused the motion for a new trial, and from this decision appeal is now taken by the defendant to this Court, the grounds for such appeal being the same as stated in the summons for the hearing before the Judge below.

The record as returned contained the following report of the Judge's remarks in dismissing that motion:—

After hearing counsel, I conclude that the matter in question was one entirely for the jury; that I am satisfied that I left the ques-

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tions fully explained to them; and that they did not misunderstand me; and that I should, therefore, not interfere with the verdict that was entered on the trial on their answers to the questions. New trial refused.

The appeal was dismissed with costs.

A. B. Connell, K.C., for plaintiff, respondent.

P. A. Guthrie, for defendant, appellant.

Barker, C.J.

BARKER, C.J.:—There is no reference here [in the record returned] to the objection as to the rejection of evidence, nor is there anything to lead one to suppose that any other question had been raised or discussed than the one as to the verdict being against the weight of evidence, and that I think the Judge disposed of quite correctly. See *How* v. *London and North Western R. Co.*, [1892] 1 Q.B. 391; *Brisbane Council* v. *Martin*, [1894] A.C. 249.

Mr. Connell, the plaintiff's counsel, says that on the argument of the motion for a new trial the question as to the rejection of the evidence was not mentioned or argued, and that the whole discussion related to the other point. This is in accordance with the reasons given by the Judge for refusing the motion. The defendant's counsel, while he says that he did not abandon that point does not deny Mr. Connell's statement. He, however, claims that as the objection to the Judge's ruling was clearly made at the trial, it is open to him on appeal, though it was not mentioned or discussed before the Judge on the motion for new trial, and he was not asked to consider that question at all.

The sole ground of appeal here is that in refusing the new trial the Judge has erred in his law. How can that be said as to a question upon which he was not asked to pass and upon which he has not expressed any opinion at all. If this point had been insisted on the Judge might, on consideration, have changed the opinion he seems to have expressed at the trial, and set aside the verdict. If it were otherwise the motion for a new trial to the Judge which is necessary in jury trials would be of no utility. Apart from this, I am of opinion that the rejection of the evidence complained of has not occasioned any substantial wrong or miscarriage, and for that reason a new trial would be refused.

The bargain between these parties was this: They each had a pair of horses which they agreed to exchange upon the following terms: The plaintiff was to give his horses and pay $200 for which he was to get the defendant's horses on his warranty that they were "all right." The horses were delivered and the money paid as agreed. This was in April, 1910, A few weeks later, one of the horses which the plaintiff got was taken ill with what appears to have been acute indigestion. This was in June

and between that time and the following April—that is about a year after the purchase—the horse had eight other attacks in the last of which he died. During each of these sicknesses, the horse was altogether unable to work for three or four days. These facts were established by the veterinary who treated the horse, and by the plaintiff and others who were personally cognizant of all the circumstances, and they are in fact not contradicted. A witness by the name of Freeman was called by the defendant, and his examination is thus reported:—

> Q. Did you know anything about this horse? A. All I know about him is when I worked him in 1910. Q. He was sold to the plaintiff in April, 1910; What was the condition of the horse when you worked him? COURT:—Was it before the alleged warranty? *Mr. Ketchum* (defendant's counsel):—Yes. COURT:—What is the object of the testimony? *Mr. Ketchum*:—It is our defence to the action. COURT:—But it is not a defence. Even if your client *bonâ fide* believed the horse to be in good condition, when as a matter of fact he was not and warranted him, he would be liable on his warranty. *Mr. Ketchum*:—I think not, your Honour.

The Judge then rejected the evidence. The defendant was seeking to shew that at the time of the sale the horse had no disease and in fact was "all right," as represented. This could be shewn only by those who had charge of him up to that time that he was not sick and gave no indications of disease. It has nothing to do with the warranty, but it has something to do with the breach of the warranty. Taking, as in this case, an individual instance, it is obvious that the evidence is of little value. I am, however, disposed to think that the Judge was wrong in rejecting the evidence and that any objection to it goes to its value and not its admissibility.

Assuming that it was wrongly rejected, what substantial wrong or miscarriage has resulted? For if there is none we ought not to grant a new trial. The witness said all he knew about the horse was derived from driving and working him in 1910. Obviously if the horse was able to be driven and to do his work he was not then sick, nor suffering from this indigestion, because during the intervals between the attacks he was able to work. The jury in this case found there was a warranty, that the defendant misrepresented the condition of the horse and that the horse at the time of the sale was not "all right," and there is no question as to the jury having been properly directed. We have the defendant's own admission that the horse had been suffering from what he said was "worms." He had consulted a neighbour and he had himself treated him for it apparently without success. In addition to this, his wife,—some time before the sale, the date is not mentioned,—had at his instance written to the editor of the *Family Herald*,—a paper published in Montreal, devoted among other things to the care and treat-

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ment of horses,—and sent him a statement of the horse's symptoms and asking for advice as to his treatment for worms. The reply he got was that according to the symptoms given the horse had acute indigestion and a prescription for his treatment was enclosed. Here was a distinct notice from an expert in such matters that the horse had acute indigestion.

It is true that the defendant rejected the diagnosis of the man to whom he had applied for information and advice, and adhered to his own theory that the horse's condition was attributable to worms. But does that make any difference? The warranty was not against the existence of any particular malady, —it was general, that the horse was "all right." It is clear that the disease from which the horse was suffering before the sale and about which the defendant consulted the *Family Herald* was the same disease, which the horse continued to have after the sale, incapacitating him for work and eventually causing his death. It is not disputed that if the horse had this indigestion at the time of the exchange there was a breach of warranty. Can you escape the liability by miscalling the name of the disease? With this evidence I cannot think there has been, or can have been any substantial wrong or miscarriage done the defendant by the rejection of Freeman's evidence as tendered at the trial.

I think the appeal should be dismissed with costs.

Landry, J.
McLeod, J.
White, J.
McKeown, J.

LANDRY, MCLEOD, WHITE, and MCKEOWN, JJ., concurred with BARKER, C.J.

Barry, J.

BARRY, J.:—This action was brought for the recovery of damages for the breach of a warranty of a horse; was tried at the Carleton County Court in the month of December last, with a jury; and resulted in a verdict for the plaintiff (respondent) for the sum of one hundred dollars. An application to the Judge of the County Court for a new trial was refused, and it is from this judgment and upon the same grounds as were taken before the Judge of the Court below upon the motion for a new trial, that the appeal is taken.

On the 25th of April, 1910, the respondent and the appellant traded horses, the former giving the latter a pair of colts and $200 in exchange for a pair of horses, a heavier and an older team. The respondent says that at the time of the exchange he asked the appellant if the horses which he, the respondent, was getting were all right, and that the appellant said that they were.

"He told me he would trade for $200 and my colts and I told him I would trade provided the horses, (*i.e.*, Tompkins' horses), were all right, and he said they were all right,"—is the way in which the respondent puts it. Shortly after the respondent acquired the pair of horses, one of them, he says, would

take sick every once in a while and be of no use for four or five days or a week; the horse was taken sick in this way eight or nine times,—the first attack occurring in June,—until the 2nd of April, 1911, when it died; the death being attributable to acute indigestion, the veterinary surgeon who was called as a witness at the trial said. It appears that the appellant himself was aware at the time of the exchange that the horse had suffered from what he thought were worms. This ailment, which he regarded as trifling, he had treated himself, and after the exchange, gave to the respondent a prescription which he had obtained through the correspondence column of a Montreal newspaper, which he had himself used, and which, he told the respondent, would bring the horse, around all right. The respondent claimed that what took place between him and the appellant amounted to a warranty, and the jury has so found.

In the plaintiff's case four witnesses were interrogated and allowed to give evidence, without objection, as to the condition of the horse before and at the time of the exchange. In the defendant's case the appellant called as a witness a man named Frank Freeman, whose examination was undertaken by Mr. Ketchum, counsel for the defendant, and this is a report of what then occurred:—

Q. Mr. Freeman, where do you live? A. Hartford.

Q. Do you know the parties to this suit? A. Yes.

Q. Do you know anything about this horse? A. All I know about him is when I worked him.

Q. When did you work him? A. I worked him in 1910.

Q. He was sold to the plaintiff in April, 1910. What was the condition of the horse when you worked him?

COURT:—Was it before the alleged warranty?

Mr. *Ketchum*:—Yes.

COURT:—What is the object of the testimony?

Mr. *Ketchum*:—It is our defence to the action?

COURT:—But it is not a defence. Even if your client *bonâ fide* believed the horse to be in good condition when as a matter of fact he was not, and warranted him, he would be liable on his warranty.

Mr. *Ketchum*:—I think not, your Honour.

COURT:—You might cumulate evidence as to the condition of the horse prior to the contract of sale, but that is not the question we are to determine. The issue we have to try is: Was there or was there not a warranty; and, if there was was there a breach of it? You might give the evidence in mitigation of damages, but in that event you would admit a verdict against you, a position, I take it, you would not like to place yourself in.

Mr. *Ketchum*:—I think it is good evidence to support my defence.

COURT:—I think not. I would have to charge the jury along the line indicated.

Mr. *Ketchum*:—I would press it as such.

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COURT:—Then I would rule it out.

Mr. *Ketchum*:—Very well, your Honour. (To witness), That will do.

The rejection of this evidence by the learned Judge is one of the grounds upon which the present appeal is based, and if the determination of the appeal depended upon this point alone, I should be disposed to allow it, because the evidence tendered was, in my opinion, admissible, and should not have been rejected.

The declaration is framed in assumpsit, and is as follows:—

> In consideration that the plaintiff would exchange two colts and pay the sum of two hundred dollars for two horses of the defendant, the defendant promised the plaintiff that the said horses so purchased from the defendant to be delivered by the defendant to the plaintiff were then all right, and the plaintiff delivered his two colts and paid the sum of two hundred dollars to the defendant for the said two horses of the defendant, yet at the time of the making of the said promise by the defendant, one of the said horses so delivered by the defendant to the plaintiff was not all right, whereby the said horse became and was of no use or value to the plaintiff and afterwards died, and the plaintiff incurred expense in keeping and feeding the said horse and in attempting to cure the same.

To this declaration the defendant pleaded the general issue of non assumpsit:—

> The defendant comes and defends the wrong and injury when, etc., and says he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him, and of this the said defendant puts himself upon the country.

Among the general pleading rules of Hilary Term, 4th Wm. IV—passed under the authority of the Act, 3 & 4 Wm. IV. (Imp.) ch. 42—which may be found in 1 Chit. Pl. (6th Lond. ed.) 742, under the head of "Assumpsit," is the following:—

> In all actions of assumpsit, except on bills of exchange and promissory notes, the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law, ex. gr., in an action on a warranty, the plea will operate as a denial of the fact of warranty being given upon the alleged consideration, but not of the breach.

If, therefore, the general issue prescribed by the County Courts Act (ch. 116, C. S. 1903), meant the restricted general issue established by the rules alluded to, I am disposed to think the learned Judge would have been entirely right in rejecting the evidence tendered.

But by express enactment (ch. 116, sec. 41, sub-sec. (2), C. S. 1903), the words "general issue" are given a much broader signification, and are to be taken to mean the general issue as it was in England prior to and at the time of the making of the rules, that is, prior to Hilary Term, 1834 (4 Wm. IV.).

Before that date the plea of non assumpsit was considered not only as putting in issue every allegation in the declaration, as well the promise as the inducement, consideration, and all averments in fact, but also as enabling the defendant to give evidence of every description of defence which shewed that the promise was void or voidable, or that it had been performed; any matter which shewed that the plaintiff never had any cause of action might be given in evidence under this plea, and also, most matters, even in discharge of the action, and which shewed that at the time of the commencement of the suit, the plaintiff had no subsisting cause of action. So that, very frequently the pleadings on the record entirely mislead the plaintiff, the Court and the jury as to the real point to be tried, and it was the inconvenience resulting from this illogical and uncertain state of pleading that led to what were thought to be the improvements introduced by the rules alluded to: 1 Chit. Pl. (6th Lond. ed.) 475. Our own legislature has, for reasons which, I have no doubt, appeared to it to be good, deemed it advisable to let the old system of pleading remain as it was before the rules, with all its inconveniences, and under that system the evidence rejected was, I think, admissible.

The improper exclusion of evidence rightly tendered will not, however, of itself, render bad a verdict, if upon the whole aspect of the case, no wrong or miscarriage has been thereby occasioned. In a recent decision of this Court, *Westell* v. *McLaughlin*, 5 D.L.R. 201, it was held that the provisions of O. 39, r. 6, the Judicature Act, 1909, were equally applicable to and governed the Court in appeals from the County Court, and that a new trial should not be granted on the ground of misdirection or of the improper admission or rejection of evidence unless in the opinion of the Court some substantial wrong or miscarriage has been thereby occasioned in the trial.

Upon a perusal of the whole evidence I cannot bring my mind to think that there has been any miscarriage of justice here; so that, notwithstanding there was, what I think, improper rejection of evidence by the trial Judge, I agree in the judgment of the Chief Justice which he has just read.

In regard to the second ground of appeal, verdict against the weight of evidence. It was decided by this Court in *Sheraton* v. *Whelpley*, 20 N.B.R. 75, that on an appeal from an order of a County Court refusing a rule for a new trial, on the ground of the verdict being against evidence, the Court would not interfere with the finding of the Court below. And in several quite recent cases, it has been held that an appeal from a County Court does not lie to this Court upon questions of fact. Appeal dismissed with costs.

Appeal dismissed.

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McNAIR v. COLLINS.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton and Riddell, JJ. July 31, 1912.

1. APPEAL (§ VII J 4—417)—QUESTION NOT RAISED BELOW—DEFENCE UNDER STATUTE AND MUNICIPAL BY-LAW.

Where there are both a statute and a municipal by-law upon which a defendant might rest his defence, and, at the trial, he concedes that he cannot rely upon the statute and stands upon the by-law, it is not open to him, upon appeal, to fall back upon the statute.

2. MUNICIPAL CORPORATIONS (§ II C 3—81)—POWER TO PASS BY-LAW—KILLING OF DOGS RUNNING AT LARGE.

Under the authority of sub-secs. 1 and 2 of sec. 540 of the Consolidated Municipal Act, 1903, a municipality has power to pass a by-law justifying the killing of dogs found running at large anywhere in the municipality and the by-law need not be limited to dogs found in a street or public place.

3. ANIMALS (§ I B—13)—KILLING OF DOGS RUNNING AT LARGE—MUNICIPAL BY-LAW.

Where a by-law passed under the authority of sub-secs. 1 and 2 of sec. 540 of the Consolidated Municipal Act, 1903, justifies the killing of any dog found running at large more than half a mile from the premises of its owner, a dog is to be deemed "found" within the meaning of the by-law where it is first seen by its pursuers and it cannot lawfully be killed if, having been first seen less than half a mile from its owner's premises, it subsequently goes beyond that distance.

4. DAMAGES (§ III J—204*a*)—MEASURE OF COMPENSATION—KILLING A DOG.

The sum of $125 is not an excessive sum to award as damages for the loss of a half-bred collie dog, which is shewn to have been of more than ordinary intelligence, kind and affectionate, a good watch-dog, useful about the farm, and well trained to herd and attend to cattle.

Statement

APPEAL by the defendants from the judgment of the County Court of the County of Prince Edward, in favour of the plaintiff, in an action for damages for the loss of a dog killed by the defendants.

Reasons for judgment of the County Court Judge, in which the facts are stated, are as follow:—

This is an action brought by the plaintiff against the defendants to recover damages for the killing of a dog of the plaintiff by the defendants on the 1st day of July, 1911. The case was tried by me without a jury on the 3rd April, 1912, when, after hearing argument of counsel, I reserved judgment.

The dog was shot upon the premises of the defendants. The act was done by the defendant Ross Collins, a young man of apparently about twenty-one years of age, still at home with his father, who is the other defendant. The father does not dispute his responsibility for the son's act.

The plaintiff and defendants are farmers, living in the township of Hillier. Their farms abut on what is called the Lake Shore road, which runs east and west; the plaintiff to the west and the defendants to the east. The farm of the plaintiff lies wholly to the north of the road, that of the defendants extends

across the road, and the dwelling-house on the latter is on the portion of the farm south of the road. Two other farms, containing three hundred acres, intervene.

Except as to the exact spot where the dog was killed, there can be no question about the material facts of the case.

As to the law, in Halsbury's Laws of England, vol. 1, sec. 857, p. 395, the common law applicable is thus stated: "To kill, shoot, or injure another man's dog without legal justification is an actionable wrong at common law. It is no legal justification that the dog was trespassing. In order legally to justify such an act it must be proved that it was done under necessity for the purpose of protecting the person, or saving property in peril at the moment of the act."

It is not pretended that under common law there was any justification in this case for the killing of the dog.

Such common law rule, however, has been changed by our statute, R.S.O.1897, ch. 271, "An Act for the Protection of Sheep and to impose a Tax on Dogs;" sec. 9 authorises the killing of any dog *seen* (epitomising the three cases): (1) worrying sheep; (2) in an enclosed field, giving tongue and terrifying sheep therein; and (3) straying between sundown and sunrise on any farm where sheep are kept.

The defendants, by their statement of defence, justified the killing of the dog under this statute, pleading, under sec. 10, "not guilty by statute," and also adding a special plea. This latter, however, alleges no legal justification, and would, I think, have been struck out on application in Chambers.

The defendants' counsel explicitly conceded at the trial that, upon the evidence given thereat, no justification had been established under the statute. But on his application, at the opening of the trial, I had granted him leave to amend his statement of defence by justifying the killing under a by-law of the council of the township, No. 14 of their revised by-laws, 1911. As I then remarked, I still think, he was entitled to avail himself of such by-law, even without amendment. In *Doan* v. *Michigan Central R.W. Co.* (1890), 17 A.R. 481, it was held that the defendants therein, under their plea of "not guilty by statute," were entitled to prove contributory negligence on the part of the plaintiff without any special plea of contributory negligence.

The only question, then, is whether the killing of the dog was justified under sec. 2 of the above by-law, which is: "It shall not be lawful for any dog to run at large unaccompanied by its owner or by some member of such owner's family; and any dog, except hounds, while actually engaged in hunting, found so running at large at a greater distance than one-half mile from the premises of its owner, and unaccompanied therewith (*sic*), may be killed by any resident ratepayer of this municipality."

The authority for passing such by-law, or rather sec. 2 thereof,

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is the Consolidated Municipal Act, 1903, sec. 540, sub-secs. 1 and 2. Such authority is to pass by-laws: "1. For restraining and regulating the running at large of dogs . . . 2. For killing dogs *running at large* contrary to the by-laws;" "or those impounded under the provisions thereof" (1 Geo. V. ch. 57, sec. 8 (2))—"(*a*) For the purposes of the two next preceding paragraphs a dog shall be deemed to be running at large *when found in a street or other public place* and not under the control of any person."

A by-law passed under this authority can only justify the killing of dogs found running at large in a *street or other public place*.

This by-law No. 14 assumes to justify the killing of a dog found running at large *anywhere*, at a greater distance than one-half mile from the premises of its owner, etc. The township council had no authority so to enact.

I do not think it could be successfully argued that there should be read into this by-law the same interpretation of the words "running at large," used therein, as the statute gives to them. But, if that view could be taken, then it would follow that this dog was not in fact, when it was killed, running at large contrary to the by-law. During all the time that it was within sight of the defendants, it was upon their own private property. When first seen, it was admittedly several hundred feet away to the west of the house. When shot, it was near the house. The defendants say they buried it in a hole near where it was shot. To prove that where it was shot was over a half mile from the plaintiff's premises, two witnesses were adduced who had measured the distance from this hole to the plaintiff's premises. They made the distance just eleven and a half feet over a half-mile. Now, assuming that the hole where the dog was buried was the place where it was shot, and that the measurement given is correct, I am not at all sure that this proves that the dog was "*found*" running at large more than a half-mile from the plaintiff's premises. Was not the dog "*found*," that is to say, "*discovered*," "met with by accident," "chanced upon," "fell in with," when first seen? If so, the dog, when "*found*," was not running at large, &c., *at a greater distance than one half-mile from the premises of its owner*; it would then be several hundred feet within such half-mile. So that, if I am right in this view, even under the by-law as it reads and independent of the statute, all that the defendants had a right to do was to drive the dog away, and not, as they did, proceed to kill it.

In no view, do I think, can the killing of the dog be justified. The defendants say that at the time there was sheep on the farm. But these, they admit, were to the east of the house, not within sight of the dog; and the dog's presence on the farm was not in any way disturbing them. It is not charged that this dog ever injured, or shewed any disposition to injure, sheep.

There cannot be any doubt, I think, but that it was the defendants' own female dog which was the attraction. The younger

defendant stated that he had seen the plaintiff's dog there before, a dozen times. There was evidence, too, that other dogs were so attracted.

Statement

As to the amount of damages which should be allowed the plaintiff. The dog was referred to as "a collie dog," not a thoroughbred, but evidently a remarkably intelligent animal, well trained and exceedingly useful to the plaintiff about his farm. He and his wife naturally prized it very highly. I would not, I think, be justified in allowing anything like the amount that is asked. But the amount ought certainly to be something pretty substantial. After the most careful consideration I can give the matter, I have concluded that $125 would be a proper sum.

There will, therefore, be judgment for the plaintiff against the defendants for that amount, with costs, including the costs of the examination for discovery before trial.

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

Argument

J. H. Moss, K.C., for the defendants. The result of the action depends on the validity of a local by-law, which, the learned trial Judge said, went beyond the power of the enabling section of the statute, sec. 540, sub-secs. 1 and 2, of the Municipal Act, 1903. The trial Judge said that a by-law passed under the authority of the Municipal Act can justify the killing of such dogs only as are found running at large in a street or other public place. I submit that the learned Judge misapprehended the meaning of the sub-sections. I contend that "running at large" means, "not under control." The killing in this case, I submit, was justified. In any event, the damages are excessive.

McGregor Young, K.C., for the plaintiff. I adopt the reasons of the learned trial Judge. No doubt, the defendants must excuse themselves for the destruction of another's property. The amendment of 1903 was made in order to define what "running at large" means. The statute refers to a street or other public place, and the by-law cannot enlarge the meaning. Dogs are not at large anywhere except on a street or other public place. There must be a by-law to justify the killing. As there was no such valid by-law, the killing was not justified. The damages are not excessive. At any rate the evidence is not too clear that the dog was found without the distance. The defendants should have strictly identified the place.

Moss, in reply, referred to Craies on Statute Law, 2nd ed., p. 211, and 2 Cyc. 443.

Britton, J.

July 31, 1912. BRITTON, J.—The action is for damages for wilfully and unlawfully killing the plaintiff's dog. There is no dispute about the ownership of the dog; the dog was wilfully killed by the younger defendant; and the other defendant, the father, frankly admits liability, if any, for the act of his son. The learned

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County Court Judge, who tried the action without a jury, found for the plaintiff, and assessed the damages at $125. The appeal is not only upon the question of liability, but also for a new trial, or reduction of damages.

The dog was a valuable one, even if not thoroughbred. He was well trained to herd and attend to cattle, was a kind and affectionate animal, a good watch-dog, to which the plaintiff and and his wife were much attached. A good deal of evidence was given as to the value of the dog, or the value of such a dog; and, as a result, it is quite clear that, if there is liability, the damages cannot be considered excessive.

In his reasons for judgment, the trial Judge states: "The defendants' counsel explicitly conceded at the trial that, upon the evidence given thereat, no justification had been established under the statute," &c. And further: "The only question, then, is whether the killing of the dog was justified under sec. 2 of the . . . by-law." My brother Riddell, in his reasons, which I have had the pleasure of perusing, thinks that there was justification under the statute for the killing, as it took place after sunset on the 1st July, on a farm where sheep were kept. With great respect, I am not able to agree. The evidence seems to me quite clear that the dog was shot before sunset.

After the position taken by the defendants' counsel at the trial, when and where the evidence was in the mind of Judge and witnesses, I do not think it open to the defendants to fall back upon R.S.O. 1897, ch. 271. All that is open to the defendants is the defence, if any, under the by-law mentioned. The municipal council of the township of Hillier had power, under the Consolidated Municipal Act, 1903, sec. 540, sub-secs. 1 and 2, to pass this by-law, which may be considered as a by-law restraining and regulating the running at large of dogs, and for killing dogs running at large contrary to the by-law. The defendants must justify, by strict proof, the act of killing. I do not agree with the proposition laid down by the learned trial Judge that a by-law passed under the authority of the Municipal Act can only justify the killing of dogs found running at large in a street or other public place. When a dog is found in a street or other public place, and not accompanied by the owner or some member of the owner's family, at a greater distance than half a mile from the premises of the owner, the dog shall be deemed to be running at large, and the onus of proof to the contrary is put upon the owner of the dog; but, when not in a street or public place, &c., &c., the onus of proof to justify is entirely upon the person killing. The defendants, to succeed, must prove that the plaintiff's dog was found unaccompanied, &c., &c., on the defendants' premises, at a greater distance than half a mile from the premises of the plaintiff, and that the defendant killing the dog was a resident ratepayer of the municipality.

The questions are questions of fact; and the trial Judge has not found in the defendants' favour upon all of these questions; and, in my opinion, this Court ought not to interfere with the findings of fact.

Then, as a matter of law, it seems to me an entire misapplication of the by-law, by it to justify the killing of the plaintiff's dog under the circumstances given in the evidence. The dog was not at first found on the defendants' premises. He was seen upon the road, apparently having taken to the road from his master's home, although the defendants did not know that; but the defendants did know that the farm was occupied. The dog was walking from the west toward the east, quietly on the road—he stopped once and turned back, perhaps, as suggested, because he heard the opening or closing of a door. He then turned east, for the younger defendant saw him go upon the defendants' premises and continue easterly along the east and west fence, not acting like a stray dog, not "giving tongue," apparently perfectly harmless—and, when turning to the south, but continuing easterly, he was wantonly shot. The dog was apparently sent from home to meet his master.

A strict application of the by-law would permit the shooting, by a resident ratepayer, of a dog which, having followed his master for a distance of one half a mile, was left outside the door upon a neighbour's premises. That was not the intention of the law; and, if a strict application of the words of the by-law is insisted upon by the defendants, then there should be a strict application as to where the dog was "found." He was found in the sense of being seen walking or running on the highway, as he was on the defendants' premises; and, when on the highway, he was within the distance of half a mile from his master's home.

In my opinion, the appeal should be dismissed with costs.

Falconbridge, C.J.

FALCONBRIDGE, C.J.:—I agree in dismissing the appeal with costs.

Riddell, J.

RIDDELL, J.:—The plaintiff, a farmer in Prince Edward county, owned a half-bred collie. The dog was of more than ordinary intelligence, very much of a house-dog, a good watch-dog, and useful about the farm. Both the plaintiff and his wife estimate his value as at least $300, and in that estimate they are backed up by at least one neighbour, while another thinks he was worth $250. It is true that other neighbours consider that $25 or $30 would be more like the proper figure—pups, it is said, being worth about $10 a dozen, and it not being a matter of much difficulty to raise and educate such animals. It is not without precedent that a man thinks his neighbour's dog nothing but a cur anyway, and more of a nuisance to everybody than a benefit to any one. However that may be, the evidence was amply sufficient to justify the finding of the Court below that the dog

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was worth $125; and we could in no case interfere with the judgment in that respect.

In the afternoon of the 1st July, 1911, the plaintiff was away from home; his wife took the dog with her and went toward her mother's; turning back, she allowed the dog to go on along the road to meet his master.

He made his way along the road for a piece, and then went "snooping along the fence" of the defendant Hamilton Collins, who saw him so snooping "as a tramp dog would do." ("Snooping," I may say, is defined by the defendant as "crouching along in a sneaking way"). If he had gone on, he would have got among the defendant's sheep, and the defendant was suspicious of the dog, as he had lost sheep by dogs and had had several bitten and wounded some time before. When the dog saw or heard the defendant, he started to go back. The younger defendant, the son of Hamilton Collins, recognised him as a dog he had seen eight or ten days before, terrifying the sheep—he would not say "chasing the sheep," because, with admirable accuracy, he says, "I can't tell you what was in the dog's head"—but "running through the field terrifying the sheep." The young man got his gun and shot the dog dead in his tracks, because, as he says, "I was afraid he would do harm to our sheep."

The place at which the dog was shot and where he fell was on Collins's farm—the defendants dug a hole close to where the dog lay, and "the dog rolled over in the hole." It was argued for the plaintiff that the grave was some distance away from where the dog was shot, but this is not justified by the evidence—farmers do not as a rule go farther than is necessary to get rid of a carcase—and the words are not "rolled over and over," as they would be if the contention of the plaintiff's counsel were correct.

The plaintiff brought his action in the County Court of the County of Prince Edward, and, after trial before the Judge without a jury (characterised perhaps with more than the usual amount of forensic acerbity), he directed judgment to be entered for the plaintiff for $125 and costs.

The defendants now appeal both as to quantum and otherwise.

So far as the quantum is concerned, leaving aside all sentimental damages (and that these are great is shewn, amongst other things, by the fact that the dog's dead body was dug up by his master and buried near his own home), there is, as I have said, ample evidence to justify the estimate of the learned County Court Judge, even if the animal was a mongrel, as contended by the defendants.

Whether the plaintiff is entitled to damages at all depends upon the law, which was canvassed before us with great care, skill, and erudition.

At the common law it is correctly said: "To kill . . . another man's dog without legal justification is an actionable

wrong . . . It is no legal justification that the dog was trespassing. In order legally to justify such an act it must be proved that it was done under necessity for the purpose of protecting the person or saving property in peril at the moment of the act:" Halsbury's Laws of England, vol. 1, p. 395, sec. 857.

No doubt, in the present case, the dog was trespassing—why does not appear, unless indeed he was in search of a *lectus genialis*, as suggested by the learned County Court Judge. But there was no present or any danger to person: and before the fatal shot all danger—even all apparent danger—to the sheep was over for the time being: the dog had turned back and was no longer on his way toward the sheep.

The defendants rely upon the statute and a by-law of the township.

The statute R.S.O. 1897, ch. 271, sec. 9 (*c*), provides: "Any person may kill . . . any dog which any person finds straying between sunset and sunrise on any farm whereon any sheep or lambs are kept." The learned Judge does not deal with this statute: but I think it affords a perfect defence to the action. Notwithstanding the evidence of Hamilton Collins, I think it fairly established by other evidence that it was after sunset that the dog was killed—the dog was found straying, and it was on a farm whereon sheep were kept.

But, in any case, the by-law, in my view, is sufficient to protect the defendants.

By-law No. 14 reads (sec. 2): "It shall not be lawful for any dog to run at large unaccompanied by its owner or by some member of such owner's family; and any dog, except hounds, . . . found so running at large at a greater distance than one-half mile from the premises of its owner, and unaccompanied therewith, may be killed by any resident ratepayer of this municipality."

This by-law was passed on the 22nd March, 1911, under the provisions of the Municipal Act of 1903, 3 Edw. VII. ch. 19, sec. 540:—

"By-laws may be passed by the councils of the municipalities . . . for the purposes

"1. For restraining and regulating the running at large of dogs; and for seizing and impounding dogs running at large contrary to the by-laws: and for selling the dogs so impounded . . .

"2. For killing dogs running at large contrary to the by-laws.

"(*a*) For the purpose of the two next preceding paragraphs a dog shall be deemed to be running at large when found in a street or other public place and not under the control of any person . . ."

The Act 1 Geo. V. ch. 57, sec. 8 (2), referred to as amending this section, was not in force at the time of the passing of the

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by-law; it came into force two days thereafter, *i.e.*, on the 24th March, 1911—and, in any event, it is not material in the present case.

In the note in Biggar's Municipal Manual to this sec. 540, it is said (p. 603): "The validity of laws providing for the forfeiture or destruction of property without compensation to the owners, has been doubted." I know of nothing justifying such a statement, or justifying such a doubt if expressed—but, however that may be, there cannot now be any doubt whatever as to the power of the Legislature: *Florence Mining Co.* v. *Cobalt Lake Mining Co.* (1908), 18 O.L.R. 275, at p. 279—"If it be that the plaintiffs acquired any rights . . . the Legislature had the power to take them away. . . . And there would be no necessity for compensation to be given. We have no such restriction upon the power of the Legislature as is found in some States."

The chief objection to the by-law, that to which effect was given in the Court below, is based upon the sub-clause (*a*). This was introduced for the first time by (1903) 3 Edw. VII. ch. 18, sec. 107. It is contended that it was intended to contain and does contain an exhaustive definition of "running at large"—and that, within the meaning of the section, a dog cannot be "running at large" unless it is "found in a street or other public place."

The result of such an interpretation would be alarming. A dog would not be at large and might roam with impunity miles away from his master's home and his master, traverse hill and dale, meadow and orchard—he might run free through the forest, pursuing at will squirrel and groundhog, not see or be seen by his master or any other person for months—and still, so long as he kept off street and public place, he would not be "running at large." Being pursued on the road, he would, if he were a wise dog, dodge through the fence upon a farm and forthwith cease to be running at large. One does not like to contemplate the tragedy of such an animal trusting to the accuracy of a survey and sitting in fancied security a foot or two beyond the apparent line of the street, and than shot with impunity because an accurate survey shewed that the true line ran a few inches beyond him. A dog traversing the country would alternately be, and not be, running at large, as he crossed the road or got through the fences.

The Legislature, no doubt, had the power to effect such a curious result: but, before an interpretation resulting in such an absurdity be adopted, we should be sure that this is their meaning. The absurdity amounts to a repugnance, in my view; and, on every canon of construction, the proposed interpretation should be rejected if at all possible.

In *The Duke of Buccleuch* (1889), 15 P.D. 86, Lindley, L.J. says (p. 96): "You are not so to construe the Act of Parliament as to reduce it to rank absurdity." See also *Simms* v. *Registrar of Probates*, [1900] A.C. 323, at p. 335, *per* Lord Hobhouse; *The*

Queen v. *Tonbridge Overseers* (1884), 13 Q.B.D. 339, at p. 342, *per* Brett, M.R.; *Christophersen* v. *Lotinga* (1864), 33 L.J. C.P. 121, 123, *per* Willes, J.; *Nuth* v. *Tamplin* (1881), 8 Q.B.D. 247, at p. 253, *per* Jessel, M.R.; *Miller* v. *Salomons* (1852), 7 Ex. 475, *per* Parke, B., at p. 553; and such cases.

The expression, "running at large," is well known; it has been applied to horses and cattle, *e.g.*, R.S.C. 1906, ch. 37, secs. 294, 294 (3). The cases on this section and its predecessors are collected in *Sexton* v. *Grand Trunk R.W. Co.* (1909), 18 O.L.R. 202. And many other cases on similar statutes will be found cited in "Words and Phrases," vol. 1, pp. 604-607. No abstract rule could be laid down applicable to every case as to the nature, character, and extent of the absence of restraint within reasonable limits; it was a question of fact in each case.

In my opinion, the Legislature, by the amendment of 1903, simply intended to remove from the realm of controversy the question whether a dog was running at large in the one case, and to lay down as a matter of law that, when a dog was "found in a street or other public place . . . not under the control of any person," he was running at large: and it must be so held: *Re Rogers and McFarland* (1909), 19 O.L.R. 622. But no other case is provided for; and in any other case the question of running at large *aut non* remains a question of fact. Clause (*a*) is not, like a mathematical definition, convertible—there is no provision that no other shall be considered running at large than those in the street, &c.; and I cannot think that the Legislature intended, by introducing this clause, to limit the power previously given to the municipalities.

It was argued that where the dog was killed was not half a mile from the premises of his owner—but the distance was measured, and it was found that, even as the crow flies, the distance from the nearest point of the plaintiff's field to the place where the dog was when shot was eleven and a half feet over half a mile.

The learned County Court Judge seems to be rather of the opinion that, as the dog was seen running for some distance before he was shot, he was "found" when he was first seen, and consequently he was "found" less than half a mile from his owner's premises, and so could not have been found where and when he was shot. This, with much respect, is quite too subtle. I may find a man in my house, though I saw him go in, a dog in my garden, though I saw him jump the fence— and one arrested in the street for being there found drunk and disorderly would hardly be acquitted because the policeman saw him coming down his own walk from his house drunk and howling.

Although I do not think authority is necessary for the construction—I refer to a few. In *Regina* v. *Lopez* and *Regina* v. *Sattler* (1858), 7 Cox C.C. 431, it was held that a person is "found" wherever he is actually present; and in *Jowett* v. *Spencer* (1847),

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1 Ex. 647, a mineral is "found" where "it is ascertained to lie and be." See also such cases, as *Simmons* v. *Millingen* (1846), 2 C.B. 524; *Griffith* v. *Taylor* (1876), 2 C.P.D. 194.

The by-law itself may be subject to criticism; it is not quite what a careful draftsman would make it; it would seem to require the premises of the owner to accompany the dog; but the "therewith" must, I think, in view of the earlier provisions in the section, be interpreted as meaning "by its owner or some member of such owner's family." With this interpretation, the by-law is well enough.

I think the appeal must be allowed; and, in view of the perfectly reasonable suspicions of the defendants as to the dog, and the absence of any improper conduct on their part either before or after the beginning of the action, I think they should have their costs both in this Court and in the Court below.

Appeal dismissed; RIDDELL, J., *dissenting.*

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BALDWIN v. BOWDEN.

Alberta Supreme Court, Walsh, J., in Chambers. August 30, 1912.

1. CORPORATIONS AND COMPANIES (§ IV G—119*a*)—STATUTORY AUDITOR—ACCESS TO BOOKS.

An auditor appointed by an incorporated company in pursuance of the Companies Ordinance (Alta.), cannot enforce against the directors of the company a right of access to the company's books and records by means of an application to the Court instituted by an originating summons under Alberta Rule 469 of the Judicature Ordinance.

Statement

THE plaintiff alleged that he was the duly appointed auditor of the Finance Securities Limited, under the Companies Ordinance, and complained that the defendant, who was a director of that company, in whose custody its books and records were, denied him access to the same, by reason whereof he was unable to discharge the duties of his office.

An originating summons was taken out under which the plaintiff applied for an order that he "is entitled to obtain access to the books and accounts and vouchers of the Finance Securities Limited, and shall be supplied by the directors and officers of the company with such information and explanation as may be necessary for the performance of his duties as auditor, and that the respondent, T. N. Bowden, and other directors of the Finance Securities Limited, do give him such access as aforesaid."

Hyndman, for the defendant, upon the return of the originating summons, took the objection that the plaintiff had misconceived his remedy, and that he could not obtain the relief which he sought through the medium of an originating summons.

Pratt, for the plaintiff, *contra*.

The objection was argued upon the understanding that, if the decision should be against it, the defendant should have an opportunity to meet the motion upon the merits.

WALSH, J.:—Rule 469 of the Judicature Ordinance provides that

> proceedings commenced by originating summons in the Supreme Court of Judicature in England may be so commenced under this Ordinance, unless otherwise provided; and proceedings by a landlord to recover possession of demised premises from an overholding tenant may be so commenced.

Rules 245 and 246 provide that summary inquiries into fraudulent transfers and orders for equitable execution may be made in proceedings commenced by originating summons. Rule 452 authorizes proceedings by way of originating summons for certain relief with respect to mortgages. Rule 481 provides for an originating summons in matters relating to express trusts and the administration of the estates of deceased persons. Under Rule 488, a new trustee may be appointed or a vesting order made by originating summons. These are the only proceedings which, under our practice, can be instituted by way of originating summons, so far as I have been able to ascertain from a careful examination of the Ordinance.

The opening part of Rule 469 introduces into our system the English practice as to originating summonses, unless otherwise provided. It is obvious that, unless the English practice warrants it, this is not the plaintiff's proper remedy, for it is not justified by any of the other Rules of our Ordinance to which I have referred. It is unnecessary for me to set out here a list of the proceedings which may, under the English Rules, be commenced in this way. A reference to them may be found in the notes to Marginal Rule 737*b* in either the Annual Practice or the Yearly Practice. It is sufficient to say that no authority is to be found in them for the commencement in that way of such a proceeding as this. Under force of certain Imperial statutes, a remedy is given in some instances by this method of procedure. For instance, under the Companies (Consolidated) Act, 1908, the Court may by order compel an immediate inspection of the register, if inspection of it is denied to one who is entitled to it.

No corresponding provision is made under that Act, however, in the case of an auditor, whose rights of access to the books and accounts and vouchers are conferred in exactly the same words as those employed in the Companies Ordinance. I take it, therefore, that neither under the Companies Act nor the Rules of Court, could an auditor in England secure,

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through the medium of an originating summons, the aid of the Court in the exercise of his statutory rights. That being so, and no authority for it existing under our practice, I must hold that the plaintiff cannot proceed in this way. In my view of the practice, this method can be resorted to only when the right to use it is expressly conferred under some statutory provision or some Rule of Court. It is a remedy specially devised for the prompt and comparatively inexpensive disposition of such matters and such only as the legislature or the Court declares may be so disposed of.

It may be that it might properly be extended to such a case as the present one; but, until those in authority so enact, it cannot be. The summons is, therefore, discharged with costs to the defendant, which I fix at $10, as the only costs incurred by him were in connection with the very brief argument of this objection. This disposition of this summons will, of course, not prejudice the plaintiff in any further application which he may make in another form for the relief which he seeks. There is undoubtedly a remedy for his grievance, but what that is, it is, of course, no part of my duty to point out here.

I may say, however, that in the case to which Mr. Pratt referred me, *Cuff* v. *London and County Land and Building Co.*, [1912] 1 Ch. 440, 28 T.L.R. 218, the motion, which was for the identical object sought to be obtained by this motion, was made in an action brought for that purpose.

Motion refused.

Annotation **Annotation — Corporations and companies (§ IV G 2—119a)—Powers and duties of auditor.**

The N.W.T. Ordinances, 1901, ch. 20, made the following statutory provisions regarding auditors of companies incorporated under the Companies Ordinance (N.W.T.).

131. Every company shall at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting.

(2) If an appointment is not made at an annual general meeting, the registrar may on the application of any member of the company appoint an auditor of the company for the current year and fix the remuneration to be paid to him by the company for his services.

(3) A director or officer of the company shall not be capable of being appointed auditor of the company.

(4) The first auditors of the company may be appointed by the directors before the statutory meeting; and if so appointed shall hold office until the first annual general meeting, unless previously removed by a resolution of the shareholders in general meeting, in which case the shareholders at such meeting may appoint auditors.

(5) The directors of the company may fill any casual vacancy in the office of auditor; but while any such vacancy continues, the surviving or continuing auditor or auditors, if any, may act.

Annotation (*continued*)—**Corporations and companies (§ IV G 2—119a)—Powers and duties of auditor.**

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Annotation

Corporations and companies

133. Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company and shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors; and the auditors shall sign a certificate at the foot of the balance sheet stating whether or not all their requirements as auditors have been complied with; and shall make a report to the shareholders on the accounts examined by them and on every balance sheet laid before the company in general meeting during their tenure of office; and in every such report shall state whether in their opinion the balance sheet referred to in their report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs as shewn by the books of the company; and such report shall be read before the company in general meeting. These two sections have been consolidated and re-enacted as to the Province of Saskatchewan as secs. 132 and 134 respectively of the Companies Act, R.S.S. 1909, ch. 72.

Section 133 above quoted corresponds with sec. 113 of the English Companies Act, 1908, which is in similar terms to the provisions contained in a prior statute, the Companies Act (Eng.) 1879, sec. 7, with regard to auditors of banking companies.

A company cannot by its regulations preclude its auditors from obtaining or availing themselves of the information to which they are entitled by statute as material for the report required by statute: *Newton* v. *Birmingham Small Arms Co., Ltd.*, [1906] 2 Ch. 378; 5 Halsbury's Laws of England, p. 268, art. 436.

It is the duty of an auditor not merely to verify the arithmetical accuracy of the balance-sheet, but its substantial accuracy, to see that it includes the particulars required by the article or by statute, and contains a correct representation of the state of the company's affairs. While, therefore, apart from the Act of 1908, it is not his duty to consider whether the business is prudently conducted, he is bound to consider and report to the shareholders whether the balance-sheet shews the true financial position of the company. To do this he must examine the books and take reasonable care that their report is true. Except in any special cases he should place before the shareholders the information on which it is based, and not merely the means of obtaining it: *Re London and General Bank* (No. 2), [1895] 2 Ch. 673. The auditor will be liable for improper payments made by the directors and naturally resulting from his breach of duty: *Re London and General Bank* (No. 2), [1895] 2 Ch. 673. So an auditor who reports confidentially to the directors the insufficiency of the securities on which the capital is invested and the difficulty of realization, but who only reports to the shareholders that the value depends on realization, with the result that the shareholders ignorantly approve an improper dividend, is liable to make good the amount paid: *Re London and General Bank* (No. 2), [1895] 2 Ch. 673; 5 Halsbury's Laws of England, p. 269, art. 438.

Auditors are not agents of the company so as to affect the members with knowledge which they have acquired while auditing the accounts, as,

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Annotation (*continued*)—Corporations and companies (§ IV G 2—119a)—Powers and duties of auditor.

for instance, of unauthorized acts of directors: *Leeds Estate Building and Investment Co.* v. *Shepherd* (1887), 36 Ch.D. 787; *Re London and General Bank* (No. 2), [1895] 2 Ch. 673, *per* Lindley, L.J., at 683.

The auditor must shew reasonable skill, care and caution in the performance of his duties, but he is not bound to be a detective, and is "a watch-dog, not a bloodhound:" *Re Kingston Cotton Mill Co.* (No. 2), [1896] 1 Ch. 331. But, if appointed under the statutory powers, they are officers of the company, who may be proceeded against for misfeasance: *Re London and General Bank* (No. 2), [1895] 2 Ch. 673; *Re Kingston Cotton Mill Co.* (No. 1), [1896] 1 Ch. 6; *Re Western Counties Steam Bakeries and Milling Co.*, [1897] 1 Ch. 617; 5 Halsbury's Laws of England, p. 269, art. 439. But see *contra*, the opinion of Lord Johnston in *Findlay* v. *Waddell*, [1910] S.C. 670, 47 Sc. L.R. 478, that an auditor is not an "officer" of the company within the meaning of sec. 164 of the Companies Consolidation Act (Imp.) 1908.

The secretary of a company having been guilty of defalcations, by which loss was occasioned to the company, the directors alleged that the company's auditors had by negligence in the performance of their duties conduced to these defalcations, and refused to give them access to the company's books for the purposes of audit. The auditors thereupon brought an action against the company and the directors, claiming a declaration that they, as auditors, were entitled at all times to access to the company's books, and an order for access thereto. The time having arrived when, in the ordinary course, the audit of the company's accounts by the plaintiffs should be proceeding for the purposes of the next annual general meeting, the plaintiffs made an interlocutory application in the action for an order that the defendants should give them access to the books, and Eve, J., made a mandatory order to that effect on the ground that the auditors had a statutory right of access to the books. On appeal the Court of Appeal held that it was a question for the judicial discretion of the Court whether the right of access to the books claimed by the plaintiffs should be enforced by a mandatory order, and that such an order ought not, under the circumstances of the case, to have been made upon an interlocutory application, and without any steps to ascertain whether the company were desirous that the plaintiffs should continue to act as auditors or not, and therefore the appeal must be allowed. The decision of Eve, J., [1912] W.N. 28, 28 T.L.R. 203, 56 Sol. Jo. 273, was reversed: *Cuff* v. *London and County Land and Building Co.*, [1912] 1 Ch. 440, 28 Times L.R. 218.

Auditors are not bound to verify valuations of the stock in trade of the company; but if from an examination of the books, they are able to discover that certain of the assets appear to be of a fictitious value, it would be their duty to report that fact to the company. For example, a large book debt may be carried forward from year to year without any interest having been paid upon it or any satisfactory explanation as to why such debt has not been collected, or the auditors may know that the debtor is a bankrupt: Hamilton's Company Law, 3rd ed., 307.

It is no part of the duty of auditors to take stock, and they are justified in relying upon the manager's certificates as to the amount and

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Annotation (*continued*)—**Corporations and companies (§ IV G 2—119a)—Powers and duties of auditor.**

value of the stock in trade, although it is subsequently discovered that they were wilfully false, and they are not liable for dividends wrongfully paid on accounts prepared by them on the footing of the certificates being true: *Re Kingston Cotton Mill* (No. 2), [1896] 2 Ch. 279.

It is the duty of the auditor of a company in auditing its accounts not to confine himself to verifying the arithmetical accuracy of the balance sheet, but to inquire into its substantial accuracy, and to ascertain that it contains the particulars required by the articles of association, and is properly drawn up so as to contain a true and correct representation of the state of the company's affairs as shewn by the books of the company. Where an auditor fails to discharge this duty, and upon the faith of the balance sheets, dividends are declared and paid otherwise than out of profits available for the payment of such dividends, and also directors' fees and bonuses are paid, which would not otherwise have been payable, he is liable in damages to the company for the amounts so paid, but he may plead the Statute of Limitations in any proceedings taken by the company against him for damages for negligence in the performance of his duty towards the company: *Leeds Estate Co.* v. *Shepherd* (1887), 36 Ch. D. 787, 805; *In Municipal Freehold Land Co.* v. *Pollington* (1890), 63 L.T. (Eng.) 238, 59 L.J. Ch. 734, the secretary was held liable for negligence in preparing balance sheets.

Although it is not the duty of accountants to take stock in auditing the accounts of a business, they may well call for explanations of particular items in the stock sheets: *Mead* v. *Ball*, 28 Times L.R. 81, affirming *Mead* v. *Ball*, 27 Times L.R. 269.

LEISER v. POPHAM BROTHERS, Limited.

B. C.

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British Columbia Supreme Court, Clement, J. March 18, 1912.

1. CORPORATIONS AND COMPANIES (§III—32)—ALTERATION OF ARTICLES OF INCORPORATION—PROVISION RESTRICTING SALE OF SHARES.

Under a statutory authority enabling a company to alter or add to its articles of association, it may provide that a shareholder shall not sell his shares except for cash and that sales should be subject to the approval of the directors of the company.

[*Borland* v. *Steel Brothers & Co.*, [1901] 1 Ch. 279, followed.]

2. STATUTES (§ II B—118)—CONVERSION OF PRIVATE COMPANY INTO PUBLIC CORPORATION — STATUTORY PROVISIONS — APPLICABILITY TO THE CONVERSION OF A PUBLIC CORPORATION INTO A PRIVATE COMPANY.

The conversion of a public company into a private company is not to be deemed to be impliedly prohibited under the maxim *expressio unius* by reason of a statutory enactment as to the method of converting private companies into public companies where the purpose of the enactment is merely to make provision for publicity in constituting public companies.

[*Colquhoun* v. *Brooks*, 21 Q.B.D. 52, 57 L.J.Q.B. 439, referred to.]

Statement

ACTION for a declaration that a certain procedure of defendant company was unauthorized and illegal, tried by Clement, J.,

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at Victoria, on the 14th of March, 1912. Plaintiff bought 210 shares in the defendant company. After the purchase of these shares, plaintiff was notified that it was proposed to pass a resolution of the company changing it from a public into a private company by altering the regulations contained in the articles of association. By this change it was proposed to provide that a shareholder could not sell his shares except for cash, and could sell only subject to the approval of the directors of the company. Plaintiff objected to these restrictions on his power to dispose of his shares, and brought action asking for a declaration whether the shareholders had power to convert a public company into a private company and to prescribe regulations such as those indicated, which might render his shares practically unsaleable.

Argument

Maclean, K.C., for plaintiff:—The Companies Act, section 130, makes provision for converting a private company into a public company; but there is no provision whereby a public company can be turned into a private company. Therefore, the maxim *expressio unius est exclusio alterius* applies, and it is impossible by any change in the articles of association to convert a public into a private company.

Harold Robertson, for defendant company:—Before the provisions in the statute with regard to private companies, it was usual to insert in the articles of association provisions which constitute companies with the powers that are now possessed by private companies, and there is, therefore, no reason why a public company could not be converted into a private company by a resolution of the shareholders.

Clement, J.

CLEMENT, J.:—"A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with section 16 of the Companies Act, 1862. The contract contained in the article of association is one of the original incidents of the share:" *per* Farwell, J. in *Borland's Trustee* v. *Steel Brothers & Co., Limited*, [1901] 1 Ch. 279, at p. 288.

Section 16 of the Imperial Companies Act, 1862, is section 24 of our Act, which reads:—

> (1) The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member, his heirs, executors and administrators, to observe all the provisions of the memorandum and of the articles, *subject to the provisions of this Act.*

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One of the provisions of our Act—section 23—is that in a certain way, viz.: by special resolution, a company may alter or add to its articles of association, "and any alteration or addition so made shall be as valid as if originally contained in the articles."

This is one of the contractual contingencies upon which a shareholder holds his shares, viz., that a majority may against his will, and, perchance, his interest, place restrictions upon his right of transferring his shares. The restrictions imposed by the articles in question before me are not more drastic than those under consideration in the case above cited, where Farwell, J., upheld the altered articles.

In this case no attack is made upon the proceedings leading up to the passing of the special resolution, and there is no evidence upon which I can find that the majority acted *mala fide* or otherwise than in what they conceived to be the best interests of the company.

Whether the effect of the changes made in the company's articles is to turn the company into a private company within the meaning of the Act, is really beside the mark. As a matter of power, I think the majority has acted within its rights.

That special provision is made (section 130) by which a private company may turn itself into a public company, while no specific provision is made for the reverse process, need not surprise one, because certain provision for publicity is necessary in the former case, and not in the latter. This consideration denies the application of the maxim (said to be a good servant but a bad master: *per* Lopes, J., in *Colquhoun* v. *Brooks*, 21 Q.B.D. 52, 57 L.J.Q.B. 439), *mentio unius exclusio est alterius*.

The action is dismissed with costs.

Action dismissed.

PALLEN v. THE "IROQUOIS."

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Canada Exchequer Court, British Columbia Admiralty District, Archer Martin, Local Judge. June 13, 1912.

1. ADMIRALTY (§ II—18)—PROCEDURE—AMENDMENT OF PRELIMINARY ACT.

In admiralty proceedings, alterations or amendments will not be allowed in the "preliminary acts" at the instance of the party who filed such "preliminary act."

[*The "Miranda"* (1881), 7 P.D. 185, followed; 1 Halsbury's Laws of England 94, referred to.]

Statement

MOTION by the defendant to amend its statement of defence and preliminary Act, heard by MARTIN, Lo.J.A., at Victoria. No objection was made to the former, but as to the latter it was contended that it is contrary to the practice and spirit of the

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rules of Court to permit it to be done. The ground upon which it was asked in the present cases (as set out in the solicitor's affidavit) was to the effect that since the filing of the Act "further information has been obtained specially through an enquiry (under the Canada Shipping Act) which was held in Victoria relating to the matter in question," and "an amendment . . . is asked to embody the points on which information for the first time came to the knowledge of the defendants on the enquiry in question."

The following authorities were cited or referred to on the argument: Rule 60; the *Vortigern* (1859), Swab. 518; the *Frankland* (1872), L.R. 3 A. & E. 511; the *Miranda* (1881), 7 P.D. 185; the *Godiva* (1886), 11 P.D. 20; Williams & Bruce Ad. Prac. (1902), 367-9; Roscoe's Ad. Prac. (1903), 325-6; Howell's Ad. Prac. 35-6.

C. Dubois Mason, for the motion.
J. A. Russell, contra.

Martin, Lo. J. A.

MARTIN, LO.J.A. (having stated the facts as above set out):—After a careful consideration of these authorities I see no reason for departing from the practice laid down in the *Miranda* case (1881), 7 P.D. 185, where it was held that the settled rule was not to allow such an amendment at the instance of the party who filed the Act, Mr. Justice Phillimore saying: "I am quite sure that it would be improper for the Court to allow any alterations to be made in the preliminary Acts." That there has been no change in this attitude of the Admiralty Court in England, I find by reference to 1 Hals. 94, in an article on the subject by Sir Gainsford Bruce (formerly Mr. Justice Bruce) and Mr. E. S. Roscoe, the Admiralty Registrar, wherein it is said:—

> 185. Alterations or amendments will not be allowed in the preliminary Acts at the instance of the parties who have filed them, but where a question in a preliminary Act is insufficiently answered, the Court, on the application of the opposite party, may direct the question to be properly answered and the preliminary Act to be amended accordingly.

It follows that the application must be dismissed, with costs to the plaintiff in any event.

Motion dismissed.

CROSBIE v. PRESCOTT.

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British Columbia Supreme Court, Murphy, J. May 3, 1912.

1. TRIAL (§ IX—350)—PRELIMINARY QUESTIONS OF LAW—LEAVE TO SET DOWN—PARTIAL SETTLEMENT.

Leave to set a case down for a preliminary hearing upon points of law raised by the pleadings will not be granted where the decision on such points of law would in effect only settle the question of the onus of proof, in view of the avowal by the party who would be affected by an adverse decision that, in such event, he would apply to amend his pleading and take issue upon the facts which upon such preliminary hearing would have been taken as admitted.

[*National Trust Co. v. Dominion Copper Co.*, 14 B.C.R. 190, applied.]

Statement

ACTION by the assignee of the vendor under an agreement for the sale of land to recover an instalment of purchase money under the agreement. The defendant alleged fraudulent misrepresentation by the original vendor that the land fronted on the Coquihalla river and included certain bottom lands, and that, on discovery of this misrepresentation, he (the defendant) had repudiated the agreement to purchase. The plaintiff replied, joining issue on the defence and objecting that it did not disclose any defence in law. The plaintiff moved to strike out the defence as frivolous and vexatious, or, in the alternative, for an order that the points of law raised by the defence and reply be set down for hearing; and an order was made that the points of law raised by the defence be set down for hearing before the trial. The case came on for hearing upon the points of law so raised before MURPHY, J.

Sir C. H. Tupper, K.C., for the plaintiff.

Ritchie, K.C., for the defendant.

Murphy, J.

MURPHY, J.:—On this application coming up in Chambers, a discussion arose as to whether it could not more properly be disposed of by granting the alternative order asked for in the notice of motion, viz., that the points of law raised by the plaintiff's reply be set down and disposed of before the trial of the action. The defendant's counsel then stated that it was not contended that the plaintiff had notice of his assignor's alleged fraud, nor that the plaintiff was not an assignee for value. On this statement an order was made as prayed alternatively. On the argument so ordered coming on, the statement of counsel was withdrawn, and I was informed that both the question of knowledge on the part of the assignee and of his having given valuable consideration would be in controversy in the action, and that the only result of any ruling I might make would be to determine upon whom was the onus of proof as to these facts, as, if the decision was adverse to the defendant, he would apply to amend by setting up notice and want of valuable consideration. Had I been aware of this, I would not have made the

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alternative order, since any decision would not decide the real points of law, to use the language of Clement, J., in *National Trust Co.* v. *Dominion Copper Co.*, 14 B.C.R. 190, which the facts, as they really exist, do in truth raise, as distinguished from suggested points of law, which the facts, when ascertained, may perhaps raise. Indeed, I think that case, though dealing with a stated case, is applicable to the present motion and precludes me from adjudicating hereon. Whether that be so or not, rule 286 states that a Judge "may," not "shall," set down such points of law before the trial; and, as stated, I would not have done so, for the above reasons, were it not for admissions made by the defendant's counsel at the first hearing. I understood the plaintiff's counsel, on these admissions being made, to have abandoned the first part of his motion. This he would not have done, but for such admissions clearing the way for the alternative order being made. If both parties will now agree that the first part of the motion be reinstated, it may be placed again on the Chamber list. If not, I decline to make any adjudication on the points of law raised when the facts on which they are based are in controversy; but, under the circumstances, if reinstatement is not agreed to by both parties, the costs should go to the plaintiff in any event. If both parties agree to the reinstatement, the costs are reserved until such reinstated motion is disposed of.

Order accordingly.

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McPHERSON v. FIDELITY TRUST AND SAVINGS CO. Limited.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. April 11, 1912.

1. BROKERS (§I—1—STOCKBROKER—AUTHORITY TO SELL ON SPECIFIED TERMS—DEPOSIT MADE ON DIFFERENT TERMS.

Where a stockbroker is given a limited authority to sell certain company shares on terms requiring a deposit of ten per cent. in cash and he receives a lesser deposit with an application for the shares, he is not warranted in forwarding such deposit to his principal and will himself be liable to the prospective purchaser for its return.

[*McPherson* v. *Fidelity Trust & Savings Co.*, 17 B.C.R. 182, judgment of Hunter, C.J., at trial, affirmed on appeal.]

2. PAYMENT (§IV—33)—PARTIAL PAYMENT—APPLICATION—CONDITIONS—DEPOSIT IN MEDIO.

Where the payment of the deposit is made with an application to an agent for the purchase of shares from the agent upon a condition that the consent of the principal, the owner of the shares, shall be obtained to the terms offered, and the principal declines the terms, the agent is not entitled to treat such deposit as the money of the principal but should place the same *in medio* so that it may be returned by the agent to the prospective purchaser on the offer being refused.

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McPherson v. Fidelity Trust and Savings Co.

Statement

Appeal by defendant company from the judgment of Hunter, C.J.B.C., *McPherson v. Fidelity Trust & Savings Co.*, 17 B.C.R. 182, in an action tried at Vancouver, on the 11th of April, 1911, to recover $200, paid by the plaintiff as a deposit on the purchase of 5,000 shares of the capital stock of the Grand Trunk British Columbia Coal Company, Limited, and for cancellation and delivery to the plaintiff of a promissory note for $1,550, made by the plaintiff in favour of the defendant Gibson, in payment of the balance of the purchase money in respect of the said shares.

The judgment at trial in favour of the plaintiff was affirmed on appeal.

The defendant Gibson was the holder of a large number of shares in the Grand Trunk British Columbia Coal Company, Limited. He appointed the defendant company his agents to sell the shares, and agreed to pay them a commission on all shares sold by them. He instructed the company that he would not accept any application for the purchase of shares unless a cash payment of ten cents per share accompanied each application, but was willing to give time for payment of the balance of the purchase money.

The defendant company appointed one Simpson a sub-agent for the sale of shares, and agreed to pay him part of the commission to be received by them from Gibson.

On the 5th of October, 1910, at the solicitation of Simpson, the plaintiff signed an application for the purchase of 5,000 shares, and paid Simpson $200 in cash, and gave him a note, made by the plaintiff in favour of the defendant Gibson for $1,550, in payment of the balance of the purchase money. The $200 was less than ten cents per share, which Gibson required as the cash instalment. There was no evidence as to whether Simpson communicated to the plaintiff the fact that Gibson required a cash payment of ten cents per share, and there was no evidence as to what occurred at the time the plaintiff signed the application, except as above stated.

Simpson handed the application for shares, the cash and the note to the defendant company. It had been arranged between the company and the defendant Gibson, that the company would keep all moneys paid on account of the purchase money of shares, and would deduct therefrom their commission, and at the end of each week would send Gibson a cheque for the balance of the cash on hand.

On receiving the cheque from Simpson, the company sent it to Gibson, asking him to indorse it to them, which he did. The cheque was then deposited by the company to their own credit. The company did not explain to Gibson the fact that the cheque was in respect of an application for shares as to which less than

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ten cents per share had been paid, and did not submit the plaintiff's application to Gibson. Gibson indorsed the cheque in ignorance of these facts, supposing that the cheque represented a cash payment of ten cents per share. After depositing the cheque to their own credit, the company then submitted to Gibson the plaintiff's application. Gibson objected to it on the ground that the cash payment was less than he had agreed to accept. Interviews took place between the company and Gibson —the company endeavouring to induce him to accept the application. One of the reasons advanced by the company to induce Gibson to accept the application was that he had, by indorsing the plaintiff's cheque, bound himself and could not now refuse to accept the application.

On the 10th of October, the plaintiff notified the defendant company and Gibson that he withdrew his application, and requested a return of the $200 cash, and the $1,550 note. At this time the company still had the money and note in its possession. The following day, Gibson assumed to accept the plaintiff's application, and the company then sent the plaintiff's note to Gibson. This action was thereupon brought against the company and Gibson to recover the $200, and for delivery up and cancellation of the note, and for damages for conversion of the note, and judgment was given by the trial Judge for the plaintiff as prayed, with costs.

Argument

W. P. Grant, for the appellant:—The defendant company merely acted as agents for Gibson. They had no duties towards the plaintiff, and there was no privity of contract between the company and the plaintiff. The plaintiff's claim was against Gibson only. The plaintiff cannot maintain this action against the defendant company, even if the company had the money and note in its possession, because the company were agents for Gibson, and payment to them was payment to Gibson.

Craig, for the respondent:—The company could not have acted as agents for Gibson, because their authority from him was expressly limited to accepting applications on which at least ten cents a share had been paid. The evidence warrants the inference that the company accepted the money and note on the understanding that it would be submitted by the company to Gibson for acceptance, the company agreeing to return the money and note to the plaintiff, if the application was not accepted. This is the only honest construction which can be placed on the company's conduct. The company were liable for conversion of the cheque.

The judgment of the Court was delivered by

Irving, J.A.

IRVING, J.A.:—I would dismiss the appeal. When the Fidelity Trust were notified that the plaintiff was not willing to pay

the amount (10%) Gibson had instructed them to accept, they should have placed the money *in medio* until they could learn whether Gibson would make an exception to his rule in favour of McPherson. Not having done that, I do not think they can now say, "We have paid this money to our principal, and he alone is responsible."

The payment to them being clogged with a condition, they could not, until the condition was assented to by Gibson, treat the money as Gibson's.

Appeal dismissed.

BATEMAN v. COUNTY OF MIDDLESEX.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith and Magee, JJ.A. June 28, 1912.

1. Appeal (§ VII L 2—475)—Review of verdict of jury—Review of findings of trial Judge without a jury—Damages.

The findings of fact made by a Judge in an action tried by him without a jury do not stand upon the same footing before an appellate Court as the findings of a jury, but the appellate Court, if it considers them erroneous, may come to a different conclusion and act upon it, and a finding as to damages is in precisely the same position in this respect as any other finding of fact.

[*Jones* v. *Hough*, 5 Ex. Div. 155, followed; *Phillips* v. *South Western R. Co.*, 4 Q.B.D. 406, 5 Q.B.D. 78, discussed and applied; *Rigsby* v. *Dickinson*, 4 Ch.D. 24; *North British and Mercantile Insurance Co.* v. *Tourville*, 25 Can. S.C.R. 177; and *Prentice* v. *Consolidated Bank*, 13 A.R. 69, referred to; judgment of Riddell, J., *Bateman* v. *County of Middlesex*, 24 O.L.R. 34, and of a Divisional Court, S.C., 25 O.L.R. 137, varied by reducing the damages from $12,500 to $10,000.]

2. Evidence (§ XII A—920)—Weight and effect of testimony—One interested witness, another not interested.

As between two witnesses, of whom one is interested and the other is not, credit should, as a general rule and in the absence of anything to the contrary, be given to the latter.

Statement

Appeal by the defendants from the order of a Divisional Court, 25 O.L.R. 137, dismissing an appeal (upon the question of the quantum of damages) from the judgment of Riddell, J., 24 O.L.R. 84, after a trial without a jury, awarding the plaintiff $12,500 damages, in an action for personal injuries caused by the negligence of the defendants.

The appeal was allowed and damages reduced, Meredith, J.A., dissenting.

Argument

Sir *George C. Gibbons*, K.C., and *J. C. Elliott*, for the defendants. The defendants admit their liability, and the only question is as to the *quantum* of damages, which, it is submitted, the learned trial Judge, and the Divisional Court, have fixed at much too high a figure. The latter Court has found that the amount is larger than it would have awarded had the case

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come before it in the first instance. According to the evidence of the plaintiff's own physician, the most serious trouble caused by the accident was the infected gall bladder, and the consequent probability that gall stones might develop; but this is only a chance, and the defendants offer now, at their own expense, to have an examination made by an independent physician, which will shew whether or not this condition has developed. [*J. M. McEvoy*, for the plaintiff, refused to accept this offer at present, as the injury to the kidney was an even more serious matter.] Not much stress was laid upon the movable kidney by the plaintiff's physician, and there is no direct evidence that it was the result of the accident. Many people have the trouble, and know nothing about it; and it is a mere inconvenience unless it goes too far. The affection does not appear to be increasing; and the defendants are willing that the proposed medical examination should cover this point also. The evidence as to the alleged diminution of the plaintiff's earning power is very unsatisfactory, and it is not shewn what the effect of giving up a country for a town practice would be. The verdict is a very large one, even if all the anticipated consequences of the injury were certain, which is far from being the case. They referred to *Beal* v. *Michigan Central R.R. Co.* (1909), 19 O.L.R. 502, 506; *Hood* v. *Eden* (1905), 36 Can. S.C.R. 476, 483.

T. G. Meredith, K.C., and *J. M. McEvoy*, for the plaintiff. The learned trial Judge had peculiar advantages for estimating the weight of the medical testimony and the extent of the plaintiff's injury, and there is no good reason for interfering with his conclusions. Damages in such a case should not be unduly minimised; and the trial Judge, who saw the plaintiff and heard his testimony, was in a better position to give a correct estimate than the Judges of this Court can be. The true principle is laid down in *Bradenburg* v. *Ottawa Electric R.W. Co.* (1909), 19 O.L.R. 34, 37, where *Johnston* v. *Great Western R.W. Co.*, [1904] 2 K.B. 250, is referred to. [GARROW, J.A., thought that was a very unique case.] The infected gall bladder and the movable kidney were the two most serious injuries. The latter is of two kinds, congenital and traumatic, the last-mentioned being the more serious, and, according to the trial Judge, that with which the plaintiff is affected. The judgment of the trial Judge is supported by the evidence, and, affirmed as it is by the unanimous judgment of the Divisional Court, should not be set aside.

Gibbons, in reply, argued that the alleged distinction between the two kinds of movable kidney was not borne out by the evidence.

GARROW, J.A.

June 28, 1912. GARROW, J.A.:—The action was brought against the defendants to recover damages sustained in conse-

quence of the want of repair of a highway under the charge and control of the defendants. The learned Judge awarded the sum of $12,500 as damages; and the only question really before us is whether or not such sum is excessive. The judgment of Riddell, J., is in 24 O.L.R. 84. No written judgments were apparently delivered in the Divisional Court, so that we are pretty much in the dark as to the view there taken.*

In the reasons for appeal it is said, apparently without contradiction from the other side, that some members of the Court expressed the opinion that, although the damages were much larger than they would have given, they would not interfere because the verdict is not so perverse and unreasonable that, if the case had been tried by a jury, twelve intelligent men might not have arrived at the same conclusion. It is, of course, dangerous to trust in such a matter to the recollection of counsel, who may not remember accurately the whole statement. All, therefore, that I can say upon the subject is, that, if such a statement was made and was the foundation for the judgment, it does not express my view of what the law is upon the subject, because it apparently fails to discriminate between a trial by a Judge alone and a trial by a Judge with a jury.

The distinction is very clearly expressed by Bramwell, L.J., in *Jones* v. *Hough* (1879), 5 Ex. D. 115, at p. 122, where he is reported to have said: "If, upon the materials before the learned Judge, he has, in giving judgment, come to an erroneous conclusion upon certain questions of fact, and we see that the conclusions are erroneous, we must come to a different conclusion, and act upon the conclusion that we come to and not accept his finding. I have not the slightest doubt such is our power and duty. A great difference exists between a finding by the Judge and a finding by the jury. Where the jury find the facts, the Court cannot be substituted for them, because the parties have agreed that the facts shall be decided by a jury; but where the Judge finds the facts, there the Court of Appeal has the same jurisdiction that he has, and can find the facts which-ever way they like. I have no doubt, therefore, that is our jurisdiction, our power, and our duty."

*The decision of the Divisional Court, Boyd, C., Latchford and Middleton, JJ., in *Bateman* v. *County of Middlesex*, 25 O.L.R. 137, affirming the judgment of Riddell, J., 24 O.L.R. 84, is as follows:—

"The judgment of the Court was delivered at the close of the argument for the defendants, by Boyd, C.:—The amount awarded is larger than we should have awarded, had the case come before us in the first instance. The Legislature has seen fit to provide that actions of this kind shall be tried by a Judge without a jury; and we must attribute to this assessment of damages as much weight as would be given to the finding of a jury. It is not suggested that the learned Judge acted upon any wrong principle; and the fact that, in his discretion, he has given more, even much more, than we should have given, is not enough to warrant the interference of an appellate Court."

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This language has been quoted more than once with approval in Canadian Courts: see *North British and Mercantile Insurance Co.* v. *Tourville* (1895), 25 Can. S.C.R. 177, at p. 193; *Prentice* v. *Consolidated Bank* (1886), 13 O.A.R. 69, at p. 74; see also the remarks of James, L.J., in *Bigsby* v. *Dickinson* (1876), 4 Ch.D. 24, at p. 29. And a finding as to damages can stand upon no other footing than any other finding made by a Judge trying the case without a jury.

What is a reasonable sum is always to me a difficult question, from answering which I would gladly escape if consistent with my duty. The principles deducible from the cases of authority upon the measure of damages do not, in my experience, go very far in helping one except along general lines. The real difficulty is, that, within these lines, there is almost always so much reason for honest difference of opinion.

The question of the proper measure of damages in such cases as this was much discussed in the well-known case of *Phillips* v. *South Western R.W. Co.* (1879), 4 Q.B.D. 406, affirmed in 5 Q.B.D. 78. That was the case of a surgeon of middle age, with a very large professional income, said to have been about £5,000 net *per annum*. The injury of which he complained had rendered his condition absolutely helpless, with no hope that he would ever be able to resume practice. The charge of Field, J., to the jury, at the first trial, was, after much discussion, in the end upheld as a correct guide upon the law of the case. In it he said (5 Q.B.D. at p. 79): "Perfect compensation is hardly possible, and would be unjust. You cannot put the plaintiff back again into his original position, but you must bring your reasonable common sense to bear, and you must always recollect that this is the only occasion on which compensation can be given. Dr. Phillips can never sue again for it. You have, therefore, now to give him compensation, once for all. He has done no wrong; he has suffered a wrong at the hands of the defendants, and you must take care to give him full, fair compensation for that which he has suffered." And upon the subject of the loss of income, a question also involved in this case, he said (p. 81): "You are not to give the value of an annuity of the same amount as the plaintiff's average income for the rest of the plaintiff's life. If you gave that you would be disregarding some of the contingencies. . . . An accident might have taken the plaintiff off within a year. He might have lived, on the other hand, for the next twenty years, and yet many things might have happened to prevent his continuing his practice." At the first trial a verdict was rendered by the jury for £7,000 damages, which was set aside, at the instance of the plaintiff, as too little, and a new trial directed. Upon the second trial, the jury gave a verdict of £16,000, which was also moved against, this time by the defendants, as excessive,

but the Court refused to interfere. See *Phillips* v. *London and South Western R.W. Co.* (1879), 5 C.P.D. 280. And see also *Church* v. *City of Ottawa* (1894), 25 O.R. 298, affirmed in this Court in (1895), 22 O.A.R. 348, which was also the case of an injury to a physician.

That the present plaintiff sustained a severe injury, from the effects of which it is improbable, at his time of life, that he will ever fully recover, is beyond question. But that he will so far recover as to be able to resume the practice of his profession, in a somewhat modified form perhaps, within a comparatively short period, is, I think, the fair result of the evidence. The three items of injury which bulk the largest are thus summed up and commented upon by Riddell, J.: "The difficulty at the liver may perhaps—probably—be overcome by a surgical operation of a comparatively simple character; the neurasthenia may be expected to be fairly well overcome in about a year longer—but the prolapsed kidney is another story;" the learned Judge evidently regarding the latter as the most serious of them all.

Prolapsed or movable kidney is, it appears from the evidence of the medical experts, a by no means uncommon condition, not always, not, I would infer, usually or necessarily, a very disabling defect, since patients may be so affected for very long periods, and even for life, without ever becoming aware of it. In the plaintiff's case it was not discovered until some six weeks after the accident—after he had gone to the baths at Mount Clements, although before that he had been examined more than once by local physicians, and was himself one of long experience. Dr. Primrose, in his statement, says that the prolapsed condition may or may not have been caused by the accident. And I am not able to find in the evidence of the other medical witnesses any more positive evidence or evidence which displaces this statement. And, if the matter rests as put by Dr. Primrose, as, in my opinion, it does, the fact is not established, for, of course, the burden of proof is upon the plaintiff, who must incline the balance in his direction, not by a mere scintilla but by a reasonable amount of legal evidence. In this connection, that is, the condition of the plaintiff's kidneys before the accident, the evidence of Mr. Robertson, a wholly disinterested witness, also is of some importance, who said that several months before the accident the plaintiff told him that he was being troubled by his kidneys, and that his hard work and hard driving were using him up. The plaintiff denies this, and says there was never even a conversation, and that he was never troubled with his kidneys; but, as between the two, there is no reason why the usual rule as to crediting the disinterested witness should not be followed. But while, for these reasons, I incline to think that the evidence as it stands does not warrant the con-

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clusion that it is established that the prolapsed condition of the kidney was caused by the accident, I think it highly probable that, as the blow which the plaintiff received was in its vicinity, the kidney was injured to some extent in the accident, since there is evidence of blood and pus in the urine, which could not otherwise be reasonably accounted for.

The plaintiff was not able to point to any decided diminution in income as the result of the accident, although it would be natural to expect a falling off to some extent. And it is quite probable that, although the plaintiff will resume practice, he may have to decline the more arduous work to which he has been accustomed, elements which, of course, very properly enter into a consideration of the amount of damages, and which I have, I hope, duly considered.

Upon the whole, after, in the language of Field, J., applying to the circumstances such reasonable common sense as I possess, I have, with deference, come to the conclusion that the amount awarded at the trial is substantially too large, and should be reduced. And the amount I would consider fair and just, under all the circumstances, would be $10,000, which, if it errs at all, as it probably may seem to do, to the minds of the next appellate tribunal, errs, I think, as I believe we all do, on the side of being generous to the plaintiff.

The plaintiff should have the costs up to and inclusive of the trial, and there should be no costs to either party of the motion in the Divisional Court or of this appeal.

Moss, C.J.O., Maclaren, J.A. Magee, J.A. Meredith, J.A.

MOSS, C.J.O., MACLAREN AND MAGEE, JJ.A., concurred.

MEREDITH, J.A. (dissenting):—I am unable to agree in the views which have just been expressed regarding the abnormal condition of the kidney; there seems to me to be no sufficient reason for rejecting the finding of the trial Judge—that it is a case of traumatic prolapsus. A trial Judge's findings are not lightly to be disturbed; and, in saying that the trial Judge in this case was one more than ordinarily well-fitted for determining such a question, I am but giving evidence which I am quite sure would be corroborated by the other members of the bench. But, even quite apart from any such finding, I would have no difficulty in reaching the same conclusion as that to which the trial Judge came upon this question of fact. The man met with an accident which, on all hands, it is admitted, might well have caused this particular injury, and, in due course, after that accident, it was discovered. Is it unreasonable, even in these circumstances alone, to attribute the injury to the accident? But there is very much more than that on which to support the finding. It is proved, beyond question, that blood and pus were found in the man's urine after the accident; an

abnormal condition which unquestionably was likely to follow a traumatic injury to the kidney; and most of the medical witnesses attribute the abnormal condition to the accident, while there is not one who gives his opinion that it is not so attributable. Against all that, what is there? The statement of a witness, denied by the plaintiff, that the plaintiff, at some time before the accident, said that his kidneys were troubling him and that the long drives were using him up. But what kind of evidence is that, that the man then had one prolapsed kidney? There are not a few of mankind who, if they told the truth, would be obliged sometimes to say that their kidneys were troubling them, and that without any kind of prolapsus or other serious ailment. To reject the finding upon such evidence merely would be plainly erroneous; and nothing else is relied upon except the negative statement, contained in the report of Dr. Primrose, that "it may or may not have been caused by the accident;" a statement which hardly calls for an answer; but, if it did, would be more than off-set by Dr. Primrose's own evidence, given, under oath, afterwards at the trial—that, whatever injury there is to the kidney, it was caused by the accident, as the pus and blood shewed; see p. 67 of the appeal-book.

The finding of this Court in this respect, reversing the finding at the trial, being placed solely upon that which I have, I think, plainly shewn to be an error, I cannot concur in the judgment just pronounced, but must dissent, agreeing, as I do quite, with the trial Judge.

Then, upon the facts as found by the trial Judge, is there any good reason in law for interfering with his assessment of the damages?

The findings of a trial Judge do not, of course, stand quite upon the same footing as the verdict of the jury; though the Lord Chancellor, in the recent case of *Lodge Holes Colliery Co.* v. *Wednesbury Corporation*, [1908] A.C. 323, at p. 326, seems to have said something like that they do. There is no appeal against the verdict of the jury; there is an appeal against the findings of a trial Judge; the assessment of damages by a jury cannot be changed by the Court; the assessment of damages by a Judge may be. But, though there is an appeal against the findings and the assessments of the Judge, such an appeal is not to be treated as a new trial; his conclusions must stand unless they are plainly shewn to be wrong; and, in dealing with every such appeal, the great advantage of a trial Judge, who sees and hears the witnesses and before whom the whole trial takes place, over any court of appeal, in seeking the truth as to all questions of fact, is always to be borne in mind, and to have much weight in supporting his findings.

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I can find no good reason for saying that any of the trial Judge's findings of fact, in this case, are wrong; they may, of course, be; neither men nor courts are infallible; but, according to the evidence adduced upon the trial of this case, they are not, and that is all we can go upon; and no Judge of this Court has found fault with any of such findings, except that which I have already dealt with, and as to which I have declined to fall in with them in upsetting.

And, upon such findings, and having regard to such cases as *Phillips* v. *London and South Western R.W. Co.*, 5 C.P.D. 280, and *Church* v. *City of Ottawa*, 25 O.R. 298, I find it impossible to say that the trial Judge was wrong in assessing the damages at $12,500. There was evidence of loss of earnings, which, if fully credited, would have warranted a much larger verdict, but it is not certain enough for that; and there was evidence of serious permanent physical injury, and of continued pain and suffering. Damages are not to be a full compensation in every respect, but only reasonable compensation under all the circumstances of the case. Upon the findings of the trial Judge, I am quite unable to say that the damages awarded were quite unreasonable, or that they are not quite reasonable, compensation under all the circumstances.

If I could agree with this Court that the man's kidney was prolapsed, and his driving days ended, before the accident, I would be obliged to say that $10,000 damages is an excessive assessment, and that it ought to be very largely reduced, because this organic ailment is, according to the evidence, the really serious one; and if his driving days were already done, he would have been obliged to give up his large country practice anyway, almost the whole source of his income.

And I feel bound to point out that the logical result of the judgment of this Court is, that the damages assessed at the trial were in amount largely inadequate, because if, after eliminating the kidney ailment as a factor, $10,000 be right, then, including it, as the trial Judge did, the damages should be more than $12,500, for that ailment is more serious than all the other three put together, especially regarding money loss: as to two—neurasthenia and pleurisy—they were generally treated, by the medical witnesses, as of comparatively little importance, already well on the way to full recovery; and the other—infected gall bladder—also of much less consequence, being said by one of the medical witnesses to be a comparatively trivial matter, which "a small operation would get rid of."

Appeal allowed and damages reduced;
MEREDITH, J.A., *dissenting.*

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(Decision No. 4.) C. A. 1912

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith and Magee, JJ.A. June 18, 1912.

1. APPEAL (§ II A—35)—RIGHT OF APPEAL TO SUPREME COURT FROM COURT OF APPEAL, ONTARIO—ACTION FOR SPECIFIC PERFORMANCE OR ALTERNATIVELY FOR DAMAGES.

Where an action is brought for specific performance of an agreement to deliver certain securities, or, in the alternative, for damages, and it appears that the defendant has rendered himself temporarily unable to deliver the securities, and the Court of Appeal by its judgment gives to the plaintiff his choice between specific performance as soon as the securities are available for delivery, and an immediate reference as to damages, an appeal lies as of right to the Supreme Court from the judgment of the Court of Appeal under subsec. (*c*) of sec. 38 of the Supreme Court Act, R.S.C. ch. 139, inasmuch as the action is in the nature of a suit or proceeding in equity.

2. APPEAL (§ III F—98)—EXTENSION OF TIME FOR APPEALING—JUDGMENT OF COURT BELOW ACTED UPON.

Where a judgment of the Court of Appeal has given to the plaintiff in an action for specific performance of an agreement to deliver stock and bonds his choice between specific performance and a reference as to damages, and the defendant has not appealed from such judgment to the Supreme Court of Canada, being under the impression that no appeal would lie, and the plaintiff has elected to take a reference, and appeals have been taken from the referee's report, the Court of Appeal should not, at the instance of the defendant, extend the time for appealing to the Supreme Court of Canada from its original judgment.

Statement

THE defendants the Windsor, Essex and Lake Shore Rapid Railway Co. appealed to the Court of Appeal from the order of Moss, C.J.O., *Nelles* v. *Hesseltine; Windsor, Essex and L.S. Rapid R. Co.* v. *Nelles* (decision No. 3), 2 D.L.R. 732, 3 O.W.N. 862, 21 O.W.R. 430, and also made a substantive motion for the order which the learned Chief Justice had refused to make.

The appeal and the substantive application were dismissed; MEREDITH, J.A., dissenting.

Argument

A. H. F. Lefroy, K.C., for the applicants, stated that the substantive motion was made under sec. 38 of the Supreme Court Act, as well as sec. 71. He referred to *Lake Erie and Detroit River R.W. Co.* v. *Marsh* (1904), 35 Can. S.C.R. 197, *per* Nesbitt, J., at p. 200, and to *Crown Life Insurance Co.* v. *Skinner*, 44 Can. S.C.R. 616; and contended that the case at bar did not come within the grounds on which leave to appeal was refused in these cases. The applicants had been advised by their counsel that they could not appeal against the judgment of the 21st April, 1908, and should not suffer if a mistake had been made in that respect.

C. J. Holman, K.C., for the plaintiffs, argued that, the applicants having allowed four years to go by, and taken their chances

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on the result of the reference, should not now be allowed to appeal against the judgment of April, 1908. He referred to *News Printing Co.* v. *Macrae*, 26 Can. S.C.R. 695.

Lefroy, in reply.

June 18, 1912. MACLAREN, J.A.:—The defendants the Windsor Essex and Lake Shore Rapid Railway Company have appealed to this Court from an order made in Chambers by the Chief Justice of the Court on the 20th March, 1912, dismissing their motion for an extension of the time for appealing to the Supreme Court from the judgment rendered herein by this Court on the 21st April, 1908, and for allowance of their appeal to the Supreme Court from the said judgment.

The motion made before the Chief Justice was based exclusively upon sec. 71 of the Supreme Court Act; and sec. 38 of the Act was not cited or referred to. On the motion before the full Court, counsel for the applicants stated that he desired to present his claim not only by way of appeal, but also as a substantive motion under sec. 38, as well as sec. 71, and he read in support of his motion affidavits that were made subsequent to the decision of the Chief Justice refusing the motion presented to him, chiefly as to the intention of the defendants to appeal.

The action was instituted in 1906, for the specific performance of two agreements whereby certain stock and bonds of the company were to be handed over to the plaintiffs. The trial Judge ordered specific performance, and in default damages. On appeal to this Court, the judgment was modified, but specific performance was decreed against the company on the 21st April, 1908: 11 O.W.R. 1062. There was no appeal from this judgment; and, the company not delivering the stock or bonds, there was a reference before the Master to assess the damages; and he made his report on the 7th April, 1909. The company appealed, and the appeal came before Meredith, C.J., who, on the 23rd January, 1911, gave judgment reducing the damages: 2 O.W.N. 643. The company further appealed to this Court, and on the 28th September, 1911, their appeal was dismissed: 3 O.W.N. 65.

From this last judgment an appeal was taken to the Supreme Court, which is still pending. The company moved in the Supreme Court to have an appeal from the judgment of this Court of the 21st April, 1908, included in their appeal to that Court. This motion came before the Registrar (see *Windsor, Essex and Lake Shore R. Co.* v. *Nelles* (No.1), 1 D.L.R. 156), who held that the Supreme Court had no jurisdiction to grant this or to extend the time for appealing; and an appeal from the Registrar was heard by the full Court and dismissed on the 23rd February, 1912: *Windsor, Essex and Lake Shore R. Co.* v. *Nelles* (Decision No. 2), 1 D.L.R. 309, 21 O.W.R. 201.

As above stated, a motion was subsequently made before the

Chief Justice of this Court, and afterwards before the full Court, to extend the time and to grant leave to appeal to the Supreme Court from the judgment of the 21st April, 1908.

In my opinion, the company might have appealed as of right from the last-named judgment within the sixty days provided by sec. 69 of the Supreme Court Act, although it is not a final judgment; and there is nothing to the contrary in the cases of *Union Bank of Halifax* v. *Dickie* (1908), 41 Can.S.C.R. 13; *Wenger* v. *Lamont* (1909), 41 Can. S.C.R. 603; *Clarke* v. *Goodall*, 44 Can.S.C.R. 284; or *Crown Life Insurance Co.* v. *Skinner*, 44 Can. S.C.R. 616; as these were all common law actions.

Section 38 (*c*) of the Supreme Court Act gives an appeal to that Court from any judgment, whether final or not, of the highest Court of final resort in any Province other than Quebec, where the Court of original jurisdiction is a Superior Court, in any action, suit, cause, matter, or judicial proceeding in the nature of a suit or proceeding in equity.

In my opinion, no leave would have been necessary to take this appeal; but, in case it were, application might have been made either to the Supreme Court or this Court under sec. 48 (*e*)* of the Act.

Assuming that we still have the power, under sec. 71 of the Supreme Court Act, to extend the time and allow the appeal, I am strongly of the opinion that it should not be done. It seems to be eminently a fitting case for the application of the old maxim, *interest reipublicæ ut sit finis litium*. Instead of taking an appeal within sixty days after the judgment of the 21st April, 1908, as they had a right to do, the company chose to acquiesce in the judgment, and to take their chances of shewing on the reference what they had previously claimed, namely, that the stock and bonds in question were really of no value. Having failed to convince the Referee of this, or to convince the High Court or this Court, on the respective appeals to them, they are now proceeding with their appeal to the Supreme Court from the judgment of this Court of the 28th September, 1911. This they have a perfect right to do; and, if they succeed, they will be entitled to the full benefit of such relief as they may obtain. But it is quite another question when they come, after four years of litigation, and after having put the plaintiffs to the expenditure of large sums of money and a large amount of labour, and now ask leave to do what they should have done four years ago, if at all, and attempt to re-open the question that was then practically closed.

*48. No appeal shall lie to the Supreme Court from any judgment of the Court of Appeal for Ontario, unless,—

. . .

(*e*) special leave of the Court of Appeal for Ontario or of the Supreme Court of Canada to appeal to such last-mentioned Court is granted.

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The officers of the company state in their affidavits that they were advised by their solicitor that they could not appeal from the judgment of the 21st April, 1908, until the amount of damages was ascertained and fixed so as to make it final; while the solicitor in his affidavit does not go so far, but says that, on account of the reference being directed by the Court of Appeal in the said judgment of the 21st April, 1908, it was not thought advisable to appeal at that time to the Supreme Court, as the same was not a final judgment.

It was not suggested to us on behalf of the applicants that this was a case that might come under sec. 48 (*e*) of the Supreme Court Act; we were asked to grant the extension under sec. 17, which allows us to do it "under special circumstances."

It is true that, in construing Con. Rule 353, as to an extension of the time for appealing to this Court, we have never been so strict as the Court of Appeal in England under their corresponding Rule. For illustrations of their refusal to extend the time on account of a mistake by counsel or solicitors, see *International Financial Society* v. *City of Moscow Gas Co.* (1877), 7 Ch.D. 241; *In re Helsby*, [1894] 1 Q.B. 742; *In re Coles and Ravenshear*, [1907] 1 K.B. 1. It is to be observed that in these cases there was no such delay as in this case; the application in each case was made shortly after the time had expired; there was no decision, as here, that it was not "advisable" to appeal at the time. There was there no deliberate choice of a particular course and a determination to take chances, as here, nor any postponement for years of what is required to be done by the statute within a limited number of days.

No precedent was cited to us where anything approaching the facts and circumstances of the present case had been held to be such "special circumstances" as would justify such an order as now asked for.

I am of opinion that the application of the company, both by way of appeal and substantive motion, should be dismissed, and that the company should be limited to the appeal which they now have pending in the Supreme Court, and to such relief as they may be able to obtain by their appeal from the final judgment of this Court, and such interlocutory judgments as may properly be brought up on such appeal

Moss, C.J.O.
Garrow, J.A.
Magee, J.A.
Meredith, C.J.

MOSS, C.J.O., GARROW and MAGEE, JJ.A., concurred.

MEREDITH, J.A. (dissenting):—It is well to state the material facts affecting this motion, because it is, I venture to assert, upon a very plain and distinct misunderstanding of one of the most material of them that this Court has come to the harsh conclusion that this application should be refused. The reason given for that refusal is, and is plainly stated to be, that, "instead of taking an appeal within sixty days after the judgment of the

21st April, 1908, as they had a right to do, the company chose to acquiesce in the judgment, and to take their chances of shewing on the reference what they had previously claimed, namely, that the stock and bonds in question were really of no value." How it could be imagined that the applicants chose to acquiesce in the judgment, when no one can even reasonably assert such a thing, and when no one, not even the Chief Justice of this Court when recently dealing with this motion in the first instance, ever dreamed that they had any such right of appeal, I feel bound to say, goes beyond my comprehension. To prevent any sort of misunderstanding, let me quote the words of the Chief Justice contained in his written judgment disposing of the motion, of the 16th day of March last: "And, in view of the several decisions on the point, found in the Supreme Court reports, which I have again read and considered, *it does not seem to be open to question that the judgment of the 21st April, 1908, falls within the prescribed category of non-final and therefore non-appealable judgments.*"

The first suggestion that that judgment might really after all have been an appealable one came from Mr. Lefroy upon his argument of this appeal; and, in all probability, but for that suggestion, this Court would have accepted and acted upon the opinion of the Chief Justice, that it was not final and was not appealable.

And so the whole fabric of this Court's conclusion, being based upon such an error in fact, must fall to the ground. If the application is to fail, it ought to fail only for some real and substantial reason.

Now let me proceed with my statement of the real facts of the case; facts regarding which there can be no substantial controversy.

The case is, in all its aspects, plainly an appealable one; the amount involved is many times greater than the minimum amount of an appealable case: the questions involved are not only serious ones of fact, but are important and difficult ones in company law; and not only did this Court differ to a very considerable extent from the trial Judge as to the relief which should be granted, but there was also some difference of opinion in this Court, one of the Judges holding that the plaintiffs' action should be altogether dismissed; so that the case was one in which an appeal might reasonably be taken, and was also one in which I find it difficult to believe that any one would have advised against an appeal.

Then it is quite plain, from the affidavits and from the circumstances of the case, that the applicants always desired and intended to appeal, but they were prevented by that which their counsel and solicitors, as well indeed as every one concerned in

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the case—including, as I have said, the Chief Justice of this Court—thought was the settled practice of the Supreme Court in such a case as this, namely, that it was not appealable until after the reference, directed in the judgment now sought to be appealed against, was concluded.

And it is also quite plain to me that, had any earlier attempt to appeal been made, it would have been met with vigorous opposition by the plaintiffs, on the ground that it was premature; opposition which, I cannot but think, having regard to what has happened, would have been successful.

The plaintiffs have, of course, now changed their tune, contending that the judgment of the 21st April, 1908, was appealable, and ought to have been then appealed against; but that change, as I have mentioned, came only upon the argument of this appeal, after Mr. Lefroy's discovery of, and reference to, sec. 38 of the Supreme Court Act. But, having so changed their position, it is quite fair to take them at their word now, and to deal with the case as if their present contention were right; and as if the Chief Justice of this Court was wrong in saying, in his judgment, to which I have already referred: "I am fully sensible of the unfortunate situation which the applicants seem to occupy at present, of not having ever had an opportunity afforded them of appealing from the judgment in question to the Supreme Court, owing to the form of the judgment and the view taken by the Supreme Court as to its jurisdiction to entertain an appeal in such a case."

And, doing so, the matter stands thus: the applicants really might have appealed from the judgment of the 21st April, 1908, but did not because it was believed that no appeal would lie until after the reference—a belief which was shared in not only by foremost lawyers but foremost Judges until the argument of this appeal, however it may be since.

Parliament has conferred upon this Court power to extend the time for appealing in such a case, and it is commonly held that, in such a case as this, this Court alone has such power; and, having it, can there be any real reason, any reason not based upon a mistake as to a most material fact, why the power should not be exercised? A case in all its essentials plainly an appealable one, especially an appealable one; and one in which an appeal undoubtedly would have been taken but for the mistaken notion, so far and so high-spreading as I have mentioned, that an appeal would have been premature if taken before the reference was concluded; a mistake in which, it is quite plain, from their conduct upon the motion before the Chief Justice as well as here, the plaintiffs shared with all the goodly company it also covered.

And what can be said against it that is really substantial and true? How can the plaintiffs be injured beyond reparation in costs? If the result of the appeal should be to dismiss their action, then, by allowing them all their costs, between solicitor and client if you will, they will be left without any reasonable ground of complaint; whilst, if leave to appeal be refused in such a case, the Court imposes upon the applicants a great debt which they never owed—the gravest kind of an injustice is done to them; and gives to the plaintiffs a small fortune they never had any legal right to receive. On the other hand, if the judgment be sustained, the plaintiffs will be recompensed in costs in respect of the proceedings upon the further appeal, and have interest upon their judgment; and neither party will have any just cause for complaint. There will be some delay, but there always is in an appeal; and that delay will be no greater than it would have been if the appeal had been taken before the reference; and it cannot lie very well in the plaintiffs' mouths to complain of that delay for very substantial purposes, when their opposition to this application, based upon technical objections, has caused and is causing greater delay.

Parliament intended that the power it conferred upon this Court to extend the time for appealing should be exercised; if it is not to be exercised in such a case as this, can any one suggest a case in which it should be exercised? There has been no intended delay; that which every one considered must be done—the reference—before an appeal could be had, was being done; it is not said that there was any undue delay, against the plaintiffs' will, in prosecuting the reference; if there had been, they would have had their remedy upon it.

And the practice in regard to appeals in cases in which a reference is directed has been and is so uncertain and unsatisfactory as to excuse almost anything and to perplex the best as well as the worst of men. I do not consider whether under sec. 38 the applicants had an immediate right to appeal against the judgment of the 21st April, 1908; there is a good deal to be said against it, especially in a case such as this, in which by the judgment the plaintiffs' final recovery is simply one for damages for breach of a contract. And I may add that the judgment of the Supreme Court in the case of *Clarke* v. *Goodall*, 44 S.C.R. 284, seems to me to be quite against the view that this case comes under sec. 38; and would also observe that sec. 38 is subject to and controlled by sec. 40. It is not necessary to consider that question: it is enough to accept the plaintiffs' changed views upon the subject, and to make an order accordingly extending the time under any power—whether under sec. 40 or sec. 71, or otherwise—this Court may have.

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I would allow this appeal, and, consequently, allow the motion which the Chief Justice refused; in which case the applicants should eventually pay the cost of that motion, and the plaintiffs the costs of this appeal.

Appeal and application dismissed;
MEREDITH, J.A., *dissenting.*

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BOEHNER v. HIRTLE.

Nova Scotia Supreme Court, Graham, E.J., and Meagher, Russell, Drysdale, and Ritchie, JJ. July 29, 1912.

1. TRESPASS (§ I A—5)—WHAT CONSTITUTES—OVERLAPPING OF BOUNDARIES—GRANTS FROM THE CROWN.

It is a trespass for one, the boundaries of whose land overlap that of a grantee named in a prior township Crown grant, to cut timber from the land described in the latter's allotment, since the person who first enters into possession of land described in his grant is entitled to all of the land called for as against a subsequent Crown grantee the boundaries of whose grant overlap those of the prior grantee.

[*Boehner* v. *Hirtle*, 9 E.L.R. 258, reversed on appeal.]

2. ADVERSE POSSESSION (§ I—1—49)—WHAT CONSTITUTES—APPORTIONMENT OF LAND—TOWNSHIP GRANT—SUBSEQUENT GRANT FROM CROWN—OVERLAPPING OF PARCELS.

Where land was divided into 300 acre lots, also into tiers of 30 acre lots and the allotment proceedings, as well as the registry thereof, by the commissioners appointed by the Crown to apportion the land among the grantees named in a township grant, clearly shewed but three tiers of 30 acre lots, a subsequent grantee from the Crown of lots in a fourth tier thereof, which would overlap one of the 300 acre lots, did not by such subsequent grant, acquire title to the overlapping land, since the rule is that the first grantee in point of time and possession takes all of the land called for in his allotment.

[*Boehner* v. *Hirtle*, 9 E.L.R. 258, reversed on appeal.]

3. PUBLIC LANDS (§ II—21)—TOWNSHIP GRANT FROM CROWN—VALIDITY—ABSENCE OF PARTICULAR DESCRIPTION.

A "township grant" from the Crown to many grantees is valid although it does not specify the locality of the area to which each grantee is to be entitled reliance being placed therefor on the provincial allotment proceedings for the location and registering of the allotments.

[*DesBarres* v. *Shey*, 8 N.S.R. 327, affirmed by the Privy Council, 29 L.T.N.S. 592, specially referred to; see also *Swinchammer* v. *Hart*, 5 D.L.R. 106.]

4. PUBLIC LANDS (§ II—21)—TOWNSHIP GRANT—RIGHTS OF SUBSEQUENT GRANTEE—POSSESSION.

Where one acquires land from a person who obtained it from the Crown by a township grant made to several grantees although it did not specify the location or the area of the land to which each grantee was entitled, the locations being afterwards allotted them by commissioners appointed by the Crown for that purpose, no subsequent allotment will be permitted to disturb the prior allotment so made or the locations of land of which possession had been taken and held.

[*DesBarres* v. *Shey*, 8 N.S.R. 327, affirmed by Privy Council, 29 L.T.N.S. 589; *Boutilier* v. *Knock*, 6 N.S.R. 77, specially referred to; see also *Swinchammer* v. *Hart*, 5 D.L.R. 106.]

5. EVIDENCE (§ IV D—400c)—PROCEEDINGS BEFORE ALLOTMENT—COMMISSIONERS AS EVIDENCE IN SUBSEQUENT ACTIONS CONCERNING THE ALLOTMENT.

Proceedings before commissioners appointed by the Crown to allot amongst the grantees named in a township grant the land to which they were entitled, as kept by the clerk of the commission, are admissible in evidence in cases subsequently arising concerning the allotments made by them.

[*Wiggins* v. *McLean*, 6 N.B.R. 671; *Pike* v. *Dyke*, 2 Maine 213; *DesBarres* v. *Shey*, 29 L.T.N.S. 592, specially referred to.]

6. EVIDENCE (§ IV D—409*d*)—ALLOTMENT CARD DESCRIBING LAND ALLOTTED—ADMISSIBILITY IN SUBSEQUENT ACTION RELATING TO THE ALLOTMENT.

An allotment card containing the description of certain land allotted a person named in a township grant in Nova Scotia by the commissioners appointed by the Crown to allot it, is admissible in evidence in a subsequent action concerning the land described on such card.

7. EVIDENCE (§ X A—683)—BOUNDARIES OF TOWNSHIP.

The location of a township boundary line may be proved by hearsay evidence.

[*Thomas* v. *Jenkins*, 6 A. & E. 575, referred to.]

8. ADJOINING OWNERS (§ I—5)—BOUNDARIES—PROOF OF POSSESSION—OCCUPATION WITH COLOUR OF RIGHT.

In proving the possession of adjoining lots of land referred to as boundaries in a given instrument concerning a lot of woodland, it is not necessary to prove a title that reaches back to the Crown, occupation with colour of title in the case of such land being sufficient.

9. PUBLIC LANDS (§ II—21)—INCONSISTENT GRANTS—OVERLAPPING—RIGHT OF SENIOR GRANTEE.

In a case of overlapping by a subsequent grant of part of the same land passed by an earlier grant, the constructive possession of the area is in the person who has the senior or better title.

[*McInnes* v. *Stewart*, 45 N.S.R. 435; *Hunnicut* v. *Peyton*, 102 U.S. 333, referred to.]

10. PUBLIC LANDS (§ II—21)—GRANT FROM THE CROWN—PRIOR GRANT OF A TOWNSHIP—ALLOTMENT BY COMMISSIONERS.

A grant by the Crown of designated numbered lots in a township excludes the inference that such lots were included in a prior grant of a township to such grant and several others, where, in the earlier grant, the land was to be subsequently allotted or laid out to each grantee by a commission to be appointed by the Crown, and such lots were not allotted by them to such grantee.

11. PUBLIC LANDS (§ II—21)—RIGHTS OF FIRST GRANTEE—BOUNDARIES OF SUBSEQUENT GRANT OVERLAPPING.

Where there is not enough land in a township to make out the lots as surveyed, the grantee from the Crown who first takes possession of a lot is entitled to all of the lands called for in his allotment, and a subsequent grant, the boundaries of which overlap those of the prior grant, must yield to the latter.

12. EVIDENCE (§ IV R—483)—ADMISSIBILITY OF PLAN—APPARENT ERRORS—OVERLAPPING.

A township plan which shews an overlapping of different grants is to that extent erroneous and such overlapping as to the land last granted must be rejected as false description.

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13. EVIDENCE (§ IV I—431)—RECITAL IN CROWN GRANT—DEROGATION FROM PRIOR GRANT.

An admission or statement in a Crown grant will not adversely affect any interest in the land after the Crown has parted with all of its interest therein, the same rule applying in that respect as well to the Crown as to a private person.

Statement

APPEAL from the judgment of Laurence, J., 9 E.L.R. 258, dismissing plaintiff's action of trespass brought against the defendant for cutting timber on woodland.

The appeal was allowed with costs, and the plaintiff's right of action sustained.

Argument

V. J. Paton, K.C., for appellant. The older grant must prevail. The Crown had no land left to grant. The trial Judge has allowed the younger grant to prevail on the assumption that defendant's predecessors in title were in occupation of the land at the time of the first grant. Declarations in the second grant are not admissible. The Crown cannot subsequently make declarations affecting the title of the grantee under the first grant: *Linton* v. *Sutherland*, 40 N.S.R. 149; *Ogilvie* v. *Grant*, 41 N.S.R. 1. Possession for less than 20 years is not sufficient as against the Crown: *Boutilier* v. *Knock*, 2 Old. 77. The person in possession was liable to be evicted: *Harper* v. *Charlesworth*, 4 B. & C. 574; *Attorney-General* v. *Dakin*, L.R. 3 Ex. 288, 296.

D. F. Matheson, K.C., for respondent. There is no connection between the card drawn by plaintiff's predecessor in title and the grant of 1784. Plaintiff relies on an older title by virtue of the grant of 1784 but all the parties named in that grant were in the grant of 1765: *Boutilier* v. *Knock*, 2 Old. 77.

Paton, K.C., replied.

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GRAHAM, E.J.:—This is an action of trespass for cutting wood on woodland. The plaintiff claims that he has a title to the land on which the wood was cut, that it is part of lot letter F. No. 3, of the 4th division of the 300 acre lots of the township of Lunenburg.

The defendants claim that they have a title to the area in dispute, that it is part of lots 48 and 49 of the fourth tier of the Oakland 30 acre lots of the township.

There is, as I shall presently shew, overlapping or interference on the ground. The parties had come into conflict there and the question of who has the earlier or better title is a serious one. There is besides the question whether the plaintiff's title covers the locus.

I am of opinion that the plaintiff's title does cover the locus and that he has the earlier and better title and the possession.

The plaintiff relies upon the allotment proceedings taken as preliminary to a township grant, the registry of his allotment in 1765; also upon the grant of 1765, although that grant was not

taken out of the government office, and upon the grant of the township of June 30th, 1784, which was ultimately passed to 150 grantees including Nicholas Conrod, the earliest predecessor in title of the plaintiff.

The township grant of 1784 is as follows:—

To all to whom these presents shall come, Greeting:

Whereas the settlement of the township of Lunenburg commenced in the year 1753 and was carried on progressively by laying out and locating plantations to the inhabitants as they advanced in cultivation and improvement until the location of the whole was completed in the year 1765, at which time a grant of the said township for and in behalf of the said inhabitants passed the seal of this province, which grant from various causes was not accepted nor taken out of the office of the secretary of this province.

And whereas many of the inhabitants do now pray that the lands so laid out and assigned to them heretofore may be granted to them in due form, and the possession thereof confirmed to them.

Know ye, therefore, etc., etc., have given, granted and confirmed, etc., unto, [150 grantees including Nicholas Conrod 724 acres] containing in the whole of said allotments and parcels of land 71,406 acres, situate, lying, etc.

Here follows a description of the exterior lines of the township.

By the description it would appear that of the whole district comprising by estimation 180,000 acres, there had been allotted and located before that date 71,406 acres.

It is clear that no subsequent allotment (if any could take place under its terms) would be allowed to disturb the allotments and locations that had taken place. It would be intolerable that the people who had been put in possession of their areas ascertained by the allotment should be shifted about.

The grant does not purport to specify the locality of the area for each grantee. Reliance was placed on the previous allotment proceedings, location and registry of the allotments. The grant calls for these.

The validity of a grant like that, which was not in an unusual form in this province, was discussed in the case of *DesBarres* v. *Shey*, 8 N.S.R. 327, particularly in the Privy Council: *DesBarres* v. *Shey*, 29 Law Times N.S. 592, and of course the question of uncertainty was disposed of, and in a very satisfactory way.

Then this very grant came up for consideration in the case of *Boutilier* v. *Knock*, 6 N.S.R. 77, in which the plaintiff relied upon the allotment proceedings.

I do not propose to repeat anything in the judgment in that case in respect to the effect of the recital in the grant. Upon the reasoning in that case the plaintiff in the case before us was inferentially included in the grant of 1765.

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The 300 acre lots were allotted by commissioners appointed by the Lieutenant-Governor by a warrant dated the 27th August, 1782. They commenced their proceedings the 27th September of that year. They employed a surveyor, Benjamin Bridge, to survey the tract and make his report and so on. The report was in favour of 300 acre lots instead of 500 acres as had been proposed.

The written contract with Bridge is set out in the minutes of the proceedings of the commission and it is very clear from the minutes later that the commissioners insisted on his performance to the letter.

The lots were to be marked out by blazing the trees with their respective numbers marked on the trees or stakes in the front. The number of each lot with its proper courses was to be given by him to the commissioners on a card, and he was to furnish the commissioners with a general plot or plan of the township on which every man's property should be marked off.

Then there was a clerk to the commission and apparently his duty was to keep the minutes of the proceedings and to make out a register of the lots drawn.

There is no doubt, I think, about these proceedings being evidence in the case. They are called for in this grant of 1784. I refer to *Pike* v. *Dyke*, 2 Maine 213; *Wiggins* v. *McLean*, 1 Allen N.B. 671. Also *DesBarres* v. *Shey*, 29 L.T.N.S. 592, relating to the township of Falmouth in which the allotment book was used in evidence and there was an earlier grant also not taken up as in this case.

The card which Nicholas Conrod drew for lot 13 under whom the plaintiff claims has been handed down in the Boehner family from the plaintiff's grandfather who as the title-deeds shew purchased from Nicholas Conrod in 1814, and is produced in evidence. It has upon the back of the card an oblong figure of the lot and written within that figure "Letter F, No. 3, 4th Division," and for courses and distances on one side line "S. 56° W. 320 rods" and on one end line "W. 56° N. 160 rods." In the corner there is "Nicholas Conrod."

Then, turning to the register contained in the book of the minutes of proceedings, and produced from the registry of deeds for Lunenburg, we have this entry:—

Fourth Division.

Letter No. F.
Lot No.
1. John Lofler, Ch.
2. Sutton Stephens.
3. Nicholas Conrod.
4. Frederick Ott.
5. Phillip Heisen, Jr.
6. Ulrich Schenckles, Ch.

I will refer to some of these names by and by when I deal with the location of lot F 3 on the ground.

The plaintiff's grandfather subsequently, by several conveyances acquired the lots on either side of lot No. 3, namely lots 2 and 4 of that letter F division 4. By will of the 15th August, 1829, he devised them to his four sons, and by a partition in 1833 these three lots were subdivided amongst the four sons in equal shares, by which the larger part of No. 3 and a small part of No. 4 fell to the plaintiff's father who devised it to two of his sons one being the plaintiff. Later the plaintiff inherited an undivided share in the balance of F 3 and also in F 4.

It is on a portion of F 3 that the defendants cutting took place as the plaintiff alleges.

It is proved beyond question that there is on the ground overlapping or interference.

It has been measured by a surveyor, Mr. Starrat, twice for the defendants when he surveyed the 30 acre lots, and once for the plaintiff when he surveyed the 300 acre lots.

Mr. Starrat says, in response to defendant's counsel:—

Q. How many acres would you have to take off the fourth division to give 2 and 3 their full complement? A. Only a good p'ece off a couple of them; possibly three of the 4th tier of the 30 acre lots.

Q. You say if you take off the corner of three or four lots you will give 2 and 3 the full complement of 600 acres? A. Yes.

Q. What becomes of the balance of the tier? A. Either the 300 acre lots lose it or the 30 acre lots.

Q. The whole 4th division must go? A. Yes, unless they are going to take part of the 300 acre lots. Either that must go or a portion of the 300 acre lots must go.

Q. If you measure across from where the Dorey bound is to the shore of Oakland will you find enough land to give them four tiers and the whole of lot No. 3? A. No.

Q. How much short will it be? A. It will depend where you strike the shore of Oakland. Take the very north line of the 30 acre lots, start at the shore of Mahone Bay at Oakland on the north line of the 30 acre lots, these lots are supposed to be half a mile each. There is one of the shortest lines on the plan, the north line, take it two miles, that will be four tiers of 30 acre lots and you won't be 10 feet from where my plan says you are to-day.

Q. That is away into No. 3? A. Yes.

Q. Did you see where the cutting took place that we are talking about? A. Yes. The dotted red line and the portion coloured red on the plan is where the cutting was done. That is all I noticed.

Q. The cutting extended below 3 also? A. I did not go down there and I don't know it. I only marked the part I saw. Just the lines I was on or was getting.

Q. Did Boehner point out where he saw the two defendants cutting? A. I don't know that he did. Yes, he did. It would be north of the

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south line of No. 3 about 8 or 10 rods and east of the division line between the Keddy lot and the 300 acres at the point "X" on W. 17.

Q. That is where he pointed out that he saw the defendants cutting? A. Yes.

The plaintiff says:—

Q. Did you ever see the defendants, the Hirtles, cutting on this land that you claim? A. Yes.

Q. Whereabouts on it? A. Pretty well to the middle of No. 3.

Q. Did you point out the place to Starrat where you saw them cutting? A. Yes.

Q. Which ones did you see there? A. John and Sandy. John and Alexander. I saw them both cutting and hauling. . . .

Q. You are quite positive that the place you saw the Hirtles cutting was within the lines of that lot No. 3 as claimed by you? A. Yes.

Edward Langille says:—

I want to say something more about No. 3. Mr. Jacob Boehner had no children and he had a meadow against Henschell's brook and he asked me to go with him to carry his scythe. He was sickly. I went with him. I helped to make hay in that meadow for 20 odd years and was never disturbed by anyone. That was Jacob Boehner.

Q. Do you know anything about the land that Edward Boehner had, the father of this Edward? A. Then they divided it between them. They divided Nos. 2, 3, and 4 between four brothers. I know about that division. I knew where the division lines were but their lines in dividing did not come on the division lines. Edward Boehner's lot in that division was next to Jacob.

Q. Who was on the other side? A. George was on the lower side. Most of George on No. 4.

Q. Edward had part of 4 and part of 3? A. Yes. Jacob was next to him.

Q. Were you back on to the lot to see where this cutting was? A. I was back there when I went to identify the bounds. I saw the cuttings.

Q. Can you tell me whether a lot of this cutting was on lot 3 where this Boehner cut? A. It was cut from one end to the other clear across from 2 to 3.

Q. And from the rear division line—how far in towards the front did it come—did it come as far as the Henschell brook? A. There is a road leading up in the woods. I did not go over it to see how far it was cut towards the Henschell brook. They got a horse and took me over. They took me around the hill and I asked them what they were going to do up here. This was the day I shewed them where the bound was. James Langille had his horse and carriage. The Hirtles were not there. Ed. Boehner was there. I said go over that little hill and I could tell where the bound was.

Q. Do you remember Edward Boehner pointing out where he saw the Hirtles? A. He did not point out to me. I know nothing about the trespass done.

Q. Except that you saw the trees were cut all the way over 3 into 2? A. Yes.

Q. You did not come towards the front far enough to see how far the cutting extended? A. No.

The defendant, John Hirtle, said:—

Q. When you speak about the lots back there in the 4th tier, you have known them on the old plan W. I for years? A. Yes.

Q. (By the Court.) What do you know about these 300 acre lots? A. I don't know anything about them.

Q. (By the Court.) Your land runs out into some of these lots or some of them run into yours? A. Yes. I cut wood up there beyond these marks. I was not there when they ran that line.

Q. You cut further to the northward or north-east of these trees you saw marked? A. Yes, where they ran in.

Q. Were you there the day that Ed. Boehner had some words about cutting down the 300 acre line trees? A. No, I think that was my cousin. I heard them talking about them.

Q. That was not Sandy? A. I would not be certain.

I must proceed to locate F3 of the fourth division. It is necessary to ascertain the two lines, the easterly and westerly lines of the letter F, fourth division of the 300 acre lots in which division the lot F3 is. Commencing at the township line the old bound between the townships of Lunenburg and Chester, we find that this bound is mentioned in the grant of the township of Lunenburg, the grant of 1784. Referring back to the description we have:—

> Thence north 56 degrees east 1,440 chains or until a line produced south 33 degrees 45 minutes east will come to the centre of the first falls on Salmon river between the old bounds between Lunenburg and Chester; thence to be bounded by said line and by said river down stream and by the seashore of Mahone Bay running westward and southward round to Lahave River aforesaid and the several courses of the said river upstream to the bounds first mentioned [namely, the first falls on the Lahave river].

By the rules of evidence that north-east township line, being a township line, can be proved by hearsay: *Thomas* v. *Jenkins*, 6 A. & E. 575, and can, I may add, be attacked by hearsay too. But in this case it is proved by the best evidence and there can be no dispute about it.

The centre of the falls of the Salmon River, now called Martin's River, (and there has always been a rock at the centre) is well known.

That township line was proved at the trial by Edward Langille. He was the nominee for Lunenburg township and with a nominee for the adjoining township of Chester and Mr. Solomon, the surveyor, renewed that line years ago. The rock was pointed out to him as the boundary by his grandfather 76 years before the trial.

Distant from this township line 160 rods is a line running parallel with it. It is a well-established line. Martin's River is the name of a settlement on Martin's River, formerly Salmon River and some of the lots between the township line and this

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line have been resided on for years and the line is recognized. The lots between are in the division D, on the township plan. This line runs through the Dorey bound. The Dorey bound is not only a bound for a common corner for four of these lots; it is a boundary for divisions. It is at the intersection of the line parallel with the township line and 160 rods distant from it, *i.e.*, between divisions D and F and the line between the third and fourth divisions.

It was a pine tree, then reduced to being a stump, now reduced to a stake always marked for four corners.

It was called the Dorey bound no doubt because one Dorey drew D 5 in the third division. That boundary Edward Langille, who had lived on one of the lots in D division and owned part of D 5 and now owns half of F 1 of the fourth division, says he has known for 70 odd years. It was marked to shew corner bounds. He had been on several different surveys with surveyors whom he named, Solomon, Thompson, Wentzell, Morris and another, he thought it was Lawson, and he says that all of these surveyors got their starting point from this one bound.

Aaron Silver has known it for 60 years; he had owned part of lot D 5. Ezekiel Langille who is 54 years of age and who owned lot 4 in D has known it as long as he can remember. Jacob Hiltz, 72 years of age and his father before him, 40 years before, owned a part of lot No. 1, third division, letter C (that is number 1 up and immediately adjoining F lots fourth division), the Dorey bound being in the line between. He had known it ever since he could remember. Jacob Eisenhaur who had owned F 4 of the fourth division has known it for 65 years. Mr. Starrat, the surveyor, who has been on many surveys of the 300 acre lots, proves it to be correct in relation to those lots to the north; also that it is correct in its relation to the township line fixed by the centre of the falls of the Salmon river.

We have witnesses from all four lots cornering upon the Dorey bound, testifying to its existence as a corner bound.

The chain of documentary title to each lot may not be perfect throughout but it is as good as can be expected coupled with the possession. And I think that in proving the possession of adjoining lots referred to as boundaries in a given instrument it is not required to prove a title back to the Crown in such a case. Occupation with colour of title even in the case of woodland would be sufficient.

Then there is the Heisen bound upon the ground which has long been recognized by the persons in possession of the lots around it. It was a stump, and now a stone, with a hole drilled in it, is used instead. It is 160 rods from the rock in the centre of the falls of the Salmon river.

This line running through the Dorey bound and the Heisen

bound parallel with the township line gives us the end line of the 300 acre lots, fourth division, letter F.

Coming to the westerly line of that 4th division, letter F, it will be remembered that those lots are 320 rods long. And on the ground there are traces of an old line parallel with the lines I have mentioned at that distance. This line is proved by Langille:—

> Q. You say then that that bound was recognized and supposed to be the bound between the rear line of the 300 acre lots and thirty acre lots? A. Yes.
>
> Q. Back to that time when Burgoyne was there? A. Yes, and he swore to it 71 years past.
>
> Q. Who were there on that occasion? A. Every landowner and if the owner was not there he had a man there. There were between 25 and 30 landowners. The various landowners of the land were there or their representatives when Burgoyne was there.
>
> Q. What Burgoyne was the surveyor then? A. George Burgoyne. The man that swore to the bound was Fred Burgoyne his brother.
>
> Q. Then Burgoyne ran a line from there? A. He ran from there across these lots going up. He ran across 3, 2, and 1 from this base line that ran across down and then crossed lots 1, 2, and 3 in letter C. These are 1, 2 and 3 up. He ran on the division line.
>
> Q. It is the rear line of these 300 acre lots we spoke about? A. Yes, and the 30 acre lots.
>
> Q. What I want to be sure about is that that line was the rear line of the 300 acre lots? A. Yes, and I saw it measured from the Dorey bound back to that rear line and there was not two feet difference.
>
> Q. That was Burgoyne that ran that line? A. Yes, I saw it run by two different men.
>
> Q. You were on the Burgoyne survey on that line? Did he hit any old lines? A. He hit every bound from No. 3 to No. 1 and from 1 going up again until he came to No. 4 line between 3 and 4 up. He hit the bounds all the way up. I was with him and saw that myself.

And in respect to acts of possession cutting logs on lot No. F 5 he says:—

> I went across the brook near the bridge and cut logs there and know where the old line was before the fire. (The fire, he proves, took place 60 years before the trial.) I saw the old line between 5 and the 30 acre lots. Saw it plain on the ground. The trees were standing. Everything green. We cut up to that line.

In cross-examination he will not say that at that point the line of the 300 acre lots and the line of the 30 acre lots coincided. Those lines as a fact have not the same course. But he in effect asserts that they did not intersect and cross and they might have been at some distance from each other. But no doubt there was a point of contact somewhere.

This brings me to the Burgoyne bound which this witness mentions. At the rear of the third tier of the 30 acre lots Oakland division, there is a bound called the Burgoyne bound.

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It appears that a man named Burgoyne once owned a lot in the third tier. It is a stump. Its locality on the ground is not disputed. Owing to the difference in the course of the line of the 300 acre lots and the line of the 30 acre lots at the point of intersection, there may have been a narrow gore left and what often happens when a gore is left probably happened in this case, namely, closing up. And that accounts for the extension of the third tier of 30 acre lots towards the 300 acre lots, or rather, the selection of the Burgoyne bound as a boundary for them.

The difference between the plaintiff and defendants is this that the defendants say that they are entitled to go to the Burgoyne bound and the length of a fourth tier of 30 acre lots beyond. The plaintiff contends that they must stop at the Burgoyne bound or at the end of the third tier.

Going to the north to get the side line of F 3 we have the line between lot 1 up and lot 1 down of the 4th division well marked upon the ground. At to the line between lots F 1 and F 2 of the 4th division, or 1 and 2 down as some of the witnesses describe them, Edward Langille says:—

Q. Do you know where the lines are on the ground between 1 and 2 down? A. I do.

Q. You have shewn them to Mr. Starrat? A. Yes and I have seen it run and measured.

Q. How long have you known that line to be there? A. Not less than 75 or 76 years.

Q. The line between 3 and 4? A. I saw that run back once.

Francis Boehner says:—

Q. Is there a line between No. 2 and No. 1? A. Yes, on the ground. Between F2 and F3 there is proof of a line which Wentzell had been upon when he surveyed F3. As one man held both F2 and F3, there is not the same strong evidence about a line there.

But Francis Boehner says:—

Q. You know the 4th division letter F lots? A. Yes, I own part of No. 2. Edward Boehner owns the lot next below me.

Q. Are there any lines on the other side of you down? A. Yes, between me and Ed. Boehner.

Then as to the line between F 4 and F 3 Jacob Eisenhaur says:—

I was 80 years old yesterday. I was born on the 6th of December. I live at Martin's River. I have lived there going on 76 years. My father's name was George. I live on No. 1 D next to the township line.

Q. Do you know any of the 4th division letter F, that division next to the one you live on? A. My land comes to the township line and I live on the lot across and I know land my father owned in the next division, No. 4 my father got joined to Edward Boehner's lot.

Q. Is that the one he got from Benjamin Legg? A. Yes, father bought it at sheriff's sale. This is the deed. (W. 18.)

Q. So you have owned part of 4F? A. My father owned No. 4.

Q. Did you know where the line was between 4 and 3? A. Yes, equally as well as I knew my own bed. I have been working on it from the time father bought and I worked on it a few days ago, every year since father bought it. We renewed the line between the two lots, plaintiff's father and my father and I always kept it renewed. I shewed Mr. Starrat that bound two years ago.

Q. That line has been kept up 60 years to your knowledge? A. Yes.

Q. At that time your father bought could you find the line on the ground then? A. Yes.

Q. It was plain then? A. Yes. I did not run it with Starrat but Edward Boehner and myself renewed it. When I shewed Starrat the bound I did not run with him. I did not follow him through.

The possession of the lots adjoining and the existence of the lines and boundaries to prove the locality of the lot F 3 go back as far as living memory.

But turning to the documentary proof, to which I have already referred and estimating the probabilities I think it is clear that lot F 3 of the 300 acre lots is upon the ground where the plaintiff claims it is and nowhere else.

It appears more than once from the minutes that the surveyor was to shew those who had drawn the lots their locality on the ground. He had to satisfy them as to each being properly laid out. That was his duty. The allottees were paying twenty or twenty-five shillings for the expense of the laying out.

I think it is hardly possible when such care was taken to locate these lots at the start putting the allottees into possession and so on, and when for seventy odd years before the trial one finds it in a particular locality, that it is elsewhere than is contended for by the plaintiff.

The plaintiff and his father before him for 60 years have cut wood and hoop poles upon lot F 3 and the lines are maintained and the bounds preserved.

There is, of course, this area of interference encroaching over the endline and on part of F 3. But the law is clear that in case of an overlapping like that and a mixed occupation or cutting rather the constructive possession of the area is in the person who has the senior or better title: *Hunnicut* v. *Peyton*, 102 U.S. 333; *McInnes* v. *Stewart*, 45 N.S.R. 435.

I have freely used the Dorey bound as a boundary but I hasten to add that this is not mentioned in the grant or shewn on the plan. But there are things mentioned in the grant and shewn on the plan which are quite as valuable to the surveyor who has to locate this lot. The plan, not in these words, calls it the intersection of the line parallel with the township line and 160 rods from it and of the line of division between the third and fourth divisions. It is elementary that in these large sur-

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veys of blocks any monument shewn as belonging to any one of the tracts within the block belongs to all of them. We have as I said the falls of the Salmon river and the township line and its course. In fact this belongs to all the tracts. We have the course of the lines on the card for lot F 3 and they are respectively parallel with and at right angles to that township line. We have the dimensions too and see that the card is in the fourth division letter F. There could be no difficulty in finding these lines upon the ground. Edward Langille, speaking of one says: "There is a division line from Bridgewater to Martin's river and hits the Dorey bound." The line is corroborated by every parallel line in the third division. And the intersecting line with its other parallel line 320 rods distant runs to the extreme north of the township. We have the residents on D 4 and D 5 and the people who own 1 up and 1 down and they prove the point of intersection of the two lines, the line parallel with the township line and 160 rods distant from it with the line of division between division 3 and division 4 at right angles to it. It happens to be this Dorey bound and serves for a convenient name for it. It was the duty of Bridge to mark a tree at his corners and this tree had the marks indicating that it was a corner tree for four lots.

I think a jury would find that it was a tree marked by Bridge. The blazed lines on the ground are evidence of these intersecting lines although blazed lines are not mentioned.

There is something to be inferred in favour of an honest and legal keeping up of the lines by re-marking.

In *Diehl* v. *Zanger*, 39 Mich. 601, 605, Cooley, J., said:—

> If they (land marks) are no longer discernable the question is where they were located; and upon that question the best possible evidence is usually to be found in the practical location of the lines made at a time when the original monuments were presumably in existence, and probably well known. As between old boundary fences and any survey made after the monuments have disappeared the fences are by far the better evidence of what the lines of a lot actually are and it would have been surprising if the jury in this case, if left to their own judgment, had not regarded them.

I also refer to *Manistee* v. *Cogswell*, 103 Mich. 602.

> Acquiescence in a marked line as forming the boundary between adjoining owners furnishes some evidence that it is a true line but its weight is dependent on the period of acquiescence: 5 Cyc. 942, note 6.
>
> In locating a patent of ancient date evidence in respect to marked trees although not called for in the grant is admissible: 5 Cyc. 962, note 63.

In *Collins* v. *Barclay*, 7 Pa. St. 67, 74, it is said:—

> To shew the boundaries of the fifty-two tracts all the adjoining

surveys were evidence to go to the jury. In every day practice such evidence is received and no sound lawyer thinks of objecting to it.

I also refer to *Gibson* v. *Poor*, 53 Am. Dec. 216; *Hathaway* v. *Evans*, 113 Mass. 264.

I mention another point in passing. I do not say that the provision of the Act of 1760, 39 Geo. II, ch. 81, sec. 3, was prospective in respect to the registry of future allotments. It may be that it was, but I think that provision is useful to shew that the registry of lots was usual and had a meaning and that registry had a recognition by the Legislature.

The grant of 1784 by the force of its recitals of allotments and location includes this lot of 300 acres in the larger acreage for Nicholas Conrod mentioned in that grant. It conveyed the legal title to these grantees and I am not relying upon equitable principles as distinguished from legal principles as to the effect of partition to separate for Nicholas Conrod a title to this lot from the lots of the other grantees.

Coming to the defendant's title, he has three grants of thirty acre lots of the Oakland lots made to Jacob Hirtle or Hartling: one of the 21st November, 1775, of lots 8, 11, 13 and 23; a second one of the 20th October, 1778, reciting that his mill had been burned down and that his woodland was insufficient, conveying to him lots 19, 24, 25, 26, 29, 30, 31, 33 and 37; the third, Crown to Jacob Hirtle, dated May 14th, 1800, with the following description:—

> Twelve 30 acre lots situate in the said township of Lunenburg containing 360 acres more or less which lots are described on the original plan of said township as lots No. 28, 38, 39, 40, 41, 42, 43, 44, 45, 48, 49, and 50, being part of the division of 30 acre lots in said township called Oakland, as more particularly described in the original plan of said township and also a water lot in front of the 30 acre lots numbers 11, 12 and 13 situate in the said township of Lunenburg in the division of Oakland before mentioned and described in said plan said water lots to run into the water of Mahone Bay so as to comprehend thirty acres of land and water more or less beginning at the north corner of lot No. 11 and running thence the whole front of said lots Nos. 11, 12 and 13 until it shall come to the south-east bound of lot No. 13 and thence running into the water a sufficient distance to comprehend thirty acres within straight lines running at right angles to the bounds first mentioned being the lots which were assigned to him the said Jacob Hirtle at the first settlement of the said township and have been in his possession for more than twenty years past for a description of which lots no plan is hereunto annexed, it being necessary to have reference to the original plan and surveys of the said township of Lunenburg for a more particular description of the whole premises which together with the possession of the said Jacob Hirtle will be found sufficient to describe the same. This grant being intended to confirm the said Jacob Hirtle in his title to the

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several lots before mentioned agreeable to his present possession with the addition of the water lot in front of the three thirty acre lots before mentioned.

Of these lots last mentioned, all but 28 and 38 are in the fourth tier of the Oakland lots.

This recital in a private grant of the Crown is relied upon to give a retrospective effect to the grant itself and make it in effect a senior grant to the grants of 1765 and 1784 which I have already mentioned. It is contended that this recital shews that those thirty acre lots were drawn by or allotted to Hirtle, that the first settlement of the township means some date earlier than 1765, that a possession of more than twenty years past makes the grant in effect senior to the grant of 1784 and that the reference to the original plans and surveys means something older than those grants.

I shall consider first whether that recital which is not on oath when there is better evidence, is evidence at all or not. It is true I have made use of a recital in the grant of 1784 but that use is distinguishable. It is a township grant—a matter of public interest. Jacob Hirtle took land under that instrument. But the principal thing that makes it useful as evidence is that it recites the contents of a previous grant, the grant of 1765. Although I do not think that the existence of that grant is essential to the plaintiff's case.

This individual grant is a different matter. The Crown grants upon certain representations, made by the applicant in his favour, and they are incorporated in the grant as a reason for making the grant. No rule of evidence makes that recital of the facts there recited binding on a stranger. The use of recitals in ancient deeds as against strangers is limited to the following cases, according to Wigmore on Evidence, vol. 2, sec. 1573. Where in one deed the contents of another deed are recited thereupon proof of the loss of the original deed which is recited the recital may be used: *Carver* v. *Jackson*, 4 Peters 1.

In Massachusetts they may be used to shew the location of a boundary or monument, "but the basis of the rule is the probability of the recital's truth either by reason of its having been acted upon in contemporaneous transactions and this limitation is strictly applied."

A recital in an ancient deed is by some Courts treated as admissible to shew the state of the relationship but "possession of the premises under the deed must also have existed as a corroborative circumstance"; *Fort* v. *Clarke*, 1 Russell 601; *Slancy* v. *Wade*, 1 My. & Cr. 338.

I say that the Crown having previously to 14th May, 1800, granted the land comprised in lot F 3 of the fourth division to Nicholas Conrod could not afterwards by any such recital dero-

gate from that grant or give any right or equity to Hirtle in that land or any part of it. The Crown can not, any more than any private person can after it has parted with all its interest (in this case to Nicholas Conrod), make an admission or statement affecting that interest. That ought to dispose of this point, provided it is shewn that the lot passed earlier to Conrod, and that I am endeavouring to shew. But taking the recital at its face it does not cut out the previous grant. It is capable of interpretation and explanation and such evidence certainly may be contradicted by better evidence.

We have the allotment book or registry of the thirty acre lots comprised in the township. It purports to be "The registry of the thirty acre lots finished the 12th day of June, 1760, drawn first A.D. 1753."

There were thirty acre lots in other places as well as the Oakland lots, namely, Lahave, Clearland, centre lots and so on.

In that book for the Oakland lots there were numbers and blanks for four tiers, fifty-three lots in all.

When the book was prepared there was no provision for the grant and fifty-three lots were provided for.

None of the lots in the fourth tier were ever registered as drawn or allotted. They were vacant. There is this note entered later in the allotment book applicable to these as well as to other vacancies.

> N.B. The other vacant lots as are in ye register numbered are such which for their badness have been (left?) by the first drawing proprietors who on application have received others in their room in ye centre or elsewhere.

There are notes in this book as late as 1779.

Jacob Hirtle or Hartling's name is not registered for a thirty acre lot and there is no note in his favour. His connection with the thirty acre lots belongs to a later date.

To return to the registry; six lots, 40 to 45, have this written opposite to them: "These six lots were registered to John Dorey by virtue of an order from Colonel Sutherland, dated September 7th, 1763." That is three years after the drawing had finished. Lots 46, 47, 48, 49 and 50 are left blank. No one was put in possession of them.

At the trial there was admitted in evidence a grant of lots No. 46 and 47 to John Hamilton, dated 2nd of March, 1777, registered 28th March, 1778. Hamilton, so the recital runs, was a discharged soldier and he obtained this land by virtue of the proclamation of the 7th of October, 1763, for granting lands to reduced officers, soldiers and seamen. The recital represents it as being "all wilderness land."

Primâ facie those two lots had not been drawn by anyone else, and this grant rather tells against the defendants. It shews

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that lots 46 and 47 were vacancies, not registered to anyone. From the evidence I infer no one is claiming under Hamilton to-day. Alexander Hirtle says he does not know who claims those lots now, and John Hirtle says he has cut over that area freely.

There is as appears by the old affidavit put in evidence by the defendant and by other references an old question as to the proper order for the enumeration of the lots going from one tier to another. But even if the registry did not correspond with those on the township plan afterwards made this 4th tier whichever way it is numbered shews no allotment or registry for Hartling or Hirtle. The lots 48, 49 and 50 are still vacant in the registry. And there is nothing from which an inference can be drawn that any of the lots in that fourth tier were laid off on the ground or that anyone was put in possession of them, excepting perhaps the inference from his grant of 1777 in the case of Hamilton. The grants to Jacob Hirtle of 1778 and 1800 are composed of vacant lots or lots which had never been taken up.

In the recitals he does not rely upon having acquired title from an allottee. But if he did and the Crown regranted the land it could not grant retrospectively if other rights had intervened.

No doubt Hirtle's reason for having to approach the Government for grants was that the power of allotting and registering had ceased. A grant in those days was written on parchment, I think, and the seal contained a great deal of wax, a rather more expensive item than the land itself if obtained by drawing. And by 1880 the grant of the whole township in 1784 had passed. If Jacob Hirtle could have made title under the earlier grant he would not likely have been applying in 1800 for a grant. If he had acquired any right by improvement or possession to the lots in the grant of 1800 as early as 1778 all he had to do was to have them included in the grant of 1778. He acquired that grant on the strength of having been in possession and built a mill and so on. The words "possession for more than twenty years past" do not take the possession back beyond 1779, *i.e.*, four or five years before the grant of 1784 passed.

Apparently by the recitals Hirtle's mill was in the first or second tier of Oakland lots, likely in the former as he asked for water lots and he was asking for more land for use in 1778. He may have been cutting lumber to be sawed at his mill on some of the lots mentioned in the grant of 1800 which included the lots in the 3rd as well as the 4th tier between 1779 and 1800. But that would not be a reason for the Crown granting to him, particularly as for 16 years of that period Conrod had title under the grant of 1784. There is no inference that the

Crown had put him in possession earlier than his grant, and if it had, even before 1784, it would be ineffective as against that grant. *Emmerson* v. *Maddison*, [1906] A.C. 596, expressly overrules *Smyth* v. *McDonald*, 5 N.S.R. 77. There was no improvement. It is still wilderness land as far back as memory goes and as Hamilton's land was.

The reference to the original plans and surveys does not help the grant of 1800 in respect to those 30 acre lots.

The plan, plaintiff's exhibit W/30, defendant's exhibit W/B., to which I shall refer presently, shews but three tiers of the Oakland lots and the township plan shews nothing but numbers as in the case of other lots. The allotment book and the entries regular and irregular shew nothing in his favour but they displace the recital relied upon.

The learned trial Judge had some doubt as to whether Jacob Hirtle might not claim these 30 acre lots under the 1784 grant and he is mentioned in that grant for 1534 acres. I think the answer to that is, first, that the recital in the grant of 1800 rather excludes that idea, and, second, that the recitals in the grant of 1784, having reference to the evidence I have mentioned, the allotment and registry of 30 acre lots of the Oakland division, do not cover them. These recitals refer to "allotment" and "location" and "laying out," and these are not terms applicable to Jacob Hirtle's case. He did not claim under Douig or Hamilton. He is dependent on the grant of 1800 and he is attacking the allotment to Jacob Conrod from the outside.

It is, I think, clear how this overlapping occurs on the ground and why the township plan is to that extent erroneous. I think the intercalation of the fourth tier of 30 acre lots must be rejected as false description. I have anticipated some of the points already.

The proceedings to allot the 300 acre lots, which began in 1762 shew that the 30 acre lots had been already allotted or partitioned. The warrant to the second commissioners recites the existence of a "plan and survey of the lands to be added to the township of Lunenburg," and at the first meeting, September 27th, 1762, a minute proceeds:—

"Then the plan of that tract of land was laid before the committee, the Deputy Surveyor Benjamin Bridge was sent for and ordered forthwith to survey the said tract, etc., etc."

At the meeting of May 29th, 1763, this appears:—

> The surveyor was ordered to include into the first draft all the small tracts of land lying between the 30 acre lots from or between Ross Bay, Kingsburg, middle range, south and centre to north-west range, that is to say, what has not yet been granted away.

Nothing can be clearer than that this plan must have indicated all of the thirty acre lots in Lunenburg township already

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laid off as well as the exterior lines of the land to be laid off for the 300 acre lots. They were to lay off vacant land, and there could not be a survey without such a plan. There is strong circumstantial evidence that this plan shewed but three tiers for the 30 acre Oakland lots.

The lines of the 300 acre lots were surveyed evidently in respect to the three tiers of 30 acre lots. Then we have plan W/B, also W/30 put in evidence from the Crown land office. It shews three tiers of 30 acre lots for the Oakland lots.

It is a fair inference from the certificates to the copies of part of the plan that that plan is the plan of the township laid off by the first commissioners to which the 300 acres were "added" by the second commission, *i.e.*, the plan of allotment of the 30 acre lots. It would be the duty of the first commissioners to return such a plan. It purports to be on its face such a plan.

True, it bears no date, but there are indications upon it which do point to its probable date. It does not shew the addition to the Clearland lots ordered by Colonel Sutherland by the order of September 26th, 1763, for instance. It is not reasonable to suppose that it with all those hundreds of lots delineated was plotted without authority. Moreover, it has been so obviously used in the compilation of the township plan (barring the addition of the fourth tier of 30 acre lots mentioned) that it is hardly possible that there is any other plan which was returned by that first commission. If there was, where is it? Were all those 30 acre lots surveyed by Bridge over again for the township plan? It is made evidence by R.S.N.S. 1900, ch. 163, sec. 19.

The reason for shewing but three tiers is obvious. The alleged fourth tier lots were never taken up or put in possession of anyone. If they were drawn the drawers took lots in other places. Those were vacant in the registry. Colonel Sutherland's order to lay off six of them to John Douig was not made until September, 1763; we do not know when it was entered there.

The duty of the second commissioners was to lay off vacant land, "land that has not yet been granted away," and they did lay it off in the 300 acre lots.

The plan W/B or W/30 shews the falls of the Salmon river and the township line.

The defendants put in evidence at the trial two plans out of their custody and the surveyor, Johnston, produced another W/E, for the purpose of illustration. As to W/C and W/R, I would not have thought that they were evidence. But W/C is old and was certified by Charles Morris the 3rd of July, 1813. It shews what the township plan was in 1813 and it shews the Ansel

grant. That is useful. Now the delineation upon these plans as to the Ansel grant shews that the third tier of 30 acre lots was senior to the Ansel grant but the fourth tier was junior to it. They came into existence at different periods.

Under the contract with Mr. Bridge he was not only to lay off the 300 acre lots but he was to make a composite plan of the whole township. This would include his own survey and all of the 30 acre lots as well. And it is quite evident what was done. The 300 acre lots had been laid off and allotted and meanwhile there had been added to the registry of the 30 acre lots from which the plan was prepared the memorandum in respect to 6 lots in the 4th tier for John Douig already quoted and 4 lots in the Clearland lots for Mr. Zauberbuhler. Provision was made for that. And they are all included in the plan for the township.

The minutes together with the *notanda* to the minutes shew that the plan included the blanks in the register which had the fourth tier as well as those lots which had been duly drawn and laid off to the allottees.

This insertion of the 4th tier necessitated some dislocation when Bridge's locations and the earlier locations shewn on W/B had to be plotted with a 4th tier intervening for the composite plan.

They were crowded in short 37 chains 50 links the normal length being 40 chains as if surveyors were short with land like that, and the 300 acre lots were crowded. But there is not enough land between the shores of the peninsula for both sets of lots and one set must give way. The plaintiff, as I have endeavoured to shew, has the earlier title. It would make no difference which set of lots was first blazed out on the ground. The first man to take possession with a title takes the complement of his grant. He had a lot delineated on his card with the dimensions of the lot, with the same course as the township line and fixed by the centre of the falls of the Salmon river and distant from the township line the thickness of one of the ordinary lots and the correct distance from the Dorey bound. And this was laid off on the ground.

The lots in the fourth division, letter F, have even on the ground shrunk somewhat in width and this is not to be wondered at as a result of surveyors running lines, influenced by the plan of the township to which I shall refer presently. But there is no reason why they should be made to shrink in length as well, by the intercalation of the fourth tier of the 30 acre lots. These lots F 2, 3, and 4 have not lost to the 30 acre lots by acts of occupation of fourth tier claimants whatever they may have lost to the proprietors of those to the south of them in that division by convention or acts of occupation.

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I think this is a plain case of error discovered, namely, there is not enough land in the peninsula for both parties, whether it is measured from the township line fixed by the falls of the Salmon river or the shore of the Mushamush.

Conrod had the monuments in his favour. The extent of the area of the fourth tier of 30 acre lots can be rejected without disturbing any title acquired by possession or otherwise at this point. The evidence shews that this is all wilderness land.

The defendant also contends that the locus is not covered by the plaintiff's title; that the township plan by scaling does not permit of lot F 3 covering it although the plaintiff may be in actual possession on the ground.

It has been said that a plan is a good servant but a bad master.

The plan in this case is not specifically referred to in the grant for a description. I say that because I am citing cases where that has been the case and the plan may be the sole evidence of a description. The grant refers to "allotment" and "location" which had previously taken place. In this way the general plan is admissible as part of the allotment and location proceedings. But it does not speak as loud as the allotment proceedings, the cards with their dimensions, courses and distances and the registry. The dimensions on the cards and the acreage in the registry are more potent than the result to be obtained by scaling the different plots on this general plan.

One has but to look at the general plan and he cannot fail to notice that there has been confusion. Take F 6 or D 1. No one would imagine that any surveyor laying off 300 acre lots laid off anything like these.

To explain that it is necessary to explain the delineation of the Ansel grant on that plan. That grant appears to have been escheated the 12th of February, 1784. That was just before the township grant passed, namely June 30th, 1784. It was escheated obviously to make way for it as the 300 acre lots had then been laid off on the ground.

On the plan W/B the first township plan (of the 30 acre lots) it is delineated as junior to the third tier of 30 acre lots and therefore must have been added after its return. The commissioners or Bridge who laid off the 300 acre lots were ignorant of its existence or ignored it. The scheme of laying off the 300 acre lots submitted to the Lieutenant-Governor ignored its existence. This appears in the proceedings. "The third draft takes in all the remaining land left back between Indian Point (Rouse) and the eastern limits of Salmon river to the extremity of the township." Ansel's grant lies across that area shutting out Indian Point.

In the register of the 30 acre lots opposite lots 51, 52, and 53 there is a later entry "Nothing" which would take up the space of the Ansel grant.

The *notanda* to the minutes of the proceedings of the commissioners laying off the 30 acre lots has this entry:—

> In Oakland the registry goes on till No. 53 but in Bridge's plan are only 50 lots.

In the minutes of July 5th, 1765, there is this note:—

> Mr. Bridge being present and laid a sketch of the township plan upon the table but said it was not correct. It was looked into and some talk but nothing resolved.

That may refer to this Ansel grant or to the 4th tier or both because at the next meeting it was decided to check or "confront the whole plan with the registry."

Apparently some of the lines, as of D 1 and F 6 were obliterated to make room and the other 300 acre lots crowded back and the other lots crowded to the north and the Ansel grant delineated as the plan now appears. The delineation of the Ansel grant was legitimate enough if it was a senior grant to the allotment of the 300 acres. But when the Ansel grant was escheated, no doubt to make way for the township grant, the 300 acre lots should have been restored to their normal condition on the plan as they were on the ground to make the plan consistent with the description in the township grant. However, that description already given at this point would clearly control the township plan. I infer from the evidence although not dealing with those lots that lot F 6 and lots D 1 and D 2 have been in occupation of the people under the township grant as if there was no Ansel grant. For instance, Jacob Eisenhaur who owns half of F 6 says: "I am sure there are 300 acres in number 6. I am only dealing with the locality of F 3.

Now, then, we have in evidence three allotment cards, Shenkel's lot F 6, Heisen's lot F 5, (none for Frederick Ott F 4), and Conrod's lot F 3. These men are all in the grant of 1784 or their heirs. The lots delineated for lots numbers F 6 and F 5 are not oblong or rectangular in shape and have different dimensions but contain 300 acres in quantity. From the peculiar shape and dimensions and courses of lot F 5 and from the lot F 3 the shape of lot F 4 may be calculated. The heirs of Frederick Ott are in the grant for a 300 acre lot.

If these cards are placed on the township plan with lot 6 resting for a base on Green's grant the line of which is indicated on W/B and which has the same course as the figure on the card for lot F/6 we have in my opinion the locality of these lots as laid out by the commissioner. The angle on the figure on the card for lot F/5 will correspond to the space required for the third tier of the 30 acre lots. There is a difference of several

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degrees in the course of the line on the card and that of the ends of those 30 acre lots, but otherwise it represents the necessary diversion for those lots.

By this process the 4th tier of lots is almost wholly obscured. Moreover the locality of lot F 3 and the title to it will be corroborated from the south as well as from the Dorey bound on the north and the marks on the ground.

As I have just said the plaintiff is not dependent on the plan solely for his description. It is useful to shew the divisions and which way the numbers run, and how the cards drawn by the allottees are to be located. And it shews monuments which can be measured from and the true distances ascertained. But if there is a description found to be false which may be rejected leaving a sufficient description of the lot to identify it, then the false description is to be rejected. The fact that a plan shews too much or too little quantity or wrong location by scaling and therefore can no longer be depended on in that respect will not be allowed to prevent the correct quantity and dimensions and locality and monuments also called for and evidenced in other ways from controlling.

In 5 Cyclopedia of Law and Procedure, p. 923, it is said:—

> Where maps, plats and field notes are referred to in descriptions of land they are to be regarded as incorporated into the descriptions, and in case of a conflict of calls the usual rules of construction are to be applied and those calls which are most certain and definite or most in accord with the true intent of the parties are to be adopted.

In 4 Am. and Eng. Encyc., p. 777, it is said:—

> When the plan and monuments made by an original survey do not coincide the monuments govern and this is also the case when the monuments are made by one survey and the plan afterwards by another and the plan only is referred to in the deed.

The case of *Esmond* v. *Tarbox*, 7 Maine 61, 20 Am. Dec. 346, is authority for that text.

In *VanWyck* v. *Wright*, 18 Wend. 157, 168, the Chancellor said:—

> I consider the law so well settled that a conveyance is to be construed in reference to its distinct and visible locality calls as marked or appearing upon the land in preference to quantity, course, distance, map or anything else, that it would be waste of time to refer to the numerous authorities on the subject.

I refer to two cases somewhat similar to this: *Jackson* v. *Ogden*, 4 Johns. 140, S.C. 7 Johns. 238; and *Jackson* v. *Freer*, 17 Johns. 29.

In *Thomas* v. *Patten*, 13 Maine 329, this was held:—

> Where the number of the lot on a plan referred to in the deed is the only description of the land conveyed, the courses, distances and other particulars in that plan are to have the same effect as if

recited in the deed. It is a well-settled rule that where an actual survey was made and monuments were marked or erected and a plan was afterwards made intended to delineate such survey and there proved to be a variance between the survey and the plan, that the survey must govern. But no such rule of construction has obtained where the survey was subsequent to the plan.

I have given American authority chiefly because it is in point. But I think the case of *Lyle* v. *Richards*, L.R. 1 E. & I. App. 222, alone is authority to cover the case. There the line between two mines was "a line of about 355 fathoms from John Vincent's house, etc., to a bound stone, etc." But everything depended on which corner of the house the line ran from. Between two imaginary lines from the two corners of the house was the locus. Reference could be made to an earlier lease and the description in it referred to a map on the back of that lease. On this map the boundary line appeared to be drawn from the north-east corner, not from the south-east corner of the house. But the delineation of the site of the house itself on the map was incorrect. It was at least 45 fathoms further to the west and also something further to the south than it really was. The contention the other way was put by Lord Westbury thus:—

To this (the acceptance of the north-east corner) the plaintiff answered that the fact of the boundary line appearing on the map to run from the north-east corner of John Vincent's house is an accident resulting from the circumstance of the site of John Vincent's house being inaccurately laid down on the map, and he adduced evidence to correct the map by proving the true position of John Vincent's house, which, if substituted for the erroneous site on the map would no longer leave the line to the boundstone running from the north-east corner of the house.

Lord Westbury only disagreed inasmuch as he thought the case should go back to a jury because he thought there was a question of fact. But the judgment of the majority was that the house as it was on the ground was to be taken and the line was to be run from the north-east corner as the map indicated and the erroneous delineation on the map as to the locality of its site was to be rejected.

Lord Chelmsford, p. 237, says:—

It is inaccurate to call this mistake in the map the disclosure of an ambiguity. It is merely the proof of incorrectness in a certain particular in respect of which it appears that the map is no longer to be relied upon.

I also refer to *Horn* v. *Struber*, [1902] A.C. 458, and to *Millett* v. *Bezanson*, 45 N.S.R. 152; *Badgeley* v. *Bender*, 3 U.C.R. (O.S.), at 229.

I think the appeal should be allowed with costs. As to damages the plaintiff had an undivided half of the subdivision parts of lots F 3 and F 4 under his father's will. He also had an

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undivided share as heir of Jacob Boehner, the adjoining proprietor, in the subdivision of the remainder of F 3 and part of F 2, that is one-eighth, and one-half, of another fourth by agreement to support Catherine Boehner and had possession.

The cutting is shewn on the surveyor's plan W/17.

The damages in my opinion should be assessed at the sum of seventy-five dollars and the plaintiff will have the costs.

Graham, E.J.

Russell, J.
Ritchie, J.

RUSSELL and RITCHIE, JJ., concurred.

Meagher, J.

MEAGHER, J., dissented on the ground that plaintiff had not satisfied the burden of proof and read an opinion (not filed) to that effect.

Drysdale, J.

DRYSDALE, J. (dissenting):—The plaintiff's right to succeed in this action depends on establishing an overlapping of the so-called 300 acre lots in the Lunenburg township grant with the 30 acre lots in the Oakland division, so-called. The defendant's title to the lots 48 and 49 of the 4th tier of the Oakland lots is established and unless the original grant of these lots is cut out by establishing that the prior grant of lot 3 in letter F. of the 4th division of the township of Lunenburg grant in fact covered the same ground that the Crown undertook to grant to defendant's predecessor in title the plaintiff cannot succeed.

The plaintiff has the burden and in attempting to satisfy this he is obliged to obliterate the 4th tier of the 30 acre lots in the Oakland division of said township. This, I think, he has failed satisfactorily to do. The question is largely one of allotment to numerous holders under a township grant. The plaintiff claims under the original allottee of lot 3 in letter F of the 4th division of the township grant. This allotment is without metes and bounds and according to the original official plans can be given its full and proper location without interfering with the subsequent grant to defendant's predecessor. In fact the grant under which defendant claims, according to the official Crown land plans, shews the 4th tier of the 30 acre lots as existing quite apart from the allotment made under the township grant under which plaintiff claims.

To destroy the title to a whole series of lots in the Oakland division of said township held for generations on the theory of overlapping grants requires, to my mind, more conclusive evidence than the plaintiff has produced here. The Dorey bound so much relied upon in establishing this overlapping is not mentioned in any grant and is not, it seems to me, any aid in establishing the original location of lot 3. The plaintiff can establish the beginning of the 180,000 acre description in the township grant but where lot 3 of letter F in the 4th division of 71,406 acres contained somewhere in the 180,000 acre description

is is to my mind left so uncertain that grants subsequently made reciting possession in the grantees for 20 years prior to the grant in 1800 should not be disturbed except upon cogent evidence of overlapping. This I am not at all satisfied with, and I agree with Mr. Justice Meagher that the plaintiff has failed in the burden undertaken in this action.

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Appeal allowed and action sustained, MEAGHER *and* DRYSDALE, JJ., *dissenting.*

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Ontario Divisional Court, Clute, Sutherland and Lennox, JJ. July 29, 1912.

1. BANKS (§ VIII C—185)—STATUTORY SECURITY TO BANKS—SUBSTITUTION FOR GOODS PLEDGED—R.S.C. 1906, CH. 29, SEC. 88, SUB-SEC. 2.

Under sub-sec. 2 of sec. 88, of the Bank Act, R.S.C. 1906, ch. 29, which enacts that a bank which has taken a statutory security by way of warehouse receipt from a wholesale dealer in products of agriculture, the forest, mine, etc., may allow the goods covered by such security to be removed and other goods to be substituted therefor, if of substantially the same character and of the same value as, or of less value than, those for which they had been so substituted, a bank, which advanced money to a paper manufacturing company upon the security of certain sulphite which the company used in the manufacture of paper, does not lose its security by such sulphite being replaced by other sulphite in accordance with the intention of all parties.

Statement

APPEAL by the defendants from the judgment of Riddell, J., in favour of the plaintiffs, in an action upon two promissory notes, dated the 23rd December, 1904, and the 31st January, 1905, for $4,500 and $5,000 each, upon which had been paid on account of principal $3,000, and interest to the 15th November, 1906, secured under the Bank Act, sec. 74 (now sec. 88), by 312 tons of sulphite pulp.

The appeal was dismissed with costs.

J. Bicknell, K.C., and *H. W. Mickle,* for the defendant.
F. E. Hodgins, K.C., for the plaintiffs.

Clute, J.

CLUTE, J.:—The defendant was, at the time of the advances, the manager of the Imperial Paper Mills of Canada, Limited, who were largely indebted to the plaintiffs for advances for which the plaintiffs held security on pulpwood of that company. The company were in straitened circumstances. Owing to the action of the bondholders, who were pressing for payment, the plaintiffs refused to make further advances to the company for the purchase of sulphite, which was necessary to enable the company to continue the manufacture of paper of a certain kind, of which sulphite formed an ingredient, it is said, of 18 to 50 per cent. of the value of the product.

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The company required sulphite to enable them to work up the wood on hand into pulp and paper. The plaintiffs were interested in having the wood upon which they held their lien turned into paper for sale. It was arranged that advances should be made direct to Craig, who should purchase sulphite and give security to the plaintiffs upon the sulphite so purchased for the advances so made. It was in these circumstances that the advances were made on the notes sued on. The money was directly used for the purchase of sulphite. Craig, as manager of the company and as owner of the sulphite, allowed the same to be used in the manufacture of paper, upon the understanding that the amount so used should be replaced from time to time by the company. This was done. Paper was manufactured and sold and the sulphite replaced down to May, 1906. The company continued to use the sulphite without replacing it, and by July it had been all used up. The defendant contends that it went into paper, which was sold, and of which the plaintiffs got the benefit; in short, that they were paid in full for the advances made upon the notes by receiving the whole of the proceeds of the paper when manufactured and sold; and that the plaintiffs were bound to account to the defendant, to the extent of the value of the sulphite, on a sale of the paper; which, he contends, realised sufficient to pay the notes in full.

It is, I think, rather a question of fact than of law.

It is clear that the plaintiffs did not lose their security for the advances made to the defendant by the substitution of other sulphite in place of that first given in pledge, as this was the intention of all parties under the arrangement.

Sub-section 2 of sec. 88 expressly provides that the bank may allow the goods covered by such security to be removed, and other goods of substantially the same character and value substituted therefor, and such substituted goods shall be covered by the security as if originally covered thereby. Under sec. 89 it is provided that the bank may continue to hold security during the process and after completion of its manufacture with the same right and title by which it held the original goods. Subsection 2 gives the bank priority over an unpaid vendor, unless the vendor also has a lien known to the bank.

That the purchase by Craig of the sulphite was made to facilitate the business of the company is evidenced by a declaration to that effect in an agreement made between Craig and the company in July, 1904.

In dealing with questions of fact, the trial Judge states that he had no reason to doubt the veracity of any of the witnesses; but that the recollection of other witnesses was to be preferred to that of the defendant in regard to matters on which they

disagreed. After a careful perusal of the evidence, I have formed the same opinion.

The case turns largely upon what took place in carrying on the business between the 1st May and the end of June or the 1st July, when the crash came. Watson was assistant-treasurer, acting under the direction of the defendant. He did the financing; and full credit is given to his evidence by my brother Riddell. If the facts are as he states—and I see no reason to doubt them—they are conclusive, in my opinion, against the defendant's contention.

It appears from Watson's evidence that the sulphite purchased by advances made upon the notes was used up within a month or two thereafter, and was replaced by purchases from time to time; that, by the direction of the defendant, about the beginning of May, 1906, the sulphite on hand began to be depleted by not being replaced as it was used. The plaintiffs were not aware of this until some time towards the end of June, when the local manager ascertained that it was all used up.

The company required advances from time to time for the running of the mill. These were obtained by selling the paper and assigning the accounts. The plaintiffs, however, did not collect these accounts. They were collected by the company; and, as soon as they were collected, the accounts so assigned to the plaintiffs were redeemed by the company. Assuming that the value of the sulphite went into this paper sold, and that the plaintiffs had the right to follow it and hold the proceeds of the paper as security for the original advances upon the notes, and that the defendant had the correlative right of insisting that the proceeds of the sale of the paper should be so paid, the question remains—and it seems to me the only question—what in fact took place upon the sale of the paper, and whether the action of the company, with the knowledge and sanction of the defendant, precludes the defendant now from claiming such right.

Watson says that, when the advances were being obtained, the sulphite hypothecations never came into discussion. He says that in May he pointed out to the defendant that they were using up the sulphite; that, as the paper was manufactured and shipped out, they would hypothecate the accounts to the bank and draw the money from it, and then repay them as the cheques came in from the different parties; that the plaintiffs thus advanced about $28,000 in June—from 90 to 94 per cent. of the face value; that this question of advances was discussed constantly with the defendant, and they were doing the best they could to try and keep the thing afloat pending some arrangements to be made in the old country.

Q. Did the bank know that the amount which ought to be kept there to keep their securities safe was diverted so as to go into

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this paper? Did the bank know that you were depleting their lot? A. No, I do not think they knew of that until the time of the trouble in July. This is confirmed by the evidence of Kirby, the bank manager.

Q. Up to February you had been keeping it replaced? A. Yes, up to May. It was only up to May. It was only when the supply was to come from their own mill that we let it drop back, and Mr. Craig understood this because it was his own suggestion we took it; and instead of paying out money we were going to use the sulphite which we were making ourselves.

The whole evidence so far as it affects the line of defence set up by the defendants, may be reduced to this. It is true the bank held the security on certain sulphite purchased by the defendant as collateral to the notes; that it was the intention of all parties that this sulphite should be used and it was used in the manufacture of paper; it was also understood that it should be replaced by other sulphite bought by the company. This was done down to May, 1906, when all the sulphite on hand was used up. The paper manufactured and of which this sulphite formed a part was sold. Indirectly the bank received the proceeds of it, but before they received such proceeds the paper had been sold by the company and the accounts assigned to the bank and advances made thereon to the extent of from 90 to 94 per cent., and all this was done by the sanction of the defendant. The evidence further shews that over and above the advances so made, there was no surplus after deducting the value of the wood owned by the company and pledged to the bank.

In my opinion, the defendant, having authorised the assignment of the accounts arising from the proceeds of the paper manufactured from the sulphite forming the security for the notes, and having received the advances thereon to their full value, over and above the value of the wood, and having made no claim, at the time, that the proceeds should in part be applied upon the notes, cannot be heard now to charge the plaintiffs with the loss of the sulphite or with its proceeds. He himself authorised the arrangement by which the company obtained the advances to the full extent of its value.

After the bank had ascertained that their security was gone they pressed the plaintiff for payment and it was under such pressure that the $3,000 and interest was paid. Mr. Kirby swears that so far from the plaintiff repudiating what was done or claiming that the notes had been paid, he repeatedly promised to pay them.

On the 17th of September, 1906, an agreement was made subject to the approval of the bondholders by which the business of the company could be carried on and a committee was named

representing the various interests for that purpose. The 17th clause of that agreement is as follows:—

> The parties to the present agreement hereby expressly recognise and admit any special lien or privilege that the party of the third part (the bank) may have under section 74 of the Bank Act on the whole product of the mill which may be on hand on the 17th day of September instant and which was manufactured previous to September 1st, 1906, and consent that the party of the third part shall take the whole of such product towards the payment of its debt for wood furnished by it to the mill prior to that date and which may still be unpaid for.

The defendant signed that agreement as managing director of the company, he being no party to the agreement except as representing the company. He then made no claim to any part of the proceeds of the paper on hand, and it seems probable that he did not do so because he had intimate knowledge that his interest in the sulphite as security was already gone owing to advances made by the bank.

It was urged upon the argument that Mr. Jones, who subsequently became the local manager of the plaintiffs' bank at Sturgeon Falls, by his affidavit of the 14th February, 1907, in another action, made claim to this sulphite on the part of the plaintiffs. The clause referred to is as follows: "4. That at the date of the said agreement, that is, the agreement last referred to, there was in the said mill and in and about the premises a large stock of paper, ground wood, and sulphite, the product of wood, upon which the above-named Quebec Bank hold securities under sec. 74 of the Bank Act." This is the new evidence sought to be given on the argument. The Court having intimated that Mr. Jones might be further examined as to this so as to make it evidence and that the defence should have the opportunity of cross-examining, Mr. Hodgins stated that rather than delay the case he would consent to the affidavit being read. I do not think, however, that this statement by Mr. Jones affects the plaintiffs' position. Having regard to the facts of the case, as now known, I think the fair reading of the clause is, that the paper, which was made up of ground wood and sulphite, was the product of wood upon which the plaintiffs held securities under sec. 74 of the Bank Act. This was perfectly true, but it was made long after the defendant, in the view I take of the case, had lost any right to claim the proceeds of such paper by authorising the assignment of the accounts to obtain advances.

There is a further view, arising out of the facts of the case, that also, in my opinion, precludes the defendant's success. The plaintiffs in fact did not sell the paper or receive the money on such sale. The various transactions were carried through by the company. Payments were made to the company, and then

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the amount of the accounts which had been assigned by the company to the plaintiffs was paid out of the money so received. In other words, the plaintiffs have never received any part of the proceeds of the paper on account of or by means of the warehouse receipts.

In my opinion, the defendant is estopped from making claim now to the proceeds of the sulphite which he himself directed in another channel, by which it was lost to the plaintiffs.

I agree in the conclusion arrived at by the trial Judge, and think the appeal should be dismissed with costs.

Sutherland, J.

SUTHERLAND, J.:—I agree.

Lennox, J.

LENNOX, J.:—The defendant appeals from the decision of Hon. Mr. Justice Riddell, directing judgment for the plaintiffs for the full amount claimed and costs.

When the defendant made the notes sued on in this action, it was agreed, and was understood by all the parties interested, that as the sulphite obtained by the money advanced was put into the manufacture of paper, other sulphite would be purchased and put in stock; and in this way the bank's security, and incidentally the security of the defendant, would be maintained. This was done for a time, but not after the beginning of May, and the whole stock of sulphite was gone by the end of June, 1906. When the paper into which this sulphite was put was sold, the plaintiffs received the proceeds and applied it upon the indebtedness of the company, this is, the Imperial Paper Mills Company, Limited.

The defendant contends that a sum equal to the value of the sulphite which went into this paper should be credited upon the notes sued on and that this would be sufficient to pay the notes in full.

Special rights are secured to the plaintiffs by the Bank Act, but I am of opinion that, aside from any of these provisions, the plaintiffs are entitled to apply, and retain, the moneys in question, just as they did apply them as the proceeds of sales were from time to time handed over to them. If, subsequently to the making of these promissory notes, the defendant were a stranger to the dealings between the plaintiffs and the company, there might be very strong reason to support the defendant's claim. But the very reverse is the fact. Everything was done through the defendant. He was the manager of the company and he it was who, ignoring the agreement, depleted the stock of sulphite without having other sulphite put in its place. He was a surety, but could he complain of his own act?

Then, as to the subsequent advances by the bank, the sales, the assignments of the accounts, the collections and the payment over to the plaintiffs, the defendant was the actor or

director at every point, and this without a suggestion of individual rights. Can he stand by and have the plaintiffs alter their position and later set up inconsistent rights to the prejudice of the plaintiffs? I don't think the Court should help him to do this. He did more than stand by—he was the chief actor. It is argued that the defendant, by virtue of his position, was virtually compelled to sign the agreement of the 17th of September, 1906, an agreement in terms wholly inconsistent with his present contention. I am not impressed with this argument. If the defendant had not intended to subordinate any possible individual rights he had to the interests of the company, if he had not intended to waive and abandon every possible personal interest, nothing was simpler than to say, "saving or without prejudice to the personal rights of the said John Craig," etc. But such a thing was not even mentioned. The subsequent payment of $3,000 on account and the promise to pay the balance is a circumstance to be noted, but the plaintiffs' rights are clear without this.

I agree too with the learned trial Judge in his finding that the moneys in question were not received by the plaintiffs on the authority or by the force and effect of the warehouse receipts. The defendant determined that they should not be received in that way.

The appeal should be dismissed with costs.

Appeal dismissed.

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Ontario Divisional Court, Falconbridge, C.J.K.B., Britton and Riddell, JJ. August 9, 1912.

1. LEVY AND SEIZURE (§ I A—10*a*)—MINING ACT (ONT.)—WRIT OF FI. FA. —INTEREST IN MINING CLAIM RECORDED BUT NOT PATENTED NOR PAID FOR.

The interest which a judgment debtor has under the Mining Act (Ont.) 8 Edw. VII. ch. 21, as the holder of an undivided interest in a mining claim, for which a certificate of record had issued, but for which no patent had issued or been applied for nor payment made of the purchase money is not exigible under a writ of fi. fa.

[The Mining Act, 8 Edw. VII. (Ont.) ch. 21, sec. 73, and 2 Geo. V. (Ont.) ch. 8, sec. 7, considered.]

2. MINES AND MINERALS (§ I A—7*a*)—MINING ACT (ONT.)—TENANT-AT-WILL—RECORDING CLAIM—PATENT.

Under the Mining Act of Ontario (8 Edw. VII. ch. 21), a licensee who prospects on Crown lands and discovers valuable mineral and stakes and records a claim, has up to this point no right, title, interest or claim in or to the mining claim other than the right to proceed to obtain a certificate of record and ultimately a patent, and he is a mere licensee of the Crown, but after the issue of the certificate, he is a tenant-at-will of the Crown until he procures his patent. (*Per* Riddell, J.)

[Sec. 68 of Mining Act, 8 Edw. VII. ch. 21, considered.]

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3. LEVY AND SEIZURE (§ I A—7)—WHAT PROPERTY SUBJECT—TENANCY AT WILL—RIGHTS NOT EXIGIBLE.

The better rule seems to be that the interest which a tenant at will has in another's real estate is not such an interest in land as can be sold on execution. (*Per* Riddell, J.)

[17 Cyc. 954; *Bigelow* v. *Finch* (1851), 11 Barb. (N.Y.) 498, S.C. (1853), 17 Barb. (N.Y.) 394; *Colvin* v. *Baker* (1848), 2 Barb. (N.Y.) 296, referred to.]

4. LEVY AND SEIZURE (§ I A—7)—WHAT PROPERTY SUBJECT—WRIT OF FI. FA. AT COMMON LAW AND BY THE STATUTE.

A tenancy at will not being exigible at common law and this particular interest not having been covered by legislation in Ontario, a *fi. fa.* issued against a judgment debtor who is a tenant-at-will under the Ontario Mining Act (8 Edw. VII. ch. 21) is not enforceable. (*Per* Riddell, J.)

[For the history of the legislation, see *Universal Skirt Manufacturing Co.* v. *Gormley*, 17 O.L.R. 114, 136, and "Memorandum of Legislation," by Riddell, J., 17 O.L.R. 139; also 9 Edw. VII. (Ont.) ch. 47.]

5. LEVY AND SEIZURE (§ I A—7)—FI. FA.—TENANCY AT WILL DISTINGUISHED FROM TENANCY FROM YEAR TO YEAR AS TO EXIGIBILITY.

While a tenancy from year to year is, a tenancy at will is not, exigible under a *fi. fa.* in the sheriff's hands. (*Per* Riddell, J.)

[*Mann* v. *Lovejoy* (1826), 1 Ry. & Moo. 355, and *Hamerton* v. *Stead* (1824), 3 B. & C. 478, specially referred to.]

6. LEVY AND SEIZURE (§ I A—10*a*)—WRIT OF FI. FA.—INTEREST UNDER MINING ACT (ONT.).

Under a writ of fi. fa. a sheriff cannot seize what he cannot sell. (*Per* Riddell, J.)

[*Legg* v. *Evans*, 6 M. & W. 36; *Universal Skirt Manufacturing Co.* v. *Gormley* (1908), 17 O.L.R. 114, 136; see also under last case "Memorandum of Legislation," by Riddell, J.; see also sec. 73 of Mining Act.]

7. STATUTES (§ II B—110)—STRICT CONSTRUCTION—LEGISLATION EXTENDING CLASSES OF PROPERTY SUBJECT TO LEVY.

Legislation extending the classes of property to which execution will attach is to be strictly construed. (*Per* Riddell, J.)

[*Morton* v. *Cowan* (1894), 25 O.R. 529, 534, 535; and *Reilly* v. *Doucette*, 2 O.W.N. 1053, referred to; R.S.O. 1897, ch. 119, sec. 8, considered.]

8. LEVY AND SEIZURE (§ I A—10*a*)—MINING ACT (ONT.)—LICENSEE—EXIGIBILITY UNDER FI. FA. NEGATIVED BY PARAMOUNT RIGHT IN CROWN.

The intention of the Ontario Mining Act (8 Edw. VII. ch. 21) is to leave the paramount power of dealing with the land in the Crown until the issue of the patent, and meanwhile the certificate-holder is not liable to have his position attacked, and although the minerals when taken out become the personal property of the exploiter and so subject to a *fi. fa.* goods, the same cannot be said of the mere right to take out such minerals under the Mining Act, because such right may be terminated at any moment by the lord paramount and such a right to get minerals does not come within the class covered by the Execution Act, R.S.O. 1897, ch. 119, sec. 8.

9 LEVY AND SEIZURE (§ I A—7)—PROFIT À PRENDRE AS DISTINGUISED FROM PROFIT À PRENDRE AT WILL OF CROWN.

While a *profit à prendre* arising from a privilege for a fixed term has been held to be exigible, a *profit à prendre* at the will of the Crown is not exigible in like manner because the paramount right of the Crown prevails. (*Per* Riddell, J.)

[*Canadian Railway Accident Co.* v. *Williams*, 21 O.L.R. 472, distinguished.]

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Statement

THE following statement of the facts is taken from the judgment of Riddell, J.:—

This is an appeal from the judgment of the Mining Commissioner in three cases (which may be treated as one, the same points arising for decision.)

One Wishart was the holder of an undivided interest in a mining claim, for which a certificate of record had issued, but which had not been patented, nor was the patent applied for nor the purchase-money paid. Judgment having been obtained against him by Clarkson, and a writ of *fi. fa.* issued, the judgment creditor took proceedings before the Mining Commissioner to be declared entitled to the interest of Wishart in the mining claim (sec. 72(2)). This application the Mining Commissioner refused.

Then the Sheriff proceeded to sell, as goods, the said interest, and made a deed; and the purchaser, Forgie, who holds and held a miner's license, endeavoured to have this deed recorded. The Recorder refused; and Forgie appealed to the Mining Commissioner, who dismissed his appeal.

In the meantime, Wishart had transferred his interest to one Myer, pursuant to the Act, and this transfer was recorded. Forgie took proceedings to have this set aside—the Mining Commissioner refused.

The execution creditor and the purchaser at the Sheriff's sale (Forgie) now appeal — and the real question to be decided is, whether the interest of one in the position of Wishart is exigible, or rather was exigible before the recent Act, 2 Geo. V. ch. 8, sec. 7.

The appeal was dismissed.

Argument

J. W. Bain, K.C., and *Gordon*, for the appellants. The sole question is, whether an unpatented interest in a mining claim is exigible. The Sheriff sold, as goods, the interest of Wishart. Such an interest is a chattel interest, and as such is exigible; or it is such an interest in land as is exigible. So, first, we submit that this is a chattel interest exigible under a *fi. fa.* goods. Section 65 of the Mining Act of Ontario, 8 Edw. VII. ch. 21, makes a mining claim free from liability to impeachment or forfeiture except as expressly provided by the Act. Therefore, there is a term which cannot be determined by the Crown. See also *Sparrow* v. *Champagne* (1856), 5 C.P. 394; *Osborne* v. *Kerr* (1859), 17 U.C.R. 134, at p. 143. We then submit that this is such an interest in land as is exigible. It is at least a tenancy at will, which is a leasehold: Stroud's Judicial Dictionary, p. 2023; and the Execution Act makes a leasehold exigible. See sec. 67 of the Mining Act; the Execution Act, 9 Edw. VII. ch. 47, sec. 9, sub-sec. 1; 1 Geo. V. ch. 17, sec. 34, sub-sec. 6, amending the Execution Act; also Blackstone's Commentaries, book 2, pp. 385, 386; *Ronan* v. *King*, [1894] 2 I.R. 648. In support of our contention that this is an interest in land, we refer to *McIntosh* v. *Leckie* (1906), 13 O.L.R.

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Argument

54. This is a *profit à prendre*,as well as a tenancy at will: *Canadian Railway Accident Co.* v. *Williams* (1910), 21 O.L.R. 472; *McLeod* v. *Lawson* (1906), 8 O.W.R. 213; *Wood* v. *Leadbitter* (1845), 13 M. & W. 838. "Land" includes an interest in land: Williams on Executors, 9th ed., p. 595; the Execution Act, 9 Edw. VII. ch. 47, sec. 17; *Tomkins* v. *Jones* (1889), 22 Q.B.D. 599, 602; Maxwell on the Interpretation of Statutes, p. 517; Craies on the Interpretation of Statutes, 2nd ed., p. 137. This interest is more than a tenancy at will: *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1900] 2 Ch. 352, at p. 360; *Griffin* v. *Caddell* (1875), 9 Ir. C.L. 488. See also the following sections of the Mining Act: sec. 2, clauses (*m*) and (*n*); secs. 35, 65, 68, 84, 85, and 111.

J. M. Godfrey, for the respondent. Wishart's interest is not exigible. There was no way of getting on the books in the Mining Recorder's office a transfer by the Sheriff. Section 73 of the Mining Act is an effective answer to an application of an execution creditor to be recorded: *Reilly* v. *Doucette* (1911), 2 O.W.N. 1053; *Holmes* v. *Millage*, [1893] 1 Q.B. 551. The Sheriff has no rights under the Act, and so he could not sell; therefore, he could not seize: *Legg* v. *Evans* (1840), 6 M. & W. 36. This is a tenancy at will and nothing more. A tenancy at will is not assignable except by virtue of the Act. The forfeiture under sec. 65 is such a forfeiture as comes by reason of loss of status by the licensee. If the provisions of sec. 65 are inconsistent with sec. 68, they cannot stand. The very act of seizure destroys the tenancy at will; it severs it from the will. That is why it cannot be seized in execution: 17 Cyc. 954; Freeman on Executions, 3rd ed., sec. 119, p. 495. This is not analogous to a patent right: Halsbury's Laws of England, vol. 14, p. 47, sec. 95, note (*a*); *Ex p. Foss, Re Baldwin* (1858), 2 DeG. & J. 230. If this interest is an estate at all, it is an estate in land, and should not be sold as goods: *Duke of Sutherland* v. *Heathcote*, [1892] 1 Ch. 475, 483; Leith & Smith's Blackstone, p. 165. But I submit that it cannot be considered "land" within the meaning of the Execution Act. See sec. 32 (1) of the Execution Act, and sec. 8 of R.S.O. 1897, ch. 119. Then there has been subsequent legislation in 1912, 2 Geo. V. ch. 8, sec. 7, which supports my contentions.

Bain, in reply.

Riddell, J.

August 9, 1912. RIDDELL, J. (after setting out the facts as above):—The position of a licensee under the Mining Act is rather anomalous. He may (sec. 34) prospect on certain Crown lands without being or being considered a trespasser; if he discover valuable mineral, he may (sec. 35) stake out a claim in a certain specified form; but not more than three in any one division during a license year (sec 53). Then he may (sec. 59) apply to have the claim recorded; and, on certain conditions, he may (sec. 64) receive a certificate of record. Up to this time he has no right,

title, interest, or claim in or to the mining claim other than the right to proceed to obtain a certificate of record and ultimately a patent (sec. 68), and he is a mere licensee of the Crown: but, after the issue of the certificate, he is a tenant at will of the Crown until he procures his patent (sec. 68).

He may transfer his interest in the claim to another licensee or may work the claim subject to the other provisions of the Act (sec. 35); this transfer *may* be in Form 11, but it "*shall* be signed by the transferor or by his agent authorised by instrument in writing" (sec. 72); and, "except as in this Act otherwise expressly provided, no transfer . . . affecting a mining claim or any recorded right or interest acquired under the provisions of this Act, shall be entered on the record or received by a Recorder unless the same purports to be signed by the recorded holder of the claim or right or interest affected or by his agent authorised by recorded instrument in writing, nor shall any such instrument be recorded without an affidavit (Form 12) attached to or endorsed thereon, made by a subscribing witness to the instrument" (sec. 73). But, after the issue of the certificate of record, "the mining claim shall not in the absence of mistake or fraud be liable to impeachment or forfeiture except as expressly provided by this Act" (sec. 65); though, if issued in mistake or obtained by fraud, "the Commissioner shall have power to revoke and cancel it on the application of the Crown or an officer of the Bureau of Mines, or of any person interested" (sec. 66).

To the application of the execution creditor to be recorded, I think sec. 73 is an effective answer: and that part of the appeal should be dismissed with costs.

And the same considerations apply to the application of Forgie to have his deed from the Sheriff recorded.

Whether the appeal against Myer's record is to succeed will or may depend upon both law and fact. The fact whether he had actual notice of the claim of Forgie or of that of the Sheriff and executing creditor may have to be tried—but only the questions of law are at present before the Court.

Was the interest of Wishart exigible, whether as "lands" or as "goods"?

Had his position been that of a tenant at will simlpy and without more, there would be little, if any, doubt. "Every estate at will is at the will of both parties, landlord and tenant; so that either of them may determine his will, and quit his connection with the other at his own pleasure:" Blackstone's Commentaries, book 2, p. 145; Co. Litt. 55 (*a*). It is of such a character "that the death of either party determines the will:" *James* v. *Dean* (1805), 11 Ves. 383, at p. 391, *per* Lord Eldon, C.; *Scobie* v. *Collins*, [1895] 1 Q.B. 375, at p. 377, *per* Vaughan Williams, J.; *Turner* v. *Barnes* (1862), 2 B. & S. 435, at p. 452, *per* Blackburn, J.; *Doe Stanway* v. *Rock* (1842), 1 Car. & M. 549; *S.C.*,

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6 Jur. 266, *per* Patteson J.; *Doe Kemp* v. *Garner* (1843), 1 U.C.R. 39—Robinson, C.J., giving the judgment of the Court. So, sale or lease by the landlord determines the tenancy: *Doe Davies* v. *Thomas* (1851), 6 Ex. 854; *Jarman* v. *Hale*, [1899] 1 Q.B. 994; *Dinsdale* v. *Iles* (1674), 2 Lev. 88; *Hogan* v. *Hand* (1861), 14 Moo. P.C. 310. And sale or assignment by the tenant has the same effect: Co. Litt. 57 (*a*); although notice must be given to the landlord before he will be bound; *Pinhorn* v. *Souster* (1853) 8 Ex. 763, at pp. 772, 773, *per* Parke, B., giving the judgment of the Court; *Carpenter* v. *Colins* (1606), Yelv. 73. Neither landlord (*Doe Kemp* v. *Garner*) nor tenant (*James* v. *Dean*) could bequeath such a tenancy; nor can the tenant assign to any other: Blackstone's Commentaries, book 2, p. 145. While leaseholds are exigible at the common law as chattels, no instance has been cited, and I can find none, in which it was held that a tenancy at will was such a leasehold.

It does not seem to have been the subject of any English or Ontario decision; and, consequently, there is no express authority.

It is said in 17 Cyc. 954: "The better rule seems to be that the interest which a tenant at will . . . has in another's real estate is not such an interest in land as can be sold on execution." Of the cases cited in support of this, *Bigelow* v. *Finch* (1851), 11 Barb. (N.Y.) 498, *S.C.* (1853), 17 Barb. (N.Y.) 394, *Colvin* v. *Baker* (1848), 2 Barb. (N.Y.) 296, are upon a statute which says in so many words "estates at will or by sufferance shall be chattel interests, but shall not be liable as such to sale on execution." See R.S. N.Y. 1852, part II., ch. 1, art. 1, sec. 5. *Waggoner* v. *Speck* (1827), 3 Ohio (not Ohio State) 293, is not in point. *Wildy* v. *Doe ex dem. Bonney* (1853), 26 Miss. 35, however, does decide that the interest of "a tenant at sufferance . . . is not capable of transfer or transmission: 4 Kent 117. The Sheriff's deed could convey no more than"—the tenant's "own deed could, which . . . could convey nothing."

Freeman on Executions, 3rd ed., sec. 119, p. 495: "It is undoubtedly true, as a legal proposition, that a defendant having no estate in property which he can transfer has none which is subject to execution for the judgment, the levy, and the sale under execution ordinarily accomplished no other purpose than might have been realised by a transfer made by the defendant." Accordingly, where the hiring, etc., amounts to a mere personal right or license, this is not exigible: *Reinmiller* v. *Skidmore* (1872), 7 Lans. 161; *Williams* v. *McGrade* (1868), 13 Minn. 174; *Kile* v. *Giebner* (1886), 114 Pa. St. 381.

The same author (sec. 177) says: "Copyhold estates, and all other tenancies at will or by sufferance, are not subject to execution." No authorities are quoted except those found in 17 Cyc., and already considered. The author proceeds: "The reason of this rule is apparent. An occupant by the permission and at the

will of the owner has no estate which he can transfer by a voluntary conveyance, and no possession which can be regarded as independent of or adverse to that of the owner. Hence he has no interest in the title, nor in the possession, susceptible of transfer by execution."

It seems in the only case in England which I can find at all bearing on the matter to have been taken for granted that such an estate could not be taken in execution.

In *Doe Westmoreland* v. *Smith* (1827), 1 Man. & Ry. 137, the defendant had entered upon land under an agreement for a lease, and had thereafter paid rent to the landlord agreeably to the terms of the intended lease. The Sheriff, under a *fi. fa.*, sold the interest of the defendant to the lessors of the plaintiff. The seizure, of course, did not vest the term in the Sheriff, but it remained in the debtor until actual assignment: *Playfair* v. *Musgrove* (1845), 14 M. & W. 239; and the Sheriff could not put the purchaser into possession: *Taylor* v. *Cole* (1789), 3 T.R. 292; *Rex* v. *Dean* (1680), 2 Show. 85; *Playfair* v. *Musgrove*, 14 M. & W. 239: and so he had to bring his action in ejectment: *Doe Batten* v. *Murless* (1817), 6 M. & S. 110. Objection was taken by the defendant that there was not such a tenancy from year to year as could be seized by the Sheriff. It is quite plain that, if a tenancy at will might be seized, the defendant's case was hopeless—and his counsel in term argued that the holding was a tenancy at will. This, however, was not acceded to by the Court. That the difference between a tenancy from year to year and a tenancy at will is considered the crux of this case is seen by the reference by the reporters to two cases, *Mann* v. *Lovejoy* (1826), 1 Ry. & Moo. 355, and *Hamerton* v. *Stead* (1824), 3 B. & C. 478, in both of which the question was "tenancy from year to year or tenancy at will?" and in the latter of which, at p. 483, Littledale, J., says: "Where parties enter under a mere agreement for a future lease they are tenants at will; and if rent is paid under the agreement, they become tenants from year to year."

When we consider that a Sheriff cannot seize what he cannot sell: Com. Dig., tit. Execution (C 4); *Legg* v. *Evans*, 6 M. & W. 36; *Universal Skirt Manufacturing Co.* v. *Gormley* (1908), 17 O.L.R. 114, at p. 136; I think it quite clear that, at the common law, a tenancy at will is not exigible.

And this particular interest has not been covered by legislation, none of the amendments applying to such a chattel interest. The history of the legislation is to be found in *Universal Skirt Manufacturing Co.* v. *Gormley*, 17 O.L.R. 114, at p. 136—the present Act is (1909) 9 Edw. VII. ch. 47.

Legislation extending the classes of property to which execution will attach is always construed strictly. See, for example, the judgment of Armour, C.J., in *Morton* v. *Cowan* (1894), 25 O.R. 529, at pp. 534, 535.

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Nor could it be considered "land" within the meaning of the Execution Act. In addition to "land" proper, sec. 32 (1) makes exigible under a *fi. fa.* lands "Any estate, right, title or interest in land which, under section 8 of the Act respecting the Transfer of Real Property, may be conveyed or assigned by any person, or over which he has any disposing power which he may, without the assent of any other person, exercise for his own benefit . . ." The section 8 referred to, *i.e.*, that of R.S.O. 1897, ch. 119, reads: "A contingent, an executory, and a future interest, and a possibility coupled with an interest in land . . also a right of entry . . . may be disposed of by deed. . . ." A mere tenant at will has none of these.

It is argued, however, that the position of a holder of a certificate of location is different from that of a mere tenant at will, and that his interest is exigible.

In *Reilly* v. *Doucette*, 2 O.W.N. 1053, the matter came up for decision; and, while the report does not contain any reference to this point, I am informed by my learned brother that he held that a *fi. fa.* could not attach to this kind of property. To give effect to the argument of the appellants it would be necessary to reverse this judgment. I do not think that should be done.

In my view, the appeal can be disposed of on the short ground that no transfer by the Sheriff could be effective (sec. 73), as he could not be "the recorded holder of the claim." Not being able to transfer effectively, he could not sell; and, as we have said, he cannot seize what he cannot sell.

But there are other and valid reasons for this view.

Is this a chattel interest exigible under a *fi. fa.* goods? The argument is, that sec. 65 makes the mining claim free from liability to impeachment or forfeiture except as expressly provided by the Act; and that, consequently, there is a term not liable to be put an end to by the Crown.

But the forfeiture is such a forfeiture as is contemplated by secs. 84, 85, 86, 190, 191, by reason of loss of the status of licensee, or doing or leaving undone something. If the provisions of sec. 65 are inconsistent with those of sec. 68, they must give way, the later section speaking "the last intention of the makers:" *Attorney-General* v. *Chelsea Waterworks Co.* (1731), Fitzg. 195; *Wood* v. *Riley* (1867), L.R. 3 C.P. 26; Maxwell on the Interpretation of Statutes, 3rd ed., p. 215; and "*leges posteriores, priores contrarias abrogant*" (1614), 11 Co. R. 62*b*; *Garnett* v. *Bradley* (1878), 3 App. Cas. 944, at p. 965.

There is, however, in my mind, no inconsistency—no necessary repugnancy. The intention of the Act is to leave the paramount power of dealing with the land in the Crown until the issue of the patent, and consequently makes the certificate-holder a tenant at will. So long as the Crown does not exercise its paramount power, the certificate-holder is not liable to have his position

attacked. So, too, while he has the right to work the mine, this right is subject to the same limitation—and I see nothing in this inconsistent with a tenancy at will, any more than the right to crop a farm held on the same tenancy. No doubt, the minerals got out become the personal property of the exploiter, and so subject to a *fi. fa.* goods, but the same cannot be said of a right to get such minerals, which right may be terminated at any moment by the lord paramount.

Nor is there any necessary inconsistency in the right given to transfer an interest to another. That, at the very most, would make the transferee but a tenant at will in lieu of the original licensee—this is not such a transfer as is covered by R.S.O. 1897, ch. 119, sec. 8.

It is argued, however, that this is an instance of *profits à prendre;* and it is argued that a *fi. fa.* lands will attach. For this is cited *McLeod* v. *Lawson*, 8 O.W.R. 213, at p. 220, where it is said that the highest Lawson's right could be put at was a *profit à prendre.* There certain persons had a mining lease which by the statute was to be for a term of ten years (R.S.O. 1897, ch. 36, sec. 35); and from one of them Lawson received the privilege of entering upon the location and mining ore and mineral and removing the same from the date of the agreement up to the 31st August, 1905. See 7 O.W.R. at p. 521, 8 O.W.R. at p. 221.

It is then urged that a *profit à prendre* is decided to be exigible by *Canadian Railway Accident Co.* v. *Williams*, 21 O.L.R. 472, a case of an oil lease like that in question in *McIntosh* v. *Leckie*, 13 O.L.R. 54. But in that case there were leases for a certain fixed time, and it was on such leases that the decision of the Chief Justice of the Common Pleas was given. That is no authority for saying that a *profit à prendre* at the will of the Crown (so to speak) is likewise exigible.

A strong argument for the conclusion I have arrived at is the recent statute, 2 Geo. V. ch. 8, sec. 7, which provides that a certified copy of a writ of execution may be filed with the Recorder, and the Recorder shall enter a note of the execution, "and from and after, but not before, such entry, the execution shall bind all the right or interest of the execution debtor in the claim, and after such entry the Sheriff shall have power to sell and realise upon such right and interest in the same way as goods and chattels may be sold . . ." In this statute there is to be noted: (1) that it is by the entry and not before that the execution binds the debtor's interest; it has no power or effect in itself; before this statute no entry could be made; (2) after the entry, the Sheriff may sell in the same way as goods and chattels, not *other* goods and chattels.

A third point is not without interest; the sale by the Sheriff may be to one who is not a licensee, which cannot be done by the debtor himself: sec. 35 of the Mining Act.

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I am of opinion that the appeal should be dismissed with costs.

I should add that, while all the many cases referred to by counsel in their very careful and exhaustive arguments (and in a memorandum sent in) are not cited in this judgment, I have read them all and many more.

FALCONBRIDGE, C.J., and BRITTON, J., agreed in the result.

Appeal dismissed with costs.

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IN THE MATTER OF THE AUTHORITY OF THE PARLIAMENT OF CANADA TO ENACT A PROPOSED MEASURE AMENDING THE MARRIAGE ACT.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. June 17, 1912.

1. CONSTITUTIONAL LAW (§ II A—160)—POWERS OF PROVINCIAL LEGISLATURE—MARRIAGE LAWS.

Upon the true construction of the B.N.A. Act conferring upon the Parliament of Canada the exclusive legislative authority over "Marriage and Divorce" and upon the Legislature of each Province the exclusive power of making laws in relation to the "Solemnization of Marriage in the Province," a Provincial Legislature has power to enact that no marriage in the Province shall be valid in which the laws of the Province as to solemnization of marriage shall not have been complied with.

2. CONSTITUTIONAL LAW (§ II A—160)—POWERS OF DOMINION PARLIAMENT—MARRIAGE LAWS.

Upon the true construction of the B.N.A. Act conferring upon the Parliament of Canada the exclusive legislative authority over "Marriage and Divorce" and upon the Legislature of each Province the exclusive power of making laws in relation to the "Solemnization of Marriage in the Province," the Parliament of Canada has no power to amend the Marriage Act, R.S.C. 1906, ch. 105, by adding thereto either the whole or any of the provisions of a section, providing that every ceremony or form of marriage, theretofore or thereafter performed by any person authorized to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, notwithstanding any differences in the religious faith of the persons so married and without regard to the religion of the person performing the ceremony; and that the rights and duties as married people of the respective persons married as aforesaid and of the children of such marriage shall be absolute and complete, and that no law or canonical decree or custom of or in any Province of Canada shall have any force or effect to invalidate or qualify any such marriage or any of the rights of the said persons or their children in any manner whatsoever.

3. MARRIAGE (§ I—2)—POWER OF QUEBEC LEGISLATURE—ANNULMENT.

The law of the Province of Quebec governing marriage does not render null and void, unless contracted before a Roman Catholic priest, a marriage that would be otherwise legally binding, which takes place in such province between persons, who are both Roman Catholics, or between persons one of whom only is a Roman Catholic.

Statement

REFERENCE by the Governor-General in Council of questions respecting the marriage laws of Canada for hearing and consideration pursuant to section 60 of the Supreme Court Act.

The questions so submitted are as follows:—

P. C. 424.

A REPORT OF THE COMMITTEE OF THE PRIVY COUNCIL, APPROVED BY HIS ROYAL HIGHNESS THE GOVERNOR-GENERAL ON THE 22ND FEBRUARY, 1912.

The Committee of the Privy Council, on the recommendation of the Minister of Justice, advise that, pursuant to section 60 of the Supreme Court Act, the following questions be referred to the Supreme Court of Canada for hearing and consideration, namely:—

1. (*a*) Has the Parliament of Canada authority to enact in whole or in part, Bill No. 3 of the first session of the Twelfth Parliament of Canada, intituled an Act to amend the Marriage Act?

The bill provides as follows:—

1. The Marriage Act, chapter 105 of the Revised Statutes, 1906, is amended by adding thereto the following section:—

3. Every ceremony or form of marriage heretofore or hereafter performed by any person authorized to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, notwithstanding any differences in the religious faith of the persons so married and without regard to the religion of the person performing the ceremony.

(2) The rights and duties, as married people of the respective persons married as aforesaid, and of the children of such marriage, shall be absolute and complete, and no law or canonical decree or custom of or in any province in Canada shall have any force or effect to invalidate or qualify any such marriage or any of the rights of the said persons or their children in any manner whatsoever.

(*b*) If the provisions of the said bill are not all within the authority of the Parliament of Canada to enact, which, if any, of the provisions are within such authority?

2. Does the law of the Province of Quebec render null and void, unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province,

(*a*) between persons who are both Roman Catholics, or,

(*b*) between persons one of whom, only, is a Roman Catholic?

3. If either (*a*) or (*b*) of the last preceding question is answered in the affirmative, or both of them are answered in the affirmative, has the Parliament of Canada authority to enact that all such marriages whether,

(*a*) heretofore solemnized, or,

(*b*) hereafter to be solemnized,

shall be legal and binding?

Wallace Nesbitt, K.C., *Eugène Lafleur*, K.C., *Christopher C. Robinson*, for the promoters of the bill.

P. B. Mignault, K.C., *I. F. Hellmuth*, K.C., for those denying the jurisdiction of Parliament to enact the bill.

E. L. Newcombe, K.C., Deputy Minister of Justice, for the Attorney-General of Canada.

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R. C. Smith, K.C., *Aimé Geoffrion*, K.C., for the Province of Quebec.

Edward Bayly, K.C., Solicitor to the Attorney-General of Ontario, for the Province of Ontario.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I am requested by Mr. Justice Brodeur to say that he does not intend to take part in the hearing of this reference owing to the fact that he was a member of the Government when, speaking for the Government, the then Minister of Justice, Sir Allen Aylesworth, said the Dominion Parliament was not competent to pass such legislation. Mr. Justice Brodeur feels that he is to some extent responsible for that opinion and, consequently, he thinks he should not take part in this hearing.

Argument

Newcombe, K.C.:—I appear for the Attorney-General of Canada to present and explain to your Lordships the question which has been referred, the circumstances of the reference, and the dispositions which the Government has made for the argument of the case before your Lordships. As your Lordships are aware, the bill which is the subject-matter of the first question referred, was introduced in the House of Commons during the early part of the recent session and, when it became a subject of debate, the Government, owing to the very great importance of the subject and the interests affected by the measure, and having regard, moreover, to the somewhat doubtful constitutionality of the bill, considered it expedient in the public interest to obtain judicial advice upon the power of Parliament to give effect to the proposed enactments, such as they are, before determining its policy upon the merits. In fact, I may say it would be premature, in view of the differences which were expressed upon constitutional grounds, for Parliament to consider and determine its action upon the bill in the absence of better assurance of its enacting authority than the occasion seemed to produce. Consequently, the Government adopted the policy of referring the bill to the Court with the question stated so that the views of the various interests might be fully submitted and argued. The Government permitted the promoters of the bill to name the counsel who should appear before this Court to uphold the jurisdiction of Parliament to enact. Counsel were named accordingly and Mr. Nesbitt and Mr. Lafleur represent the promoters. They have filed a factum which your Lordships have before you. At the same time the Government named counsel to submit the reasons which seemed to exclude the proposed legislation from Dominion powers and my learned friends Mr. Mignault and Mr. Hellmuth are arguing that view. Then, each Attorney-General of each province was notified so as to give each province an opportunity of appearing and presenting such arguments as it might deem wise. The provinces have acknowledged the notice. We have communi-

cations from the Province of Prince Edward Island and from the Yukon Territory that they do not intend to appear upon the hearing. What course the other provinces are taking will develop, I suppose. As it will be necessary to read these questions in the argument as the case proceeds, perhaps your Lordships do not require to hear them read now as a mere formal matter of submission. Therefore, with these observations, I propose with your Lordships' permission to leave the matter in the hands of the Court to be discussed under the arrangement which the Government have made for the argument.

R. C. Smith, K.C.:—When we last had the honour of appearing before your Lordships I stated that on behalf of the Attorney-General of the Province of Quebec we should enter a respectful objection to the jurisdiction of this Court, upon the ground of the doubtful constitutionality of the Act referring such questions. The Judicial Committee of the Privy Council on the 16th of this month rendered a decision in the case which was then pending: *In re References by the Governor-General in Council*, 43 Can. S.C.R. 536; *sub nom. Attorney-General for the Province of Ontario et al.* v. *Attorney-General for the Dominion of Canada et al.*, 3 D.L.R. 509, [1912] A.C. 571, and I suppose I must say frankly that, with regard to the absolute question of jurisdiction, we must accept it as disposing of the question of jurisdiction and upholding that such a reference is constitutional. On behalf of the Attorney-General of Quebec, however, I think it proper to direct your Lordships' attention, especially to a few observations of the Lord Chancellor in rendering that decision and I do so especially with reference to question No. 2. I may say that we think question No. 2 is actually involved in question No. 1. We therefore do not propose to raise any further objection to the jurisdiction of this Court, considering it finally decided by their Lordships of the Privy Council. It is specially with reference to question No. 2 that I desire respectfully to invite your Lordships' attention to some of the observations that fell from the lips of the Lord Chancellor. The second question reads as follows:—

> 2. Does the law of the province of Quebec render null and void, unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province:—
>
> (*a*) between persons who are both Roman Catholics, or,
>
> (*b*) between persons one of whom only is a Roman Catholic?

The Attorney-General of the Province of Quebec respectfully objects to the submission of that question and respectfully asks your Lordships either not to answer it, or before answering it to make representations to the Government as suggested by the Lord Chancellor in *Attorney-General for the Province of*

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Ontario et al. v. *The Attorney-General for the Dominion of Canada*, 3 D.L.R. 509, [1912] A.C. 571, at p. 589. Their Lordships of the Judicial Committee first set out that the real point raised in this important case—that is the Companies Act—is whether or not an Act of the Dominion Parliament authorizing questions either of law or of fact to be put to the Supreme Court, and requiring the Judges of that Court to answer them on the request of the Governor-General in Council is a valid enactment within the powers of that Parliament. Of course, my Lords, the question in that case was not really one between the legislative jurisdiction of the provinces and that of the Dominion, but it raised the broader question whether or not any power whatever existed to ask such questions. Their Lordships determined that the full ambit of legislative power has been conferred by the British North America Act, that is to say, that the legislative power covering every species of matter or subject concerning the internal Government of Canada had been committed. I may say to your Lordships that that is perhaps the first judicial decision which has in so plain terms acknowledged the absolute legislative independence of the countries. Then, after referring to the various questions upon which appeals have been taken to their Lordships, the Lord Chancellor goes on to say:—

> In all cases the appeal was entertained; in some cases the answers of the Supreme Court were modified by their Lordships; and in one case Lord Herschell, delivering the opinion of the Board, declined to answer some of the questions upon the ground that so doing might prejudice particular interests of individuals.

There we have an express authority for this Court declining to answer this question if private interests be involved in that question. The Lord Chancellor further on says:—

> The Supreme Court itself can, however, either point out in its answer these or other considerations of a like kind, or can make the necessary representations to the Governor-General in Council when it thinks right so to treat any question that may be put.

The decision of His Lordship concludes:—

> It is sufficient to point out the mischief and inconvenience which might arise from an indiscriminate and injudicious use of the Act, and leave it to the consideration of those who alone are lawfully and constitutionally entitled to decide upon such a matter: *Attorney-General for the Province of Ontario et al.* v. *The Attorney-General for the Dominion of Canada et al.*, 3 D.L.R. 509, [1912] A.C. 571, at p. 589.

His Lordship, as I take it, refers with approval, inasmuch as no disapproval is expressed, of the decision of Lord Herschell: *Attorney-General for Canada* v. *Attorney-General for Ontario et al.*, [1898] A.C. 700, to which I ask your Lordships' attention, and he further lays down the principle that the Supreme Court has full jurisdiction to make any representations to the Government requesting the question submitted.

The first case to which the Lord Chancellor is referring is the case of *Attorney-General for Canada* v. *Attorneys-General for Ontario, Quebec and Nova Scotia*, [1898] A.C. 700, at p. 717. This is the "River and Lake Improvement" case, where a number of questions were submitted with respect to an Act passed by the Province of Ontario (Revised Statutes, Ontario, 1887, ch. 24, sec. 47), with reference to the power of the Province of Ontario to deal with the beds of rivers and lakes. I need not trouble your Lordships by referring to all the questions submitted, but the 17th question submitted was this (page 704):—

> Had riparian proprietors, before confederation, the exclusive right of fishing in navigable non-tidal lakes, rivers, streams and waters, the beds of which has been granted to them by the Crown?

At page 717, Lord Herschell, rendering the decision of the Board, dealt with that question in these words:—

> Their Lordships must decline to answer the last question submitted as to the rights of riparian proprietors. These proprietors are not parties to this litigation or represented before their Lordships, and accordingly their Lordships do not think it proper in determining the respective rights and jurisdictions of the Dominion and provincial Legislatures to express an opinion upon the extent of the right possessed by riparian proprietors.

There, we have an absolute refusal to answer that question because it involves private rights and rights of persons who are not represented in the litigation, nor represented in any manner whatsoever before the tribunal. There was the subsequent case of *Attorney-General for Ontario* v. *Hamilton Street Railway Co.*, [1903] A.C. 524. This was an appeal from the judgment of the Court of Appeal for Ontario rendered on a reference by the Government of Ontario to that Court under a provincial statute which is similar in character to the section of the Supreme Court Act in question.

I shall raise two principal grounds of objection, (1), that this is a question which prëeminently affects private rights and private interests, the interests of persons who are not represented here; and (2), that in order to determine whether or not the Dominion Parliament would have any legislative power to deal with the subject-matter at all, it being a pre-confederation law, the first question would have to be determined as to whether it related to marriage or whether it related to solemnization of marriage. If it related to solemnization of marriage the Dominion Parliament would have no power whatever to deal with it so that I shall in the second place ask that that question should be deferred until the main question is determined, or otherwise, it is putting a purely hypothetical question before the Court when it is not at all clear that if the state of the law required any amendment the Dominion Parliament would be competent to deal with it at all.

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FITZPATRICK, C.J.:—You say it does not go to our jurisdiction; if it goes only to our discretion you might postpone your argument on that point.

Mr. Smith:—As long as we have an opportunity of pointing that out I have no objection, if that is the view of your Lordships.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—Now that you have drawn attention to the difficulty, Mr. Smith, we will take a note of it and expect you to discuss it at a later stage of the proceedings. Will you proceed with the argument, Mr. Nesbitt.

Argument

Nesbitt, K.C. (after reading the questions submitted):—Your Lordships will observe that in one point of view, the proposed bill which I have just read is capable of being predicated on the ground that the provincial legislation requires the marriage ceremony to be performed by some officer, and, that if performed before such an officer, no matter who the parties may be who seek the services of that officer, the marriage is valid. Question 3 will probably involve the broader question: that the Dominion has within its jurisdiction the whole subject of marriage as such which would include the contract of marriage, and, that under the term "solemnization" the evidence of that marriage and the machinery by which that marriage is evidenced is the power of the province, and that the extent of its power is not to affect the actual contract of marriage but solely to impose such penalties for the non-observation by the parties of the provincial legislation, as the province may see fit. As for instance, although the parties would be validly married, unless they have entered into that marriage with such form or solemnity that the province may require before its own particular officer, I suppose that the province could say that the wife should be deprived of dower, or that there should be no right of succession, or that the parties contracting the marriage should be subject to fine or the like. That is so, in order to enforce the provincial legislation in reference to the forms that ought to be observed to evidence the contract after the Dominion has said who may make such a contract. Then, as to the second part of the question, namely, as to the rights and duties of married persons, that part of the bill may still be treated as valid even if the first part should be held as infringing upon provincial legislation, as it affects simply the status of the parties and their children, such as their right of citizenship as legitimate persons and the like, which cannot be said to fall in any way within "solemnization." Referring again to the first part of the bill, if the contention of my learned friends on the other side is to be adopted, that clandestinity is an impediment, then we may argue

that the first part of the bill is *ultra vires* as removing that impediment.

If clandestinity, as to a Roman Catholic's marriage before any person except a priest, is an impediment under the Roman Catholic doctrine on that point, and if that should be held to be an impediment, clearly the Dominion has the right to legislate with respect to that impediment, and the first part of the bill would be, to that extent, a repeal of article 127 of the Civil Code. That would be our submission. Now, to come to questions No. 1 and No. 3, treating them for the moment together, the right of the Dominion is, of course, set out in section 91, sub-section 26, of the British North America Act, and by section 91 the exclusive power is vested in the Dominion on all matters embraced within the sub-heads and that is so "notwithstanding anything in section 92." Notwithstanding anything in section 92 the widest legislative power is vested in the Dominion in relation to sub-head 26 in section 91, namely "Marriage and Divorce." All that is left in the province is, under sub-section 12 of section 92 "the Solemnization of Marriage in the Province" and our submission is that everything must turn upon what is meant by the term "solemnization" when read in conjunction with the fact that under section 91, sub-section 26, the whole subject of "Marriage and Divorce" is vested in the Dominion. Our contention is that the line of division is the line between the contract of marriage and the accompanying formalities by way of solemnization; that the Dominion has sole power over the first while the provincial jurisdiction extends only to the second; that the provinces may require, for purposes of publicity and evidence, such formalities accompanying or subsequent to the contract as they may see fit, and may enforce their requirements by penalties upon the solemnizing official, and upon the parties, but that they cannot make compliance with these requirements a condition of the validity of the marriage contract, nor dissolve, nor annul, nor empower any provincial Court to dissolve or annul, any contract of marriage otherwise valid, merely because the provincial requirements have not been complied with; and that, therefore, the Dominion has power to pass the bill referred for the purpose of protecting the contract of marriage against any such invalidating provincial legislation.

There is nothing new in the two distinctions involved in this contention, those, namely, (1) between the contract on the one hand and the solemnization on the other, and (2) between the nature of these requirements as on the one hand essential to the validity of the contract and on the other as merely evidentiary, so that, in the one case, non-compliance renders the marriage void, and, in the other, merely exposes those concerned to penalties without affecting the validity of the contract. On the con-

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trary, both these distinctions are to be found throughout the whole history of the subject. Under the canon law, until the Council of Trent, a mere contract *per verba de præsenti* constituted a valid and binding marriage—it was *ipsum matrimonium* —and this was also the law of Scotland, and, according to the better opinion, of England until the time of the Marriage Act of 1753.

Perhaps I had better briefly refer to one or two of the authorities on that subject. The first is the case of *Dalrymple* v. *Dalrymple*, 2 Hagg. Cons. R. 54, at page 62 (commencing at the words "Marriage being a contract" down to "*appellavit*"); that is the leading case up to that date. Then I refer to *Beamish* v. *Beamish*, 9 H.L. Cas. 274. I cite it in the first place because it contains nearly all the learning on the subject, and I also wish to shew what the view of the House of Lords was as to the case to which I shall next refer. I refer especially to page 334.

Then at page 336, the chief ground of this decision, *The Queen* v. *Millis*, 10 Cl. & F. 534, was the ordinance of a Saxon King, in the year A.D. 940, requiring that at nuptials there shall be a "mass priest who shall by God's blessing bind their union."

Accordingly, following that, it was held by the House of Lords, in the judgment of an equally divided Court, 3 against 3, that by reason of that Saxon ordinance, there was, so to speak, express legislation which made the ceremonial a part of the contract of marriage, and avoided the contract without that ceremonial.

That brings me then to the case of *The Queen* v. *Millis*, 10 Cl. & F. 534. What I have read from *Beamish* v. *Beamish*, 9 H.L. Cas. 274, was to make good the point that the law of Europe and the law of Scotland was as stated in the passages which I have read to you from *Dalrymple* v. *Dalrymple*, 2 Hagg. Cons. R. 54. The *Millis Case*, 10 Cl. & F., turned entirely upon the point that by the act of one of the Anglo-Saxon Kings, in A.D. 940, the ceremony was made part of the contract, and the whole contract, therefore, was null unless the ceremony was performed. Then, in the case of *The Queen* v. *Millis*, 10 Cl. & F. 534, I pass to the judgment of Lord Brougham to which I desire to draw your Lordships' attention at pages 701, 702, 718, and 723.

Will your Lordships note Howard's History of Matrimonial Institutions, vol. 1. pp. 295, 314, 339, 376. Now, following that, let me just point this out: That in the colonies, as shewn by an article in 5 Law Quarterly Review 44, at page 57, to which I will also give your Lordships the reference, Sir Howard Elphinstone, a very great authority on such a subject, points out that the case of *The Queen* v. *Millis*, 10 Cl. & F. 534, was not supposed to be applicable to the colonies; indeed, it was held in two cases,

one in Upper Canada and one in Lower Canada, prior to the British North America Act, to be inapplicable. The first case is *Breakey* v. *Breakey*, 2 U.C.Q.B. 349, and the other is the celebrated judgment of Mr. Justice Monk in *Connolly* v. *Woolrich*, 11 L.C. Jur. 197, at page 224, when it is again stated to be inapplicable to the colonies. I cite these cases for a statement of the law, but it is better put by Sir Howard Elphinstone in this article in 5 Law Quarterly Review where the decisions shewing *The Queen* v. *Millis*, 10 Cl. & F. 534, to be inapplicable are also collected.

My contention in a word is just this: that you have to read the word "marriage" with the word "divorce" as I understood His Lordship Mr. Justice Idington to point out; the two are interrelated. I ask my friends on the other side where, in the language "solemnization of marriage in the province," do you find any possible authority to declare invalidity; to declare that, as part of the contract of marriage over which the Dominion has complete jurisdiction, the province might interpose something the absence of which would render null and void that which the Dominion has exclusive authority to legislate upon? The province may, as I say, insist upon any form of ceremony it may see fit.

The province may say it is against public policy to have no solemnization at all and it may prevent certain of the results of such a marriage, and it may impose penalties upon persons who see fit to take advantage of their rights under Dominion legislation to contract a relationship which is indissoluble but which relationship the province declares, as a matter of public policy, should be evidenced.

My submission to the Court is that the subject of marriage, those who may marry, at what age, who may not marry, the regulation as to the degrees of consanguinity with which persons may marry, the persons to contract and their capacities to contract, are undoubtedly within Dominion jurisdiction.

Solemnization of marriage does not, in the natural sense of the word, extend to such matters as capacity. Some attention has to be paid to that language because if the Dominion can enact a general law for the whole Dominion declaring what shall constitute a marriage, surely there cannot be an invalidity in that respect in any province; you cannot be obliged to carry a surveyor's rule with you, to see which province you are in.

As to the civil effect of the contract—rights to property, for instance, succession, dower and the like—I should imagine that the province, not under the head of "solemnization of marriage" but under the head of "property and civil rights" might impose such penalties as would make people careful. They have the right to impose conditions with respect to the subsequent

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relations that will exist between husband and wife as to the property; as, for instance, in reference to community of property in the Province of Quebec.

"Property and civil rights," enables the province, possibly, to legislate upon anything that may flow from the contract of marriage—the rights of the parties as to property, the rights as to succession, the right of dower and the like.

The meaning of "marriage," in the British North America Act," may, perhaps, be said to be ambiguous, but it must mean, as used in that Act, the contract alone, that is, as opposed to the solemnization. The meaning of the words "solemnization in the province" is what you have to consider. The words "in the province" indicate that the provinces have no jurisdiction over the contract, since if they legislate upon that their legislation becomes, from the nature of the case, effective all over the Dominion. The object of the framers of the British North America Act must have been to have uniform legislation upon the essentials of the contract. The result of a contrary construction would be to give the provinces all the power and the Dominion really none. Complete jurisdiction over the contract is essential to effective Dominion legislation. The legislation in question is not an infringement upon the power of provincial "solemnization" properly understood. Nor can the province say that power to nullify the contract is necessary to the exercise of their jurisdiction over the solemnization. I contend that the effect of *The Queen* v. *Millis*, 10 Cl. & F. 534, and all the authorities is, that unless you find express legislation dealing with the subject of the contract of marriage, which makes some use of the evidentiary machinery of solemnization essential to its validity, the contract is perfectly valid. You must have that requirement imposed as it was held to have been by the English legislation. There is nothing of the kind upon the subject here except legislation by the provinces attempting to legislate under the guise of solemnization. I say that such provincial legislation cannot nullify a contract which the Dominion declares, or has the right to say—and that is the third question—is a valid marriage. The provinces cannot say that power to nullify the contract is necessary to the exercise of their jurisdiction over the solemnization. I contend that the doctrine of necessarily implied powers has no application to the provinces which have not the benefit of the words "notwithstanding anything in this Act," nor of the last paragraph of section 91. I am free to admit that has never been expressly decided by the Judicial Committee. The best observations on that your Lordships will find in Lefroy's Legislative Power in Canada, at page 454. I repeat that the doctrine of necessarily implied powers has no application to the provinces, which have not the benefit of the words, "notwith-

standing anything in this Act." Your Lordships will remember that it has been held in various cases where Dominion legislation was concerned that where there is a subject expressly given to the Dominion, like railways, powers properly incidental to that subject are also given; that doctrine has no application to any of the sub-heads of section 92. If I am right about that, then you get a narrower construction of "solemnization," and any power claimed must be found expressly within these words, not by reading in implied powers such as are read in under the sub-heads of section 91 because section 92 has not the language, "notwithstanding anything in this Act." This must be so, *a fortiori*, in this case where the entire remainder of the subject is assigned to the Dominion. In any case, I say that the whole history of the matter, as discussed above, shews that such a power is not necessarily implied.

I contend, moreover, that the annulment of the contract of marriage is an infringement of the exclusive jurisdiction of the Dominion over divorce. Attention has to be drawn to that. When you come to deal with the provincial authority how could a province declare, under the guise of solemnization of marriage, that a contract of marriage, which the Dominion has said may be made, is not a marriage at all.

I follow that up by saying this: strictly speaking, annulment and divorce are different, the one meaning to declare a marriage void *ab initio*, the other to dissolve an existing marriage, but the word "divorce" is here used apparently as meaning every means of getting rid of the marriage tie. And, even when a provincial Court annuls the marriage, it does dissolve an existing *de facto* marriage, which would otherwise remain good and would become unassailable on the death of either party. You will find that running through it all. There is a very good definition in Murray's Dictionary of the meaning of the word "divorce;" it gives it the wider meaning. You cannot give a restricted meaning to the word "divorce" because, as is to be inferred from what was said by the Lord Chancellor, whom I quoted this morning, the Dominion Parliament is given the most sweeping power, the absolute power on the subject of divorce, and, therefore, you have to give the widest meaning to the word "divorce." It results from the judgment of Lord Brougham which I read this morning that every conceivable legislative power is vested under the British North America Act under those two words. The whole subject of divorce, in its widest possible aspect, is, therefore, in the Dominion, and would include both annulment and divorce for cause.

This is a point I want to drive home. If the marriage tie is declared to exist and the provinces declare it is non-existent, then they are stepping within the jurisdiction of the Dominion.

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The provinces cannot interpose and legislate upon the contract at all without having the effect of an annulment; they cannot interfere with the contract.

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To declare that the marriage does or does not exist must come under the all-embracing word "divorce" which covers the whole question of the validity of a marriage, *de jure* or *de facto*. I quote from Bishop on Marriage and Divorce, vol. II. sec. 786: —"A suit to declare a marriage null is held to be within the term of divorce suit," etc. That is the meaning in which I say the word is used in the British North America Act. I refer to Murray's Dictionary, sec. V. "Divorce," "Legal dissolution of marriage by the Courts . . . evidence accepted by the Courts." It is in the first sense that it must be taken in this Act, because the Dominion is given the sole jurisdiction relating to the whole subject-matter of divorce and I submit that it must be given the widest possible meaning. I submit that it covers all three of the jurisdictions, vested by the English Act now in the divorce Courts, whether it is separation from bed and board, a decree of nullity, or a regular divorce in the common strict meaning of the word.

Idington, J.

IDINGTON, J.:—I cannot understand how we can escape any one of them under the statute and especially the first and third questions. The other question might have been left out until question No. 1 and question No. 3 were determined.

Argument

Mr. Nesbitt:—Will your Lordships let me examine the language of the first section of the bill a little more closely? (The learned counsel reads the section.)

To bring it to a concrete case, the evil that was supposed to have arisen was a limitation of the express language of article 129 of the Civil Code, which stated that marriage might be performed—I am paraphrasing it—by any one of several officers; which, it was supposed, gave the right to any citizen, not falling within the prohibited decrees, to appear before these parties and have the ceremony performed. The bill pre-supposes the right of the province to declare that marriage shall be performed by certain officers, at certain hours, and so on, and the evidences that are to be observed about the marriage.

The bill hits squarely at article 127 C.C. in this, that it says, that no matter who is married before any person, whom the provincial law declares to be the proper officer to marry, if they comply with all the provisions of the provincial law, then notwithstanding any difference in their religious faith, that contract shall be good.

If your Lordships answer question 2 in the affirmative, as I said to your Lordships early in the discussion, in all probability that will be the end of the whole matter because there will be

nothing more to discuss. Now, my Lords, if the provinces have no power to nullify, the Dominion must have the power to confirm. Apart from the question of power to nullify the contract, the Dominion has admittedly exclusive jurisdiction over the capacity of the parties. Differentiation between persons of different religions as to the manner of solemnization affects their capacity and is beyond provincial powers.

The real object of question 3 seems to be to ascertain whether or not, if the bill referred does not accomplish the desired object, it can be accomplished by some other legislation. If the contention as to the first question be correct, then plainly it stands, so that the two questions run into one another so far as the argument is concerned. Or, if the distinction between the contract and its solemnization be incorrect, the Dominion can still pass the legislation under (1) power over divorce, (2) power to define marriage.

I submit, therefore, that question 3 must be answered in the affirmative because, even if the bill referred does not accomplish the alteration of that law, it could be done by the Dominion by a proper enactment.

I desire only to add, my Lords, a few words in reference to the meaning that is to be given to the word "marriage" in section 91. My submission is, that as it is used in conjunction with the words "and divorce" the same wide meaning that is given to the word "marriage" must necessarily be given to the word "divorce" subject to the qualification that nothing is carved out of divorce while the solemnization of the marriage tie is carved out of the word "marriage."

Now, in reference to one or two observations, which fell from the Court, as to the doctrine of civil rights. Just as in the case of banks and banking, just as with railways, and so forth, whenever the doctrine of civil rights has impinged upon the wide jurisdiction given to the Dominion Parliament in section 91 "civil rights" has had to give way.

You have the whole subject of marriage, you have that whole field of legislation given expressly to the Dominion, and overriding civil rights or anything that may interfere with it. All that is incidental, all that is ancillary to it, all that is impliedly necessary to create the tie of marriage, is vested in the federal jurisdiction, subject only to whatever may be said to be carved out of it in the solemnization or evidence of that marriage which is vested in the provinces, and nothing else. Therefore, if I have been understood in the argument this morning, to admit that the provinces, under the doctrine of civil rights, can take away from any legislation which the Dominion may see fit to pass in this respect, I have been misunderstood. If the doctrine of civil rights impinges upon whatever is impliedly necessary in the

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opinion of the Federal Parliament fully to carry out the object of their legislation relative to marriage, then the doctrine of civil rights must give way.

Lafleur, K.C.:—May it please your Lordships, I intend to ask your Lordships' attention to the second question on this reference which is:—

> 2. Does the law of the Province of Quebec render null and void unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province,
> (*a*) between persons who are both Roman Catholics, or
> (*b*) between persons one of whom, only, is a Roman Catholic?

I do not know whether I should preface my remarks by pointing out to your Lordships the utility of answering this question. I understand my learned friends on the other side no longer contest that you have the power and the duty, subject to the exercise of your proper discretion, to answer question No. 2, but they do submit that you should exercise your discretion or decline to answer that question in its present form, because they say—at least I understand they are going to say—it may affect the rights of private parties. It is just as important for Parliament in the exercise of its right of legislation to know what the law of the province is upon this subject as it is that it should know the extent of the field of legislation that is open to it. Parliament in legislating upon the subject of marriage will necessarily inquire, first, as to the ambit of its own powers, and in the second place as to what grievances, if any, exist, which it is proposed to redress by the promoters of the bill. Now, it is of the first importance, therefore—when you get over the first difficulty, when you ascertain that Parliament has legislative authority over the subject-matter—to ascertain whether the law of the province is in such a condition as in the opinion of Parliament requires redress or relief. As my learned friend, Mr. Nesbitt, put it this morning, if this question is answered in our sense, if it is held that these marriages are valid and binding, then *cadit quaestio*. Therefore, it seems to me, it is just as important for Parliament to know what the law of the Province of Quebec is on that subject as it is for Parliament to know the extent of its own powers to legislate over the subject-matter.

As to interference with the rights of private parties who may not be represented here, I suppose that is an objection that may be made to almost any sort of reference of this kind. It is impossible for your Lordships to decide any general question of this nature without in some way affecting private rights, but not judicially affecting them, because your pronouncements upon this, as upon all other matters referred to you in the same way, are merely opinions. Your functions are advisory, and, therefore, you do not preclude the parties—although, of course, it

would be absurd for me to contend that your opinions would not be regarded by the Courts as important on the subject. I think your Lordships have even said that you would not be bound by your own opinion given on a reference.

It is a little bit perplexing to know what view is ultimately going to be taken on the subject. Take, for example, the "Insurance Reference" which was before your Lordships for adjudication; that was referred by the Government in consequence of a judicial decision in the Province of Quebec upon a prosecution under the Federal Insurance Act. If your Lordships are to hold that because there is a pending case you should not answer a question then the "Insurance Reference" should not be heard at all. And, in the present instance, if because there is a case pending in Court, that of *Hébert* v. *Clouâtre*, 6 D.L.R. 411, 41 Que. S.C. 249, in which the second question on this reference is to be decided, your Lordships do not give an opinion on that question, then, of course, I do not know how far it would be useful for me to go on with the argument. I do not know whether your Lordships intend to decide that before hearing us on question 2, but I submit that it is almost impossible to answer upon any reference at all without the possibility of your affecting private rights prejudicially or otherwise. I submit that the last amendment to the statute requires the Court to answer the question.

I think I have said all I need say for the present upon the discretion which your Lordships should exercise. It seems to me that on a large question of this kind it is of vast importance to the people throughout the whole Dominion that an answer should be elicited in this inquiry. It is quite obvious that any number of marriages may be affected in the same way as this Hébert marriage, and the fact that this case has come before the Courts does not mean that there are not dozens, and perhaps hundreds, of cases in which the status of the parties if not attacked to-day may be attacked next year, or ten years hence. It is impossible to consider any question of this kind without necessarily affecting private rights.

The question which is submitted to your Lordships depends, in my humble opinion, upon the construction of a number of articles of the Civil Code of the Province of Quebec. I should like to say at the outset that, while I anticipate a very elaborate historical argument will be made by my learned friend Mr. Mignault on the other side, and I understand he relies upon the judgment of Sir Louis Jetté in *Laramée* v. *Evans*, 25 L.C. Jur. 261, which was based on what I may call the historical argument, it seems to me that all that is entirely beside the question. The question of the law as it stood before the Code it is not necessary for us to consider, because, in my humble opinion, the

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Code is perfectly clear upon the subject. I need hardly do more than refer to a couple of cases which are well known to your Lordships where the principle of construction was clearly laid down in such cases. There is the case of the *Bank of England* v. *Vagliano Brothers*, [1891] A.C. 107, at page 144, in which Lord Herschell, speaking of the very elaborate argument which had been presented as to the state of the law before the Bills of Exchange Act, said:—

> I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any consideration derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.
>
> If the statute, intended to embody in the Code a particular branch of the law, is to be proved in this fashion, it appears to me that its utility will be almost entirely destroyed and the very object with which it was enacted will be frustrated.

He goes on to say that he is far from saying that resort may never be had to the previous state of the law, but that, on the contrary, it is justifiable to refer to it when the provisions of the actual law are of doubtful import or when words are used which had previously acquired some technical meaning. But in this case that seems to me immaterial because we have an enactment which, in my opinion, is clear and free from any ambiguity, and if that is so any examination of the anterior state of the law is only misleading.

It seems to me that article 129 of the Civil Code has stated the law so clearly that no possible reference to the previous state of the law is useful or necessary. Let me first read article 128, which says that marriage must be solemnized openly by a competent officer recognized by law, and also article 129.

Article 128 says:—

> 128. Marriage must be solemnized openly by a competent officer recognized by law.
>
> 129. All priests, rectors, ministers, and other officers, authorized by law to keep registers of acts of civil status, are competent to solemnize marriage.
>
> But none of the officers thus authorized can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion and the discipline of the church to which he belongs.

Wherein is there any ambiguity in the first paragraph of that article? The language is perfectly general. The authority to celebrate marriage is conferred upon rectors, ministers, and other officers authorized by law to keep registers of acts of civil status, and they are the persons who are competent to solemnize marriage. Is not the only thing to be ascertained, who are the

persons who are authorized to keep registers of civil status, in order to answer the question who are competent persons to celebrate marriage. Is there any indication at all that the functions of these officers of civil status are to be in any way restricted? Is it not obvious, on the contrary, that the second paragraph of that article, which says they are not compellable, shews that they may receive applications from all kinds of people, belonging to all kinds of faiths and that this provision was made for the protection and ease of their own conscience. But, does not that imply the idea that they are not exclusively concerned with marriages of their own parishioners, and that their authority and jurisdiction is general. Otherwise, what would be the use of making them non-compellable? If their functions were restricted to their own flocks, if, as is contended, the priest or the minister has to marry those of his own congregation, and if article 127 C.C. makes the rules of that religious community binding upon the members of that community, then it would be no use saying that the minister or priest is not compellable, because, manifestly, he could not be compelled to celebrate what would be an invalid marriage between persons who would be governed by the rules of their own church, which would be his church. Does not the second part of that article, on its face, shew that the jurisdiction of these officers of civil status was general and not restricted?

Another thing to which I would like to call your Lordships' attention is that the article does not contemplate that this jurisdiction or that these functions shall be exercised solely by ministers of religion. It says, all priests, rectors, ministers, and other officers authorized by law to keep registers; it contemplates the possibility of other persons than priests or ministers being authorized by statute to keep registers.

There is one provision in the Code in regard to the keeping of acts of religious profession, articles 70 *et seq.* of the Code. In every religious community in which profession is made by solemn and perpetual vows, registers are kept, and my adversaries argue from that that it is not every one who can keep registers of civil status who are competent to celebrate marriage. But, manifestly, what article 129 means is that these persons can celebrate marriage, who are authorized to keep registers of civil status generally, not merely persons who may be authorized to keep registers of deaths or of religious profession. It means those who have the general power to keep registers of civil status—that is, as to all acts of civil status—and these persons are competent to celebrate marriage. And, if the Province of Quebec to-day empowers an individual, not a clergyman, to keep registers of civil status, that person is a competent person for the celebration of marriage. Whatever may be the

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case as to births and deaths, as to marriage the Code expressly provides that a person, other than an officer of civil status in the domicile of the party, can be the celebrant. Take article 63:—

> 63. The marriage is solemnized at the place of the domicile of one or other of the parties. If solemnized elsewhere, the person officiating is obliged to verify and ascertain the identity of the parties.

Is not that plainly saying that the person solemnizing or celebrating the marriage need not be the functionary to officiate in the parish or domicile of these parties? The only obligation imposed on an outsider who celebrates a marriage is the verification of the identity of the parties, and, of course, all these solemnities are provided in order to prevent clandestinity. The banns themselves are simply protection taken to enable the officiating clergyman to ascertain that there are no impediments. The whole object of this provision is to prevent clandestinity, but the jurisdiction is manifestly not restricted to the officer who is in the place inhabited by the parties, either by one of the parties or by both, because an outsider may marry them, although he must make sure that there are no impediments existing. As your Lordships will see, if he does not publish the banns, he must see that the banns have been published elsewhere. It is even provided that, when the parties have not been for a certain period in the jurisdiction, the officer must ascertain whether the banns have been published in the foreign jurisdiction, and if they have not, then he must assure himself of the non-existence of any impediment. Articles 131 and 132 deal with that:—

> 131. If the actual domicile of the parties to be married has not been established by a residence of six months at least, the publications must also be made at the place of their last domicile in Lower Canada.
>
> 132. If their last domicile be out of Lower Canada and the publications have not been made there, the officer who solemnizes the marriage is bound to ascertain that there is no legal impediment between the parties.

In the case of dissenting Protestant congregations the banns are published by the minister who performs the marriage, and he may or may not be the minister who is the minister of the parties. They have never regarded the jurisdiction as being restricted and they have never considered that there was any incompetency on the part of any of the functionaries who are created by article 129 of the Code. Therefore, that question has not arisen in the case of marriages of Protestants. I may add that it has never arisen in the case of a marriage between a Protestant and a Catholic. No doubt has ever been cast, so far as I know, in any judicial proceeding upon the validity of marriages between Protestants and Catholics, whether celebrated by a priest of the Roman Catholic faith or by a Protestant minister. I do not think any suggestion has been made of the invalid-

ity of these marriages. Now, if you take the wording of article 129, what reason is there for making any restriction in the case of one of these functionaries and not in the case of the other one? And if you say that each of these is subject to the same restriction—because that cannot depend upon the practice of the different congregations; it cannot depend upon what they are in the habit of doing or of the opinion they have as to the law of the land—if there are any restrictions as to the jurisdiction of any one of these, they must be derived from law. I submit that you cannot say there are restrictions as to some of these functionaries which do not exist as to the others. If you were to restrict the power of these officers of civil status to the persons who are in their congregation under their spiritual charge, where would any authority be given to any one to marry non-Christians or the numerous immigrants who come to our shores and settle in our cities, and who are not organized into congregations? If that interpretation were given to it, then these people would be absolutely without any provision for their lawful marriage. You cannot say that a Protestant minister has any greater authority to celebrate such a marriage than a Roman Catholic priest has. If you once get beyond the flock or the congregation of the clergyman or the priest, then where are you going to stop with the jurisdiction? You cannot stop, there is no halting place at all, unless you consider that by a previous article (127) there exists an impediment in the case of people professing the Roman Catholic faith. I will contend later on that there is no such impediment, that such an impediment would not import nullity in any event, and that it is a misapplication of article 127 to say that it could have any influence at all upon the competency of the public officers who are created by article 129.

Before I leave the construction of article 129, I desire to ask your Lordships' attention to an argument that is advanced by my adversaries in their factum. I am considering now article 129 *per se* without any assistance from article 127. In their factum, my learned adversaries say that article 129 is far from clear and that it is subject to notable limitations, and they say, in the first place, that under article 70, which I have mentioned a moment ago, certain religious communities are authorized to keep registers of civil status, and yet these communities are not authorized to celebrate marriage. I point out that these communities are not authorized to keep registers of civil status; they are authorized to keep a certain kind of register of a certain kind of religious status; that is, solemn and perpetual vows taken in their community. But, that is not authority to keep registers of civil status, and so I contend that does not qualify the article at all.

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Then my adversaries say that another important limitation of article 129 will be admitted. They say:—

> Another most important limitation of article 129 will also be admitted. Are priests, rectors and ministers competent to solemnize marriage whether they are authorized or not to keep registers of civil status, a construction which the general terms, if construed literally, of article 129 would justify, or can marriage be solemnized only by such priests, rectors, or ministers who are authorized to keep registers of acts of civil status.

I do not think you can give that restriction to the article. Do the words "authorized to keep registers of civil status" apply to the priests, rectors and so forth, or only to the other officers? It does not matter from my point, whether you adopt one construction or the other. There is a curious article of the Code, which is referred to by my learned adversaries in their factum, and that is article 53(*b*), which would seem to imply that there may be persons—although I have never seen them and I do not know who they are—who, without keeping registers of civil status may celebrate marriages. The article says:—

> 53. (*b*) Every person authorized to celebrate marriages, or to preside at burials, who is not authorized to keep registers of civil status, shall immediately prepare, in accordance with the provisions of the Civil Code, an *acte* of every marriage which he celebrates, etc.

My learned friend, Mr. Mignault, thinks this was intended for a congregation of Jews in Quebec. I have not been able to discover what that particular congregation was that this article is intended to assist, but it is a peculiar disposition of the law.

23 Viet. ch. 11 refers to Quakers, and it requires them to keep registers. I do not think 53(*b*) can refer to the Quakers, because before that article was passed this legislation as to Quakers was in force and they had the necessary authority and duty of keeping registers of civil status.

It may well be that the proper construction of article 129 is that priests and rectors and ministers, even if they do not keep registers of civil status, may celebrate marriage, and that, in addition, other officers who are authorized by law to keep registers of civil status may also celebrate marriage. That is not, however, what I should think to be the natural construction of that article. I should have said—independently of the provisions of article 53(*b*) and whatever provisions may be made for the unorganized districts—that this article meant on the face of it that priests, rectors, and other officers, all of whom are authorized to keep registers of civil status, are competent to celebrate marriage. I think that is the plain meaning of that article. Article 53(*b*) I cannot explain in any way.

That statute is authority to keep registers of civil status, and it is conferred upon a person because he has a congregation, and

it is within the discretion of the legislature to give to some congregations or the heads of some congregations the right to keep registers of civil status. That all points to the construction of the article, as I have been reading it, that it is only those persons who keep registers of civil status who can celebrate marriage. Sometimes the authority is to individuals by name and sometimes it is the head of the congregation. They are statutes to afford relief to certain religious congregations. I shall deal with that when I am giving the history of the law, and I intend to notice it although I submit it is not necessary for the construction of the article. Still, I cannot neglect it, because my learned friends base an argument upon it. You will see that by these statutes which preceded the Code (with, I think, one or two exceptions), they did not in terms confer authority to celebrate marriage, but simply authority to keep registers of civil status.

My contention is that the civil law has nothing to with the internal government of these religious communities. The civil law creates these persons officers to register acts of civil status. It is often said that we have no civil marriage in this country. What I understand by civil marriage, in the sense in which it is ordinarily used, is that the officiating person is not a clergyman or a priest, but is a public functionary like a mayor, or a registrar, or a justice of the peace, but the religious character of the person who registers the act of civil status does not change the character of the act. It is a civil act altogether; it is an act of the representative of the State, who, by the authority of the State, gives authenticity to his records. But, whatever may be the religious character of these officers of civil status, when they are officiating as officers of civil status they are not acting in a religious capacity at all. They may accompany their celebration of marriage with any religious ceremony they may choose, but they are still *pro hac vice* purely officers of civil status.

That is my argument as to the jurisdiction and authority conferred on these persons by article 129. I submit there is nothing there which suggests the idea that they must necessarily be of clerical character. What is the meaning of these words, "and other officers authorized to keep registers"? The only requirement is that they be authorized to keep registers, and it is quite competent for the State to empower by proper authority a justice of the peace, or a registrar, or any one else of similar character, to keep these registers of civil status and to celebrate marriage.

Another limitation which is referred to by my learned friends is one which I have noticed already. They say that another limitation is that the priests, rectors, and ministers can only

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solemnize marriages in the place where they are authorized to keep registers of civil status. I submit that is not so. You have article 63, which clearly shews that the celebration may be made by a clergyman who is not at the domicile of the parties.

They say:—

> By article 63, under the general rule, marriage is solemnized at the place of the domicile of one or other of the parties. This rule is no less a general rule, because the article asks that, if the marriage be solemnized elsewhere, the person officiating is obliged to verify and ascertain the identity of the parties, so that the latter provision can only refer to exceptional cases, such as those of vagrants or of persons domiciled outside of the province; otherwise, it would have been useless to say that the marriage was solemnized at the place of the domicile of one or other of the parties. Therefore, since the general rule requires the solemnization of the marriage at the place of the domicile of one or other of the parties, it follows that priests, rectors, and ministers, authorized to keep elsewhere registers of acts of civil status, are not competent to solemnize the marriage, either at the place of the domicile of one or other of the parties, for they are not there authorized to keep registers of civil status, nor in the place where they do keep these registers, for the parties are not there domiciled.

It is the general rule, but not the invariable rule, that marriage shall take place at the domicile. The cause of an exception may be the desire of the parties to be married elsewhere as often happens. There is nothing which prevents them from exercising their liberty in that regard. The law has laid down the rule as to publication of banns and formalities and the assumption is that the general rule is that the domicile of the bride is generally the place where the marriage is celebrated. But it has also provided for a case where the parties do not choose to follow the general rule, and it says then what it is incumbent on the officiating clergyman to do in order to prevent clandestinity.

The publication of banns is an entirely different thing; the publication is made in their own church or else the parties get a license; they get a license if they wish to exercise their freedom to be married before some person they select. The minister gets the license of the Lieutenant-Governor to celebrate that marriage and the license is granted on proper security shewing there is no impediment. In the Catholic Church, they may be dispensed by the bishop from publishing the banns. The license does not apply to the parties, it applies to the officiating minister and he can get a license from the Lieutenant-Governor, and when the parties present him with one he is licensed upon receiving that document to celebrate the marriage between the two people. The licence is to the minister, not to the parties. There is no such thing as licensing the parties. It dispenses with the publication of the banns by the officiating clergyman.

whoever he may be, but there is no restriction as to the clergyman who may celebrate the marriage, provided he has a license. The only difference is that with regard to Catholic priests they cannot get a license, they have to get a dispensation from their ecclesiastical head, and as to Protestant ministers they must get a license, but there is no permission given to the parties, it is to the functionary of the State to dispense with certain formalities which would otherwise be required.

There is another objection which is made by my learned adversaries. They say that our interpretation of article 129 cannot be sustained because the Code of Procedure, in articles 1107 *et seq.*, provides for an opposition to marriage and requires that the opposition should be served upon the functionary called upon to solemnize the marriage. They say, further, that article 61 of the Civil Code requires that the disallowance of the opposition be notified to the officer charged with the solemnization of the marriage. They ask if it is contemplated that the opposition to a marriage should be served on perhaps two or three hundred clergymen in Montreal, for example, in order to prevent a marriage from taking place. My submission is that the expression "called upon to celebrate a marriage," or, "charged with the celebration of a marriage" means a clergyman or a priest who is selected by the parties to celebrate a marriage. It does not mean an officer who is competent, because there may be more than one. Even on their own theory there must be two, if the parties reside in different parishes. And, in the case of Protestants where there is no such thing as an impediment on the ground of clandestinity, and when they may select any one of two or three hundred persons to cement the union, they say it would be impossible that all these functionaries could be served with the opposition or notified of the difficulties that existed. What the article means by "charged with the celebration of a marriage" or "called upon to celebrate a marriage" is the clergyman who is selected by the parties to celebrate their marriage, and there must be only one, and that one is the one who is to receive the opposition.

Now then, my Lords, another objection which is made is that, in the Province of Quebec, marriage is essentially a religious ceremony. They say there is no such a thing in the Province of Quebec as a civil marriage, as the term is generally understood, and as they say would result from the wide construction sought to be placed on article 129.

Now, is it true that in the Province of Quebec marriage is essentially a religious ceremony? A religious ceremony, in connection with a mixed marriage, for example. I have always understood there was no religious ceremony performed there but that the priest merely acted as a witness and that there was

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no ceremony at all. There cannot be any religious ceremony, when non-believers or Mahommedans, or Hindus, are married in the Province of Quebec; there is no religious ceremony in their case. There is an authentication of their marriage by the priest or officer of civil status, but it is wrong, I submit, to say that a Quebec marriage is necessarily and essentially a religious ceremony. It generally is accompanied, no doubt, by a religious ceremony, but my submission is that the only part of the ceremony which concerns the law is the authentication of that marriage by the officer of civil status who generally happens to be, who always happens to be now, a clergyman of some church. But, in exercising this function, he is exercising purely a civil function. I would submit that the creation of the officers of civil status to celebrate marriages is merely the exercise of authority by the State to enable these officers of civil status to exercise a purely civil function. The fact that they happen to be ministers of religion in addition to that does not alter the case at all. The words "celebration of marriage" found in our law are used by the European Codes where the only legal marriage is celebrated before a public officer, who is not a priest or a minister of religion. You go before the mayor and he celebrates a marriage. The parties afterwards, if they so desire, may repair to their own church and get what is called the nuptial benediction, but that is entirely distinct from the ceremony of marriage. The ceremony of marriage is celebrated by a public officer, and I say that here you have both done by the same officer.

Then, of course, all the decrees recognized the possibility of a valid marriage where a priest could not be obtained, so that it is not essential that there should be a ceremony. There may be, resulting from the religious belief of the parties, a ceremony in their sense of the word, but so far as the law is concerned there is no ceremony. There is nothing there but the consent of the parties and their agreeing to be husband and wife, before a person, who is recognized by the law, as capable of exercising that function. All these decrees provide that, while it is desirable that a priest should celebrate the marriages of Catholics, it is not absolutely essential, because if a priest cannot be procured that does not prevent the celebration of a valid marriage. I, therefore, submit that you cannot say that a "ceremony" is of the essence of a marriage. It is imposed upon the parties as a religious duty in most churches, but that is a religious obligation only, it is not one which is required by the law of the country. In the last decree, the *Ne Temere* decree itself, you will find that article VIII. says:—

> VIII. Should it happen that in any district a parish priest, or the ordinary of the place, or a priest delegated by either of them, before

whom marriage can be celebrated, is not to be had, and that this condition of affairs has lasted for a month, marriage may be validly and licitly entered upon by the formal declaration of consent of the contracting parties in the presence of two witnesses.

It is submitted in this connection that article 65 of the Code, which provides what is to be set forth in the act of marriage, does not in any way refer to the religious belief of the parties; but simply states the day on which the marriage was solemnized, the names, quality, occupation and domicile of the parties, and so forth, whether married after publication of banns, or dispensation, or license; whether it was with the consent of the parents, and whether there has been any opposition. That excludes the idea of anything but a purely civil ceremony, so far as the legality of the marriage is concerned.

I will have occasion, in referring to the previous legislation, when I come to that part of the case, to shew your Lordships that in all the statutes which are enabling, or authorizing or relieving ministers of congregations there is no restrictive language of any kind, there is no limitation to their jurisdiction ever imposed by any of the previous statutes; they are generally authorized to keep registers of civil status, and whenever they are authorized to celebrate marriages, in a few cases in which express authorization is given to celebrate marriages, there is no restriction in any of the statutes which I have been able to find.

The Act of 1795 expressly authorized and required the Catholic Church and the Anglican Church—that is the construction put on the Act—to keep registers of civil status. The other denominations began to complain that they were not entitled to keep registers of civil status. The Church of Scotland complained, and the Methodist Church complained, and the Baptist Church, and so on, and they all had extended to them the right which was given by the statute of 1795, to the Catholic Church and to the Anglican Church, of keeping registers of civil status. Now if it were so that the Jews could only celebrate marriages between Jews, and the Quakers between Quakers, and the Presbyterians between Presbyterians, and the Methodists between Methodists, then there would be no officer competent for the celebration of marriages between unbelievers, or Buddhists, or even the people of the Orthodox Greek Church, or in the case of these numerous immigrants who are coming to our shores every day. I do not think anybody has ever disputed the validity of the marriages of these persons. My learned friends on the other side would have to go to the length of arguing that there is no officer of civil status to celebrate the marriage of these people, if they restrict the power of each functionary to the members of his own congregation. There is no greater reason for doing that in one case more than in the other, apart

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from the provisions of article 127 which have been discussed, and apart from the two statutes which restrict the powers of the Quakers and of the Jews. If you are going to restrict any of these functionaries, you must restrict them all in the same way. There is no halting place, and you must come to the conclusion that a large proportion of our present population in the large cities is under the absolute disability or incapacity of getting lawfully married at all.

Now, my Lords, I come to the consideration of article 127. It is contended, on the part of my adversaries (and it has been held in the cases which have been decided in accordance with that view) that whatever may be the jurisdiction of the functionaries enumerated in article 129—other than those of the Roman Catholic religion, in the case of Catholics at least, by reason of article 127—there is an impediment which prevents Catholics from being validly married by any other than their parish priest or a priest delegated by the parish priest or by the bishop. I am dealing with the meaning of the word "impediment" in article 127. May I point out incidentally, that, if it be true that what is called clandestinity is an impediment in the proper sense of the term, the bill can hardly be said to be *ultra vires* of the Parliament, because, in so far as impediments to marriage are concerned, the legislative jurisdiction of Parliament clearly extends to all matters of that kind. It extends on the subject of marriage to the capacity to contract marriage, to the impediments to marriage, and to all that goes to constitute a valid marriage, except the solemnization. Now, if it is true that what is called clandestinity is an impediment in the proper sense of the term, then the object of the bill is really to affect and amend article 127, by declaring that no matter what the religion of the parties or of the officiating clergyman may be, that will not prevent the validity of a marriage, otherwise regular, under the provisions of the law of the province. Now, is it not clear that that bill has for its object the removal of that impediment and the modification of article 127 if that article creates any such impediment as is contended? I would submit that it does not create such an impediment, because I think it is a misuse of the word "impediment" to apply it to the competency of the officer who is about to celebrate the marriage. It seems to me that the only proper meaning of the word impediment, and more particularly its meaning in article 127, must be an impediment of the same nature as those enumerated in the chapter. The whole chapter in which that article is found is called: "Of the qualities and conditions necessary for contracting marriage." These are the qualities and conditions in the parties themselves, and the next chapter deals with the competency of the officer for the celebration of that marriage. I submit that it is a subversion of

all correct ideas, to say that the incompetency of a civil officer constitutes an impediment to marriage. If it is an impediment to marriage in the sense of article 129, I do not see how my learned friends on the other side can escape from the conclusion that the bill is *intra vires* of Parliament because Parliament can unquestionably repeal article 127. It can remove all these impediments, it can say what shall be the natural impediments to a marriage, and upon the theory that it is an impediment, called the impediment of clandestinity, then the object of that bill is to remove that impediment and it does accomplish that purpose if you consider clandestinity to be in the nature of an impediment. I do not want to elaborate this. I refer your Lordships to the *considérants* of the judgment of Mr. Justice Charbonneau in *Hébert* v. *Cloutre*, 6 D.L.R. 411, 41 Que. S.C. 249, where your Lordships will find the whole subject discussed with great lucidity and force. I do not think I could add anything to what Mr. Justice Charbonneau says.

The judgment of Mr. Justice Jetté in *Laramée* v. *Evans*, 25 L.C. Jur. 261, is one of the most interesting on the whole subject because it reproduces what may be called the historical argument, and I desire to say a word about that point without anticipating too much what may be advanced on that head by my adversaries. But I do understand the proposition as laid down by Mr. Justice Jetté to be somewhat like this: He says at the time of the conquest there was in England an exclusive jurisdiction on behalf of the Anglican clergy, and there was in France the same exclusive jurisdiction on the part of the Roman Catholic priesthood, to celebrate marriage; they were each exclusive, they recognized no other authority for celebration of marriage. Now, at the time of the capitulation there was nothing said in the articles of capitulation which could affect that situation, nor indeed, I submit, is there anything in the Quebec Act of 1774 or in the Constitutional Act of 1791, and it was not until the statutes began to be passed with reference to the keeping of registers of civil status that we find the subject is dealt with at all, and Mr. Justice Jetté puts this question—he says: "What was the effect of the conquest upon this state of things?" he says you had a jurisdiction claimed by the Anglican clergymen on the one hand and an exclusive jurisdiction claimed by the Roman Catholic clergy on the other, and his presumption is that by the very force of things each claimed exclusive jurisdiction as to its own congregation. Now, I am quite unable to follow that line of argument. It may be the fault of my logic, but it seems to me that if there was going to be any result produced by the juxtaposition of these two conflicting powers it would mean that they would have concurrent powers as to the celebration of all marriages, or else there came about the pre-

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dominance of one over the other. If we take the view of Chief Justice Sewell in the case of *Ex parte Spratt*, Stu. K.B. 90, that this was a function of the State which came from the Crown, we can hardly escape the conclusion that the right to celebrate marriage and to give authenticity to registers derived from the Crown became vested in the clergy of the conquering nation at the time of cession. We find this opinion expressed by him in this case of *Ex parte Spratt*, Stu. K.B. 90, at page 95.

It was held in that case that a dissenter was not included in the terms of the Act of 1795 and it was further held that the exercise of this office depended upon the Crown. If that is good law—and the authorities he cited are very strong on that point—then the effect of the conquest was to confer to the Anglican Church the sole authority for the celebration of marriages. It is clearly suggested, and even held expressly in that case, that the source of authority must be from the Crown. However, what I am submitting is that the deduction drawn by Mr. Justice Jetté in *Laramée* v. *Evans*, 25 L.C. Jur. 261, is not a proper deduction if you consider the legal effect of the conquest. I submit that as a matter of logic and inference you can not come to the conclusion that Mr. Justice Jetté does, that each church preserves its rights and functions and jurisdiction but only within its own sphere. If you admitted they were both exclusive of everything else, how could you come to the conclusion that they were restricted to their own parish or their own flock after the conquest? I cannot follow that reasoning at all. Therefore, my submission is that that historical argument does not advance you one bit.

The Anglican parochial organization was established almost immediately after the treaty.

In 1795, shortly after the conquest, an Act was passed for the keeping of registers of civil status by ministers of that church. The curious thing is that these marriages were not confined to the Roman Catholic Church nor to the Anglican Church, for we find that justices of the peace were celebrating marriages then, and without the slightest apparent authority. I have never been able to find authority for the celebration of marriages by justices of the peace at that time, or since for that matter. I am told, I do not know that it is true, that the United Empire Loyalists who came back to this country after a sojourn of some length in the United States had got accustomed to marriages before justices of the peace and that they imagined, wrongly imagined I should think, that our justices of the peace had the same power and jurisdiction and that that accounted for the celebration of these marriages by justices of the peace.

The Act 44 Geo. III. ch. 2 provided that all marriages solemnized since the 30th of September, 1779, by any minister of the

Church of Scotland or by any person reputed to be a minister of the Church of Scotland, or by any Protestant dissenting minister, or by any person reputed to be a Protestant dissenting minister, or by any justice of the peace, shall be held to be valid in law, and 1 Geo. IV. ch. 19 validated similar marriages in Gaspé.

My Lords, the only additional reference I desire to make to the law before the Code is to two or three of the statutes relating to marriages celebrated by dissenters.

My submission is that these statutes, which conferred the power to keep registers of civil status by necessary implication confer the power to marry. None of these persons who were permitted to keep registers of civil status were authorized to celebrate marriages, but these Acts have always been construed as authority to celebrate marriages in consequence of their being authorized to keep marriage registers.

There seems to be nothing before the Code which directly conferred competence on officers of civil status to celebrate marriages, with one exception. I may be wrong as to that, and perhaps my learned friends have discovered some other statute, but I have only discovered one and that is the one referring to the ministers of the Church of Scotland. It uses language different from the language of the other statutes which merely authorized the keeping of registers of civil status and it is the only instance I find as to the dissenting ministers.

This is the authority that is given:—

> Be it therefore further enacted by the authority aforesaid, that all marriages which have heretofore been or shall hereafter be celebrated by ministers or clergymen of, or in communion with the Church of Scotland, have been and shall be held to be legal and valid to all intents and purposes whatsoever, anything in the said Acts or in any other Act to the contrary notwithstanding: 7 Geo. IV. ch. 2 (L.C.).

The inference from that is that it was taken for granted that the Anglicans and the Catholics could celebrate marriages, and it seems to have been taken for granted also that justices of the peace could celebrate marriages. It does not shew that there was any lawful authority for doing that, but it shews that that was the state of the practice. Now, it is quite possible that in so far as the celebration of marriage by the priest or by an Anglican clergyman is concerned it resulted necessarily from the effect of the cession. That is quite possible, but what I say is that there is no legislative authority at any time given to them, before the Code, either to Anglicans or to Roman Catholic priests. At all events I cannot find any, although, perhaps, my learned friends may have discovered something that has escaped my notice. This is the only statute which, before the Code, appears to confer power to celebrate marriage.

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It has been suggested that the Hardwicke Act was introduced into Canada and persisted in notwithstanding the Quebec Act. It seems to me that, so far as the law of marriage was concerned, the introduction of the French law—the law of Canada—by the terms of the cession and the Quebec Act, would *pro tanto* repeal any provisions of Lord Hardwicke's Act that were applicable otherwise to the colonies. Your Lordships will remember that the free exercise of the Catholic religion was always subject to the King's supremacy. You have to read all these things together. It makes up a very perplexing situation, and all I can say is that the inhabitants of Lower Canada at the time took it for granted that the Anglican clergymen could celebrate marriages and that portions of the Catholic clergy could celebrate marriages, and they even seemed to believe that justices of the peace could do the same. That being the case, the first Act that was passed relating to marriages of Catholics and Protestants was the Act of 1795.

As to the common law right of justices to celebrate marriages, how could it persist, and how could the jurisdiction of the justices of the peace continue after the Quebec Act, which introduced the law of France into the Province of Quebec. The only limitation I would suggest would be this: That if you regard the authority to celebrate marriages as Chief Justice Sewell regarded it, as a function which derives its authority from the State, then, of course, the effect of the cession would be to abolish all the authorities that emanated from the French Government, and the source of all authority in that respect would then be in the King of England, and that would require new commissions, new instructions, and new authorities. I have always thought that this Act of 1795 was intended to confer the power to celebrate marriage because it is impliedly contained in the power to keep registers of marriages and to enter therein all marriages celebrated by the clergymen. If that is not so, how could you construe the subsequent legislation in regard to the dissenters, which, with the single exception of the one relating to the clergy of the Church of Scotland, did not confer power to celebrate marriages at all, but simply conferred power to keep registers, and put them all under the general Act of 1795. Is it not clear that the meaning of the Legislature at that time must have been to confer upon those dissenters (who certainly did not have any power to celebrate marriages by any tradition or any antecedent authority) the power to celebrate marriages by giving them the authority to keep registers of civil status? That would be my construction of that statute, or otherwise you would have come to the conclusion that, until the Code, all these dissenters for whom all this special legislation was passed really could not celebrate marriage at all; they could keep registers,

but they must have some other authority outside the statutes to celebrate marriages. That seems to be inconceivable and it seems to me we must construe that legislation as by necessary implication conferring the power to marry.

I wish to refer to two more statutes which are mentioned by my learned friends on the other side. One of them, 9 & 10 Geo. IV. ch. 75 (L.C.), relates to the Jews. My learned friends were not quite right in their statement about this, because, while it is true there is a restriction, it does not appear to me, under the words of the Act, to be a restriction as to their power to celebrate marriage. The Act (sec. 7) says: Every Jewish minister is to keep "a register in duplicate of all marriages and burials performed by him, and of all births which he may be required to record in such register by any person professing the Jewish religion." It is manifest that the Jews did not celebrate baptism, but they did celebrate marriages and they did officiate at burials, and their power does not seem to be restricted as to marriage or as to burials. But it is restricted as to the case of births which are presented to them to be recorded. I do not know whether that was really the intention of the legislation, possibly they expressed themselves badly, because I do know that in England the acts relating to Jews restricted their power to marriages within their own congregation. I say that this Act has not, in terms, done it. The only other statute of this kind to which I will refer, is that respecting the Quakers, 23 Viet. ch. 11 (Can.). The restriction in this Act is not quite so extensive as my learned friends on the other side contend, but it does say:—

> 1. All marriages heretofore solemnized in Lower Canada according to the rites, usages and customs of the Religious Society of Friends, commonly called Quakers, and all marriages hereafter to be solemnized in Lower Canada, between persons professing the Faith of the said Religious Society of Friends, commonly called Quakers, or of whom one may belong to that denomination, shall be held, and are hereby declared to be valid to all intents and purposes whatsoever.

I say this special legislation was due to the fact that the Quakers did not appear to have any ministers over their congregation. They are a society who are very much impressed with the personal equality of all members of the congregation, and they refuse to elect or to recognize any one at their head, and consequently it was in the nature of things that a separate legislative provision should be made for the Society of Friends. With these exceptions, and to the extent of these exceptions, all the legislation appears to be directed to authorizing dissenting congregations to keep registers of civil status, but never in terms, except in the one case of the Church of Scotland, authorizing them to marry.

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There is just one other observation I wish to make before I leave this part of my subject, and that is that it is a very doubtful question whether article 127, if it be relied on, creates a nullity of marriages celebrated in contraversion of the terms of that article. It may be—and I suggest this is a very reasonable construction of the language of that article—that, while it recognizes the religious impediments established in the different communities of Christians, it merely leaves the contravening parties to the penalties which may be imposed by their respective churches. The article simply says that the other impediments recognized according to the different religious persuasions, as resulting from relationship or affinity or from other causes, remains subject to the rules hitherto followed in the different churches and religious communities; the right likewise to grant dispensation from such impediments, appertains, as heretofore, to those who had hitherto enjoyed them. If you compare that article with article 152 which enumerates the nullities resulting from a violation of the articles of the Code, you will find that any marriage contracted in contravention of articles 124, 125, 126, may be contested either by the parties themselves or by any of those having an interest therein. But, nowhere in the Code is it said that a marriage celebrated in contravention of article 127 of the Code can be set aside. No nullity is pronounced by the Code as to that, and you cannot infer it from the language of 127 which simply says that the impediments recognized in the different religious communities remain subject to the rules which have hitherto prevailed. Nowhere do you find any article in the Code annulling such marriages. If that be the case, then all the force of the argument derived from the application of article 127, as establishing an impediment to clandestinity, disappears. That is a part of the argument, which I have already had the honour to submit, that it is not an impediment within the meaning of article 127.

Now, my Lords, I pass on to the second branch of the question which I shall deal with very briefly, because a great deal of what has been said on sub-question (*a*) applies to sub-question (*b*) necessarily, these two overlap.

Now, this question says:—

> 2. Does the law of the Province of Quebec render null and void, unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province; (*b*) between two persons, one of whom, only, is a Roman Catholic.

My submission is briefly this: by the terms of article 129 all priests, rectors, ministers and other officers authorized by law to keep registers of civil status are competent to solemnize marriage. The construction which is put on this article by my adversaries is that the jurisdiction of each of these enumerated officers

of civil status is restricted to a certain class of persons. As I understand them, they contend that a Roman Catholic priest is authorized to celebrate marriages between Roman Catholics, and that Protestant ministers are authorized to celebrate marriages between Protestants, and that that results from the cession and from the delimitation of powers which necessarily resulted. I understand that to be the contention of my adversaries. It is the theory which is propounded by Mr. Justice Jetté in *Laramée* v. *Evans*, 25 L.C. Jur. 261. He says that at the time of the cession there were these two mutually exclusive jurisdictions and that the result of their juxtaposition, without any legislation at all on the subject, was necessarily to render them competent each within its own sphere.

The question is: what is the limit of the jurisdiction of these functionaries; and is there any limitation? Of course, if you impose limitation in one case, there is no reason for not imposing it in the other. How could you say that, in the case of all these enabling Acts, these various persons who are authorized to keep registers of civil status, and in the case of ministers of the Church of Scotland, who are authorized to celebrate marriages —how could you say there is any restriction? The Act giving power to the ministers of the Church of Scotland says that all marriages celebrated by them shall be valid hereafter. That is not qualified by any restriction of any kind. It is not to be supposed that the ministers of the Church of Scotland were given any authority less than that which was vested in the clergymen of the Anglican Church; it could not have been supposed that greater authority was given to them. My submission is, that there is no restriction, but my friends on the other side say there is some necessary restriction upon all these functionaries to celebrate marriage within their own parishes and among persons of their own flock. They do not admit in their factum but they will probably admit in their argument that that extends further than their own flock, and these functionaries have the authority to marry, providing one of the parties applying to be married is of their flock.

Now, where is the law for making that distinction? How can you find such a distinction in any of the legislation before the Code; where can you find it in the Code? The whole historical argument, as I understand it, goes to this: that the jurisdiction of each of these functionaries is exclusive and restricted, but where do you find any suggestion as to that in any law upon the subject? And the necessary result of that theory would be, it seems to me, that in order to celebrate a mixed marriage, as it is commonly called, it would require the presence of two officiating clergymen and by the very nature of things each would be without jurisdiction in the parish of the other. Suppose, the

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two parties, the Roman Catholic and the Protestant, belonged to different parishes,—what would happen? We will take, for simplicity's sake, the case of an Anglican where there is a parochial division, living in one parish, and a Catholic living in another parish,—how are you going to get concurrent action on the part of the clergyman and the priest? The clergyman has no jurisdiction in the parish of the priest and, *vice versa*, the priest has no jurisdiction in the domicile of the other. It seems to be a *reductio ad absurdum* to say that two ministers could by joint operation validly effect one marriage. Where do you find any authority for saying that the priest has any authority to marry beyond his own flock; or that the Anglican minister has any authority to go outside his own congregation; unless you adopt the prefectly plain and natural meaning of article 129 that there is no restriction whatsoever. To go a step further, how can you celebrate a marriage between a Christian and a Chinaman; by what possible combination of officers of civil status can you validly effect such a marriage; how could you validly effect a marriage between two unbelievers who have no parish and belong to no religious community; how could you marry two Chinese or Hindus or Turks; and we have all of these people in our midst. If you say that there is a restriction there according to the historical argument that is made, which confines the power of each to his own congregation, you are disfranchising, so to speak, this large part of our population, because you will see that there is no officer of civil status competent to marry them. I am only using this argument to shew the improbability of our codifiers having, at the end of article 129, intended to create any such ridiculous restriction as that, which would make it impossible for a large proportion of our population in the large cities to get married at all.

Now, I submit it is contrary to reason and to common sense to adopt such a construction of article 129. In so far as the construction of that article is concerned, even if the commissioners supposed that they were reproducing the disabilities of the old law, the question is not what they intended to do but what they have done by that language. I submit that they have in the clearest manner established the power to celebrate marriage without any of the restrictions which may have existed prior to the Code. I cannot find any law which gives the authority for the celebration of a mixed marriage, either by a Catholic priest or by a Protestant minister, unless you adopt my construction of the Code, and of all the previous statutes, that the power to celebrate marriage is not restricted to any particular community of Christians or of citizens, and that any persons authorized to marry can marry generally, unless, as in the case of the Quakers, there is a restriction, and that exception proves the

rule, and it was a necessary restriction in the case of the Quakers because they do not have any minister, and people would not go to them to get married unless they were members of the Society of Friends and joined the congregation. Marriage was celebrated among the Quakers by the consorts getting up in the middle of the congregation and saying they took each other for man and wife, and there was no priest or minister involved in it. There was no official of any kind, and as soon as they were put under the operation of the Act of 1795 they had to have a registry officer and keep a register of civil status. But there was no one who performed the marriage. That officer attended as a member of the congregation, and, as I say, there was this restriction necessary in the case of the Quakers because of the peculiar constitution of their religious society. I wish to give your Lordships one more reference upon the construction of the Code, and I wish to refer to the *Canadian Pacific Railway Co.* v. *Robinson*, 19 Can. S.C.R. 292; [1892] A.C. 481. And I wish to add the case of *The Bank of England* v. *Vagliano Bros.*, [1891] A.C. 107. This is an English case, decided in the Privy Council. I refer to the judgment of Lord Macnaghten, in *Norendra Nath Sicar* v. *Kamalbasini Dasi*, 23 Indian Appeals 18, at p. 26. It re-affirmed the rule which was laid down by Lord Herschell in *The Bank of England* v. *Vagliano Bros*, [1891] A.C. 107, and applied it to the Indian Succession Act; it entirely approves of the principle that was laid down in that case.

In regard to mixed marriages, as the Chief Justice has pointed out, the question has not been raised in any judicial proceeding, and I am not aware it is a matter of doubt in our province, and so there is no grievance or anything of that kind that requires to be redressed. I am bound to say that. But I do consider that the argument upon that question is of the highest value in assisting you to interpret article 129, because I think, when you reflect over the question of a mixed marriage, you must come to the conclusion, my Lords, that it is the *reductio ad absurdum* of the historical argument. It seems to me to lead to consequences which are repugnant to reason and to a proper interpretation of article 129. As to its being a question of moment in our province it is not so far as I know.

Mignault, K.C.:—My Lords, I do not think, especially at this late stage, that there can be any doubt as to the construction which should be put on the Civil Code of Lower Canada, and more especially as to the canons of construction which apply. The question has come up in its general form through some remarks made by my learned friend, Mr. Lafleur, both in his factum and in his argument. I conceive that it is beyond question that the Civil Code is mainly declaratory of the law as it existed in 1866.

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If your Lordships will look at the sections of the Act; the instructions given by the legislature to the codifying commissioners was, in every case, to express the existing law, and where they thought proper to suggest an amendment it should be indicated as an amendment suggested. My main purpose in referring to this is to state that our Civil Code is mainly declaratory of the existing law. It is not a new law; it is not a law like the Bills of Exchange Act in England, which, in some ways, may have been a codification, but I think was not so in many respects. I am speaking with all due deference, because I am not as familiar with that as I am with our own laws. But I take it that in the case of the Bills of Exchange Act there were many, —what I may call reforms,—which were effected by the new legislation. I think that is beyond question. I think that certainly my learned friends will not disagree with me that, mainly, the Civil Code of the Province of Quebec is declaratory of the existing law. It is in no wise—or if it is I humbly confess that I have not grasped its meaning—an ordinary statute; it is a body of laws; it is a concise expression of the entire system comprising the whole law of the province as mainly derived from the Coutume de Paris and from several of the old ordinances with the additions which came from certain customs. So that our Civil Code, when construed, must be considered in the light of a declaratory law.

We have the reports of the codifiers to guide us. My learned friend in his factum objects to the use of these reports and he cites certain judicial opinions where it has been suggested that it was not proper to refer to reports. There have been Royal Commissions and these Royal Commissions recommended a change in the law and Judges have sometimes, and I think in some instances very properly, refused to be controlled by the report of the commissioners in construing a law. But between our case and those cases, I submit, there is no parity whatever. Our Courts have been in the habit, rightly or wrongly, and I think rightly, of referring to the reports of the codifiers, and their Lordships of the Privy Council have also referred to them in the case of *Symes* v. *Cuvillier*, 5 App. Cas. 138, at p. 158. In that case they referred to them on the question as to the old law and they said that the reports of the codifiers were entitled to the very greatest weight, the greatest respect, but were not to be considered as judicial utterances. But, for purposes of comparison, and that is my point, they have always been considered by our Courts as throwing light on the meaning of the articles of the Code. They have been incidentally cited in such cases; they have been cited by your Lordships, they have been cited by every Court, and on this point specially is it necessary to refer to them because I will shew to your Lordships that article 129

is not clear, as has been stated, by my learned friend; that there are very serious limitations, and that, considering the whole subject, it raises questions of construction in which certainly your Lordships can be aided by reference to the codifiers' reports. We have certain rules which have plainly been applied in the construction of our Code as well as in the construction of the French Code. As the Chief Justice has pointed out, Laurent has always been a source of authority as to the meaning of the law in France. These reports have always been referred to before our Courts, and I am not aware that the practice of referring to these interpretations has ever been considered as worthy of reprobation. I may say, further, that we have distinct rules in our Code covering construction, which are mainly taken from the French Code. I refer to the familiar rule laid down by article 1020 of the Civil Code which refers to the construction of contracts but which equally applies to the construction of any statute. Article 1020 says:—

> 1020. However general the terms may be in which a contract is expressed, they extend only to the things concerning which it appears that the parties intended to contract.

I say that rule applies to the construction of a statute and I find laid down in Beal on Legal Interpretation, 2nd edition, 1908, page 311, under the title of Restriction of Language, the following utterance of Lord Herschell:—

> It cannot, I think, be denied that for the purpose of construing any enactment it is right to look not only at the provision immediately under construction, but at any that is found in connection with it, which may throw light upon it, and afford an indication that general words employed in it were not intended to be applied without some limitation: *Cox* v. *Hakes*, 15 App. Cas. 506, at p. 529.

My learned friend, Mr. Lafleur, to some extent has, so to say, isolated article 129, his argument being that there is no restriction whatever in the terms of article 129, and consequently, that it is to be given the widest application. I propose to consider article 129—I think I am right in doing so—in connection with all the provisions of the law covering both marriages and the case of registers of civil status, the two subjects being branches of the one general subject. Article 129 is in the following terms; and paragraph 1, which I will consider now, reads:—

> 129. All priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status are competent to solemnize marriage.

My learned friend says there can be no doubt about the meaning of this, that it is a general provision to which is to be given the widest possible effect. I have to contest that doctrine in regard to article 129; I think it cannot be given general effect according to its terms. I have to suggest, first, one limitation as

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to which, to my mind, there can be no doubt, and that is in respect to the words: "and other officers authorized by law to keep registers of civil status." My submission is that these general words must be restricted so as to extend merely to officers of the same category as priests, rectors, and ministers. Otherwise, I submit, that superiors of religious communities would have the right, according to the contention of my learned friend, to solemnize marriage. Mr. Lafleur says that all superiors of religious communities are not authorized to keep registers of civil status, but that is not what article 129 says. Article 129, if you give it general effect, says, "all officers authorized by law to keep registers of acts of civil status," and that according to its general meaning would mean any act of civil status. Consequently, if you give general effect to article 129 it is undoubted that superiors of religious communities are authorized to keep acts of civil status; acts of religious profession, which are acts of civil status. Consequently, here is one indication that the terms of article 129 cannot be followed and so we must begin to look at it with that notable restriction.

Now, there is a second restriction to the general meaning of article 129 and it is a most important one. Are priests, rectors and ministers competent to solemnize marriage whether or not they are authorized to keep registers of civil status? If general effect be given to article 129 the affirmative might be predicted. I submit that it is evident, by all the provisions of this law, that here again we must restrict article 129 to priests, rectors, and ministers who are authorized to keep registers of civil status. This being granted, then there is the further limitation that priests, rectors and ministers are competent to solemnize marriage only in those places where they are authorized to keep registers of civil status, because elsewhere they have not that authority, and, consequently, priests, rectors and ministers can only solemnize marriage where they are authorized to keep registers of civil status. Then we come to article 63 of the Code.

I desire to point out to your Lordships that the canons of construction which my learned friend, Mr. Lafleur, would apply to the interpretation of article 129 cannot apply because they omit material provisions which require to be applied in the construction of this particular law. We have article 53*b* and my learned friend, Mr. Lafleur, practically admitted that he could not say what officers it applied to. Now, I say, that by article 63 and as a general rule marriage must be solemnized at the place of domicile of one or other of the parties, but here is an article which requires construction. This law is not so clear as has been stated. Article 63 says:—

63. The marriage is solemnized at the place of the domicile of one

or other of the parties. If solemnized elsewhere, the person officiating is obliged to verify and ascertain the identity of the parties.

My learned friend, Mr. Lafleur, says that marriage can be celebrated anywhere, and consequently the first part of article 63 is useless. I say that the first part of article 63 lays down the general rule, and that the reference to marriage being celebrated elsewhere in the second part of the paragraph refers to exceptional cases. But it is evident that, between us, article 63 must be construed and consequently we have an indication which I submit to your Lordships as having, in my humble opinion, very great force. Therefore, this article requires construction, and I will shew your Lordships that article 129 requires construction, when combined, as it must be combined, with another article of the Code. Article 63 indicates that, as a general rule, marriage must—I use the word must—be solemnized at the place of domicile of one or other of the parties. I have been at some pains to verify this, and I have referred to the authorities cited by the codifiers, but have derived no light from that.

Article 63 says that the marriage is solemnized at the domicile of one or other of the parties, but according to the old law, as laid down by Pothier, the marriage should be celebrated where the bride lives, but with the permission of the parish priest of the domicile of the bride the marriage could be celebrated at the domicile of the husband. That is what was laid down. But, under article 63, the marriage could be solemnized in the place of the domicle of either party.

The second part of the article says:—

If solemnized elsewhere the person officiating is obliged to verify and ascertain the identity of the parties.

I think we can help ourselves in construing that portion of article 63 by reference to article 132 which uses practically the same phraseology. Article 132 of the Civil Code says:—

132. If their last domicile be out of Lower Canada, and the publications have not been made there, the officer who, in that case, solemnizes the marriage is bound to ascertain that there is no legal impediment between the parties.

Your Lordships will notice that the language of the two is very similar. In article 63 it is stated that if solemnized elsewhere the person officiating is obliged to verify and ascertain the identity of the parties, and in article 132 it is said that the officer who solemnizes the marriage is bound to ascertain if there is no legal impediment between the parties. I would take the case mentioned in article 132 as being one of the exceptional cases to which the latter part of article 63 refers. There is another case in point. Under canon law, it was a vexed question as to where vagrants, who had no domicile at all, could be married. It was conceded that they could marry, but the question arose as to whether they should go to the parish priest of their domi-

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cile of origin and there be married. The decision of the canonists was, and it was laid down authoritatively by the commission of cardinals entrusted with the construction of the decrees of the Council of Trent, that they could marry anywhere, but before marrying them the priest was bound to ask the permission of the ordinary, that is to say, of the bishop, and also to make an inquiry in order to discover whether there was any impediment between the parties. I would refer your Lordships, on this question of the marriage of vagrants, to Esmein, Le Mariage en Droit Canonique. I submit to your Lordships that this case of vagrants is one of the things to which the exception in article 63 would apply. I know of no other case and I would say that outside of these exceptional cases, unless you deprive of any effect the first part of article 63, marriage must be celebrated at the place of residence of one of the parties.

With regard to Roman Catholics, "place of residence" undoubtedly it is the parish; with regard to other religions I am possibly not sufficiently informed to state. Article 63 was considered by this Court and by the Privy Council in the case of *Wadsworth* v. *MacMullen*, 14 App. Cas. 631, and as I understand the decision it was stated that article 63 referred to residence and not necessarily to domicile.

I am not prepared to say with regard to other religious congregations, but I believe in the case of the Anglican Church there is a parochial organization. I am not aware whether a parochial organization, that is to say, a distinct territory, exists for the ministers of other religions, but in the statutes which we have printed, there is some reference to a "circuit."

There is article 133 which reads:—

> 133. If the parties, or either of them, be, in so far as regards this marriage, under the authority of others, the banns must also be published at the place of domicile of those under whose power such parties are.

The point I am making, and from which I have somewhat wandered, is, that article 63 lays down the general rule and that in consequence of this rule article 129 must receive no limitation, and as it would only apply to the priest, rector or the minister of the domicile of the parties, no other could, without the permission of the parish priest or rector of the parties, solemnize marriage either at the domicile of the parties, because they are not there authorized to keep registers of civil status, or elsewhere, because, as a rule the marriage must be solemnized at the domicile of the parties. Consequently, I say we have no limitation to the terms of article 129. There is another article of the Code, which I think your Lordships should consider in connection with the construction of article 129. I refer to the second paragraph of article 44. Article 129, as we know, authorizes

priests, rectors, ministers and other officers, authorized by law to keep registers of acts of civil status as competent to solemnize marriage, and the second paragraph of article 44 says:—

> In the case of Roman Catholic churches, private chapels or missions, they are kept by any priest authorized by competent ecclesiastical authority to celebrate marriages or administer baptism and perform the rites of burial.

On the one hand, according to article 129, priests who are authorized by law to keep registers of acts of civil status are competent to solemnize marriage; on the other hand, by the second paragraph of article 44, Roman Catholic priests who are authorized by competent ecclesiastical authority to celebrate marriage are authorized to keep registers. The juxtaposition of the two articles shews this: that because priests are authorized by competent ecclesiastical authority to solemnize marriage, they are by the civil law authorized to keep registers, and because they are authorized to keep registers according to article 129 they are declared competent to solemnize marriage. I submit to your Lordships that these two articles must be considered together, and it is perfectly obvious, that in view of these articles the wide construction claimed for article 129 is impossible with regard to Roman Catholic priests. My learned friend states in his factum that there is no distinction between Roman Catholics and non-Catholics in article 129, whereas he concedes a sharp distinction between Roman Catholics and other religions under articles 42, 43, and 44. But I take it, my Lords, that so far as Roman Catholics are concerned, articles 129 and 44 must be read together. I am referring to what my learned friend says in his factum. He says:—

> Articles 128 and 129 are in sharp contrast in this respect to articles 44, 49, 53*a*, 59*a*, which refer expressly to the Roman Catholic church and distinguish between its priests or members and those of other religions.

My point is that, so far as the Roman Catholics are concerned, articles 128 and 129 and 44 must be read together, because article 129 says that all priests who are authorized by law to keep registers of acts of civil status are competent to celebrate marriage and, when we inquire who are the priests who are authorized by law to keep registers of acts of civil status, we find the answer in the second paragraph of article 44, that they are those priests who are authorized by the competent religious authorities to solemnize marriage. Consequently, I submit that the title of the priest is the authorization given him by the bishop. I am referring to nothing else now than the provisions of the Civil Code, and it is because he is authorized by the bishop to solemnize marriage that he is authorized by the law to keep registers, and it is because he is authorized to keep registers that he is

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declared competent to solemnize marriage. It is not claimed to give him the power, it is said he is competent to solemnize marriage, and, consequently, I say that the title of the priest is the authorization of the competent ecclesiastical authority, so that in the final analysis, according to these articles of the Civil Code, the priest derives his authority, his right to solemnize marriage, from the authorization of the bishop. If there is any other construction that could be placed on the construction of these articles of the Code, I would be happy to hear it from my learned friend. I see no escaping from my contention and I would submit that it was done deliberately. There was never a doubt, I am speaking perfectly frankly, before the decision in *Delpit* v. *Côté*, 20 Que. S.C. 338, that Roman Catholics could only be married before their own parish priest. My learned friend has referred to the case of *Burn* v. *Fontaine*, 15 L.C. Jur. 144, 3 R.L. 516, 4 R.L. 163, but that is not a case in point because in that case there was no action to set aside the marriage. It was pretended that the first marriage was null *ipso facto* and that a second marriage had been contracted, and the wife—I am speaking from memory, but it is to be found in Revue Légale, vol. 4,—the wife claimed marital rights or alimony or something of that kind, and it was alleged that one of the marriages, I think the first, was an absolute nullity. The natural position is that the Court would not assume the marriage to be null, in the absence of any action taken to set it aside. That case was merely an application of the doctrine of the presumption of the validity of the marriage until the marriage was set aside. As I have said, there never was a doubt before the decision in *Delpit* v. *Côté*, 20 Que. S.C. 338, as to what the law of the Province of Quebec was. It is conceded by Mr. Justice Jetté, *Laramée* v. *Evans*, 25 L.C. Jur. 261; Justice Papineau had, in that very same case, decided the same thing on demurrer, 24 L.C. Jur. 235. There never had been any question before.

It was argued in the case of *Laramée* v. *Evans*, 25 L.C. Jur. 261, that the marriage was good. To be perfectly frank I should say that one of the earliest commentators on the Code expressed the opinion that, under article 129, such marriages could be celebrated, but Mr. Justice Loranger, in his treatise on the civil law, and Sir François Langelier, in his course of lectures at Laval University, which have been published, agree that marriages of Roman Catholics must necessarily be celebrated before their parish priest. I was saying that I considered the words used in article 44 were used advisedly. It was never doubted in the Province of Quebec that the authority to solemnize marriage, *quoad* Catholics and *quoad* a Roman Catholic priest, came from the church, and that it was a part of the jurisdiction which he received from his superior. We find this idea stated in article

44. My argument on this would be extremely simple; authorization of the bishop, I submit, is the title of a priest to solemnize marriage. This authorization is necessarily restricted to people of the same communion as the Roman Catholic priests, that is to Roman Catholics. If it were held, under article 129, that the competency of these ministers and rectors extended to all marriages, without any distinction, then the power and authority of the non-Catholic priests would be wider than those of the Catholic priests, and that would be contrary to the principle of equality. I take it that article 129 applies to the religious belief, in so far as the Roman Catholic clergy are concerned, and, to my mind, it would be extremely difficult to otherwise satisfactorily construe article 129 with the second paragraph of article 44.

I think, that it is also possible to discover the true meaning of article 129 by reference to some other provisions of the law. I would direct your Lordships' attention to the provision concerning opposition to marriage. I may say generally that the chief object of the law in enacting articles 128 and 129 was to secure the publicity of marriage and to prevent clandestine marriages. This was, of course, a consideration of public order, and, consequently, they provided for a procedure for the taking out of oppositions to marriage. I do not know that there is a similar procedure in the English law, but in accordance with our law a marriage might be prevented by reason of an opposition. For instance, the father or the mother or the tutor or a prior consort of one of the parties, in order to prevent a marriage which would be null according to law, might take proceedings. Some construction must be put on article 129 to meet the provisions of the law concerning opposition to marriage. For instance, when an opposition is taken out by article 1107 of the Code of Procedure, it must be served upon the functionary called upon to celebrate the marriage; by article 1109 of the same code service of nonsuit of the opposition must be made upon the person called upon to solemnize the marriage. Article 61 of the Civil Code requires that the disallowance of the opposition be notified to the officer charged with the solemnization of the marriage. My argument is that there must be some officer, some priest or minister, who, in the intendment of the Legislature, is charged with the solemnization of marriage. Take the case of a marriage about to be celebrated in the city of Montreal where there are probably fifty Roman Catholic parishes including the suburbs, and perhaps three times that number of non-Catholic congregations. A marriage is about to take place and that marriage may be stayed by means of an opposition. The law requires that the opposition to marriage be served on the officer charged with the solemnization of the marriage. It seems to me

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obvious that there must be some particular officer before whom the marriage must be celebrated or otherwise effect could not be given with respect to these provisions as to opposition. There is another important article, article 65 of the Civil Code, which states what the acts of marriage must contain. That article, 65, sets forth that the act of marriage must set forth that there has been no opposition or that any opposition there may have been has been disallowed. How could a priest or minister make this entry that there had been no opposition to this marriage unless he is the only person on whom such an opposition could be served? I know the point taken by Mr. Lafleur in his argument, and it is that under article 65 of the Civil Code there is no requirement or mention of the religious faith of the parties to be married. He says that, if the competence of the officer solemnizing the marriage depends in any way upon the religious faith of the parties, it ismost extraordinary that mention of the religious faith of the parties is not required in the act of marriage. My submission is, and it is a complete answer, that all that is required in the act of marriage is the mention of those facts which go to make out the status of the married people, such as their names, the day in which the marriage was solemnized, whether they are of age or minors, whether they were married after publication of banns, whether with a dispensation or license and whether it was with the consent of their father or mother, tutor or curator, or with the advice of a family council when such consent or advice is required, the names of the witnesses, and whether they are related or allied to the parties, and if so on which side and in what degree. Finally, it must be stated in the act of marriage, that there has been no opposition, or that, if there has been any opposition instituted, it has been disallowed. All these facts go to make up the status of the parties. There is nothing in the act of marriage referring to the competence of the person solemnizing the marriage. It is not necessary, at least article 65 does not require, that his name should be given; it merely states that he will sign. All the facts mentioned in this act of marriage are facts which go to make out the status of the parties as married people, and certain facts relating to the witnesses and to the consent of the parents or guardians in case these parties be minors. But my submission is, that the law evidently contemplated that there should be one special officer or priest or minister, out of perhaps many thousands, who is called upon to celebrate the marriage. I think that is most important from the point of view of the construction of article 129, because the argument of my learned friend, Mr. Lafleur, if it has any force, would shew that a person could be validly married anywhere in the Province of Quebec, from Vaudreuil on one side to Gaspé on the other. For instance, a minor might go to any one of the hundreds of clergy in the city of

Montreal and produce a marriage license and be married without there being any means of preventing the marriage. Now, the law provides a means for preventing such a marriage, and says that the opposition which is taken must be served upon the person who is called upon, or charged, with the solemnization of the marriage. I say, therefore, that there must be, in article 129, one out of many thousands, who alone is competent to solemnize marriage.

I have said that in my humble opinion, the provisions respecting opposition to marriage shew the construction which must be placed on article 129. I would say the same as to the banns of marriage. By article 130 banns are directed to be published in the church to which the parties belong, and article 57 states that the officer who is to perform the marriage must be furnished with a certificate establishing that the publication of banns required by law has been duly made, unless he has published them himself. What would be the object of publishing banns in a church to which the parties belonged if the marriage could be celebrated one hundred miles away? Why, the object of the law would be absolutely defeated. I submit with confidence, that taking into consideration nothing outside the provisions of these two titles,—"Of Acts of Civil Status" and "Of Marriage"—the limitation for which I am contending must necessarily be placed on articles 129 so far as the Roman Catholics are concerned.

I will now take up the second question which I propose to discuss; and first, as to the prior state of the law. I think it is very material on this question to refer to the prior state of the law, and I wish to say a few words on the statute of 1795, 35 George III. ch. 4. The title of that Act is:—

> An Act to establish the forms of registers of baptisms, marriages and burials, to confirm and make valid in law the register of the Protestant congregation of Christ Church, Montreal, and others which may have been informally kept, and to afford the means of remedying omissions in former registers.

If your Lordships will look at section 10 of the Act, there is a reference to a petition which had been presented to the House of Assembly from the church wardens:—

> From the Church Wardens and Vestry of the Protestant congregation of Christ Church, Montreal, praying the interposition of the Legislature to legalize the register of baptisms, marriages and burials of the said congregation, which have not been kept agreeable to the rules and forms prescribed by the law of this province, and which, etc.

Through the courtesy of Dr. Roy of the Dominion Archives, I have been able to find the text of that petition which I think should be made a part of my argument. I will cite from the Journal of the House of Assembly of Lower Canada, from the

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11th of November, 1793, to the 31st of May, 1794, both being inclusive. It is published in Quebec by order of the House of Assembly in the year 1794. At page 62—the text is in the two languages, French on one side and English on the other—at the foot of the page I find the following:—

> The petition of the Church Wardens and Vestry of the Protestant congregation of Christ Church, Montreal, was presented to the House by Mr. Richardson and read in both languages, setting forth that the keeping, depositing and preserving in regular and due form and due manner registers of baptisms, marriages and burials, in their parish, most essentially concerns the rights of families and of individuals and that the not keeping and depositing of registers of baptisms, marriages and burials of the Protestant congregation of Christ Church, Montreal, according to the rules prescribed by the law of this province since the first day of May which was in the year of our Lord, 1775, unless provided against and remedied, may be attended with the greatest prejudice to the rights of the families and individuals of the said congregation. And, therefore, praying that leave may be granted to bring in a bill for legalizing the register of baptisms, marriages and burials of the said congregation of Christ Church, Montreal, and for the better keeping, depositing, and preserving the same hereafter.
>
> The House was then moved by Mr. Richardson, seconded by Mr. Frobisher, and it was resolved that the petition of the Church Wardens and Vestry of the Protestant congregation of Christ Church, Montreal, be referred to the consideration of a committee of three members, two whereof shall form a quorum, to examine the matter thereof and report the same as it shall appear to them to the House, with power to meet and to adjourn to such time and place necessary and to send for persons, papers and records.
>
> Mr. Richardson also moved the House, seconded by Mr. de Rocheblave, that he be exempt from being nominated on the said committee as he will not be present at Montreal when the information necessary will most probably be taken, which, upon the question being put, passed unanimously, and Mr. Richardson was accordingly excused by the House from being on the said committee.
>
> Ordered that Messrs. McGill, Frobisher, McBeath do compose said committee.

And I find at page 220 of the same volume the report of the committee:—

> Mr. McGill, chairman of the committee, to whom the petition of the Protestant congregation of Christ Church, Montreal, relative to the method of keeping the register of baptisms, marriages and burials of His Majesty's British subjects of the City of Montreal, was submitted, reported that the committee had examined and inquired into the allegations of the said petition and had directed him to report their proceedings therein, which he was ready to do when the House should be pleased to receive the same. Ordered that the report be now received.

And he read the report in his place and afterwards delivered the same in at the clerk's table where it was once read throughout in both languages, whereof the following is an abstract:—

The committee met at Montreal on Friday, the 10th day of January last. The Reverend Dr. Delisle and Mr. Tunstall, assistant clergymen, attended, also Messrs. Antill, Davidson, Hughes, Edwards, Finley and Winter, church wardens or parishioners. Dr. Delisle produced the book entitled "Copy of the Register of the Protestants of Montreal, made by me, David Chabrand Delisle, Rector of the Parish and Chaplain of the Garrison, on the 31st December, 1763," and informed the committee that he had made up that register from notes and memorandum occasionally taken by himself and the parish clerks who had been employed in that office; and that he had not in his possession nor did he know of any other register that had been kept by any Protestant clergyman of Montreal preceding his arrival in this country in 1766. The committee then proceeded to peruse and consider the copy of the register which they found to contain a list or register of christenings, marriages and burials in the following order:—

Marriages.

They begin 22nd November, 1766, and end in 1793, and a copy of the register contains a list of marriages celebrated by the Reverend Dr. Delisle and Mr. Tunstall during that time, the names of the parties married, but the avocations or places of abode not being inserted, or of the witnesses who were present. The better to judge thereof the committee esteemed it proper to subjoin a copy of the first and last entries of marriages as a sufficient specimen of the whole.

1. 1766. Mr. Peter Paul Souberiau and Miss Catherine Félicité Chaumont were married by publication on the 20th November.

Last. 1793. 22nd December, Mr. John Turner and Mrs. Mary Knowles, widow, were married by license.

Christenings.

The register of christenings is perhaps more regular as it appears that when there were sponsors their names are inserted. The first is in 1766 without sponsors; the second is of the same year and with sponsors in the following manner:—

1. Ann, daughter of Mr. Lawrence and Mrs. Jemima Ermatinger, born 16th October, baptized 5th November; sponsors, Mr. Horace Oakes, Miss Moore Oakes, Miss Margaret Oakes.

The last is as follows in 1793; Abagail, daughter of Samuel and Mary Brown, born 25th October and baptized 8th of November.

Burials.

The first appears to have been in 1767 and is entered in the following words:—

Isabella Holmes, died 24th of May and was buried the 25th.

The last is in 1793: Margaret Wraser, died the 4th of December and was buried the 5th. And there is no mention of the parents or other relations or places of abode.

The committee esteem it proper to add that they desired the vestry men and parishioners who are present at the perusal of the copy of the register to examine it and see whether in their recollections there had been christened, married or buried any persons whose names were not therein inserted; Major James Hughes remarked that in the list of christenings no less than three persons in his own family had been omitted, namely, his sons Charles and William and his grandson

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James Walker; from that circumstance it is inferred that an omission has been made as well of marriages and burials as of christenings.

Upon the whole your committee is of opinion that it is with reason the petition referred to states that the register of baptisms, marriages and burials of the Protestant congregation of Christ Church, Montreal, have not hitherto been kept in the manner prescribed by the law of this province, which may be attended with great prejudice to the right of families and individuals. The committee conceive it their duty to observe that they have reason to believe that marriages, baptisms and burials have been solemnized by other Protestant ministers as well, Episcopalian, and Presbyterians, at other parts of the province without any register whatever having been kept of them. Your committee, therefore, submit whether a law to remedy these and such other like defects should not be passed as soon as convenient, that the mind of His Majesty's Protestant subjects and others their relations may be quieted and a mode pointed out for the due and legal keeping and registering of all baptisms, marriages and burials of His Majesty's Protestant subjects in the future.

The point I desire to make from that is this: The question was put by one of your Lordships this morning to my learned friend Mr. Lafleur, as to what was the law as to the solemnization of marriages in keeping the registers before 1795. Your Lordships will see by section 10 of the Act referring to the petition I have just read, it is stated that these registers at Christ Church, Montreal, had not been kept agreeable to the rules and forms prescribed by the law of the province. At the end of the same section, it is provided that a copy be made of this register and that it be compared by a Judge of the Court of Queen's Bench at Montreal, that the copy, therefore, shall have the same force and effect to all intents and purposes as if the same had been kept in accordance with the rules and forms prescribed by the law of the province.

Section 11 of this Act is also material. It says:—

11. And whereas there may be other registers which have been kept in this province, not strictly agreeable to the rules and forms prescribed by law; and be it further enacted by the authority aforesaid, that any register of baptisms, marriages and burials which has been informally kept and not deposited as the law directs before the commencement of this Act, by any rector, curate, vicar or other priest or minister of any parish or of any Protestant church or congregation, and which before the expiration of five years after the passing of this Act, shall be presented along with an exact duplicate or transcript thereof to one of His Majesty's Justices of the Court of King's Bench, or provincial Judge of the district wherein such register was kept, in order that the original and the duplicate or transcript thereof may be by him, the said Justice or Judge, compared, certified and signed. And notwithstanding any defect in point of form or otherwise regarding such register, duplicate or transcript, the same shall severally be received as evidence in all Courts of justice of the truth of the entries therein contained, according to the true intent and meaning thereof, and shall

have the same force and effect to all intents and purposes, as if the same had been kept according to the rules and forms prescribed by the laws of this province.

Then, by section 15 of that Act it is further enacted:—

15. And be it further enacted by the authority aforesaid, that so much of the twentieth title of an ordinance passed by his most Christian Majesty, in the month of April, in the year one thousand six hundred and sixty-seven, and of a declaration of his most Christian Majesty of the ninth of April, one thousand seven hundred and thirty-six, which relates to the form and manner in which the registers of baptisms, marriages and burials are to be numbered, authenticated or paraphé, kept and deposited, and the penalties thereby imposed on persons refusing or neglecting to conform to the provisions of said ordinance and declaration, are hereby repealed, so far as relates to the said registers only.

My submission is that prior to 1795 the law of the province was the old ordinance of France, and, so far as the registers are concerned, more particularly the 20th title of the ordinance of 1667 and the declaration of the month of April, 1736. That is clearly shewn by the statute of 1795 to have been considered as the law of the province.

The question of instructions to the Governor is a rather complicated question to discuss, but your Lordships have read the instructions contained in the books of Drs. Shortt and Doughty and you will have noticed that there were public instructions and secret instructions. I may refer generally to the report from the pen of Chief Justice Hey, which is published in the appendix to the first volume of the Lower Canada Jurist and which touches on all these questions. On the 2nd of October, 1763, the famous proclamation of George III. was issued by virtue of which it was claimed that English law has been introduced into the Province of Quebec. Governor Murray acting by virtue of certain instructions—my impression is that they were not the public instructions, but secret or confidential instructions—passed two ordinances which are referred to the Quebec Act. These ordinances purported to introduce the English common law into the Province of Quebec. They are discussed at length in the report of Chief Justice Hey to which I have referred, and they are also discussed and the whole question most exhaustively treated in the opinion of Chief Justice Lafontaine in the case of *Wilcox* v. *Wilcox*, 8 L.C.R. 34. The point taken as to the proclamation of 1763 was that it did not introduce, *proprio vigore*, the English law into Canada, but provided means by which it might be gradually introduced by means of a legislature to be summoned and which legislature was never summoned. The point as to the ordinances of Governor Murray was that they were beyond his power, that he could not by his own authority introduce the English law into the Province of Quebec.

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The provisions of the old French ordonnances refer to the solemnization of marriages by the proper curé. Now, with all due deference, I would say it is possible that these provisions may have been construed as being applicable in the case of Anglican clergymen and Roman Catholic clergymen. This is a subject with which I am not absolutely familiar and I speak with hesitancy. I take it that the same parochial organization existed in the Anglican Church as in the Roman Catholic Church, and that the provision of the law requiring the solemnization of marriage by the parish priest could be applied in the case of the Anglican Church the same as in the case of the Roman Catholic Church. I say that, with hesitancy, because so far as I am aware there is nothing absolutely conclusive as to the authority on which marriages were solemnized by the Anglican community prior to the Act of 1795. My learned friend, Mr. Lafleur, has stated that there is no statutory authority authorizing the solemnization of marriages by ministers of the Church of England prior to the Civil Code.

Section 16 of the Consolidated Statutes of Lower Canada, for the year 1860, which is a consolidation of 35 Geo. III., reads in this way:—

> 16. The Protestant churches or congregations intended in the first section of this Act, are all churches and congregations in communion with the United Church of England and Ireland, or with the Church of Scotland, and all regularly ordained priests and ministers of either of the said churches have had and shall have authority validly to solemnize marriage in Lower Canada, and are and shall be subject to all the provisions of this Act.

Quoad the Roman Catholic Church there never has been provision by legislation prior to the Civil Code which could be construed as conferring on priests the authority to solemnize marriage. I take it as an incontrovertible truth that the provisions of the old ordonnances of the French Kings, which were in force in the Province of Quebec, were preserved in operation under section 2 of the Quebec Act, and that continued to the Civil Code and there was no necessity for any provisions in the laws of Lower Canada authorizing the Roman Catholic priest to solemnize marriage.

As to the Anglican Church any authority its ministers had to solemnize marriage would be an authority derived from the old French law which continued to be in force. At all events that would strike me as the better view. That will come up more particularly under what I may describe as the question of repugnancy, which in two words is this—it is referred to in my learned friend's factum and is somewhat extensively treated of in the judgment of Mr. Justice Archibald in the case of *Delpit* v. *Côté*, 20 Que. S.C. 338—and it is, that those provisions for marriage were repugnant to the ideas and principles of the victors

and, consequently, did not remain in operation after the conquest. I submit it as an unquestionable fact that the whole body of the French civil law, including these ordonnances, was maintained in force in the Province of Quebec after the conquest, that at no time did the English common law have any effect in the Province of Quebec, and that it is possible to construe these ordonnances as conferring sufficient official authority to any parish priest to solemnize marriage. That, however, is a question that I discuss with a great deal of deference. It may be that authority was assumed by the ministers of the Anglican Church; it may be, as I thought my learned friend suggested, that they assumed they had authority under the law in Lord Hardwicke's Act. But I would say this: that undoubtedly the whole body of the civil law was in force, and my submission is that there is nothing therein that could be considered repugnant. The question of repugnancy is an absolutely new one; it was never suggested at any time that the provisions of the French law were repugnant and would have been abrogated by the effect of the conquest.

The subsequent special laws I will ask your Lordships briefly to look at, because it is contended by my learned friend, Mr. Lafleur, that they conferred a general authority to solemnize marriage. They were all special laws; they were adopted to come to the relief of certain congregations. I would submit that all these laws which were enacted after the statute of 1795 with respect to different religious communities are merely special laws and do not confer any authority to the ministers outside of their own congregations. I submit that as the proper construction of these laws.

Your Lordships will observe section 17, of chapter 20, C.S.L.C.:—

> 17. This Act extends also to the several religious communities and denominations in Lower Canada, mentioned in this section, and to the priests or ministers thereof, who may validly solemnize marriage, and may obtain and keep registers under this Act, subject to the provisions of the Acts mentioned with reference to each of them respectively, and to all the requirements, penalties and provisions of this Act, as if the said communities and denominations were named in the first section of this Act, that is to say: (Here the communities, etc., are enumerated.)

Your Lordships will see, therefore, that the Act refers to each special statute in which authority is given. Going back to these statutes, if your Lordships will look at 1 Wm. IV. (L.C.) ch. 56, an Act intituled "An Act to afford relief to a certain Religious Congregation at Montreal denominated Presbyterians," the sixth line of which says that they are authorized to solemnize and register all such marriages, baptisms and burials as may be performed or take place under the ministry of such minister or clergyman. The words "under the ministry" I

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submit refer to the ministry exercised in regard to his own congregation, because the petition they forwarded to the legislature was:—

> That the Reverend George W. Perkins, their present minister, or the person who hereafter may have the pastoral charge of the congregation to which they belong, should be duly authorized to solemnize marriages, administer baptism and inter the dead, and to keep registers authenticated in due form of law for that purpose.

The minister is authorized to keep registers of marriages, baptisms and burials which may be performed or take place under his ministry. Your Lordships will find practically identical language in the other statutes. In 3 Wm. IV. ch. 27, which enables the regularly ordained minister of the United Association Synod of the Secession Church of Scotland, to keep authenticated registers, this is the language:—

> It shall be lawful for every regularly ordained minister of the United Association Synod of the Secession Church of Scotland, having a permanent and fixed congregation, to obtain, have and keep . . . registers duly authenticated according to law, of all such marriages, baptisms and burials as may be performed or take place under the ministry of such minister or cleryman.

I make the point that in each of these particular statutes authority is given of a limited nature. The authority is prayed for in regard to the purposes of the congregation; it refers to baptisms, marriages or burials under the ministry of the minister and I submit the whole effect of the statute is that it never was conceived that any authority was given to these ministers outside of their own church so far as it might affect the rights of other denominations. Your Lordships will find by verification that that is the effect of the statute. I have stated that with respect to one statute and I can state it with respect to all.

Well now, I come to consider the objections which have been taken to the construction which I have put on article 129. There is an objection which is founded on the second paragraph of article 129. It is stated, in the first place, that recognizing that the Roman Catholic priests could only celebrate the marriage of their own co-religionists would be to recognize special privileges in the Roman Catholic Church. I respectively submit that that would not be the effect. At all events, to my mind, it would not be a serious argument and I need not do more than mention that objection. The second argument which is of more technical nature is founded on the second paragraph of article 129, which says that none of the officers thus authorized can be compelled to solemnize a marriage to which impediment exists according to the doctrine and belief of his religion and the discipline of the church to which he belongs. The objection is that this provision would be senseless if Roman Catholic priests could only marry their own parishioners. Mr. Justice

Archibald states that it would be of no use because then a person against whose marriage an impediment existed could go to another church where such an impediment was not recognized. I think the effect of the second paragraph of article 129 favours the view that Roman Catholics can only be married before their own priests, because it is stated that none of the officers thus authorized can be compelled to solemnize a marriage to which any impediment exists. My best submission would be that this recognizes an impediment according to the religious belief of the church to which both the parish priest and the parties belong. To my mind, it does not favour the view that Roman Catholic priests have not exclusive authority *quoad* their parishioners. On the contrary, if there is no impediment, then surely, under the construction of the second paragraph of 129, the celebration of the marriage can be completed. If there is an impediment, then the law recognizes that impediment because it provides that the priest cannot be compelled to solemnize the marriage. I submit that that is the clear and true meaning of the second paragraph of article 129. It does not go to the length of saying that then somebody else could celebrate the marriage, because if there is an impediment to the marriage I would submit that it cannot be solemnized by anybody. If there is no impediment then the Roman Catholic priest could be compelled to solemnize it. It seems to me that that is a perfect answer to my learned friend's argument, which is founded on the second paragraph of article 129.

Another objection is founded upon the question of marriage licenses. Marriage licenses are issued by officers appointed, in the Province of Quebec, by the Lieutenant-Governor, and the whole object of the marriage license is to dispense with the publication of banns. The granting of marriage licenses in the Province of Quebec is left to certain persons who are appointed or delegated by the Lieutenant-Governor. In order to obtain the issue of a marriage license it is necessary to give a bond, by two sureties being house-holders to the extent of $800, stating that no impediment exists to prevent the marriage. The whole object of the marriage license is to dispense with the publication of banns. The Roman Catholic bishop, on the one hand, and the Crown on the other, can both dispense with the publication of banns. The Roman Catholic permission is called a "dispensation"; the permission of the Lieutenant-Governor is called a "marriage license," but, the dispensation either of the bishop or the license of the Lieutenant-Governor cannot affect the solemnization of the marriage; in other words, the license does not confer the authority on the officer solemnizing the marriage and, if there be an impediment, the marriage license will not save the marriage from being declared non-existent. Conse-

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quently, no sound objection, to my mind, can be founded upon this. But I think there is a distinction made here, the effect of which is significant. The distinction is made between marriages of Roman Catholics and of non-Roman Catholics. As to non-Catholics a license can be obtained; as to Roman Catholics the dispensation is required before the publication of banns can be omitted. But, the license of the Crown cannot relieve the Roman Catholic priest from the necessity of publishing banns any more than the dispensation of the Roman Catholic bishop can relieve the Protestant clergyman from liability from the solemnizing of a marriage without the publication of banns. I take it that no argument of my learned friend can be founded on this, and I submit that it shews a distinction between marriages between Roman Catholics and non-Catholics.

There remains one question that I should treat on this branch of the subject and it is this: Assuming that a marriage between Roman Catholics must be celebrated before a Roman Catholic priest;—what is the effect of the solemnization of a marriage between two Roman Catholics before a non-Catholic priest? In answer to this, my submission is, that the marriage is non-existent and that there is no valid marriage. The objection is taken that article 152 of the Civil Code refers to marriages contracted in contravention to articles 124, 125, 126, and does not mention article 127, to which I will refer in a moment. I take it that under article 156 such a marriage could be set aside. Article 156 provides:—

> 156. Every marriage which has not been contracted openly, nor solemnized before a competent officer, may be contested by the parties themselves and by those who have an existing and actual interest, saving the right of the Court to decide according to the circumstances.

The saving clause has been referred to by both Mr. Justice Charbonneau and Mr. Justice Archibald. I submit that that is taken from the old law. The codifiers, on article 156, refer to Pothier, numbers 361, 362, and 451. The doctrine of Pothier, in a few words, is, that a marriage which is not celebrated before the curé of a party is always null, but that in some cases the Courts have been of opinion that the plaintiff was unworthy of being heard and that it was presumed that the priest who had solemnized the marriage had received permission of the parish priest of the parties. That I submit is the effect of the saving clause in article 156. It is taken from Pothier, and Pothier states that the marriage, not celebrated before the curé of the parties, is always null, but that in certain cases the plaintiff has been put out of Court, being considered unworthy to be heard. So I submit that, if the marriage be solemnized before another than the proper official, the marriage is null.

Now, article 161 is cited and 161 says:—

161. When the parties are in possession of the status and the certificate of their marriage is produced they cannot demand the nullity of such act.

That, by all the authorities, is held to refer merely to the certificate of marriage, that is, to the act of marriage; but it does not prevent one of the parties from attacking the marriage itself. It is a mere reference to the act of marriage.

Now, I shall take up very briefly the provisions of article 127, submitting this point of my case as subsidiary to the first.

I would like to cite as part of my argument and as bearing on the construction of article 129 the codifiers' report on the title of "Marriage," at page 41, the last paragraph of which reads:—

With the view of preserving to every one the enjoyment of his own usages and practices according to which the celebration of marriage is entrusted to the ministers of the worship to which he belongs, several provisions are inserted in this title which, although new in form, have nevertheless every source and every cause of existence in the spirit if not in the letter of our legislation.

They were considered to be new in form, but they carried out the spirit of the previous legislation. I also wish to cite to your Lordships an article published by the late Mr. Justice Girouard in the Revue Critique, vol. 3, p. 241. This article is a very exhaustive treatise on the whole subject and contains valuable information, and the learned author construed article 129 as I have done.

It seems to me extremely important, in view of the very great gravity, may I say, of the question submitted for your Lordships' determination, that I may insist once more upon the reasons which underlie the provisions I have quoted. The object of the legislature was to secure, so far as it could be secured by legislation, due publicity of the marriage. The fundamental article under the title of "Marriage" is article 128, which I have referred to and which states that marriage must be solemnized openly by a competent officer recognized by law. The codifier states, and I have cited the reference in the factum at page 7, that the publicity required by the former part of article 128 is with a view of hindering clandestine marriages which are, for reasons, condemned by all systems of law, and they add that the word "openly" has a certain elasticity which makes it preferable to all others, being susceptible of more or less extension. It has been used so that it might be suited to the various interpretations that the various churches and the different religious congregations of the province may require of it according to their customs and usages and the rules peculiar to them upon which it is not wished in any way to innovate. All that was wished was to prevent clandestine marriages.

Therefore, a fundamental principle of our law of marriage

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is that the marriage must be celebrated openly, that clandestinity is a radical vice annulling marriage, and, for the purpose of securing the publicity of marriages and the prevention of clandestinity, the law provides ample safeguards requiring the publishing of banns of marriage in the church to which the parties belong. My contention is that the only way to prevent clandestinity is to secure the celebration of the marriage in the place where the parties are known. I do not desire to repeat unnecessarily what I said yesterday, but, as it is so important, I must say again that there would be no object in requiring the publication of the banns in the church to which the parties belonged if the parties could afterwards go to a different part of the province and have their marriage celebrated.

I must put before your Lordships a statement of the legislation of the Province of Quebec on the subject, up to the present date. We see every day the passage of statutes authorizing religious bodies to keep registers of civil status. Here is a list I compiled from the year 1900 to the year 1911 and I find there no less than 15 statutes passed, all declaring that church bodies shall have the power to keep registers of acts of civil status. I have here the statute of 1900, and in that year no less than five of those statutes were passed by the legislature. They comprise all kinds of bodies. These are Roumanian Jews and other Hebrew organizations, the Free Methodist Church of the Province of Quebec, the Syrian Church, calling themselves the Greek Orthodox Church. The following is the list:—

List of special statutes passed by the Legislature of the Province of Quebec since the year 1900 authorizing religious congregations to keep registers of acts of civil status.

1900—Congregation of Roumanian Jews, "Beth David," of Montreal, 63 Viet. ch. 107.

1901—Congregation, "The Chevra Kadiska, of Montreal," 1 Edw. VII. ch. 86.

1901—The Free Methodist Church of the Province of Quebec, 1 Edw. VII. ch. 87.

1902—Congregation, "Beth Hamedrash Haddodol Chevra Shaas," 2 Edw. VII. ch. 96.

1903—Congregation, "Beth Israel," 3 Edw. VII. ch. 114.

1907—The Congregation, "Temple Solomon," of Montreal, 7 Edw. VII. ch. 120.

1908—The Congregation, "Beth Budah," of Montreal, 8 Edw. VII. ch. 151.

1908—The Congregation, "Bais Israel," 8 Edw. VII. ch. 153.

1909—The Greek Orthodox Church Evangeliamos, of Montreal, 9 Edw. VII. ch. 141.

1910—The Saint Nicholas Syrian Greek Orthodox Church, of Montreal, 1 Geo. V. ch. 99.

1910—The Syrian Greek Orthodox Church of Saint Nicholas, of Canada, 1 Geo. V. ch. 10.

1910—The Congregation, "Kehal Jeshurin," 1 Geo. V. ch. 101.

1910—The Jewish Congregation, "Beth Israel," of Lachine, 1 Geo. V. ch. 102.

1910—The Jewish Congregation, "Nusach Hoaari," of Montreal, 1 Geo. V. ch. 103.

1911—The Congregation, "Chavayria Hall Yisrael," 1 Geo. V., second section, ch. 115.

I know nothing of the circumstances which led up to the passing of these statutes. I could venture no opinion which would not be an absolutely rash one as to how long these people were in the country and whether they had suffered under or complained of any of the disabilities referred to. But I do know, and this is the answer to the contention of my learned friend, that so soon as anybody went to the Legislature of the Province of Quebec and asked for these powers the powers were granted.

Mr. Lafleur has made an argument, and insisted on it with much earnestness, that under my construction of article 129 a lot of people could not lawfully contract marriage in the Province of Quebec, but I desire to point out, and this is only secondary to the object for which I cited the statutes, that whenever a religious body desires to get these powers to keep registers they went to the Legislature of Quebec and obtained them.

Any argument I have made, based on the fact that these people obtained these powers from the Legislature of Quebec, would be in favour of my contention, and an answer to the objection of my learned friend that, under my construction of article 129, people are arriving on our shores every day and that these immigrants cannot get married. I will take up the case of persons who belong to no church in a moment, but what I wish to point out is, and that is why I cited these statutes; what I wish to emphasize to the Court is that at the present time a vast number of bodies have obtained and are obtaining from the Legislature of the Province of Quebec authority to keep registers. My argument still is, and I insist on it with all the earnestness I can bring to bear, that all these statutes are special statutes, that general powers are not given, that any powers which these bodies have are restricted to the persons who belong to these bodies; that the intention of the legislature was not to give them any wider competence than that necessary to register births and celebrate marriages for people who belong to the bodies themselves.

(Pursuant to questions from the Bench the learned counsel discusses the effect of the conquest on the prior law.)

I rely on the distinction between the public and the private law. I say the private law remains. The public law is to a certain extent superseded and it is certainly superseded so far as it belongs to the political branch, but I would cite to your Lordships, and I will supplement the authorities I am now citing

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by others I shall, of course, communicate to Mr. Lafleur; I would cite Salmond on Jurisprudence.

On the question of the abrogation of the laws concerning religion I will submit with absolute confidence the capitulation and the treaty. Whatever may be the doctrine of international law as to laws concerning religion, in the present case by reason of the capitulation and treaty stipulations the principles of such international law as is suggested could not be applied here, even though they were adverse to my contention.

I would ask your Lordships to listen to a quotation from Salmond. He gives the distinction between public and private laws as follows:—

> Public law comprises the rules which specially relate to the structure, powers, rights and activities of the state; private law includes all the residue of legal principle. It comprises all those rules which specially concern the subjects of the state in their relations to each other together with these rules which are common to the state and its subjects.

Consequently, private law comprises all these rules which specially concern the subjects of the state in their relations to each other. I would say that laws of religion belong to private law; at least, under our principles it would be an undoubted doctrine to-day. I would also like to refer your Lordships to Holland's Jurisprudence. At page 168 he treats of marriage as classified under private law. I would also cite to your Lordships on the general question, Halleck's International Law, vol. 2, p. 516, 4th edition.

I will read the passage:—

> "The laws of a conquered country," said Lord Mansfield, "continue in force until they are altered by the conqueror; the absurd exceptions as to pagans mentioned in Calvin's case, shews the universality and antiquity of the maxim. For that distinction could not exist before the Christian era and in all probability arose from the mad enthusiasm of the Crusaders." This refers to the municipal laws of the conquered country, but not to its political laws or to the relations of the inhabitants with the Government. On the transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved and new relations are created between them and the Government which has acquired their territory; the law, which may be dominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State. This is a well settled rule of the law of nations; its provisions are clear and simple, easily understood; but it is not so easy to distinguish between what are political and what are municipal laws, and to determine when and how far the constitution and laws of the conqueror change or replace those of the conquered.

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I, therefore, take it to be an undoubted principle that the private law is not changed by the effect of the conquest. Coming down to the particular case of the Province of New France, after the capitulation of Quebec and Montreal, the law officers of the Crown were frequently consulted and expressed the opinion that the laws of the Province of Quebec had not been changed by the effect of the conquest. The criminal law was introduced and Attorney-General Thurlow criticized the introduction of the criminal law, but apparently it was done by consent. I submit very confidently, and I can send a list to your Lordships without lengthening unduly the argument that the law officers of the Crown conceded on every occasion when they were consulted that the conquest had not abrogated the laws and customs of Canada.

The law officers of the Crown in England when consulted with reference to the plans of government for Canada expressed the opinion that the King could not by the exercise of his Royal prerogative exempt the Protestant inhabitants of the Province of Quebec from paying tithes to the Roman Catholic clergy. This was cited in the opinion of Chief Justice Lafontaine in *Wilcox* v. *Wilcox*, 8 L.C.R. 34. I have a copy of the answer by the law officers of the Crown in my hand; the document was, I believe, only found recently. It is referred to in the collection of Shortt and Doughty, but it was stated that the document had not then been found. Here is what they state on that point:—

> As to so much of the 22nd article as exempts Protestants from paying to the Romish clergy tithes and ecclesiastical dues, we conceive that if by the law and usages of Canada the tithes and dues should belong to the persons who are professing the Roman Catholic religion, His Majesty cannot by his Royal prerogative deprive them of their right to receive or exempt the Protestant inhabitants from the obligation to pay such tithes or other dues.

That document is signed by Sir James Marryat, who was the King's Advocate, William De Grey, who was Attorney-General, and E. Willis, who was Solicitor-General and afterwards Chief Justice.

I cite that, of course, as illustrating what I am claiming, that it was never suggested that the laws of the Province of Quebec on a subject of this nature or on a subject concerning religion had been abrogated.

On the other question as to whether the establishment came into force by the effect of the conquest I will first cite to your Lordships the decision of the Privy Council in the *Guibord Case, Brown* v. *Les Curé, etc., de Notre Dame de Montréal*, L.R. 6 P.C. 157, at p. 207:—

> Nor do their Lordships think it necessary to pronounce any opinion upon the difficult questions which were raised in the argument before them touching the precise *status*, at the present time, of the Roman

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Catholic Church in Canada. It has, on the one hand, undoubtedly, since the cession, wanted some of the characteristics of an established church; whilst, on the other hand, it differs materially in several important particulars from such voluntary religious societies as the Anglican Church in the colonies, or the Roman Catholic Church in England. The payment of *dimes* to the clergy of the Roman Catholic Church by its lay members; and the ratability of the latter to the maintenance of parochial cemeteries, are secured by law and statutes. These rights of the church must beget corresponding obligations, and it is obvious that this state of things may give rise to questions between the laity and clergy which can only be determined by the municipal Courts. It seems, however, to their Lordships to be unnecessary to pursue this question, because even if this church were to be regarded merely as a private and voluntary religious society resting only upon a consensual basis, Courts of justice are still bound, when due complaint is made that a member of the society has been injured as to his rights, in any matter of a mixed spiritual and temporal character, to inquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury.

In the case of *Long* v. *Bishop of Cape Town*, 1 Moo. P.C. (N.S.) 411, at p. 461, their Lordships said:—

The Church of England, in places where there is no church established by law, is in the same situation with any other religious body—in no better, but in no worse position; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them.

That authority, I submit confidently, is that the Church of England was not an established church in the colonies. It was never an established church in Canada. I submit that the opinion of their Lordships in the *Guibord Case*, L.R. 6 P.C. 157, supports that view. There are no documents which can be cited which would shew that there was an establishment in Canada of the English Church. There are certain instructions issued by the Crown to the Governors who were sent out here to govern Canada. There were two kinds of instructions, and probably your Lordships have read the report of Chief Justice Hey, the second Chief Justice of Quebec under the English rule, on the whole question. Your Lordship will find the report or opinion of Chief Justice Hey in the appendix of the first volume of the Lower Canada Jurist. The Royal instructions are there referred to. There were the private instructions and the instructions under the sign manual which constituted letters patent and which were destined to be published. The former category, or the private instructions, had no force of law and could not be relied upon. The other instructions were of a different character. Now I would say this, that I have read these instructions and, outside of what I stated yesterday, they contain nothing that is of any direct character. They were undoubtedly instructions sent to the Governor to endeavour to do certain things if

it were possible or if it were thought advisable, but there is no clause in them, I submit, that would go the length of establishing the English Church in Canada.

As to the jurisdiction of the Bishop of London in Canada I will read paragraph 37, which is to be found at page 140 of the volume of Constitutional Documents by Shortt and Doughty:—

> 37. And to the end that the ecclesiastical jurisdiction of the Lord Bishop of London may take place in our province under your Government, as far as conveniently may be, we do think fit, that you give all countenance and encouragement to the exercise of the same, except only as collating to benefices, granting licenses for marriage and probates of wills which we have reserved to you, our Governor and to the Commander in Chief of our said province, for the time being.

Undoubtedly, the granting of licenses for marriages was reserved to the Governor of Canada.

While we are on this point I wish to make it doubly clear that there is nothing in this article 37 that points to the establishment of the English Church in Canada.

Paragraph 32 says:—

> You are not to admit any ecclesiastical jurisdiction of the See of Rome or any other foreign ecclesiastical jurisdiction whatever in the province under your Government.

But that has no bearing on the point. The ecclesiastical jurisdiction of the See of Rome could be excluded without there being any established church in Canada.

I will take up the question as to what the English law at the time as to marriage was. Assuming for the sake of argument that the English law concerning marriage was introduced either it was Lord Hardwicke's Act or the English common law. According to the English common law as defined in the case of *Reg.* v. *Millis*, 10 C. & F. 534, the marriage had to be celebrated before a priest.

Taking the other side of the argument, that under English law at that time marriage *per verba de præsenti* was considered a valid marriage then, if the English law was introduced into the Province of Quebec by the effect of the conquest, a marriage in a certain form would be valid if the parties were Protestants and a marriage in another form would have to be resorted to if the parties were Catholics. I am submitting, if it is held that the English law was introduced, that there would be endless confusion. I would understand the logic of the proposition that the whole English law was introduced as to the old inhabitants as well as to the others, but there were the treaty stipulations which prevented this law being applied to the old inhabitants of the colony. Then, I say, that, in the absence of anything shewing that the English law was introduced, with the single exception of marriage licenses, that we are bound to assume that there was no English law introduced on the subject.

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The license system could not be applied in view of the stipulations to the Roman Catholics. It was at most a dispensation of the necessity for publishing the banns. The subject of marriage licenses is not unknown; I think it can be traced far back in the history of England. Dispensations were granted by the Pope prior to the Reformation and afterwards by a statute which was passed, I think, in the reign of Henry VIII., the authority was granted to the Archbishop of Canterbury. The Crown has exercised the jurisdiction to grant marriage licenses as part of the Royal prerogative, but it does not shew that the English law of marriage was introduced into this country. There is nothing to shew that. We have absolutely no documents and no decision under the English law upholding the contention that the English law was introduced here. The first decision that can have any bearing on the subject is the decision of Chief Justice Sewell in *Ex parte Spratt*, Stu. K.B. 90. That was after the statute of 1795 and it was on a question whether dissenting ministers had the right under the statute of 1795 to obtain registers of acts of civil status, and he decided that they had not for the reason that they were not in holy orders. The reason I refer to the decision is that it is the earliest on the subject which could have any relation to marriage and the authorities he quotes therein are all French authorities. It may be that looking carefully into old Court registers something may be discovered, but certainly nothing has ever been published up to this date.

Then, my Lord, if that be the case, I would rely on the general principles of international law, that the private law is not abrogated by the effect of the conquest. I point out to your Lordships, as extremely significant, that my learned friends on the other side who are interested in setting out any authority pointing to the introduction of the English law, have not done so, outside of the judgment of Mr. Justice Archibald, who merely expresses an opinion and who is not in any better position than we are to determine the question. I would say, therefore, and I believe I am warranted in saying so, that under the general rule we cannot assume that the English law as to marriage was introduced.

Then, looking at the treaty stipulations, it has never been doubted that I am aware of that they secured absolute independence—I am using that word advisedly—to the Roman Catholics and to their clergy. Whatever doubt there may have been on account of certain answers made by General Amherst, on some points which were put to him at the time of the capitulation of Montreal there is no doubt as to the guarantee of the free exercise of the Roman Catholic religion. The wording of the capitulations is worthy of attention. I refer to the articles of the

capitulation of Quebec, and the articles of the capitulation of Montreal. The articles of the capitulation of Quebec, 1759, read:—

Articles de Capitulation de Québec, 1759.

Articles de capitulation demandés par M. de Ramzay, Lieutenant pour le Roy commandant les haute et basse villes de Québec, Ch. de l'Ordre Royal & Militaire de St. Louis, à son Excellence Monsieur le General des troupes de sa Majesté Britanique.

The capitulation demanded on the part of the enemy, and granted by their Excellencies Admiral Saunders and General Townshend, etc., etc., etc., is in manner and form hereafter expressed.

Article 2.

Que les habitans soient conservés dans la possession de leur maisons, biens, effets et privileges.

Granted upon their laying down their arms.

Article 6.

Que l'exercice de la relligion Catholique, apostolique et romaine sera conservé; que l'on donnera des sauvegardes aux maisons des ecclésiastiques, relligieux et relligieuses, particulièrement à Mgr. l'Evêque de Québec, qui rempli de zèle pour la re relligion et de charité pour le peuple de son diocèse désire y rester constamment, exercer librement et avec le décense que son état et les sacres mystères de la relligion Catholique, apostolique, et romaine exigent, son authorité episcopale dans la ville de Québec lorsqu'il jugera apropos, jusqu'à ce que la possession de Canada ait été decidée par un traité entre S. M. T. C. et S. M. B.

The free exercise of the Roman religion is granted, likewise safeguards to all religious persons, as well as to the Bishop, who shall be at liberty to come and exercise freely and with decency, the functions of his office, whenever he shall think proper and until the possession of Canada shall have been decided between their Britannic and most Christian Majesties.

Que la présente capitulation sera executée suivant sa forme et teneur, sans qu'elle puisse être sujette à l'inexecution sous prétexte de represailles ou d'une inexécution de quelque capitulation précédente.

Granted.

Le présente traité a été fait et arreté double entre nous au camp devant Québec, le 18 Septembre, 1759.

Chas. Saunders.
Geo. Townshend.
De Ramzay.

The articles of the capitulation of Montreal, 1760, read:—

Articles de Capitulation de Montréal, 1760.

Articles de capitulation entre son Excellence le Général Amherst Commandant-en-Chef les troupes & forces de sa Majesté Britanique en l'Amerique Septentrionale, et son Excellence le Mis. de Vaudreuil, Grand Croix de l'Ordre Royal et Militaire de St. Louis, Gouverneur et Lieutenant Général pour le Roy in Canada.

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Article 27.

Le libre exercice de la Religion Catholique, apostolique et Romaine, subsistera en son entier; en sorte que tous les estats et les peuples de villes et des campagnes, lieux et postes éloignés pourront continuer de s'assembler dans les églises, et de frequenter les sacramens comme cy devant, san estre inquiété en aucun manière, directment ou indirectment. Ces peuples seront obligées par le Gouvernement Anglais à payer aux prêtres qui en prendront soin les dixmes, et tous les droits qu'ils avoient coutume de payer sous le gouvernement de sa Mte. Très Chrétienne.

Granted as to the free exercise of their religion; the obligation of paying the tithes to the priests will depend on the King's pleasure.

Fait à Montréal le 8 de Septembre, 1760.

Vaudreuil.

Done in the camp before Montreal, the 8th September, 1760.

Jeff. Amherst.

You will see that there is no restriction as to the free exercise of their religion, and your Lordships will notice in what wide terms this was demanded by article 27, and it is granted without any restriction except as to the obligation to pay tithes to the clergy.

The word "estats" is used meaning, no doubt, "orders." The clergy were a distinct order as well as the noblesse. There were the three orders, the clergy, the noblesse and the tiers d'état, which swallowed up the two others. Now, take the Treaty of Paris, which is material in this connection. After saying that His Most Christian Majesty renounces all pretensions to Nova Scotia and Acadia and so forth, it says:—

> His Britannic Majesty on his side agrees to grant the liberty of the Catholic religion to the inhabitants of Canada; he will consequently give the most precise and most effectual orders, that his new Roman Catholic subjects may profess the worship of their religion, according to the rites of the Roman Catholic Church as far as the laws of Great Britain permit.

As to the restriction which has been referred to several times, there is abundance of opinion as to what effect the restriction could have.

I would take it, and I think I can say so, that my position, which I conceive to be founded on authority, is, that the Treaty of Paris did not supersede the capitulation. I will be able to refer your Lordships to authority for that basis. What is stated is that the treaty is a contract between one Government and another Government, but the Articles of Capitulation is between a Government and the inhabitants of a country. I think your Lordship will find that in the case of *Campbell* v. *Hall*, Lofft. 655, Cowp. 205. The inhabitants of the country, in consideration of their laying down their arms, are granted certain privileges. To my mind it is an undoubted principle founded on reason that a treaty is between two nations and capitulation is

a pact—I do not think I can choose a more proper term—between the conqueror and the inhabitants, so I will say that I am entitled to look at these three documents as forming the title for the free exercise of the Roman Catholic religion. I would think that the stipulations of the capitulation cover my point, that the free exercise of the Roman Catholic religion is guaranteed. I would say that it is guaranteed to the church as much as to the inhabitants. It was guaranteed to all orders of Canadian society. My position on this branch of the argument would be that marriage, according to the doctrine of the Roman Catholic Church, is a sacrament, and I would say the administration of the sacraments is exclusively attributed to the ministry of the priests of the Roman Catholic Church, and that if any interference with this administration of the sacraments were permitted it would be a violation of these stipulations. I submit that these reasons are fundamental and that they would cover the construction of the provisions which I have cited to your Lordships.

Then, I have shewn what the construction of these articles are; that article 129 must be restricted as I have stated and I shall not repeat what I have said on that subject.

Before I touch on article 127, I desire to say something which I began to say this morning, namely: that the object of the law is to prevent clandestinity of marriage, that if my learned friends' contentions are right, clandestinity is rendered not only possible but extremely easy, that some restriction must be put on the provisions of the law to secure the due publicity of marriage, and that the number of religious bodies obtaining statutory authority, as I have shewn, is increasing so rapidly that it becomes a fundamental necessity that the views of the codifiers and that the proper construction of article 129 be insisted upon. If my children wanted to contract marriage, in spite of my objection and in spite of the impediments that might be against it, it would not be possible for me to prevent it because some of these people might have a church or place of meeting in a back store, and if my learned friends' contention is right, that means they will have as much authority as anybody else, then there would be thousands of clergymen irrespective of locality, irrespective of religion, who could solemnize marriage. If that system is to be allowed under my learned friends' contention, then the law has failed in its main object to secure the publicity and non-clandestinity of marriage.

Article 127 of the Civil Code provides:—

> 127. The other impediments recognized, according to the different religious persuasions, as resulting from relationship or affinity, or from other causes, remains subject to the rules hitherto followed in the different churches and religious communities.

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The right, likewise, of granting dispensations from such impediments, appertains, as heretofore, to those who have hitherto enjoyed it.

Article 127 follows articles 124, 125, and 126 which prescribe what might be called the scriptural impediments to marriage as resulting from relationship in the Levitical degrees; marriage in the direct line, ascending or descending; marriage, between brothers and sisters; marriage between uncles and nieces, or between nephews and aunts. After these provisions, article 127 is introduced as a general provision purporting to cover all other impediments.

The codifiers at first drafted this article, so that it read:—

The other impediments admitted according to the different religious persuasions as resulting from relation or affinity within the degree of cousins-german and other degrees, remain subject, etc.

The codifiers presented a supplementary report in which the words, "within the degree of cousins *germane* and other degrees" were stricken from the article, and the words, "or other causes" introduced. They explained why they did so. One of them, Mr. Justice Day, dissented. The explanation shewed clearly what the meaning, in the opinion of the codifiers, was to be placed on the article. The majority of the codifiers say:—

Two of the commissioners recommend a modification of article 11a in the title of marriage, in order to remove all doubt as to the intention to leave the subject in the same state as it is at present.

Mr. Commissioner Day dissents from the proposed change, because, by the addition of the words "other causes," it has the effect of extending the grounds of impediment contemplated by the article as adopted, and appears to him to recognize, as legal impediments, certain obstructions to marriage, dependent upon ecclesiastical rules and discipline, and binding only upon the conscience of the parties whom they affect.

I understand my learned friends to take the position that the words "and other causes" must be controlled by the impediments mentioned in article 124, 125, and 126 as being *ejusdem generis*, with the impediments mentioned in these articles. The intention of the codifiers would appear to have been entirely different, and further I would say that this rule cannot be applied for the following reasons: in the first place, the rule *ejusdem generis* does not apply where the genus is entirely exhausted or covered by the preceding words. For instance, if the words which precede exhaust the whole genus, then to give some meaning to the general words following it is necessary to give them more extension. It is only when the general words following such a word compel the enumeration of the special words that they can be restricted to things of similar nature to those mentioned by the special words in the statute. I take that to be the undoubted rule of legal interpretation. Well now, the very

wording of the article shews that it was intended here to give a greater extension to the meaning of the words "or other causes" because the first impediments were impediments which have been recognized at all times and I think in all systems by the civil law. Here it was proposed to introduce a new set of impediments which would vary according to the belief of each church. There is in article 127 an enumeration of all causes of impediment, that is to say, causes of impediment resulting from relationship or affinity, and I would say that that relationship or affinity comprises the whole genus of impediments which result from those causes. Then, there were other impediments recognized by different canonical systems which were different. There was the impediment resulting from holy orders, from perpetual vows; there were several impediments of a similar nature. I submit that the words "other causes" comprise all these impediments. They may vary according to the different churches, and it was so intended by the codifiers, and it was deemed by the codifiers impossible to make the enumeration that would be absolutely necessary. It was impossible to do so by reason of the number of religious societies which were in contemplation of the law, and it was necessary to provide by a general article for all these impediments which were recognized by each church, and which had received the passive, if not the express consent, of the members of each church to the rule which their church had decreed. My learned friends opposite say that these impediments are impediments recognized by the civil law. I confess I am unable to follow this argument. It seems to me self-evident that the impediments referred to here are impediments not already recognized under the civil law, because the different articles have enumerated the impediments of the civil law. I submit that these are canonical impediments; impediments that have been recognized by the different canonical systems.

I will discuss the argument which I understand is made, that these impediments referred to are not necessarily the impediments known to the civil law, but they must be impediments of a similar nature to those enumerated in the three preceding articles. I take issue with my learned friends on this point; I take issue absolutely with them and my submission is respectfully that their contention cannot be maintained, or otherwise article 127 would have absolutely no meaning.

If my learned friends suggest any impediment of the same nature as those enumerated or of a similar nature, that could be comprised by article 127, it would not be necessary to my argument to say that impediments resulting from more remote degrees of relation would be of a similar nature and would be comprised in article 127. But article 127 enumerates the im-

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pediments resulting from relationship or affinity, and consequently the words "or other causes" would have no effect at all. And, as it is necessary to give them an effect, I would say that the construction claimed by my learned friends cannot be sustained. My submission is that it was intended to recognize all canonical impediments without it being thought advisable to attempt any enumeration of them. The impediment of clandestinity was an impediment by the canon law; I think there can be no question about that. It was made in express terms an impediment by the Council of Trent. It greatly strengthens my point that clandestinity was recognized as an impediment by the civil law in France although the decrees of the Council of Trent were not received in France. Nevertheless, the impediments resulting from clandestinity were recognized in France. The old ordinances of the French Kings were to the same effect on this point as the decrees of the Council of Trent. Some of your Lordships are no doubt familiar with the verse in which the canonical impediments were enumerated and among these there is a reference to the impediment of clandestinity. It was also recognized as an impediment; the Council of Trent made it one. This is the verse:—

> Error, conditio, votum, cognatio, crimen,
> Cultus disparitas, vis, ordo, ligamen, honestas,
> Aetas, affinis, si forte coire nequibis,
> Si parochi et duplicis desit præsentia testis,
> Rapta si sit mulier, nec parti reddita tutas,
> Hæc facienda vetant connubia, facta retractant.

I think that would be absolutely beyond question now, and it has never been questioned by any writer on the French law; on the contrary, the authority is all the other way, that clandestinity was an impediment. I have given in the factum several references and these references enumerate clandestinity among the impediments which were recognized in France in spite of the fact that the decrees of Council of Trent had not been received there.

I have given in the factum several references to writers under the old French law, shewing that clandestinity was considered in France as an absolute impediment to marriage. I may, perhaps, read a few extracts.

Thus Durand de Maillane, Dictionnaire de Droit Canonique, "Empêchement," p. 305, 2nd column, says:—

> Le Concile de Trente a ajouté deux autres empêchements dirimants qui subsistent dans les lieux où ses décrets sont en usage; savoir, la clandestinité et le rapt.

Page 306, 1st column:—

> A l'égard des empêchements dirimants, nous admettons en France les douze qui précédaient le Concile de Trente, et les deux que ce Concile a ajoutés.

Page 314, 2nd column:—

XIII. Empêchement, clandestinité, si parochi et duplicis desit præsentia testis. Voyez Clandestin, mariage.

Nouveau Denisart, V. Empêchement de mariage, vol. 7, p. 518:—

XIII. 30. Le défaut de célébration du mariage en face de l'église par le curé du domicile des parties ce qui forme le dix-huitième et dernier empêchement dirimant.

These extracts will suffice for the purpose of my argument, the other references in the factum being absolutely to the same effect.

It seems to me it would be idle to say that such an impediment would be an impediment more in word than in essence because what article 127 intended to cover were the impediments recognized by the canon law, and if this is an impediment recognized by a canon law, as it undoubtedly is, it is covered by the terms of article 127: Mr. Justice Charbonneau (p. 117 of 18 R.L.N.S. and p. 267 of the Q.R. 41 S.C.) cites Pothier (ed. Bugnet, vol. 5, p. 45) as considering as an impediment "une déqualification subjective, inherente à la personne des conjoints." But Pothier says, vol. 5, at page 42 (ed. Bugnet), No. 85:—

Nous ne traiterons, dans toute cette partie, que des empêchements de mariage qui se rencontrent dans les personnes. Il y a d'autres empêchements qui naissent du défaut de quelqu'une des choses qui sont requises pour la validité des mariages; cette matière sera traitée dans la quatrième partie.

And in the fourth part of his work he treats of clandestinity.

It is to be observed that Pothier, in the part cited, stated that clandestinity was absolutely recognized theretofore as an impediment by the canon law. My submission is that, under article 127, consequently, this impediment would render a marriage between two Catholics, before any other than a Roman Catholic priest, impossible. A valid marriage between two Catholics, before any other than a Roman Catholic priest is impossible. The impediment being of the class of absolute impediments, would import nullity.

There is another point I should touch on and that is the effect of the impediment as casting a nullity on the marriage. The very nature of an absolute impediment creates nullity. The objection of Mr. Justice Charbonneau is that the nullity is not declared and he says that, by article 152, an action of nullity is given to all parties interested to set aside marriages contracted in violation of articles 124, 125, and 126. But there is no mention of article 127. My submission is that article 127 is comprised *quoad* an action of nullity. Then by article 156 of the Civil Code:—

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156. Every marriage which has not been contracted openly, nor solemnized before a competent officer, may be contested by the parties themselves and by all those who have an existing and actual interest, saving the right of the Court to decide according to the circumstances.

Article 156 gives an action in nullity to the parties themselves and to all who have an actual interest. The action in nullity is given in each case to the same class of persons. So, I submit that Mr. Justice Charbonneau is wrong when he says that there is no action to have the marriage set aside by reason of the impediment of clandestinity. The decrees of the Council of Trent were published in the Province of Quebec. Of course, on this submission to this Court, certain facts, if material, must be taken, I would not say as admitted, but as not contested. I have two certificates from the Vicars-General of Quebec and Montreal stating that the "Tametsi" decree of the Council of Trent is read once a year in every church of the Province of Quebec.

The following are the certificates:—

WE, THE UNDERSIGNED, Vicar-General of the Archdiocese of Quebec, in the Province of Quebec, hereby certify that the decree "*Tametsi*" concerning the reform of marriage, adopted in the 24th session, 1st chapter, of the Council of Trent, was promulgated by Monseigneur de Saint-Vallier, Second Bishop of Quebec, in the *Rituel du diocèse de Québec* (edition of 1703) and moreover, that the ordinance requiring the said decree to be read once a year, contained in the said Rituel, judging by the invariable tradition, custom and practice regarding such ordinances, and a personal experience of forty years as regards the Basilica of Quebec, has been executed, and that the text of the said decree has been read in each parish of the Archdiocese of Quebec on the first Sunday after Epiphany since its promulgation until the Decree of the Sacred Congregation of the Council, 2nd August, 1907, came into force.

C. A. MAROIS, V.G.

Seal.

Archbishop's Palace of Quebec,
April 29th, 1912.

Montreal, le 25 avril, 1912.

We, the undersigned, Vicar-General of the Archdiocese of Montreal, in the Province of Quebec, hereby certify that the decree "Tametsi" concerning the reform of marriage, adopted in the 24th session, 1st chapter of the Council of Trent, has, since the erection of the Diocese of Montreal and until the promulgation of the decree of the Sacred Congregation of the Council of the 2nd August, 1907, been read each year in each parish church of this diocese on the first Sunday after Epiphany.

Given at Montreal, under the seal of the Archdiocese this 25th day of April, 1912.

EMILE ROY, Canon.
Vicar-General.

And the Benedictine Decree was introduced in Canada in 1764. It was published in 1741. The Bishop of Quebec, at the time of the cession, was Mgr. Pontbriand, and he died before Montreal was surrendered and the Vicars-General of Quebec administered the See of Quebec until his successor was appointed some six years afterwards, and questions were put to the Court of Rome and the answer was given extending the Benedictine declaration.

My submission to the Court is, therefore, that the answer to sub-question (*a*) should be in the affirmative.

On sub-question (*b*) I will state frankly that I do not consider I have any satisfactory reason to give to the Court under the construction of article 127. I think it will be sufficient for me to say that the Benedictine Decree concludes the matter.

That, my Lords, is the case and the argument which I have to lay before the Court.

Hellmuth, K.C.:—I propose, my Lords, to deal with the first and third questions, both of which may be characterized as questions of jurisdiction.

The question of jurisdiction is necessarily, my Lords, an extremely important question, not only for the Dominion and the provinces, but in this matter, for, one might almost say, the people throughout Christendom generally, because for a great many years the *lex loci contractûs* has always been the law which, in one respect, governs the validity of a marriage. That is to say, if an Englishman, or a Frenchman, or a German, or an Austrian, came out to Canada and was married here, assuming that by his own law, the *lex domicili*, he and the woman with whom he desired to contract marriage were capable of contracting it, the absolute validity of that marriage would depend upon whether the parties had observed the form and ceremony prescribed by the law of the place of celebration. Therefore, it is a question whether the law of the place of celebration rests with the Dominion or rests with the individual provinces to enact. If it were to be held that under the British North America Act the law of the place of celebration is that of the province—whether it be in Ontario or Quebec or any other province—then any law that might be passed in this respect by the Dominion of Canada would be entirely beyond its powers, and the parties who might assume that they had been married according to the law of the Dominion of Canada in regard to the mode of celebration, would find there had been no valid marriage at all. I say, at the very outset, that this question of jurisdiction involves not merely the rights of the provinces and the rights of the Dominion but the rights of people of other countries, who, although their domicile may be that of a foreign country, may come to the various provinces and be married.

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Perhaps, at the outset, one should inquire what is necessary to constitute a valid marriage. Undoubtedly, consent is necessary, but following consent there are two absolute essentials, or, perhaps, I should say an essential and a requisite, because I think the words are used in that sense in some of the authorities. There must be, of course, capacity to contract and that is invariably governed by the law of the domicile, and, in the second place—I am differing here entirely from my friends on the other side—there must be, in order to constitute a valid legal marriage, a celebration or a going through of the form prescribed by the law of the place where the marriage is celebrated. That is covered by innumerable authorities. Dicey, on the Law of Domicile, at page 15, lays down this rule, Rule 44:—

> Subject to the exception hereinafter mentioned, a marriage is valid when (1) each of the parties has, according to the law of his or her place of domicile, the capacity to marry the other, and, (2) any one of the following conditions as to the form of celebration is complied with; that is to say: (1) if the marriage is celebrated in accordance with any form recognized as valid by the law of the country where the marriage is celebrated, called hereinafter the local form.

He goes on and deals with extra-territorial marriages, and so on, in embassies, and he lays down the requisites in these cases. At page 155, in relation to the subject, he says:—

> The result is that the validity of a marriage, with the right depending on its validity, is governed by two different laws, namely: (1) by the law of the parties' domicile which determines their capacity to contract; by the law of the place where the marriage is celebrated which determines in general the formal requisites of the marriage.

Then I cite a very old writer, Shelford, on Marriages and Divorce, at page 5 of the original, which we have not in the library, the page of the book in the library is 27. The heading of the article is: "Validity Depends upon Conformity to Law." I may say, my Lords, that I am not now in any way dealing with the question of church decrees or anything of that kind; I am dealing with the civil contract of marriage, if one can speak of marriage as a contract at all, which Mr. Bishop seems somewhat to doubt. Bishop says you may call a marriage a contract as you may call a locomotive a horse, because there are more things in which marriage differs from a contract than in which it complies with the terms of a contract. But, there is no doubt there is a portion of marriage which is a contract, it involves the consensual contract of the parties to it, but this is only the beginning of the creation of a valid marriage. Shelford says:—

> Marriage being a civil contract its validity depends on its having been celebrated in the manner, and with the formalities required by law. In some countries only one form of contracting marriage is

acknowledged; thus in England, after the Marriage Act, with the exception of Jews and Quakers, all marriages were required to be celebrated according to the form prescribed by the Church of England.

That is to say, that people could not say in England: we desire to be married, we take one another for man and wife, we will go through all kinds of solemn forms; for the law says you must have an Anglican clergyman pronounce you man and wife or you are not married at all. The questions, when I shall come to them, are entirely irregular in form, because it is not a question of declaring a marriage null and void; there is absolutely nothing creating the marriage status, no matter what form may be gone through, unless you comply with the requirements of the local law in regard to its celebration. I refer also to Hammick in "The Marriage Law of England," second edition, page 23; Foote, second edition, page 70; Eversley & Crays, Marriage Laws of the British Empire, pages 2 and 53; Ringrose, Marriage and Divorce Laws of the World, at page 18.

A marriage that might be perfectly good according to the forms of England, between parties capable of contracting, but which was celebrated in France where the English form has no force or validity, but where other forms and ceremonies were prescribed, would only be good if celebrated according to the forms prescribed in France, where the marriage is celebrated; except, of course, in exceptional cases when people get married at the embassies. I have the authority here of the House of Lords in regard to that matter, where in one case marriage was celebrated in Austria, between a Roman Catholic and a Protestant, according to the form, and the only form, in which marriage could be celebrated in Austria, which was by a Roman Catholic priest. Although that Protestant man, at that time, was, by the law applicable in Ireland, the place of his domicile, not entitled to marry a Roman Catholic by means of a Roman Catholic priest and could not have been so married in Ireland —the Roman Catholic priest would have been liable at that time to have been hanged or something of that kind, if he had celebrated the marriage—yet the House of Lords, not later than this very year, held that the marriage celebrated in Austria was a perfectly legal and valid marriage, because it had complied with the *lex loci celebrationis*, and that the law of the domicile could not be put beyond its territory. That is the case of *Swifte* v. *The Attorney-General for Ireland*, [1912] A.C. 276. The House of Lords held in that case that the law in regard to Roman Catholics in Ireland was only territorial, and only applied, so far as the celebration was concerned, to the celebration of a marriage in Ireland. Indeed, their Lordships, in upholding the judgments of the Courts in Ireland, adopted the reasoning of the Courts there, and I ask your Lordships to see the reasoning

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of the Judges in Ireland, because it is the latest case, practically, on this subject: [1910] 2 I.R. 140, at page 151 *et seq.*

Then, the question may arise (and again I differ from my learned friend, Mr. Nesbitt): What was the common law of England either at the time of the conquest or at the time of the British North America Act? My submission to your Lordships is, that from the time of King Edmund, the Saxon King, A.D. 940, down to the time of the Reformation, the common law of England was that no person could be married in England, except a mass priest was present. And, after the Reformation, the common law of England was that no person could be married except either by a priest or a deacon. That that is so, has never been questioned since the decision in *Reg.* v. *Millis*, 10 C. & F. 534. The old rule, as taken from Thorpe's edition of the Ancient Laws, page 505, is cited in the edition of Holmsted on the Marriage Laws of Canada. I cannot express my concurrence in what Mr. Holmsted says throughout by any means, but I quite accept his citation from Thorpe. Rule 8 of Thorpe—this is in the time of Edmund—says:—

> At the nuptials there shall be a mass priest by law who shall, with God's blessing, bind their union to all posterity.
>
> 9. While it is also to be looked to that it be known that they, through kinship, be not too nearly allied, lest they be afterwards divided, which before were wrongly joined.

We get some way back there and we find that after the *Millis Case*, 10 C. & F. 534, in 1844, there was an equal division of opinion in the House of Lords as to whether that was or was not the common law of England, or whether it was not competent and sufficient for two persons who were capable of contracting, who had the capacity, to come together and solemnly *per verba de præsenti* declare that they were married. There was, as I say, an equal division of opinion in the House of Lords as to that, and my learned friend, Mr. Nesbitt, read the very able and wonderfully researchful judgment of Lord Brougham. But my learned friend did not say that it was a dissenting judgment. It was a judgment that did not prevail because, the House being equally divided, the judgment of the Court below, which held that the common law of England did require a priest to be present, was upheld, and Lord Campbell, who joined with Lord Brougham, in the dissent, was able, in *Beamish* v. *Beamish*, 9 H.L. Cas. 274, to frankly say that while his opinion as one of these dissenting in *The Queen* v. *Millis*, 10 C. & F. 534, was an opinion that he might still hold, yet, that the decision in *The Queen* v. *Millis*, 10 C. & F. 534, was absolutely binding upon him. He said:—

> However, it must now be considered as having been determined by this House that there could never have been a valid marriage in

England before the Reformation without the presence of a priest episcopally ordained, or afterwards without the presence of a priest or of a deacon.

One cannot find language, stronger, clearer, or more definite that that. The very Judge, who had dissented in the previous case of *Millis*, 10 C. & F. 534, says that what he formerly contended against must now be held to be the law of England.

Now, my Lords, I do not wish, at this stage, to take up time unnecessarily, but I think it is incumbent on me at least to point your Lordships to the authorities which render this view practically—I do not wish to use too strong language—practically unassailable. There is, in fact, I may say, no decision to the contrary. One can find in some of the States of the Union expressions in regard to common law marriages, but they have no application to any country that is under English rule, in any shape or form. There is no such thing as a common law marriage in England or Canada; there is in Scotland.

In *Brook* v. *Brook*, 9 H.L. Cas. 193, dealing there with the matter of English subjects domiciled in England, but who had gone to Denmark to be married, and where the other side of the essential or requisite of marriage came up for consideration—that is, where the offence against the law of domicile could not be cured no matter how correctly the form had been followed—in that case a man went to Denmark with the view of marrying his deceased wife's sister, then a marriage incapable of being contracted in England. He was married according to the forms necessary in Denmark and according to the then law of Denmark it was a legal marriage. But, he had only gone there for the purpose of getting married, and he did not in any way abandon or give up his English domicile. The House of Lords in that case held that the marriage was invalid for want of capacity to contract it in such a case.

I refer to Lord Campbell's judgment, at page 207. It is laid down here that although the form of celebrating a marriage may be different from that required by the law of the country of domicile, that marriage may be good everywhere; but if the contract of marriage is such in essentials as to be contrary to the law of the country of domicile, and is declared void by that law, it is to be regarded as void in the country of domicile though not contrary to the law of the country in which it is celebrated. This qualification upon the general rule that a marriage valid where celebrated is good everywhere, is to be found in the writings of many eminent jurists who have discussed the subject.

I refer further to what Lord Campbell says, at page 218, and Lord Cranworth, at page 223, in discussing another marriage.

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One more case I cite to your Lordships, the case of *Catherwood* v. *Caslon*, 13 M. & W. 261, judgment of Baron Parke, at page 265.

That case goes to shew, as it is laid down, that the mere proof of ceremony is not enough; they must comply otherwise with the requirements of the law. A well-known case was cited here, from a judgment in Lower Canada, in the case of *Connolly* v. *Woolrich*, 11 L.C. Jur. 197, and your Lordships will find some remarks there quite apposite in regard to this very subject-matter. At page 244, in the judgment, it is said:—

> By what law is the validity of marriage to be decided?

And then the judgment says:—

> Validity of marriage depends upon the *lex loci* of the place of solemnization.

And for that, several authorities are given.

Now, I challenge any possible dispute on the proposition that in order to constitute a valid marriage there must be a solemnization. That is, there must be a going through of such forms and ceremonies, whether those be of the most primitive character or of the most elaborate ritual, as are prescribed by the laws of the place where it is celebrated, and that there is no such a thing in Canada, and never has been since the time of the conquest, any law by which there could be a marriage, merely on a consensual contract. But, my Lords, in this case, it is not at all an instance of the Dominion Parliament, by its bill, attempting to say—marriage may be celebrated, or a valid marriage may be created or constituted by the mere consent of the parties. The promoters of this bill have boldly come out and said—we propose to deal with the solemnization of marriage. They have, by the very language they have used in the bill, stated that in plain words. The bill says "every ceremony or form of marriage (that is, every solemnization of marriage) before or hereafter performed by any person authorized to perform any ceremony of marriage." Let me take a concrete illustration: Rabbi Jacobs, of Toronto—with great respect for him—is authorized to celebrate, by the laws of the Province of Ontario, a marriage between Jews of his congregation and professing his faith, and between nobody else, and two Christians go to Rabbi Jacobs and are married. The Dominion Parliament, under this bill, would say that, as Rabbi Jacobs is authorized to perform a certain ceremony between Jews, that ceremony of marriage which he has performed between Christians, and which he is not authorized by the Provincial law to perform, is perfectly good.

I think somebody has pointed out that the bill only says that a validly solemnized marriage is valid. I do not think that is arguable. Let me get it down again to a concrete case. If the

Province of Quebec says a Roman Catholic priest is the only person who is authorized to perform a marriage between two Roman Catholics, if a Protestant of any denomination does perform that ceremony, the bill says it is valid. It cannot mean anything else. It simply means—we will amend your solemnization of marriage law and widen and broaden it. The Dominion, in effect, says to the province: you cannot say this person may solemnize this marriage, and that person may solemnize some other marriage, but if you give a man authority to solemnize any marriage, you must give him authority to solemnize all marriages. That is the meaning of that bill and I submit to the Court that no other meaning can be taken out of it. And that being so, we have the Dominion at once stepping in to deal with matters exclusively assigned to the province, one of which is the solemnization of marriage. Why stop there; why not say—the province must authorize everybody to solemnize marriage; the province must put no limit in any respect in regard to the form? My submission is, that the Province of Ontario to-day, or the Province of Quebec to-morrow, can alter in any way they see fit their laws in regard to the solemnization of marriage.

It comes simply down to this, that you say to the province: you may play with solemnization of marriage, you may enact penalties, but nobody need pay any particular attention to them; you cannot actually carry out what is admitted in regard to every other subject of legislation assigned to the province; you cannot carry the thing to its logical conclusion; you cannot say that a marriage not solemnized according to your power under the British North America Act is not valid. The bill means that, or there is nothing in it at all. The argument with regard to consensual contracts being sufficient is not open to my learned friends on the other side upon this bill, because they boldly say that the solemnization which the province has laid down is not necessary, in certain cases, or else, this bill means nothing.

I am going to ask your Lordships, if you come to the conclusion that the Parliament of Canada has no power to enact this particular bill, if you think it necessary or wise or just that the second question should be answered at all. If the Parliament of Canada has no part or parcel in jurisdiction in regard to the solemnization of marriage, if the question of the solemnization of marriage does rest with the province, why then should the Dominion request your Lordships to answer what the law in any province is. If they cannot amend or alter it, should it require amendment or alteration, and if that must be done by the provincial legislature, is it not that legislature only which should ask your Lordships what is the meaning of

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their own laws. Can the Dominion, in relation to a subject in regard to which they have no legislative capacity—let us take some subject which is entirely within their jurisdiction beyond all question, such as contracts—can the Dominion ask your Lordships with regard to a contract, which is solely concerned with the sale of lands in the province, what the meaning of the legislation of the Province of Ontario is with regard to it? I think the only body that could come before your Lordships for any authority to ask for interpretation of that question would be the body that can, if necessary, amend or alter or change that law, and not a body that has no jurisdiction over it.

The power of the legislature as to "solemnization of marriage" is absolute and full, and the difficulty with this question is really not as great as it appears, because, under our system of government, we have had a lot of these constitutional questions up where the subject-matters have more or less been held in some instances to overlap and the rules have been laid down for construction. Your Lordships are familiar with all these cases; most of them you have taken part in, and in every case it has been held, where there is any overlapping, that the jurisdiction is as clearly defined and as capable of exercise by the province, in its own field, as it is by the Dominion.

Your Lordships have been referred to the memorandum of the law officers of the Crown in regard to what was covered under the head of "solemnization of marriage" in their opinion, and to the remarks, *obiter* though they are, of Mr. Justice Gwynne, in the *City of Fredericton* v. *The Queen*, 3 Can. S.C.R. 505, at pages 568 *et seq.*, where he says, in dealing with another matter, that the solemnization of marriage, that is, the power of regulating the ceremony and the mode of its celebration, is a particular subject expressly placed under the jurisdiction of the local legislature as a matter which has always been considered to be purely of a local character.

In the Judicial Committee, in the case of the *Citizens' Insurance Company* v. *Parsons*, 7 App. Cas. 96, Sir Montague Smith deals with the matter in much the same way. That view was not taken by Judges, but when at a later stage, the acts relating to the marriage of a man with his deceased wife's sister was discussed in Parliament, the Hon. Mr. Blake made a speech upon that bill which will be found in the Debates of the House of Commons of February 27th, 1880, at page 299. Whatever views one might have as to matters which Mr. Blake advocated, he stood out before the whole of this Dominion, and the whole of the world practically, as a great constitutional lawyer; a man who was not likely in the Dominion Parliament to waive one jot of the powers of that Parliament at that time, and he then recognized that as one of the requisites to a marriage which

rested with the province and in regard to which the Dominion has nothing to say.

The right to say who shall perform a marriage ceremony, between persons of different religions; how persons of different religions will have to be married as to ceremonial, is a matter which is not a marriage act in the sense of capacity to contract, but is purely a solemnization of marriage act. That is absolutely, I submit, beyond controversy at the present moment, and this Court—whether it is sitting as a Court or as an advisory board—is practically bound by the decision of the House of Lords in *Swifte* v. *The Attorney-General for Ireland*, [1912] A.C. 276. The Act there in question was absolutely such an Act, dealing with religion—that is the religious belief of the parties—and dealing with the persons who might celebrate that marriage.

Now, a marriage contract, using that loose expression, is not an ordinary contract, it is what may be commonly called a solemn contract, that is, in order to be valid, it has to be entered into in a certain solemn form, and, can any one, looking at the division of jurisdiction between the Parliament of Canada and the legislatures of the provinces, doubt for one moment that the form, the solemnity of the form, is left entirely with the province. That is the point, I respectfully submit, that has to be decided here. Is not the form of the contract, the solemnities which must follow that form, left entirely with the legislatures? And if they choose to say to-day or to-morrow that all marriages between Roman Catholics must be celebrated in one way, or that all marriages between Anglicans must be celebrated in another way, that is absolutely, whether one approves of it or not, left to each individual provincial legislature, according to the will of people who return members to that legislature.

They have the right to draw the line as to beliefs for this reason. When the first Act that one can find dealing with matters of this kind in England was passed they drew the line there. Will your Lordships look at 4 Geo. IV. ch. 76, which is intituled "An Act for amending the Laws respecting the Solemnization of Marriages in England." The section therein relating to the publication of the banns set out everything in regard to licenses. It provides about parishes or extra-parochial places, and it provides for the consent of guardians and parents. Everything in relation to what the law officers of the Crown in their report think appertains to the solemnization of marriage, is contained in that Act. That is an Act specially dealing on its face with the solemnization and it goes a long way to shew what in England at that time was deemed to fall within solemnization. But that Act does not say one word in

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reference to capacity to contract; it does not say anything in regard to divorce; it is an Act to provide the form, the means rather.

Then, there is a very curious illustration as to what was done with regard to religious beliefs in the Act of 6 & 7 Wm. IV. ch. 85. By the second section of that Act it was provided that the Society of Friends, commonly called Quakers, and also persons professing the Jewish religion, might continue to contract and solemnize marriages according to the usages of the said society and of the said persons respectively, and every such marriage is hereby declared and confirmed good in law provided that the parties to such marriage be both persons of the said society or both persons professing the Jewish religion. Marriage celebrated according to the Jewish religion, I do not know so much about the Quakers, but according to the Jewish religion there was a very, very high ritual and ceremonial. It is a more elaborate ritual than either the Roman Catholic or the Anglican, and I am going to point your Lordships to what has to be done. If that high ritual was performed over a Christian and a Jew, there was absolutely no marriage. If the Rabbi performed the highest marriage ritual in the world over any one except two Jews it was absolutely null; they both had to be Jews. So that the Parliament of England recognized, even in 1836, and subsequently recognized by 19 & 20 Viet. ch. 119, sec. 21, a ceremony in regard to both Quakers and Jews. In regard to both the Parliament of England made the validity of the marriage depend upon two things, the religion of the persons to be married and the religion of the person who performed it, and yet, that all came under the solemnization of marriage.

Then I want to refer your Lordships, with regard to Dominion and provincial jurisdiction, to *The City of Montreal* v. *Montreal Street Railway Co.*, [1912] A.C. 333, at page 343, the judgment of Lord Atkinson, where, dealing with sections 91 and 92 of the British North America Act, he says to the Dominion, you must not, in a subject exclusively assigned to the provinces under section 92, encroach at all; and the solemnization of marriage is entirely within the exclusive jurisdiction of the province and upon that solemnization the Dominion, because they have marriage and divorce assigned to them, cannot trench. The solemnization is a part that is cut out and taken away entirely from "marriage and divorce."

(Counsel was asked as to the effect of the capitulation and treaty.)

That refers to the second branch of the case. Just in regard to that, it has struck me in this way, that the agreement that was made, the capitulation and the treaty, was not a mere guarantee to an individual Catholic at all. It was a guarantee to the

conquered country. There is a very curious bit of advice which was given in 1722 and which will be found reported in 2 Peere Williams's Reports, 2 P. Wms. 74. It is headed: "An uninhabited country newly found out and inhabited by the English to be governed by the laws of England." I read from page 74:—

> Memorandum, 9th August, 1722, it was said by the Master of the Rolls to have been determined by the Lords of the Privy Council, upon an appeal to the King in Council from the foreign plantations,—
>
> 1st. That if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so, wherever they go, they carry their laws with them, and, therefore, such new-found country is to be governed by the laws of England; though, after such country is inhabited by the English, Acts of Parliament made in England, without naming the foreign plantations, will not bind them; for which reason, it has been determined that the Statute of Frauds and perjuries, which requires three witnesses, and that these should subscribe in the testator's presence, in the case of a devise of land, does not bind Barbadoes; but that,
>
> 2ndly. Where the King of England conquers a country, it is a different consideration: for there the conqueror, by saving the lives of the people conquered, gains a right and property in such people; in consequence of which he may impose upon them what laws he pleases. But, until the conqueror gives them new laws, they are to be governed by their own laws, unless where these laws are contrary to the laws of God or totally silent.
>
> 3rdly. Until such laws given by the conquering prince, the laws and customs of the conquered country shall hold place; unless where these are contrary to our religion, or enact any thing that is *malum in se*, or are silent; for in all such cases the laws of the conquering country shall prevail.

That is to say, when a country is conquered, while a conqueror has the right to impose his own laws, the people are to be governed by the laws they have until the conqueror chooses to do so.

Then there is a very interesting article, in the report of the Canadian Archives, for 1891, from Richard Cartwright, Junior, of the 12th of October, 1792, dealing with this very question, and he speaks of the marriages which have taken place in Upper Canada without any clergyman being present (page 85). He says that officers have celebrated marriages and that some clergymen have subsequently come in, evidently being clergymen of the Anglican communion, and celebrated marriages.

I will give a memorandum to your Lordships of *Reg.* v. *Roblin*, 21 U.C.Q.B. 352, at pp. 354-5, where Chief Justice Robinson says that under the Act of 32 Geo. III. ch. 1, the statute of 26 Geo. II. ch. 33, Lord Hardwicke's Act, came into force: *Hodgins* v. *McNeill*, 9 Gr. 305; *O'Connor* v. *Kennedy*, 15 O.R. 20. Whether Lord Hardwicke's Act was in force or whether

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the common law of England was in force, or whether the French law with the treaty was in force, at all events at the time that the British North America Act came into force, there was no question that marriage could no longer be celebrated in any part of Canada—I am speaking of civilized Canada at that time—without some form or ceremony, in order to render it valid. So that it is not necessary to carefully delve into the question of whether it was Lord Hardwicke's Act, or the common law of England, or the law of France as amended and introduced here, which brought into force, at that time the decree of the Council of Trent, so far as Lower Canada was concerned, requiring the presence of a clergyman or priest; there had to be a ceremony or form of some kind used at that time; at all events there had to be, without doubt, at the date of the British North America Act.

Bayly, K.C. (for the Attorney-General of Ontario):—I wish to make a brief statement as to the position which the Province of Ontario takes.

While of opinion that it is difficult to give an unqualified "yes" or "no" to any one of the questions submitted in this case, and that the law on the subject is difficult to determine, the Province of Ontario favours a uniform general marriage law for the Dominion if so framed that the legislative authority of the provinces in relation to the solemnization of marriage is not thereby violated, and the Province of Ontario adopts so much of the argument of counsel for the Dominion as is consistent with the view above expressed, and no more.

The Province of Ontario considers that an Act of Parliament which renders valid throughout the Dominion marriages performed in a province by persons legally authorized by such province would result in consolidating and perfecting provincial authority throughout Canada and, in this view, the passing of such an Act by the Dominion Parliament would enlarge rather than encroach upon provincial jurisdiction.

R. C. Smith, K.C. (for the Attorney-General of Quebec):—My Lords, I come here under express instructions to discuss only the constitutional question, and not to discuss the merits of the second question that has been submitted. I will ask your Lordships' patience later to add several reasons why that second question should not be considered and answered, but, inasmuch as your Lordships' attention has been concentrated upon the constitutional questions submitted, I think it would be proper that I should add anything I have to say with regard to that branch of the case before referring to question No. 2 at all. It is not, my Lords, that I at all desire to trouble the waters if I refer to the terms of this reference. The difficulty which I

encounter is that arising from the words in the bill "and duly performed according to such laws." I think it is perhaps common ground now, and we have all agreed to treat the bill as having some meaning, and as having been moved in pursuance of some definite intention, and the only intention that could possibly be evident by the bill as drafted, has been expressed by my learned friend, Mr. Hellmuth. It must mean, and I think it cannot mean anything else than this: that it is intended to legalize a marriage performed by a person or functionary, or solemnized by a person or functionary, who would, in the Province of Quebec, have authority to solemnize marriages between any persons or class of persons. That is to say, that it will be impossible, if this bill becomes law, that there should be a person capable of solemnizing a marriage in the province between any two persons without being equally capable of solemnizing a marriage between all persons. That is the evident intention.

I submit for your Lordships' consideration this: that the British North America Act, when it was finally crystallized into legislation, was the result of a contract, and I say with all possible respect that those who desire the stability of Confederation, cannot preserve that stability better than by a conscientious and a frank and an honest interpretation of that Act, giving to each section the intention that the framers of the British North America Act would give it. I am going to argue this upon very narrow grounds indeed; I am going, I think, to shew your Lordships, as has been so eloquently and logically shewn by those who preceded me, that this bill deals exclusively —so far as it attempts to deal effectively with anything—with the quality and the character of the functionary solemnizing the marriage. And, if I have any difficulty in arguing that, it is because the difficulty arises more from the disposition, which I cannot resist, to treat the matter as obvious. The very first words of the bill, I submit, condemn it. It says: "Every ceremony or form of marriage," and that is what the bill deals with and, with all possible respect, it is what it was intended to deal with.

Now, before I come to discuss that would your Lordships allow me to refer to the second clause of this bill?

The second clause I do not think it is necessary for me to discuss, because I think if it legislated, or purported or attempted to legislate, effectively concerning what appears to be its subject-matter, it would open up a very wide subject as to the purview of the powers of the provinces with regard to property and civil rights, etc. The second clause of the bill uses the words "shall be absolute and complete." Now, my Lords, Parliament has never legislated with regard to questions

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of property, succession, or any questions of civil rights and property. I assume that when this bill says "these rights shall be absolute and complete" it must mean, in accordance with the laws of each province, because there are no other laws. So that section 2 of this bill, while it does declare absolute and complete rights, not only of the persons themselves, but of their offspring, it does not presume for one moment to decree what these rights shall be. I assume, as I am bound to do, that it would naturally mean these rights as defined by competent authority, which is the provincial authority. If it were to go any further it would very greatly broaden the scope of these rights and would involve a discussion even more extended than that to which your Lordships have so far listened. I do not propose to discuss the second section of the bill as though it dealt with the rights of married people because I cannot conceive for one instant that the general authority to legislate upon the question of marriage, *quoad* marriage, involved the right in the Dominion to prescribe the social relations and the property obligations and everything of that sort, of married people. That would be giving to the word "marriage" a meaning which never could have been intended. It does not mean that because Parliament may legislate upon the subject of marriage, that Parliament can legislate with respect to every right of a married person. No, it has only the power to legislate upon marriage, and if it had power to legislate as to anything incidental it must be incidental to marriage, *quoad* marriage, and not to all the multifarious rights and interests, whether property obligations or otherwise, of the parties themselves. That would be an absolutely impossible view, so that I do not feel on this reference, and with the particular wording of clause 2 of the bill, that I am called upon to go into any question so broad as that.

To revert to the question of jurisdiction to pass this bill, there is one part of the British North America Act, and one part only, in which there is any power of remedial legislation. When the Imperial Parliament was considering the British North America Act it considered the question of remedial legislation and what remedial legislation should be conferred upon the Dominion, and in section 93 of the British North America Act we have that power of remedial legislation with respect to education alone, and only within the limits of certain circumstances and in so far as these circumstances should render it necessary. I say respectfully that that is the only clause or section of the British North America Act that deals in any way whatever with remedial legislation, and the fact that we have such a section, shewing that the question of remedial legislation was considered by the Imperial Par-

liament, would be an absolute answer to the suggestion that, because a province exercised either inadequately, imperfectly or wrongly a power conferred upon it, Parliament would have remedial power. I say there is nothing in the British North America Act that could sanction such an inference or such an argument.

Now the marriage ceremony, the persons capable of solemnizing marriage, everything connected with the contract, so far as solemnization is concerned, has always been religious. The qualification of a person celebrating or solemnizing marriage is primarily derived not from civil authority but from ecclesiastical authority. In this, the whole history of France, as well as the whole history of England, agrees entirely. I do not think it can be challenged for one moment, as far as the solemnization of marriage is concerned, that that has been historically always religious, and it does not advance the argument one whit to say it may have been something else, that other functionaries may have been appointed by the State; that we might have had justices of the peace or other civil functionaries; I say it does not advance the argument one whit to say that there might have been other functionaries because the fact of the matter is that historically marriage has been always—and I need not go further than the two countries from which Canada has been peopled, France and England—marriage has always been a religious and not a civil ceremony. The State took what was an established institution of the church and enacted laws concerning it. And here I think it is important and relevant to consider that even what is purely evidential was, I say, derived from the ecclesiastical authority originally, and not from the civil authority. Your Lordships have in the decrees of the Council of Trent provisions for the publication of banns and for the keeping of registers, and all the elaborate provisions of civil law which we have to-day respecting the keeping of registers of civil status were foreshadowed in ecclesiastical legislation long ago. The Council of Trent referred to the Council of Lateran and the Council of Lateran provided for the publishing of banns and the keeping of some register of civil status. Therefore, we have not only what relates to the solemnization as regards the persons before whom or by whom it is solemnized, but we have a provision for the publication of banns and the keeping of registers of civil status which we undoubtedly find to be of ecclesiastical origin.

As regards France, the first reference as to the keeping of these registers of civil status is found in the Ordonnance de Blois, which is directed to prevent clandestine marriages. We see there that the civil law comes in and adopts what has been decreed by the ecclesiastical law in regard to the publication of

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banns and the keeping of registers. Then we have the Edit de Henri IV., and the Declaration of Louis XIII.

The whole history of marriage in France shews it to have been primarily a religious ceremony, and the most important thing connected with that ceremony was the officer or the person before whom that ceremony could be solemnized. In the Ordonnance of 1667 we have, of course, very precise provisions with regard to the keeping of registers of civil status. In the Edict of Louis XIV., 1697, we find it said that the essential solemnity to the *sacrement* of marriage is the presence of the proper curé of the parties. I know your Lordships have given attention to all these things, but I am merely following rapidly these papers to shew that throughout the history of France the presence of the person celebrating was considered as of the essence of the solemnization. Perhaps I need not detain your Lordships with this, you will find the special references in the Edict of Louis XIV., Ritual of the Diocese of Quebec, and Declaration of Louis, 1736.

Then, I ask your Lordships' attention for a moment to the Act 32 Henry VIII. ch. 38, this being an Act passed in 1540. You will notice that the words always used is "marriage solemnized." We have there the expression, "such marriage being contracted and solemnized in the face of the church." We have also the expression, "before the time for contracting that marriage which is solemnized" and reference is also made to the Levitical decrees in connection with marriage. That Act, so long ago as 1540, adopts the Levitical decrees of consanguinity, and all through, it deals with solemnization in the face of the church and so on.

Of course, your Lordship is familiar with Mr. Bishop's reasoning that marriage is not a contract, but a status. Whether the word "status" more correctly describes marriage than "contract," it clearly involves a contract, and so far as it involves a contract that contract is consensual, but it requires the sanction of solemnization. I do not think we gain any light by dissolving the contract entirely from the solemnization; I do not think we gain anything by that or that it throws any light upon the question.

The House of Lords, considering the terms of Lord Hardwicke's Act, 1753, discussed the fact that the word "solemnization" is used in connection with matrimony as absolute evidence that the word had a well-founded and well-understood meaning. It says the banns must be published on three Sundays preceding the solemnization of the marriage, and at the end of the first section it says that the marriage shall be solemnized at one of the parish churches or chapels where such banns have been published, and no other place.

Throughout the different sections of Lord Hardwicke's Act the term "solemnization of marriage" is used and it all shews clearly that the words had even at that date an absolutely clear and defined meaning. I am, of course, not pretending to elaborate the very full argument of Mr. Mignault, but when we come down to the articles of the capitulation of Quebec, 1759, and the articles of the capitulation of Montreal, 1760, and the Treaty of Paris of 1763, and the Quebec Act of 1774, they all granted the free exercise of the Roman Catholic religion. The question has arisen here, as to whether this was a permission granted to certain individuals to resort to churches of their own. It was, in the fullest possible terms, the granting of the exercise of the Roman Catholic religion, and then coming to the Treaty of Paris we find that, whereas that is granted in the fullest and amplest terms in section 4, in the very following section (section 5), there is a provision for the encouragement of the Protestant religion, and a provision that later on, as His Majesty from time to time shall think fit, he will make provision for the support of the Protestant clergy.

The point I make here is that both religions were from that moment fully recognized. The granting in the Articles of Capitulation of the free exercise of the Roman Catholic religion presupposed naturally the exercise by His Majesty's other subjects of their religion, and that was acted upon from that very moment and in every subsequent Act both systems are fully recognized. My point now is simply this; that marriage was an established institution of both religious systems and in both religious systems the person celebrating was of the very essence of solemnization of marriage. In the Act 35 Geo. III. ch. 4, 1795, both systems are recognized and that is an Act passed a very short time after. I will not trouble your Lordships by references to these other Acts further than to say that the word "solemnization of marriage" occurs in every case. We cannot get away from the fact that in the various branches of the Protestant Church and in the Roman Catholic Church marriage was an established institution and that the person who solemnized was of the essence of the solemnization. Then, we have that recognized in articles 57 and 128 of our own Code, which, it must be remembered, was the state of the law in the Province of Quebec when the British North America Act was passed.

Then we have before us the course of legislation extending over centuries by the very Parliament that enacted the British North America Act. If your Lordships have any curiosity to look at these statutes there is a list of them in the first volume of Philimore's Ecclesiastical Law, pages 643 and 644. There is a list there covering two pages of marriage cases, dealing

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with solemnization of marriage, curing defects in solemnization of marriage, prescribing the hours in which solemnization of marriage could take place and so on. In that long list there is not a statute that does not deal with the solemnization of marriage as involving as an essential the presence of a priest or a clerk in orders.

All our elaborate systems of registration of civil status are directly traceable to the Council of Lateran and the Council of Trent. I have some reason to believe that there were earlier provisions than those particularly with respect to the registration of baptism. Is it conceivable, my Lords, that in the Parliament that for centuries—I do not require to go back further than Henry VIII.—had been enacting laws respecting solemnization of marriage, and always treating solemnization as meaning the one thing, and in the whole history of that legislation there is nothing that is antagonistic to this one view or that is at variance or incompatible with this one view—is it conceivable that the British Parliament in enacting the British North America Act had any doubt whatever as to what the signification of solemnization was?

One observation on what is called the doctrine of overlapping. In *Hodge* v. *The Queen*, 9 A.C. 117, page 130, we find this declaration:—

> It appears to their Lordships that *Russell* v. *The Queen*, 7 App. Cas. 829, when properly understood is not an authority in support of the apparent contention and their Lordships do not intend to vary or depart from the reasons expressed for their judgment in that case.

On the following page there is that declaration so frequently referred to, that the legislatures of the provinces are not to be deemed with respect to the matters assigned to them, to exercise a delegated authority, but are deemed to have all the power which the Imperial Parliament in the plenitude of its powers, passed or could confer. The latest declaration on this question is in the recent decision of the Privy Council upon the question of jurisdiction on the Reference in the Insurance Companies cases, [1912] A.C. 571, at p. 581, and Lord Loreburn, the Lord Chancellor says:—

> Numerous points have arisen, and may hereafter arise, upon those provisions of the Act which draw the dividing line between what belongs to the Dominion or to the province respectively. An exhaustive enumeration being unattainable (so infinite are the subjects of possible legislation) general terms are necessarily used in describing what either is to have, and with the use of general terms comes the risk of some confusion, whenever a case arises wherein it can be said the power claimed falls within the description of what the Dominion is to have, and also within the description of what the province is to have. Such apparent overlapping is unavoidable, and the duty of a Court of law is to decide in each particular case on which side of the line it falls in view of the whole statute.

The point to which I ask you Lordships' very careful consideration is this (and I must say that it impresses me quite as strongly as any other point arising on this argument), that where you have the general subject committed to the Dominion Parliament and you have a portion of that very subject, as has been not inaptly said, carved out of it, detached from it, I respectfully suggest to your Lordships that there can be no application of the doctrine of overlapping. Neither can there be any application of incidental or implied powers. If your Lordships were to say that under the doctrine of implied or incidental powers the Dominion Parliament by virtue of its general power to legislate on marriage could also legislate regarding the solemnization, the British North America Act would be defeated absolutely. In other words, what I ask your Lordships to hold is that, in this particular case, solemnization of marriage calls for an exact delimitation, and I say that nothing else can possibly be a reasonable or true interpretation of the Act. It calls for an exact delimitation, or, otherwise, why should it have been detached or carved out of the general subject of marriage? If on any pretence whatever the Dominion Parliament is to be allowed to trench upon the solemnization of marriage on the pretence of legislating upon marriage, then I say that the object and purpose of the Imperial Parliament in clearly carving out that portion of the subject would be defeated by such an interpretation.

Another thing I submit as an essential consideration is this: If the Legislature has power to legislate it has power to legislate effectively. To concede that the legislature has power to pass laws relating to solemnization of marriages that may be violated with impunity as far as the validity of the act done in contravention is concerned, is, I say, to take away the power of legislation. If the legislature is given power to legislate with respect to solemnization, surely it has the power to say, at least within the province, what you do in contravention of this law that we enact is null, or what you do without the sanction of what we have prescribed is null. If you are going to give the power of legislation at all it must be necessary that you are entitled to enact a law which has some force and to provide that a thing which is done contrary to it cannot stand. Again, my learned friend Mr. Nesbitt says that solemnization relates only to what is evidential. I need not go back into history again to shew that solemnization of marriage existed long before there was any evidential proceedings at all, long before there was publication of banns, long before there was any registry kept of it. The act of solemnization is quite distinct from the record of that act. The record of that act may be incidental to it in that sense, as a necessary consequence of it that it should be pre-

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served and so on, but the registration of the marriage and the keeping of the register is one thing, and the actual solemnization is another. The solemnization existed long before any of these requirements, which my learned friend treated as evidential, had any existence at all.

Another argument of my learned friend is this: That allowing the legislature to prescribe nullity in case the requirements of the provincial laws are not observed is an invasion of the power of Parliament with regard to divorce. I say with all possible respect that the fundamental error there is this: The distinction between, as we say in civil law, that which is void and that which is voidable. We do not pretend for a moment to say that the effect of the Quebec law is to annul a marriage which has had valid existence. For the purpose of my present argument I would concede my learned friend's most extravagant claim with regard to divorce, and I say respectfully this, that if the Province of Quebec can validly legislate regarding the solemnization of marriage then if that law be not observed the marriage has no existence and never had any existence. If the Province of Quebec can legislate concerning the solemnization of marriage it can create what is the condition precedent to the existence of the thing at all. It is not that the thing has to be annulled.

I would be willing to go to the extreme and say that suppose the Legislature of Quebec at its next session were to pass an Act saying that the laws of the Province of Quebec relating to the solemnization of marriage are hereby repealed, and the Province of Quebec is left without any law whatever relating to the solemnization of marriage, it is not debatable that such a law would be absolutely constitutional. I say that if the Province of Quebec passed such an Act to-morrow it would not invest the Parliament of Canada with a scintilla of legislative power regarding solemnization of marriage. The power is derived from the British North America Act, and I say that the British North America Act has committed to all the provinces the power to legislate regarding solemnization, and if they do not exercise it, that does not give the Dominion power. If they abuse it, if they enact an absurd law, no matter what they do in that respect, that does not confer power on the Dominion; as I pointed out this morning the only case in the British North America Act in which there is any suggestion of remedial power is in section 93 with regard to education.

A very plausible argument was presented by Mr. Lafleur in these terms: If clandestinity be an impediment then the bill in question is constitutional because the Dominion would have the power to deal with impediments. That would be altogether too easy a solution of this question.

The word "impediment" has been used by some high authority in connection with this, and I am willing to let it go at that, but it is begging the whole question to say that the Dominion could deal with it. Your Lordships have to inquire first as to clandestinity. Is clandestinity an impediment which relates to the solemnization of marriage, which is within the provincial jurisdiction, or is it an impediment which relates to that which is within the federal jurisdiction? It does not help us a bit to make use of the term "impediment." We have to inquire whether it comes within a subject-matter which is assigned exclusively to the province or whether it comes within a subject-matter assigned to the Dominion. In this particular case, beyond all question I suppose it relates to the person who is to give solemnity to the Act and it must come under the terms "solemnization." I do not think there is much to be gained by citing analogies. The power to legislate regarding solemn declarations one would naturally conclude included the nomination of the person who was to receive solemn declarations. The power to legislate with regard to a notarial instrument would involve the nomination of the person who was to give effect to the instrument, and so on. How could it be otherwise? I could not conceive it possible that solemnization did not include the person who was to give solemnization or who was to solemnize as the bill says. This bill deals exclusively, in both its clauses, with the functionary who is to solemnize. It is not necessary for my argument that I should try to enumerate what powers are included in marriage or what is the residuum of legislative power remaining with the Dominion. All that is necessary for our argument is that this particular bill deals solely with one question, the nature and character of the official who is to solemnize. With that I submit our argument is complete. As I said in opening, I would not be willing to concede as much as has been claimed with regard to the power of the Dominion to legislate as to rights resulting from marriage and all sorts of incidental property rights. I think things of that sort would have to be determined as they arise in proper cases. Our argument is complete in saying that as regards this bill it deals with one thing, and that, we say, incontestably comes under solemnization. I do not think I can add anything on this question, my Lords; it is a question on which I am sure your Lordships are well advised.

Permit me to say a few words now as to the answer to question 2. The bill uses the expression "without regard to the religion of the person," and the second question refers to marriage "unless contracted before a Roman Catholic priest." It deals with the one thing throughout and it is enough for our argument to say that that comes clearly under solemnization.

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The *Swifte Case*, [1912] A.C. 276, that my learned friend Mr. Hellmuth commented on was a clear authority for saying that the person celebrating certainly comes under the form of ceremony.

This division of authority, shall we call it, on the subject of marriage, also follows the general lines of private international law, which, if anything were necessary—I do not say anything is necessary—would also aid in interpreting it.

Just a word or two on the second question in the reference. It is my duty to pray your Lordships not to answer the second question. In the first place I do it because it seems that probably and inevitably your Lordships will answer to the first question that the bill is unconstitutional as dealing with solemnization of marriage. If your Lordships reach that result, as we hope your Lordships will, is there any necessity for answering question No. 2? In the second place we say that there cannot be any question submitted which involves more complete private rights than this question. It involves a declaration which would not only cause disturbance, but would put the ban of absolute nullity upon scores of marriages of persons who are not represented at all before your Lordships. My learned friends, Mr. Lafleur and Mr. Mignault, have been placing before your Lordships their views upon that question, but the individual whose rights as a married person or whose legitimacy is in question is entitled to be represented by his own counsel. My learned friends say that your Lordships' declaration would be advisory. We know that it would, but, should your opinion go that way, as far as the name and fame and standing of every person married under the conditions set forth in these general questions is concerned, it would place the stamp of illegitimacy upon the children and the stamp of illegitimacy authenticated by the highest tribunal in the country. The Civil Code, which says that marriage contracted in good faith produces civil results, is very indefinite, and it would have this effect. It is conceded at once that while a marriage in good faith or an ordinary putative marriage may have the effect of producting legitimate offspring, that the parties themselves would be free to contract another marriage, and it would be practically dissolving the marriage tie as far as that part of it is concerned. At all events it is obvious that it involves a pronouncement upon the rights of those who are not here represented. My learned friend, Mr. Lafleur, said, while speaking on the *Hébert* v. *Clouâtre* case, 6 D.L.R. 411, 41 Que. S.C. 249, that there are hundreds of other cases in exactly the same position. I say that no wider admission could have been made before your Lordships. I cite the declaration of Lord Herschell, in *Attorney-General for Canada* v. *Attorney-General for Ontario*, *etc.*,

[1898] A.C. 700, at p. 717 (referred to by the Lord Chancellor in *The Companies Case*, [1912] A.C. 571), that their Lordships declined to answer one of the questions because it involved certain private rights with respect to certain riparian proprietors; rights which are not measurably comparable for a moment with the rights of individuals involved in such declarations as your Lordships are asked to make with regard to the invalidity of certain marriages.

What I am asking is, that your Lordships should refer question No. 2 back to the Governor in Council asking his Royal Highness in Council to consider whether there is necessity now for answering that question in view of the answer which I presume you will give to question No. 1; or referring to His Royal Highness the other consideration that there is now *sub judice* before a competent tribunal the very same question. Your Lordships may make either of these representations to His Royal Highness in Council and I feel that they would commend themselves to him. At all events I am absolutely confident that whatever representations your Lordships would make would be acted upon.

Aimé Geoffrion, K.C. (for the Attorney-General of Quebec):—On questions No. 1 and No. 3, which I intend to refer to together, I have little to add to the argument made by Mr. Smith as to the construction of the words "marriage" and "solemnization of marriage." Mr. Smith has very forcibly pointed out that "solemnization of marriage" must be considered as having been carved out of "marriage" relegated to the Federal Parliament, so as to be exclusively within the power of the province, and, that the doctrine of overlapping does not, therefore, apply. Mr. Smith has given, as a reason why the jurisdiction as to solemnization should be absolutely exclusively in the province, and not divided between both, the decision on the overlapping theory, and the fact that we are here with a general power in the federal and a special power in the province. As was pointed out by Mr. Justice Duff, in every case where the question of ancillary or overlapping power has come up it was in connection with property and civil rights, where the general power was in the province and the special power, carved out, in the Federal Parliament. I would like to quote an authority bearing indirectly on that question which is to be found in *City of Montreal* v. *Montreal Street Railway Co.*, [1912] A.C. 333, pages 343 and 344. Lord Atkinson, suggesting that the previous decisions dealt only with the residuum power given by the opening words of section 91, adds that some considerations before the Court appear to refer to matters enumerated in section 91, namely, the regulation of trade and commerce. There

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is here, as you will notice, a departure from the general proposition till then always acted upon as regards the ancillary or overlapping power theory. It is there held that as regards the regulation of trade and commerce which is a federal subject, the natural meaning of the words used has to be restricted so as to allow of the powers expressly granted to the provincial legislatures remaining with the provincial legislatures. This is really only developing further what has been intimated in the *Citizens Insurance Co.* v. *Parsons*, 7 App. Cas. 96. In that case their Lordships intimated that the words "trade and commerce" had been restricted and could not have the full effect the words otherwise would have because if so it would absolutely nullify powers given expressly to the provincial legislatures. In the *Montreal Street Railway Case*, [1912] A.C. 333, they go further and they state that the residuum power can never be used so as to curtail the special powers given to the provinces. And, while the general express powers given especially to the Federal Parliament do curtail the special powers given to the legislatures, their Lordships go on to assimilate to the residuum, the trade and commerce clause without any apparent reason to distinguish, except that they cannot apply to the trade and commerce power the same rule of construction as they applied to the bills of exchange power, the bankruptcy power, without absolutely nullifying the power of property and civil rights given to the legislature. The analogy between that case and the present case is complete. If you apply to the general allowance of "marriage" in the federal authority, the theory of overlapping as it has been applied to bills of exchange, railway legislation and so on, you completely nullify the solemnizing power or at least you completely nullify its exclusive character. All that could be suggested as regards the effect of giving to the words "trade and commerce" their true construction, was that if you did so it would, to a large extent, nullify the exclusive character of the allowance of property and civil rights to the local legislature. It was shewn that whenever there was federal legislation dealing with trade and commerce, which also affected property and civil rights, then the power of the provincial legislature became void, if the construction applied to bills of exchange and bankruptcy was to be applied to trade and commerce, and it would, therefore, nullify in great part the exclusive authority of the province to legislate respecting property and civil rights. In the present case, if this Court does not hold that "solemnization of marriage" is carved out from "marriage" completely, so as to be exclusively given to the province, and so that the Federal Parliament under the word "marriage" cannot touch it, you will nullify absolutely the exclusive power of the provincial legislatures regarding sol-

emnization. I would suggest that the logical working out of this analogy should lead your Lordships to hold, either broadly, that the rule about overlapping as applied in the cases summed up in these last decisions applies only when the general power is in the province and the carved out power is in the federal authority or, if your Lordships are not prepared to go that far, I would ask your Lordships to hold, at least, that giving effect to the overlapping theory so as to extend the federal power would have the effect of nullifying the exclusive power of the provincial authority in this matter, and that, therefore, the overlapping theory cannot be applied. We should read the British North America Act, as regards the words "marriage and divorce," as marriage laws minus all laws respecting solemnization of marriage. That is all that has ever been assigned to the federal authority.

I was trying to answer the point that the law respecting the solemnization of marriage is also a law respecting marriage. I submit that the authority is assigned to the two powers from different points of view: one as being a law respecting marriage, and the other as being a law respecting solemnization. I am pointing out that "marriage" absolutely has never been assigned to the federal authority, and we must read the British North America Act as a whole, qualifying the allowance of marriage to the federal authority by the allowance of solemnization to the province. And so the only thing left to the federal power is marriage minus solemnization. And, I submit, that the moment that marriage minus solemnization is the only thing assigned to the federal power, the whole question is at an end. This, I submit, disposes of every one of the objections made so far.

I do not intend to add anything to the argument as to what solemnization is. I respectfully submit that the very authorities cited by Mr. Nesbitt shew that the designation of an officer, or of a person before whom one must appear to get married, is legislation respecting solemnization. The American authorities which he cited say that solemnization consists of a third party appearing at the making of the contract, but, I submit that, in the days when the British North America Act was passed, the word "solemnizing" had a more limited meaning. Even taking Mr. Nesbitt's own definition, the designation of the person, or of the officer before whom the parties must appear to make the contract, is obviously legislation respecting solemnization. I submit that any law that touches that question, that specifies that for certain purposes it shall be one officer and for certain other purposes it shall be another officer, is necessarily legislation respecting solemnization. Then, if it is legislation respecting solemnization, the next point is as to the argument

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of Mr. Nesbitt to the effect—and I understood this to be his main argument—that, while the power to prescribe how marriages shall be solemnized is in the province, the power to determine when nullity results from failure to comply with that law is in the federal authority. Mr. Nesbitt might have suggested that the power to make that mandatory provision is with the province and the power to impose the sanction is with the federal authority, a rather unusual division of legislative power. But, Mr. Nesbitt has gone further, and he has stated that the province has the right to impose penalties for non-observance. His argument amounts to this, that the province can legislate as regards solemnization, can prescribe what forms must be followed in order to get married, and can impose one definite condition, namely, a penalty for disobedience to its laws, but cannot impose, what is the most ordinary condition in such cases, nullity for non-compliance with the law. I submit that such a distinction is illogical. It would have been more logical to say that the power of imposing a sanction would be in one authority, while the power of making the mandatory order would be in the other. Surely, the legislature which imposes the formality must be able to say what would be the consequence of non-compliance. Our Quebec Code says that the failure to make publication, in marrying without a license, entails only a penalty. There are many formalities that the parties would be willing to frustrate if the result would be only a penalty and not a nullity. There are other formalities as an essential condition of the contract, and it is clear that the judgment of the legislature in prescribing what formalities it may prescribe will be influenced by the consideration of the success and the failure to comply with these formalities. The suggestion of my learned friend is that the provincial legislature could plainly legislate requiring formalities, but without knowing what the Federal Parliament would do about it; whether it would prescribe an absolute or a relative nullity or a penalty. It is obvious that any legislature which undertakes to declare a mandatory provision, must, in order to make that provision wisely, know what will be the consequences flowing from disregard of it. It is unheard of where the division between the power to make a rule and the power to impose a consequence for disregard of it has been divided between two independent bodies. And yet, the theory of my learned friend, Mr. Nesbitt, would lead to this. He says that the province can prescribe formalities, but he says the province cannot say whether there will or will not be a nullity for non-observance of them. He admits that some person has the power to say that nullity shall result from non-observance, and, therefore, he contends it must be in the Federal Parliament. It seems obvious that the moment a provincial

legislature repeals a requirement that a certain form shall be followed—a requirement which under the laws existing anterior to Confederation had to be followed or if not their non-observance resulted in a nullity—it seems to me that the common sense view is that the repeal of the requirement would carry with it the repeal of the nullifying clause. But the suggestion of my learned friend would be that the nullifying clause would have to remain in force until the Federal Parliament would repeal it. We can work out indefinitely a regular Chinese puzzle which would result from giving the power to prescribe forms, to repeal requirements as to form, to amend the laws as regards forms, to one authority, and to put in the other authority the power to say whether the consequence of non-observance shall be a penalty, an absolute nullity, or a relative nullity.

This brings me to deal with the argument in reference to divorce and I think the word "divorce" should be given a construction—if it is the only construction that can be given to it—that does not produce the results I have indicated. The word "divorce" may be given a meaning which, when tortured, may include actions in nullity, but in its strict sense it does no such thing, or, at least, it is possible of being construed as not including nullity. Under the law of our province the distinction is obvious. We have an absolute nullity, we have a voidable relative nullity, and we have, beyond that, the right to rescind a contract at the request of one party for non-fulfilment of his obligation by the other. I cannot do anything better than to suggest it as pointing out the distinction between the three actions; an action to have it declared that a marriage has always been void, an action to annul a voidable marriage, and a divorce action to cancel an absolutely previously binding contract, because one of the parties has broken his engagement. I submit that this distinction is recognized expressly by the English Act. The Matrimonial Clauses Act of 1837 clearly distinguished between actions to annul and divorce. What was called divorce *a mensa et thoro* is now called judicial separation. In that Act, however, the previously existing distinction is recognized, between an action for dissolution of marriage, which is divorce, and an action to annul, which is not, but which declares that on account of a defect in the making of the contract it should be set aside. It is difficult to argue conclusively, with any chance of success, that when there is an absolute nullity the judgment that recognizes it divorces. I am discussing the question of formalities now, because to a certain extent the Civil Code makes certain want of formalities a nullity, and I want to say a few words as to where a distinction should be made between absolute and relative nullity. Is it logical to use the word "divorce" in the British North America Act, which at the

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time of its passing had such a definite meaning, so as to import into the Act such an illogical distinction as this—that if the provincial legislature prescribed a form it is denied the right to say that there will only be a nullity if the parties are in bad faith, or that it will only be annulled if the Judge thinks the circumstances justifiable?

It seems to me perfectly obvious that this bill purports to legislate on solemnization of marriage, because it says that although the laws before Confederation said that if you do not follow certain formalities you are not married this bill undertakes to say that, nevertheless, although you have not observed these formalities prescribed by the pre-Confederation laws, you are validly married. That is amending the law respecting solemnization of marriage. The whole question lies in the submission that it is only "marriage," minus "solemnization," that is left to the federal authorities. If that is correct, then this bill which says that, in future, your marriage will be good even if you do not go through certain formalities prescribed by the province, and which previously were neglected under the pain of penalty, is absolutely *ultra vires* of the Federal Parliament. Can it be suggested that the jurisdiction as to prospective legislation is in one authority, while the jurisdiction as to retrospective legislation shall be within another authority? I fail to see any justification for such a proposition. What is done under the British North America Act is invariably to leave to the same authority the power as to prospective and retrospective legislation. The validity of an Act as regards its retrospective character depends on its validity as regards its prospective character. The prospective character of this bill, worded as it may be, is simply that in the future you need not comply with certain formalities which the previously existing law required.

It has been suggested by one of your Lordships, that suppose there is no law in the province respecting solemnization, and that province refuses to pass a law respecting solemnization, that the Federal Parliament could do so, and then that would constitute a valid marriage, or if you like, that they could go back to the Roman form of marriage and declare, that that would be a marriage, and then make it subject to conforming to the solemnization. My submission is that if the legislature repeals every law governing marriage, there is only one effective remedy in the hands of the federal authority and that is the disallowance of such a provincial act. The fact that the province repealed all its solemnization of marriage laws would give no authority to the Federal Parliament.

I want to protest against the theory advanced that the law of Quebec, as construed by Mr. Mignault, is what your Lord-

ships call an abdication, and that that should be given as a reason why the Federal Parliament should interfere in the matter of solemnization. I think your Lordships are entitled to construe the British North America Act by the conditions existing in Canada at the time of its passage. The fact that there are a number of French people, having French laws, living in Canada, is referred to in the various cases before the Privy Council, defining property and civil rights. In the present case, what your Lordships may think absurd is considered by a large part of the population of Quebec as the only right thing to exist. It may seem to your Lordships extraordinary, but nevertheless the people of the Province of Quebec think it is right. And, when Confederation was brought about, why was there this extraordinary division between marriage on the one hand and solemnization on the other hand? It was not because one was of national importance and the other was not; it was because of the religious differences and the resulting difference in the points of view of the majority in one province compared with the majority in another. It was because the Roman Catholic majority in Quebec thought the views of their co-patriots of other religions so entirely different from theirs that they would not understand their views, and so the Catholic majority in Quebec would not entrust their other co-patriots with the power to legislate upon the solemnization of marriage, and that is why the solemnization was entrusted to the province. The people of Quebec were convinced that the majority of other religions and origin could not understand their feelings as they did themselves, and so they were not willing to allow them to interpret them for them, and so the solemnization of marriage was entrusted to the provinces in the British North America Act. By the Roman Catholic people of Quebec, rightly or wrongly, it was considered more of a religious than of a civil ceremony, and they were unwilling to entrust the matter to the Dominion and they wanted to be the sole judges as to when and how they would change their minds on the question of marriage. They were unwilling to abandon their authority over the question as to how they could get married to any other authority than themselves.

When the Roman Catholic population of Quebec entered into Confederation they had to make certain concessions from their religious point of view, and, no doubt, the people of Protestant religions had to make concessions, and it is to be assumed that the people of the other provinces agreed to leave the question of mixed marriages, and even Protestant marriages, as to solemnization, in the hands of the provincial authorities in Quebec, trusting either to the reasonableness of the Quebec Legislature to pass just laws, or to the power of disallowance

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by the Dominion which was for them an effective protection. At all events, whatever the reason, the solemnization of marriages, mixed marriages and Protestant marriages, was left in the power of the provincial authorities. I do not understand that Mr. Mignault, in his argument, insisted very strenuously on the point that mixed marriages were null unless contracted before a Roman Catholic priest.

I have only, my Lords, to add a few words. The position of the Province of Quebec, with respect to question No. 1 and No. 3 is in favour of maintaining its jurisdiction. The position of the Province of Quebec, with regard to question No. 2, is that it has no opinion to offer and no argument to present as to what is the existing state of the Quebec law. All it has to state on that point is that the law of Quebec is the law of Quebec and that the Province of Quebec alone can change it. If the law of the Province of Quebec is Quebec law alone, the law of Quebec being the law of Quebec, Quebec alone can change it, and the only reason why the Supreme Court should be called upon to give an opinion disappears. I submit, that there is excellent ground to justify this Court in asking the federal executive whether it insists on an answer to question No. 2, notwithstanding the answer which may be given by this Court to questions No. 1 and No. 3. I need not insist on the fact that the answer to question No. 2 may lead to very serious results. If it is answered in the sense of the invalidity of these marriages, then there may be many who want a divorce who will be willing to step into the box and say they were Roman Catholics, when, as a matter of fact, they were practising no religion at all. It may not affect the illegitimacy of the offspring because bad faith would be hard to prove and illegitimacy in the Province of Quebec depends on there being bad faith in contracting an invalid marriage. I am instructed to point out some of the possible consequences that might follow from the answering of question No. 2, and I submit that every ground of public policy and good sense suggests that it should not be answered by your Lordships. Is it not well to leave things as they have been going alone and under conditions in which no great harm has resulted to anybody? Before the agitation arose we were getting along in perfect peace and harmony, and there were only three or four cases in dispute, but the moment the agitation arose we heard of a great many others. I point out to your Lordships that in the Province of Quebec the *Hébert* case, 6 D.L.R. 411, 41 Que. S.C. 249, is pending in the Court of Review, and that on that case a decision will be given.

I am instructed to submit the point to your Lordships, as to whether the decision of the Privy Council is conclusive that, when an opinion is asked by the federal authority concerning a

matter which exclusively affects the Province of Quebec, there is jurisdiction in the federal authority to ask that question, and whether you are bound to answer it. The recent Privy Council decision, [1912] A.C. 571, proceeds on the basis that the power to consult the Court must be somewhere and that admittedly if it is not in the province it must be in the Federal Parliament. In that case, what was being dealt with incidentally was the power of the provincial legislature to legislate but, practically, it meant the power of the Federal Parliament to legislate, because, in almost every case, the question as to what is the power of the Federal Parliament to legislate, involves the question as to what is the provincial power to legislate. In that case it could not be contended that it appertained to the provincial legislatures alone. The question as to whether the Federal Parliament can pass an Act is a question which the Federal Parliament can refer, but I submit, your Lordships, that if the question is one which concerns exclusively a provincial law, or on which the Federal Parliament has no power whatever to legislate—the disallowance period having passed—the Federal Parliament has no right to refer such a question to the Court.

Newcombe, K.C.:—If your Lordships please, speaking on behalf of the Attorney-General of Canada, I am principally concerned to answer the objections raised by my learned friends, Mr. Smith and Mr. Geoffrion—and to some extent apparently supported by Mr. Hellmuth—to the answering of what are termed here questions No. 2 and No. 3. The attitude of the Province of Quebec is, of course, in this respect, not quite consistent with that which she has maintained throughout the proceedings from the very commencement. But, my Lords, these provincial objections which were formerly urged before this Court, and which were raised here yesterday by my learned friends, Mr. Smith and Mr. Geoffrion, have been conclusively and finally overruled by the Privy Council in its recent decision with reference to companies legislation, [1912] A.C. 571. It is well known that the contention of the provinces was a very broad one, going to deny entirely the authority of the Parliament to require this Court to answer in an advisory capacity any sort of a question at all, whether relating to the construction of the British North America Act, to the interpretation of Dominion statutes, to the administration of the laws of Canada, or to provincial powers of legislation, or to the enactments of the provinces in the execution of those powers.

But, there was also a more limited contention put forward which found favour with some of your Lordships—that, while questions affecting federal powers, questions the answers to which might be made the basis of Dominion legislation, questions affecting the interpretation of these powers which are to be

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executed by the Dominion under the British North America Act, might be submitted, that questions of interpretation of provincial powers or questions of interpretation of provincial statutes, on subjects within the jurisdiction of the provinces as distinguished from the Dominion, could not be put to this Court. And although that distinction was not urged very forcibly upon the appeal before the Judicial Committee, still it was there.

Now, the result of the judgment (upon the construction of it which I submit to your Lordships) involves the power in the Dominion, in the broadest terms, to submit any question of law or fact which the Governor-General in Council may be advised in his own good judgment to submit for the consideration of this Court. But, while it is quite open to my learned friends of the Province of Quebec, if they think there is room in view of what has been decided, to renew that contention, so far as my learned friend Mr. Hellmuth is concerned, in the observation which I happened to hear during the time I was listening to his argument, he has no brief or instructions from the Government to submit or to suggest to your Lordships that any one of these questions should go unanswered.

We have a factum filed denying the jurisdiction of Parliament to enact bill No. 3, signed by Mr. Mignault and Mr. Hellmuth, counsel retained by the Dominion of Canada, and whatever weight your Lordships may attach to Mr. Hellmuth's observations I wish you to consider them subject to the statement that he certainly has no instructions to submit on behalf of the Government that any one of the questions which have been solemnly submitted by the counsel for the Government to your Lordships, should not be answered. Outside of instructions he should make no suggestion on that point. He is either instructed or he is not instructed; his instructions are the limit of his authority to submit anything to the Court. As to the course your Lordships should take I have submitted and I maintain that the power of the Governor-General in Council to submit every one of these questions and to require your Lordships to answer them is conclusively set at rest by the recent decision of the Judicial Committee, [1912] A.C. 571.

The practical question remains as to what course should be adopted by the Court under the circumstances of the present reference and I would like to direct your Lordships' attention for a moment to the circumstances out of which this reference arose. A bill was introduced into the Parliament which is set out in what is termed the first question. That bill came up for discussion and being a bill predicated upon nothing but the solemnization of marriage it seemed hard to resist the conclusion that it did not relate to that very subject. But, it was maintained that it did not relate to the solemnization of marriage;

that there was either an overriding power in the Parliament to control provincial legislation in the exercise of its powers to solemnize marriages or that this bill did not relate to that subject; I think the latter was the contention upon which the promoters of the bill rested. Now, my Lords, in these circumstances the absence of jurisdiction by the Parliament to enact the bill seemed to be reasonably clear, but considering the uncertainties of the law and that, in these constitutional questions particularly, the variety of judicial opinions is only limited by the number of Courts to which resort may be had, it seemed necessary to submit a question upon the subject. Now, I say a "question," because in the view I submit there is really only one question here. You may say that there are five questions here if you like, or you may say there are three, but, in my view, there is really only one question before the Court, because what exists is an interrogation of the Court arising out of the circumstances that this bill was introduced into the House of Commons and was advocated there as a measure which the House had authority to pass and which, in the exercise of its judgment, should receive effect as law. Then, the subject being very important and the authority of the Parliament to interfere with it at all being, at least, very doubtful, the Government concluded that the matter should stand over until judicial advice could be obtained, and the result was this interrogation which is before your Lordships.

Nobody says that what they call question No. 1 is not a perfectly proper question. It is the main point of the interrogation: Is this bill a bill which the Parliament has authority to enact? But, it is very plain to see that when a question is submitted to a Court it cannot be foreseen what the answer to that question may be, and, therefore, in order to cover the ground so as to put Parliament in a position to deal intelligently with the subject (if it be renewed) it is necessary to put several inquiries, the one bearing upon the other, anticipating any sort of conclusion which the Court may arrive at. Now, if your Lordships should conclude that Parliament has jurisdiction to pass this bill, it is obvious, I submit, that it is a very important and necessary inquiry as to what is the law of the Province of Quebec in respect to the point raised by the second question. Questions No. 2 and No. 3, in that view, especially question No. 2, become of the utmost importance, and I would respectfully urge that your Lordships should not hesitate by reason of any of the considerations which have been urged, to answer these questions on the merits if your conclusion be favourable to the jurisdiction of the Parliament upon the first question.

It is said that these questions may affect marriages, the status of parties who are not and cannot be represented in this

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Court. The same is true, my Lords, of every case that is heard in this Court, because other interests which are not represented and which cannot be represented under the practice of the Court are affected, and are determined in every case which your Lordships decide. If the *Hébert* case, 6 D.L.R. 411, 41 Que. S.C. 249, comes to this Court, the decision on it might affect hundreds of people, and yet they are equally without representation and without means of representation in that case as they are upon one of these references. The same is true of every case that has been heard and determined by this Court by way of reference under the procedure of section 60 of the Supreme Court Act. It is true that my learned friend points to one question of the *Fisheries* case, [1898] A.C. 700, at p. 717—and a single one—which Lord Herschell objected to answer because it related to the rights of riparian proprietors acquired previous to Confederation, and in that case his Lordship said that these people were not, and could not be represented before the Court and he did not see fit to answer. But he did answer all the other questions and these other questions affected existing rights to the fullest extent. Take the question, for instance, as to the section in the Fisheries Act where it was enacted—and the Act had been standing there ever since the Union— that the Dominion might make leases of property in fisheries. The Department of Marine and Fisheries had been exercising that jurisdiction to grant fishery leases from the very beginning; there were hundreds of these leases outstanding; and yet the Court proceeded cheerfully and without any protest to say that the Government had no power to grant these leases, but, the lessees were not and could not be represented although the property which they thought they had was taken away by that very decision. The same result may be shewn with regard to the other references.

Then, there is the public interest and there is the private interest to consider and the public interest overweighs the private interest. Your Lordships cannot question the policy of any action of the Parliament within its jurisdiction, and if the Parliament has considered it good policy for the peace, order and good government of the country that these questions should be set at rest generally in this way, then I say that no single private interest, or group of such interests, should stand in the way of the determination of such questions as the Governor-General in Council sees fit to submit. The constitution, it is said, is carefully balanced so that no one of the parts of the Dominion can pass laws for itself except under control of the whole acting through the Governor-General. The Governor-General in council in the exercise of that control, and by the authority of the Parliament, has submitted these questions in view of the situation which I have endeavoured to state. If

your Lordships conclude, therefore, that there is jurisdiction, I submit that on no consideration which has been or can be suggested should your Lordships fail to advise upon every point that has been placed before you. On the other hand, if it be determined that there is no jurisdiction to enact the bill a different situation is before your Lordships. If there be no jurisdiction to enact the bill, if you answer the first part of the interrogatory in the negative, I see no reason to suppose that the latter part is not to be grouped with that; question No. 1 and question No. 3 as they stand here appear to go together:—

> 3. If either (*a*) or (*b*) of the last preceding question is answered in the affirmative, or if both of them are answered in the affirmative, has the Parliament of Canada authority to enact that all such marriages whether,
>
> (*a*) heretofore solemnized, or,
>
> (*b*) hereafter to be solemnized,
>
> shall be legal and binding?

That reference is in reference to the character, status, or qualification of the person before whom the marriage is celebrated. The bill says:—

> 3. Every ceremony or form of marriage heretofore or hereafter performed by any person authorized to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, notwithstanding any differences in the religious faith of the persons so married and without regard to the religion of the person performing the ceremony.

That speaks of the religion of the person performing the ceremony and as to the religious faith of the persons married. Question 2 reads:—

> (2) Does the law of the Province of Quebec render null and void unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province,
>
> (*a*) between persons who are both Roman Catholics, or
>
> (*b*) between persons one of whom, only, is a Roman Catholic?

That has to do with the person before whom the celebration takes place, and question No. 3 is concerned with the power of the Parliament to enact whether such marriages whether heretofore or hereafter solemnized would be legal and binding. These questions go together and if No. 1 be answered in the negative, No. 3 must be answered in the negative.

Now, my Lords, I have very little to add; it is certain, I submit, that between the view of the executive and the view of the Court as to whether a question should be answered or not, in the last resort the view of the executive prevails. But in the meantime situations change and opinions develop, and if it appear on the reading of this submission that there is in effect one interrogation, that it is divided into clauses having regard to

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what might follow from the different views which the Court might entertain, it is quite open and proper for the Court, no doubt, to submit that, in view of the opinions which are handed in upon certain parts of the interrogation it becomes unnecessary, in the view of the Court, to answer the rest. And if the Government upon that submission, entertain a different view, I presume the Government would communicate that to the Court for further consideration.

The two bodies are engaged, each in its own sphere, in working out the constitution of the country. In arguments before the Court extreme cases are often put, but they are not good as illustrations for the purpose of arriving at the principle. It would be an extreme case that the Government insist upon very extravagant questions, unusual and improper, being put and answered by the Court. It is time enough to consider that when a case arises. It never has arisen yet and I do not anticipate, and I do not see that there is any reason to anticipate that there should ever be any conflict between the executive and the judiciary in the administration of section 60 of the Supreme Court Act. That section contains a very useful power and one which has been often invoked and which the Courts have accepted and acted upon in the settlement of the great constitutional questions of the country. The Government in the submission of questions, so far as intention goes, is certainly very careful to submit nothing but what is of public importance and what, in the view of the Government, may properly be answered by the Court. The Court, in its superior knowledge of the constitution and the working of the laws, may upon the consideration of these questions see reason, instead of answering categorically, to submit points for the consideration of the Government with regard to the matter. That is the situation here. I submit that the matter is in your Lordships' hands here as one interrogation arising out of a situation created in view of the public agitation and the introduction of this bill.

Nesbitt, K.C. (in reply):—My Lords, my desire first, is, to get back to what is, after all, the real question, namely, whether the Dominion has power to pass the bill referred, and to arrive at a right conclusion upon that question.

The first essential is a careful examination and a right understanding of the terms of the bill itself. The bill pre-supposes three things: (1) It pre-supposes a provincial official, appointed and authorized by one of the provinces to solemnize marriages —no matter for the moment what marriages, but "some" marriages—in other words, it pre-supposes some machinery established by the province for the solemnization of marriages in the province. The power of the province to establish such machin-

ery is in no way questioned or impaired by the bill. (2) It pre-supposes also that the parties seeking the protection of its provisions shall have their marriage solemnized before this provincial official—that is, that they have availed themselves of the solemnizing machinery established by the province. (3) And lastly, for more abundant caution, it pre-supposes that all other relevant provincial requirements, with the one exception to be mentioned in a moment, have been complied with. Unless the requirements of these three suppositions have been complied with, the benefit of the bill cannot be obtained. In short, the language of the bill is confined strictly to the object which it is designed to effect, and neither touches nor impairs anything but the difficulties which it is intended to remedy. It does not dispense with the performance of any ceremony, nor relieve any one concerned from any penalty which they may have incurred under the provincial law owing to failure in such performance. What it does, and all that it does, is to relieve the persons who have fulfilled its requirements from the effect, upon the validity of their marriage—not upon any other liability to which they may have exposed themselves—which the province has said shall prevent them from availing themselves of the machinery of solemnization which it has established. In other words, it relieves them from the effect upon their marriage of article 127 of the Civil Code.

It is admitted—indeed learnedly contended by the other side—that the incapacity of the parties to avail themselves of the provincial machinery I have mentioned is an impediment so-called, and an impediment within the meaning of that article. It is admitted also that the Dominion has jurisdiction to create and remove impediments to marriage under its undoubted jurisdiction over the capacity of the parties. What foundation, then, is there for the objection of the power of the Dominion to pass this bill, which is designed to remove this impediment of clandestinity as it is carefully worded so as to do nothing more.

My submission is that the Dominion, under the right to legislate upon the broad subject of marriage, as to the status or capacity of the parties, can enable any person to enter into that state, to obtain that status and can prescribe what is precisely necessary to create that status, leaving it for the provinces to pass any laws they see fit to solemnize the status which the Dominion has so allowed to be created.

But my friend, Mr. Mignault, has endeavoured to put his case on question 2 upon the provisions of the Code apart from article 127. I shall leave it to my friend, Mr. Lafleur, to discuss how far it is possible for Mr. Mignault to support his contention without the assistance of that article. But, Mr. Lafleur has pointed out in opening, and I point out again that, even as so

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put, Mr. Mignault's contention involves this—that there is no way in which those who profess any religious belief not recognized by one or other of the special Acts that have been referred to and no way in which those who profess no religious belief whatever can validly contract marriage at all. That has been referred to at somewhat greater length since I made this note—my learned friends opposite are left in the extreme dilemma that, although the Dominion has complete and absolute jurisdiction on the subject of marriage to declare throughout the length and breadth of the Dominion what shall constitute marriage, so far as the Province of Quebec is concerned, if Mr. Mignault is correct, there are great numbers of people in that province with an absolute inability to obtain that status from any jurisdiction. My friend, Mr. Mignault, has no answer to the contention that those who profess no religious belief whatever cannot, under his argument, validly contract a marriage in the Province of Quebec at all. His idea is that such persons can, if they choose, and if they can afford it, apply to the legislature for a special Act of their own, which they may or may not obtain. So that the situation is, if he be right in his contention, that many of the inhabitants of the Province of Quebec have no capacity to marry, there being an absolute impediment to their marriage. Why, if this be so, is it not competent to the Dominion, in the exercise of its admitted jurisdiction over capacity and impediment, to confer upon such persons the capacity which my learned friend, Mr. Mignault, by his answer to the difficulty, admits that they now lack, and to remove the impediment to their marriage, which under his contention is imposed upon them.

As to the second clause of the bill it is, I submit, interesting to discuss any questions as to the power of the Dominion under the word "marriage," to legislate upon the property rights and so forth which may flow from the establishment of the marriage contract. The bill, which alone is before your Lordships, touches none of these matters, but simply leaves the parties to such rights in these respects as, their marriage being established, they may have under the provincial law. It gives them no greater rights than such as may be conferred by the province legislating in its own sphere, upon any other married people, the words "rights and duties as married people," obviously mean only such rights and duties as the competent authority—the Dominion, possibly, in some respects; the provinces, in others—may confer upon persons validly married.

I turn now to the argument of my friend, Mr. Hellmuth, and it seems to me, if I may say so, that he has completely misapprehended the argument which I addressed to your Lordships in opening this discussion. I am quite prepared to admit

to the fullest extent—I could not do otherwise if I would—the principles laid down by the authorities he has cited. But I was unable to understand their effect upon my argument. They establish, as I understand them, that a marriage validly solemnized according to the laws where the solemnization takes place, is, *quâ* that solemnization, valid everywhere—in other words that the "form" of the marriage is governed by the *lex loci contractûs*, or *celebrationis* as it is sometimes called, and differs in that from the capacity of the parties to the marriage, which is governed by the law of their respective domicile. And, consequently, if a marriage be solemnized in a country by the laws of which certain ceremonies are essential to the formation of a valid marriage, or, in other words, where those ceremonies are actually made part of the very contract, and those ceremonies are omitted, or defectively performed, the marriage, being invalid by the *lex loci contractûs* is invalid everywhere. No one, I should think, could dispute that proposition. But, it has no application to my argument or to any of the questions before the Court, for it assumes the very point at issue in all of them. It assumes, and is based upon the assumption, that by the law of the place where the marriage is contracted the proper observance of the prescribed forms and ceremonies is essential to validity of the marriage. But the very questions before the Court in this case are: (1) Has the province made a particular form of solemnization essential to the validity of a marriage, and, (2), if it has purported to do so, is such legislation within its powers?

I am, of course, not dealing with the former question because an affirmative answer to it is just as necessary a pre-supposition of my present argument as it is of my learned friend's proposition. But, my friend's authorities can have no application to the latter question either, which is the one I am now discussing, that as to the legislative power of the province, because those authorities equally pre-suppose an affirmative answer to this question as well. Every case that Mr. Hellmuth discussed is based upon the ceremony, the form being made an essential part of the validity of the contract, and made by a power with undisputed rights to deal with the whole subject-matter, contract, solemnization and everything else. But, that does not forward the discussion here. What we have to discuss is a question of legislative power under a divided jurisdiction, and the only question with which I am now concerned is one on which my friend's authorities throw no light at all, namely, whether or not it is within the powers of the provinces under "solemnization of marriage in the province" to make any ceremony at all essential to the validity of a marriage.

The British North America Act says "solemnization of

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marriage;" that is, solemnization of that status, of that condition pre-supposing the status existed. I should think that a very large majority of your Lordships—I hope not all—are startled by the argument, but, were it not for the fact that it had been taken in, so to speak, the breath of our lives from the beginning that marriage means something connected with a ceremony and that a ceremony is essential to it, I should have thought that the language of the Act would be perfectly plain—the solemnization of the status, which status is entirely within the sole and absolute jurisdiction of the Dominion to deal with entirely; and when the Dominion says what shall form that status when people are married the provinces can pass any legislation they please with reference to the solemnization of it, but they cannot for one moment interject or interpose something that is essential to the validity of that marriage. The Dominion alone has the power to deal with that.

My contention, as I have said, is that ceremony is not essential to the validity of a marriage. And here again my learned friend, Mr. Hellmuth, seems to have fallen into some misapprehension. He appears to have thought that the purpose for which I cited *The Queen* v. *Millis*, 10 C. & F. 534 and *Beamish* v. *Beamish*, 9 H.L. Cas. 274, is answered by pointing out that what those cases actually decided was that under the law of England a certain form or ceremony, namely, the presence of a priest, had always been essential to the validity of a marriage. But that decision—that is, the point actually decided—has no application to my argument, for the same reason that my friend's other authorities have none, namely, because it was based upon special legislation making the ceremony essential. The purpose for which I cited *The Queen* v. *Millis*, 10 C. & F. 534, was to shew, from the reasoning and authorities to be found there, what the situation was and always would be apart from such special legislation, and to establish that, apart from legislation to the contrary, the contract of marriage and its solemnization are two separate and distinct things, and that, even when some ceremony was prescribed, its absence did not invalidate unless it appears from the legislation that that was the intention. My friend cited *Swifte* v. *Attorney-General for Ireland*, [1912] A.C. 276, but I should think that that authority made perfectly clear the difference. Lord Loreburn says that legislation relates only to the form of ceremony and, therefore, is not extra-territorial, but he points out the distinction. In that case the form or ceremony was made an absolute essential, a condition precedent to the validity of the marriage, and the legislation was passed by a legislature fully competent to deal with the subject. It throws no light on it except the sort of side-light that may be gathered from case after case

cited by Mr. Hellmuth where the statutes used the word "solemnize" as distinct from the other, and, as I say, with every submission, points to the one conclusion to be drawn from this Act—that what you are dealing with is the power of the provinces, not to legislate upon marriage, but simply on the solemnization of the existing status—of a status, the right to prescribe all the essentials of which are in the Dominion. Deny that proposition and you will say that although the Dominion has complete and absolute power, notwithstanding anything contained in section 92, to deal with the subject of marriage, to create that status with the subject of marriage, and, therefore, to create that status and, therefore, to legislate upon all its essentials, yet the provinces can step in and, by interposing anything they see fit under the guise of solemnization, can say that that status cannot come into existence. I submit that such a result will certainly make your Lordships pause a long time before you bring it into effect. It was for this reason that I quoted so largely from Lord Brougham and Lord Campbell. They held that there was no such special legislation in England, and, consequently, discussed what the position was in its absence. And what they say as to this neither was disputed, nor, I suppose, could be disputed. From their reasoning I argue that the power claimed by the provinces to make any ceremony essential to a valid marriage, and to invalidate marriages where such ceremony has not been performed, cannot be conferred on them by the words "solemnization of marriage," in any proper meaning of these words, and, consequently, the power to override any such invalidating provincial legislation must be in the Dominion under the word "marriage." Under the word "marriage" the Dominion must have power to define what marriage means, to say what are, and, consequently, what are not essentials, of a valid marriage; in other words, as Mr. Justice Idington put it, to say that marriage is what marriage is; and you cannot get out of the word "solemnization" the power to add another essential to marriage. The result I submit is that, even though the bill cannot be supported as removing an impediment or conferring a capacity,—for that argument has nothing to do with the argument I am now urging—it is still within the power of the Dominion as asserting its jurisdiction over marriage.

One other observation about the *Montreal Street Railway Case*, [1912] A.C. 333. That case, I submit, has no bearing whatever upon the real point of the construction of the British North America Act involved here. As I understand it, what is involved here is this: Granted the subject is one for which there is a special heading under section 91 of the British North America Act, anything that is necessarily incidental to that can

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be passed by the Dominion Parliament, this overrides any of the matters involved in section 92. I think that is established beyond doubt.

But His Lordship, the Chief Justice, puts this which needs to be grappled with,—as I understand him he says you have out of that head in 91 a special head of its own delimited and coupled with property and civil rights and, therefore, that it hinges upon the rule of construction that I have been urging. Now, I say that, if anything, it points and adds force to the rule that I have been urging. You have got to take first marriage, and out of that is taken—they have seen fit not to leave property and civil rights to be dealt with at all—but out of that they have taken the solemnization of that condition. Suppose they said "the solemnization of that status," would your Lordships say that they could say that under the head of "solemnization" they could destroy that status by inserting terms that would render the bringing of that status into existence absolutely useless. You have the word "marriage" coupled with "divorce" and you have to read the two together. Divorce must be given the meaning of anything that relates to the untying of the supposed *de facto* condition of marriage. Why should you make marriage of a less breadth or importance than divorce when you have eliminated out of that simply the solemnization of that status? Now, the answer to the first question is only with regard to the bill and the answer to the third question is as to the general validity. The Dominion can create a Court and can give that Court full power to deal with, if I am right in my argument, the undoing of that marriage which would set the parties loose, as for instance, on the ground of physical incapacity. Under this authority the Dominion could give that Court any rules it sees fit, to declare what it shall be governed by. Could the Dominion not say that if the parties have gone through the solemnization in a form that is prescribed they may have the status or may not have the status; and could not the Dominion legitimize the children and declare that the parties had the status of married people? Could a province, under the guise—and this is my last suggestion—could a province, under the guise of solemnization, limit the right of a citizen to enter into the state of marriage; could the provinces say that a red-haired man must only be married to a red-headed woman? Can the provinces curtail and fetter the rights of a citizen in that respect upon which the Dominion alone has the right to legislate? Can a province declare as to the right of a citizen to enter into the married state; can a province limit his capacity by any attempt to say that he can only do it by so and so?

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Lafleur, K.C.:—My Lords, as I intimated in my opening remarks, an investigation of the conditions of our laws immediately after the conquest does not seem to me to be pertinent or necessary for a decision in this case, because, as I observed to your Lordships, we have a declaratory statute immediately preceding the Code which seems to me to do away with all doubts as to the rights of the several churches to celebrate marriage, and it only becomes a matter of construction as to how far the authority of the clergymen of each of these communities extends in the celebration of marriage. That there is no restriction as to the persons whom they may marry is my view on the matter, and nothing that I have heard up to this time has disturbed that.

The declaratory Act is the Consolidated Statutes of 1860. May I say this with reference to the law before that date, and I consider it useful only in leading up to a statement of what the law was in 1860 and at the time the Civil Code was enacted. It appears to me that the Articles of Capitulation in 1759 and the Articles of Capitulation in 1760, and the Treaty of Paris, in 1763, had this effect, and no more: It gave to the Roman Catholic subjects of His Majesty free exercise of their religion and the fullest and freest rights in that respect, but it appears to me that it cannot be successfully contended that the grant of this right and privilege to the Catholics of the colony implied the exclusion in any sense of the religion of the conquering nation or delimitation or restriction of the rights of the clergy of the conquering nation who were clearly entitled to exercise their ministry in the conquered country. It seems to me that any other contention is repugnant not only to the British constitution but to a reasonable construction of these Articles of Capitulation and to the language of the treaty. It would seem to me on the face of it that you cannot pretend that by tolerating a religion, which was then repugnant to the religion in the constitution of the conquering country, that you restricted in any way the religion of the conqueror in the conquered territory. That would seem to be self-evident as a matter of constitutional law.

Therefore, it does not seem to me to be reasonably arguable that the grant to the Roman Catholic subjects of His Majesty of the free exercise of their religion whether under the capitulation of Quebec or the capitulation of Montreal or the Treaty of Paris gave them any exclusive rights as against the Anglican Church. That, I think, is reasonably clear.

I say that so much of the French canonical law as was inconsistent with the free exercise of the ministry of the Church of England, after the conquest, was repugnant and could not survive the conquest. So much of that law as would exclude the

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ministry of the Anglican Church clergymen would be quite incompatible with the law of the conqueror and would be repealed, and I find that is the law by reason of the declaratory statute that says that Anglican clergymen had the power before 1861, which pre-supposes existence of that power from the time of the conquest down to this date; and remember, when you come to the next step after the capitulation of Quebec, and the capitulation of Montreal in 1760, you have in the Quebec Act of 1774, language which introduces, in the 8th section, the laws of Canada. Now, that must mean the laws of Canada as they existed immediately before the Act. It says that resort shall be had to the laws of Canada as the rule for the decision of matters of controversy relative to property and civil rights. That means and includes the law that was brought in as a necessary part of the conquest, and which had not been repealed. The Quebec Act simply repealed the proclamation of Governor Murray, which purported to introduce the English civil law as a whole into the country, and all the previous ordinances and other Acts and instruments which had been issued thereunder. But it did not affect what I contend was a necessary part of our system immediately after the conquest and that is the exercise of the ministries of the Anglican clergymen according to the rites of their church, and in that respect their authority was absolutely unrestricted, and they could marry any one whomsoever.

What confirms that view is the fact that between 1774 and 1860 you find no statute which purports to give to the clergy of the Anglican Church the power to marry. You have statutes granted to dissenters to give that power, and you have it given at a very early date to the Church of Scotland, and you will find from the statute that the authority given in 1827 to the Church of Scotland is absolutely unrestricted.

Now, with regard to the Anglican Church no special statute was necessary because of the position of things which necessarily occurred at the time of the conquest, viz., the introduction of the power of the clergy of the conquering nation and of the exercise of that religion. It is only in 1860 that any reference is made to the subject by a statute which recognizes the rights of the various communities to celebrate marriage.

I submit that that Act, being a declaratory interpretative Act, justifies my contention. That statute with reference to the Scotch Church is absolutely unrestricted, the clergy of that church can celebrate all marriages.

It helps one to understand this legislation when we see that section 16 of the Act, ch. 20, Con. Stat. L.C. 1860, made provision separately for the Church of England and the Church of Scotland. Then you pass on to section 17 of that Act, which

recites the numerous statutes passed to enable various religious communities to keep registers of civil status, beginning with the Baptists and ending with the Quakers. The recital of these Acts covers two pages and includes almost all the dissenting sects which had arisen in Canada up to that time. Of course many more have arisen since and we have had a great deal of private legislation giving them the right to keep registers. But the enacting part of that Act says, that this Act extends also—independent of the Anglican Church and the Scotch Church—to the several religious communities and denominations in Lower Canada mentioned in this section of the Act, to the priests or ministers thereof, who may validly solemnize marriages and may obtain and keep registers under this Act subject to the provisions of the Act mentioned, with reference to each of them respectively. So that if there was any restriction in any Act applying to a religious denomination its powers would be restricted *pro tanto*. It is not very material, but, if your Lordships refer to the Act respecting the Jews you will find that they did not effectually restrict the powers of the Jews in that respect, but that they did restrict the power of the Quakers by saying that they should have the right to celebrate marriages between persons professing the faith of the said religious Society of Friends commonly called Quakers or one of whom may belong to that denomination.

But I suggest that this interesting inquiry into the old law becomes superfluous when we have the law immediately before the enactment of the Civil Code clearly laid down in the statute of 1860. I say it is the source of the Code, and that statute gives the state of the law which you have to consider, if you are going to consider the antecedent law at all, in explaining unambiguous words in the Code. But, my submission is that there is no ambiguity in the Code, that nothing could be clearer than article 129 and that it needs no reference to antecedent law to construe it, and if you go beyond the existing law then you must take the law that existed immediately before the enactment of the existing law, and not go back one hundred years before for your authority. The law which immediately preceded the Code is the law laid down in the statute of 1860, and it gave no restricted authority to the ministers of religion, except in so far as a special Act in some cases may have restricted them. That brings me once more to article 129, to which I am loth to return, because it seems to me I have taken up a great deal of your time over it already. To the Baptists, to the Presbyterians and so on, the powers are given to the ministers of these bodies almost in the same words in each statute.

It would be impossible, where all religions are tolerated as they are with us, where all sects are lawful and are able to

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carry on their ministry without any difference being made between them by the law of the land, to carry out a system in these days that originated at a time when there was only one State Church. It is inapplicable in its terms to the present complicated state of things and there I take it we find an explanation of the general terms used in article 129 of the Code. The observations of the commissioners which have been cited by Mr. Mignault go no further than this: that it was intended to frame this article in general terms because of the difficulty of the situation but not to make any distinction between one and the other in law. My learned friend's contention, if I understood it at all, was this: that the Catholic priest's authority to marry was restricted to the Catholics, the Anglican clergyman's authority was restricted to the Anglicans, and so on, every sect was restricted to its own congregation. I submit you cannot find that even suggested by the terms of article 129. I say, on the contrary, it is precluded by the language of article 129. The first paragraph of article 129 is of so general a character that you cannot import any such idea into it unless you had it in your mind beforehand. I would defy any one who is not familiar with the history of this country to take that article *per se* and read into it all that the ingenuity of Mr. Mignault has read into it. He is filled with all the historic lore that he has so well expounded to your Lordships, but take any Judge who is free from any such prepossession and get him to construe article 129,—can you imagine he would introduce any such restriction into it? It says:—

> All priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status are competent to solemnize marriage.

It says they are competent to solemnize marriages generally; not, to solemnize particular marriages between certain persons. And then it goes on to say what is inconsistent with the idea of their being so restricted: it says that "none of the officers thus authorized can be compelled to solemnize a marriage if any impediment exists according to the doctrine and belief of his religion and the discipline of the church to which he belongs."

Mr. Mignault suggests that that means that where there is an impediment to the marriage the priest or clergyman is not compellable to marry. Of course he is not; if there was an impediment he would not need article 129 to relieve him of the obligation; he would not have the right to celebrate the marriage. The provisions of that paragraph are intended to apply to a case where there is no legal impediment but where there is conscientious objection on the part of the minister.

Can it be doubted that the Parliament since Confederation

has the power to pass bills for the relief of consorts who have been married and to authorize them to marry again? That power has not been disputed. Take the case of two persons who have thus procured divorce from the Parliament of Canada and who have been authorized to marry again, presenting themselves before an Anglican clergyman or a Roman Catholic priest; surely that is a case where the article applies. That clergyman is not compelled to celebrate that marriage because it is contrary to the doctrine of the church to which he belongs although the parties are free to marry. They are free to marry but they cannot compel that clergyman to marry them. That is surely the natural meaning of that article, and to give it any other meaning is to deprive it of any sense at all.

Just one or two observations with regard to the other articles you are referred to in connection with article 129. It seems to me that if you look first at the place where the marriage is to be celebrated, and I do not think that would be conclusive in any event, but even if it were there, which I contend it is not, and that the marriage must be celebrated in the parish of the parties, it could not always be celebrated in the parish in one place because the parties might have different parishes. I will comment on article 63 as to that. However, that is not the question, the question is: Assuming that the *locus* of the marriage is defined and restricted, that does not restrict the capacity of the officer to marry persons who come from another place, as long as he performs his ministry within his jurisdiction, if jurisdiction there be. I shall refer briefly to these articles. By article 57 the banns must be published where the parties reside, in their respective churches, but as you see from this article the marriage is not necessarily solemnized by the person who publishes the banns, and all the person who performs the marriage has to do is to get a certificate shewing that the banns have been published.

Take the case where they are in different parishes, and then there must be two competent since the marriage is celebrated by the curé of the parties. By article 63 the marriage is celebrated at the place of domicile of one or other of the parties.

My learned friend says there may be two competent to solemnize the marriage, and I say there may be more, but at all events he cannot contend there is only one competent. The marriage is to be celebrated at the place of domicile of one or other of the parties and if it is solemnized elsewhere the person officiating is obliged to ascertain the identity of the parties. That is a natural consequence of having your marriage solemnized outside of your domicile. Surely, that shews that the provision is merely directory. If you look at article 1105 of the Code of Civil Procedure, which has not been referred to,

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you will find it confirms the idea that the *locus* is not a matter of necessity, but the obligation is placed on the officer of identifying the parties if they are married elsewhere than at their domicile.

I do not attach the slightest importance to the question of the *locus* where the marriage is to be celebrated, because it does not seem to me that touches the question of the capacity of the clergyman when he is officiating in that *locus*. I merely wished to give your Lordships my construction of these articles which, I admit, leave the law in an unsatisfactory condition, though not as unsatisfactory as the law with regard to marriage licenses.

Now, as to the application of section 127 of the Civil Code—that is really the last fortress of my learned friend, Mr. Mignault. After he is driven from the field in his restricted construction of article 129, he still says that, under the provisions of article 127, there is an incapacity in the case of Catholics to have a marriage celebrated before any one else than a priest of that religion. What I have to submit, with respect to article 127, is that, whatever may be regarded by the canonists as its meaning, we must construe what is the meaning and application of the word "impediment" in article 127, having regard to its place in the Civil Code and to the context. You find that it is under the chapter headed: "Of the Qualities and Conditions Necessary for Contracting Marriage," and among the disabilities there enumerated you will find there is want of puberty, impotency, minority, alliance and relationship. Articles 123, 124, and 125 deal with relationship or affinity, and article 127 says:—

> The other impediments recognized according to the different religious persuasions, as resulting from relationship or affinity or from other causes, remain subject to the rules hitherto followed in the different churches and religious communities.

My submission was and is, that these other causes must be causes of the same nature, causes within the purview and scope of that chapter, that is, they must be qualities and conditions necessary for contracting marriage and of the character of the others, viz., they are disabilities of the persons. The whole chapter deals with the competency of the candidates for marriage. The next chapter deals with a totally different subject, and that is the competency of the officer who solemnizes the marriage. I say you introduce a hopeless confusion if you construe article 127 as in any way referring to the formalities relating to the celebration of marriage, and I say it is a misnomer and a misuse of language for lawyers to say, when they are construing article 127 of the Code, that that is an impediment to the marriage of the parties, when the heading of the chapter within which the article is found treats of the qualities and con-

ditions necessary for contracting marriage in the parties themselves.

My submission is that that must all refer to the qualifications and conditions of the candidates for marriage. The next chapter deals with the qualities of the celebrating officer. You cannot say that in a chapter that deals with the qualifications and conditions required for marriage, you could consider the objection to or incompetency of a public officer. Article 127 has left that subject-matter of canonical impediments to the different churches and in the next chapter, which deals with the competency of the public officer, it has not left it to any church to say; the Code itself says what a competent officer is. I submit that the language of that section is very plain.

Now, I have only one word to add as to sub-question (*b*) of question No. 2. I shall say very little on that for the obvious reason that my learned friend, Mr. Mignault, does not support the view that mixed marriages are at all in jeopardy; he believes that they are valid. An expression fell from the Chief Justice yesterday to the effect that the whole question was settled by the terms of the Benedictine declaration, and I concede that settles the question so far as the application of article 127 is concerned. That is clear, because under the Benedictine declaration it seems to be a canonical impediment and so there is an end to that question. But I say it does not do away with the difficulty which does result from the restrictive interpretation put upon article 129 independently of article 127.

If the minister of each sect were restricted to his own congregation, then there would be an end to the possibility of mixed marriages at all, there would be no clergyman by which they could be celebrated. That is the legitimate conclusion of Mr. Mignault's argument, but he recoiled from that legitimate conclusion when it comes to be applied in practice.

THE CHIEF JUSTICE:—As this is the end of the argument, it remains for me, on behalf of my brother Judges and myself, to say that we are extremely indebted to the Bar for the very valuable assistance they have given to us throughout the whole of this argument. We have all been impressed with the unfailing patience and courtesy of counsel, and the learning displayed by them, which we all agree is quite worthy of gentlemen who occupy the very high position that you occupy at the bar of your respective provinces. Fitzpatrick, C.J.

The Court reserved its decision and, on the 17th day of June, 1912, their Lordships proceeded to give the following reasons for their respective opinions.

THE CHIEF JUSTICE:—To the first question, my answer is "no." Fitzpatrick, C.J.

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Whatever may be, with respect to the capacity of the parties, the authority over marriage which is vested by section 91 in the Dominion Parliament, there can be no doubt, in my opinion:—

1st. That a marriage is not valid and can produce no civil effects until solemnized.

2nd. That solemnization, which includes the form and ceremony of marriage, is, by virtue of section 92 of the British North America Act, within the exclusive legislative competency of the different provincial legislatures.

3rd. That there is no marriage within a province where all the legal formalities prescribed by the legislature of that province are not observed.

4th. That Parliament has no power or authority to remedy any omission or defect or to dispense with any of the requirements with respect to form or ceremony which are prescribed by the legislature of the province within which the marriage is solemnized.

Therefore, Parliament has no authority to enact in whole or in part Bill No. 3 of the First Session of the Twelfth Parliament of Canada, intituled "An Act to amend the Marriage Act" the purpose of which is to provide a legislative remedy for or dispensation from any defect or requirement in "every ceremony or form of marriage" and to regulate the "rights and duties of the persons married and of the children of such marriages."

In answer to question 2:—

In view of the replies given to questions 1 and 3 and the reasons assigned therefor by the majority of the Judges here, I beg to ask that I may be relieved of the obligation to answer the first branch of this question No. 2 for the following among other reasons:—

1st. Because Mr. Newcombe and Mr. Hellmuth, both acting for the Attorney-General of the Dominion, have informed the Court, in substance, that this question was predicated on the assumption that questions 1 and 3 would be answered in the affirmative.

2nd. Because, as at present advised, I am of opinion that there is no appeal to this Court from the judgment of a Quebec Court in a case which would involve the determination of this abstract question;

3rd. Because the question involves the determination of a point that is in issue in a case now actually pending before a competent Quebec tribunal, and I respectfully suggest that in such circumstances proper respect for judicial ethics requires us to abstain from unnecessarily expressing an opinion which must be without force or effect;

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4th. Because the Attorney-General of the Province of Quebec, who is immediately responsible for the administration of justice in that province and the guardian of the legal rights of its inhabitants has represented to this Court that although the answer to the first branch of this question is only advisory in its character, litigants in that province will necessarily be prejudiced by any answer that may be given, to use the language of the Lord Chancellor "without so much as an opportunity of stating their objections." In these circumstances, adopting the suggestion of the Lord Chancellor, I give the above reasons as some indication of the "high degree of constraint and inconvenience" which is certain to result from a merely academic answer to the first branch of this question.

To the second branch of this question, I answer "no."

In answer to the third question, I can add nothing to the reasons given in support of my answer to question No. 1. If the power to authorize the solemnization of marriage in a province is vested exclusively in the Provincial Legislature, there can be no authority in the Parliament of Canada to retrospectively validate a marriage defectively solemnized or to provide that future marriages may be solemnized otherwise than in accordance with the requirements of the provincial law.

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DAVIES, J.:—Question 1(*a*). "Has the Parliament of Canada authority to enact in whole or in part Bill No. 3 of the First Session of the Twelfth Parliament of Canada, intituled 'An Act to amend the Marriage Act' "?

The bill provides as follows:—

1. The Marriage Act, chapter 105 of the Revised Statutes, 1906, is amended by adding thereto the following section:—

3. Every ceremony or form of marriage heretofore or hereafter performed by any person authorized to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, notwithstanding any difference in the religious faith of the persons so married and without regard to the religion of the persons performing the ceremony.

(2) The rights and duties, as married people of the respective persons married as aforesaid, and of the children of such marriage, shall be absolute and complete, and no law or canonical decree or custom of or in any province of Canada shall have any force or effect to invalidate or qualify any such marriage or any of the right of the said persons or their children in any manner whatsoever.

(*b*) If the provisions of the said bill are not all within the authority of the Parliament of Canada to enact, which, if any, of the provisions are within such authority?

I construe this bill as attempting, in its first section, to validate by Dominion legislation marriages solemnized by or before a person having only a limited provincial authority to

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solemnize marriages in cases where such person has ignored such limitations and attempted to solemnize a marriage beyond the powers given him by a provincial legislature.

The bill is supported on the ground that the subject-matter of "Marriage and Divorce" was assigned by the 91st section of the British North America Act, 1867, to the Dominion Parliament, and that as a consequence that Parliament has the exclusive power of legislation with regard to essentials over the whole subject-matter, and that this exclusive power has not been lessened or diminished by the assignment in the 92nd section of the same Act to the Provincial Legislature of the exclusive power to legislate with regard to "the solemnization of marriage."

The contention submitted by Mr. Nesbitt was, in effect, that under our constitutional Act of 1867, all questions relating and essential to the contract of marriage, namely, its definition, the capacity of the parties to enter into it, and all the circumstances upon which its validity are to depend, are assigned to the exclusive jurisdiction of the Dominion Parliament while the regulation of the evidential formalities authenticating the contract, they are not being essential to its validity, are assigned to the legislatures of the provinces. All matters of substance would thus be assigned to the Dominion. Mere matters of form would be assigned to the provinces and their neglect or violation though punishable by penalties prescribed by provincial law would not in any way affect the validity of the marriage.

The conclusion was submitted by counsel for the promoters of the bill that the contract of marriage is and always was "entirely independent of any religious or other ceremonial accompaniment" and that in the absence of Dominion legislation the common law had to be resorted to in order to determine whether parties were legally married or not.

I cannot bring myself to believe that these contentions can prevail. They are not in my opinion based upon a true construction of the British North America Act, 1867. In my judgment the division of legislative power created in that statute and assigned respectively to the Dominion and the provinces was not one which gave exclusive legislative power over all the essentials of the subject-matter of marriage to the Dominion, and that over non-essential formalities only to the provinces. The Imperial Parliament, when passing that Act, will at least be credited with the knowledge that so-called common law marriages were not valid in England and that it had been judicially determined by the House of Lords in the case of *Beamish* v. *Beamish*, 9 H.L. Cas. 274, that

> it was settled by the decision of *The Queen* v. *Millis*, 10 C. & F. 534, that to constitute a valid marriage by the common law of England it

must have been celebrated in the presence of a clergyman in holy orders.

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In the light, therefore, of the law as it existed in England at the time of the passage of our constitutional Act, 1867, on the subject of marriage and also as it then existed in the colonies being confederated into the Dominion and also in view of the differences of race and religion prevailing amongst the inhabitants of the various provinces, I cannot doubt that in assigning the exclusive power of legislature over the solemnization of marriage to the provinces, the Imperial Parliament intended to confer upon them a much greater power than that of legislating on mere non-essential formalities.

The subject-matter, "the solemnization of marriage in the province," covers and aptly expresses, in my judgment, every manner or mode in which competent parties, intending to contract marriage with each other, might validly so contract. No limitation was placed upon the power of the legislatures to which that subject-matter was assigned. Their powers are plenary. The legislatures of the several provinces may within their several legislative jurisdictions make religious ceremonies necessary to validate a marriage or may make its solemnization before a civil functionary of any kind sufficient for the purpose with or without witnesses. It is probable that they would have power to declare the solemnization of marriage to be complete without the presence of a priest, clergyman, minister, civil functionary, or witness, and by the mere consent of the parties inter-marrying evidenced in writing or by mere words. As their powers of legislation are plenary and exclusive over the subject-matter assigned to them, no limitation can be placed upon their exercise and any invasion of their jurisdiction by the Dominion Parliament under the guise of legislating upon marriages and divorce would be *ultra vires*. If apt and proper language is used in provincial legislation, making any form of solemnization or the presence of any designated person or any person of a designated class, religious or civil, essential to the validity of the solemnization of a marriage and such requisite is disregarded and ignored, the marriage is *ipso facto* void and cannot be validated by the Dominion Parliament.

I construe the division of legislative powers made by our constitutional Act as carving out of the subject-matter of marriage and divorce assigned to the Dominion a distinct and essential part denominated "the solemnization of marriage." The legislative powers of the Dominion cover the subject-matter of marriage and divorce minus that part of it carved out and assigned exclusively to the provinces. The judicial rule of construction of the two sections, 91 and 92, of the British North America Act that the Dominion Parliament in exercising its

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powers of legislation under any one of the enumerated powers of section 91 may do so to the extent of invading or interfering with the subject-matters assigned to the provincial legislatures, so far as is necessarily incidental to effective legislation on the part of Parliament within the enumerated subject being legislated on, is a rule of construction necessary to the practical working out of the division of legislative powers assigned to the Dominion Parliament on the one hand and the provincial legislatures on the other. Efficient legislation could not be had if such salutary rule was not adopted. But that rule has no application, in my opinion, to the unique case we now have before us where a special subject-matter is assigned to the Dominion Parliament and a portion of that subject-matter carved out and deducted from it and specially assigned to the provinces. If the rule was applied to such a case it would defeat the very object and purpose of the division as I construe its meaning.

The conclusions above expressed seem to have been those of the Crown law officers of England as found in the despatch from the Secretary of State for the Colonies to the Governor-General dated the 15th January, 1870.

The questions submitted to them were whether the authority to grant marriage licenses was vested in the Governor-General of Canada and whether the power of legislating on the subject of marriage licenses was solely within the Parliament of Canada. That opinion is stated by the Secretary of State, as follows:—

> It appears to them that the power of legislating upon this subject is conferred on the provincial legislatures by 30 & 31 Vict. ch. 3, sec. 92, under the words "the solemnization of marriage in the province"; the phrase "the laws respecting the solemnization of marriages in England" occurs in the preamble of the Marriage Act (4 Geo. IV. ch. 76), an Act which is very largely concerned with matters relating to banns and licenses, and this is, therefore, a strong authority to shew that the same words used in the British North America Act, 1867, were intended to have the same meaning, "Marriage and divorce," which by the 91st section of the same Act are reserved to the Parliament of the Dominion, signifying in their opinion all matters relating to the status of marriage between what persons and under what circumstances it shall be created and (if at all) destroyed. There are many reasons of convenience and sense why one law as to the status of marriage should exist throughout the Dominion which have no application as regards the uniformity of the procedure whereby that status is created or evidenced.
>
> Convenience, indeed, and reason would seem alike in favour of a difference of procedure being allowable in provinces differing so widely in external and internal circumstances as those of which the Dominion is composed and of permitting the provinces to settle their own procedure for themselves, and they are of opinion that this permission has been granted to the province by the Imperial Parliament and that

the New Brunswick Legislature was competent to pass the bill in question.

For these reasons, I am of the opinion that the proposed bill, the constitutionality of which is submitted for our opinion is, upon the construction we put upon its language, beyond the authority of the Parliament of Canada to enact.

I answer the first question in the negative.

The second question submitted to us, reads as follows:—

> 2. Does the law of the Province of Quebec render null and void unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province,
>
> (*a*) between persons who are both Roman Catholics, or (*b*) between persons one of whom, only, is a Roman Catholic.

In view of the answer I have already given to the first question that the Dominion Parliament has not the power to pass the bill submitted to us as it is construed by me, and that the exclusive power to legislate on its subject-matter is by our constitutional Act assigned to the provinces, I proceed to examine the law of the Province of Quebec and I am of opinion that the answer to both parts of the second question above set out must be in the negative.

The answer depends entirely upon the construction of the legislation of the Province of Quebec as embodied in the Civil Code and its amendments. That Code was enacted by the late Province of Canada and became law before our constitutional Act was passed in 1867. The legislature of the late Province of Canada had jurisdiction over the whole subject-matter of marriage. There was no divided jurisdiction as there is now between the Dominion and the provinces. The Code, therefore, contains many provisions upon the subject-matter of marriage, such as title 5, chapter 1, of Marriage, defining "the qualities and conditions necessary for contracting marriage," and chapter 2 "of the formalities relating to the solemnization of marriage," and chapter 3 "of oppositions to marriage." It is necessary to bear this in mind when putting a construction upon the articles of these several chapters of the Code.

I am of the opinion that Mr. Lafleur's contention is sound, namely, that the question now being discussed can be decided by reference to the Code itself without reference to the historical aspect of the question or the state of the law antecedent to the passing of the Code and *must* be so decided without reference to previous legislation on the subject if the language of the articles which control and govern the answer to be given the question are intelligible and unambiguous.

I think the judgment of the Judicial Committee in *Robinson* v *Canadian Pacific Railway Co.* (1892), A.C. 481, ample auth-

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ority for that latter proposition. In delivering the judgment of the Board, Lord Watson, says, at page 487:—

> In the course of the argument, counsel for the parties brought somewhat fully under their Lordships' notice the law of reparation applicable to cases like the present, as it existed prior to the enactment of the Code; and they discussed the question whether, and if so, how far, chapter 78 of the statute of 1859 altered or superseded the rules of the old French law. These may be interesting topics, but they are foreign to the present case, if the provisions of sec. 1056 apply to it, and are in themselves intelligible and free from ambiguity. The language used by Lord Herschell, in *Bank of England* v. *Vagliano Brothers*, [1891] App. Cas. 145, with reference to the Bills of Exchange Act, 1882, (45 & 46 Vict. ch. 61), has equal application to the Code of Lower Canada: "The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities." Their Lordships do not doubt that as the noble and learned Lord in the same case indicates, resort must be had to the pre-existing law in all instances where the Code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning. But an appeal to earlier law and decisions for the purpose of interpreting a statutory Code can only be justified upon some such special grounds.

But apart from judicial authority, I agree that article 2613 of the Civil Code is conclusive upon the point, as express provision is therein made upon the subject-matter of the question.

While I contend that the Code itself until altered either by Parliament or the Legislature of Quebec under their respective powers is the sole arbiter of the law on the subject-matter of marriage and its solemnization irrespective of what that law was previous to it being enacted, still the subject of the antecedent law was so largely discussed at bar and the whole subject is so important that I may be pardoned if I shortly refer to this antecedent law and its gradual development.

Before and up to the time of the conquest the Roman Catholic religion was the only one tolerated in Quebec, and the priests of that church were the only ones who could solemnize marriage there.

In England, on the contrary, the Anglican Church was at the time of the conquest the only one tolerated. Its ministers and priests were the only ones who could solemnize marriage in England, and Roman Catholics were subjected to severe penalties.

Anything, therefore, in the law of Quebec at the time of the conquest which required any person not a Roman Catholic to be married before a priest of that religion or prevented any person of that religion who so desired from being married before a priest or clergyman of the Anglican Church, was so far opposed

to the will of the Government of the conquering power as it had been previously expressed upon the subject, that it must be taken to have been abrogated by the conquest.

The capitulations of 1759 and 1760, and the provisions of the Treaty of Paris, 1763, conceded to the Roman Catholic inhabitants of Quebec the "free exercise of their religion as far as the laws of Great Britain permitted."

In 1774, eleven years after the Treaty of Paris, the Quebec Act was passed by the Imperial Parliament and it declared, section 5, that "His Majesty's subjects of the said province (Quebec) professing the religion of the Church of Rome of and in the new Province of Quebec may have, hold and enjoy the free exercise of the religion of the Church of Rome, *subject to the King's supremacy.*"

I do not doubt that under these concessions, treaty rights and statutory provisions, the priests of the Church of Rome could legally solemnize marriages between the Roman Catholic inhabitants of Quebec, but their *exclusive* power to do so was gone. The privileges and concessions made to the Roman Catholic subjects of the King as to the free exercise of their religion was what is expressed to be, a concession, a privilege, a right, granted to the people, not to the church. They involved necessarily, it seems to me, the right, amongst other things, to have the marriages of Roman Catholics solemnized by the priests of their own church, but they neither recognized nor in any way sanctioned any exclusive right which would be repugnant to the laws of the conquering nation and they were in the treaty and in the Quebec Act made expressly "subject to the King's supremacy."

There cannot be any doubt either in my mind that the clergy of the Anglican Church, the established church of England, and which, it seems to me, became the established church of Quebec, retained also their power to solemnize marriage in Quebec. That power was not exclusive either. It was concurrent with the privilege involved in the grant to the Roman Catholic inhabitants of the conquered country to have their marriages solemnized by priests of their own church.

Beyond that, it does not seem to me there was any limitation upon the exclusive right which they, as the priests and clergy of the established church of England, possessed and brought with them to Canada after the conquest.

Then followed the statute of Lower Canada, 35 Geo. III. ch. 4 (1795), enacting amongst other things, that

> in each parish church of the Roman Catholic communion, and also in each of the Protestant churches or congregations within this province, there shall be kept by the rector, curate, vicar or other priest or minister doing the parochial or clerical duty thereof, two regis-

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ters of the same tenor, each of which shall be reputed authentic, and shall be equally considered as legal evidence in all Courts of justice, in each of which the said rector, curate, vicar or other priest or minister doing the parochial or clerical duty of such parish or such Protestant church or congregation, shall be held to enregister regularly and successively all baptisms, marriages, and burials *so soon as the same shall* have been by them performed.

The judicial construction placed upon this Act was that it extended to priests or ministers of the Anglican Church only, and did not include what were then called Protestant dissenting churches or their clergymen.

Although the statute did not expressly confer the power to marry upon the clergy required to keep the registers of baptisms, marriages and burials, it assumed the existence of such powers and was a statutory recognition of them.

And here I may remark that at no time subsequently was express power to solemnize marriage given by statute to the priests and clergy of the Anglican church until 1861, or to the priests of the Roman Catholic Church, until the Code was passed in 1866.

In the meantime, however, Scotch and other immigrants had come to Quebec, accompanied by the clergy or ministers of their own churches. These solemnized marriages amongst their own people, and in 1804 the Legislature passed an Act confirming these marriages and adjudged them "to be good and valid" except in cases where the parties were incompetent to contract marriage with each other, without, however, conferring upon these clergy any powers to marry in the future.

In 1821, another similar confirmatory Act was passed, 1 Geo. IV. ch. 19, while in 1827 the Act of 7 Geo. IV. ch. 2, was passed, which *inter alia* enacted

> that all *marriages* which have heretofore been *or shall hereafter* be celebrated by ministers or clergymen of, or in communion with, the Church of Scotland, have been and shall be held to be legal and valid to all intents and purposes whatsoever, anything in the said Acts or in any other Act to the contrary notwithstanding.

This Act not only confirmed past marriages, but also validated

> *all marriages which should thereafter be celebrated by ministers or clergymen of or in communion with the Church of Scotland.*

There was no limitation at all with respect to the place where the marriage should be solemnized or the persons between whom these ministers should solemnize marriage, no suggestion or language from which it could be implied that the religious beliefs of both or either of the contracting parties had anything to do with the validity of the marriages solemnized. The statute I am citing would, of course, be construed as embracing only

marriages the parties to which could legally intermarry with each other.

Then followed a series of Acts conferring on the ministers of different Protestant denominations being previously licensed thereto by the governing power and authority "to have and keep registers of baptisms, marriages and burials according to the laws of the province."

The language of these statutes differed somewhat. Some of them conferred the power upon "regularly ordained" clergymen of a denomination having a permanent and fixed congregation. The power was conferred in the case of the Wesleyan Methodists

> upon the Wesleyan preachers or ministers in connection with the society in Great Britain known as the Conference of the people called Methodists being previously licensed thereto by the Governor, etc.

Nothing was said about these preachers or ministers being regularly ordained or having either permanent or fixed congregations.

A great many of these statutes were passed; none of them conferred express power to marry, though it seems to have been universally accepted that the power was of necessity impliedly given. Some gave simply the power to keep registers of such baptisms, marriages and burials as might be performed or take place under the ministry of such minister, etc.

With the exception, however, of the Quakers, there was no limitation confining the marriages these clergymen celebrated to their own denomination. In the case of the Quakers, there was the limitation that one of the contracting parties should belong to that body.

In the Consolidated Statutes of Lower Canada, 1860, ch. 20, the general Act is found, and this is a most important Act. The first section reads as follows:—

> 1. In order by the keeping of uniform and authentic registers of the baptisms, marriages and burials in Lower Canada, to secure the peace of families, and to ascertain various civil rights of Her Majesty's subjects therein: In each parish church of the Roman Catholic communion, and also in each of the Protestant churches or congregations within Lower Canada to which this Act extends, there shall be kept by the priest or minister doing the parochial or clerical duty thereof, two registers of the same tenor, each of which shall be reputed authentic, and shall be legal evidence in all Courts of justice,—in each of which the said priest or minister of such parish or church or congegation shall enregister regularly and successively all baptisms, marriages and burials, so soon as the same have been by him performed.

The sixth section is also important:—

> 6. In the entries of a marriage in the registers aforesaid, mention shall be made in words, of the day, month and year, on which the

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marriage was celebrated, with the names, quality or occupation and place of abode of the contracting parties, whether they are of age or minors, and whether married after publication of banns or by dispensation or license, and whether with the consent of their fathers, mothers, tutors or curators—if any they have in the country—also the names of two or more persons present at the marriage, and who, if relations of the husband and wife or either of them, shall declare on what side and in what degree they are related:

(2) Such entries shall be signed in both registers by the person celebrating the marriage, by the contracting parties, and by the said two persons, at least,—and if any of them cannot sign his or her name, mention should be made thereof in the said entries. 35 Geo. III. ch. 4, sec. 4.

It will be noticed while many facts have to be set out in the register nothing whatever is said requiring the mention of the religious faith or connections of either of the contracting parties between whom the marriage was to be solemnized and if the limitations sought to be read into the powers conferred upon these clergymen were intended, surely they would have been required to state the facts on which their very jurisdiction to marry depended.

Then comes the 16th section declaring that

all regularly ordained priests and ministers of either of the said churches (the Church of England and Ireland and the Church of Scotland) *have had and shall have authority validly to solemnize marriage in Lower Canada.*

Could language be broader or stronger? By what authority could any Court read any limitation into the power so declared to exist in the clergy of the Anglican and Scottish churches beyond the necessary one that the contracting parties were persons who could lawfully intermarry?

Then comes section 17:—

17. This Act extends also to the several religious communities and denominations in Lower Canada, mentioned in this section, and to the priests or ministers thereof, who may validly solemnize marriage, and may obtain and keep registers under this Act, subject to the provisions of the Acts mentioned with reference to each of them respectively, and to all the requirements, penalties, and provisions of this Act, as if the said communities and denominations were named in the first section of this Act.

Then follow the names of the different religious communities and denominations, twenty-one in number.

The powers given to the clergymen of these several denominations are given subject to "the provisions of the Act mentioned with reference to each of them respectively," and if it is sought to impose any limitation upon these powers, these special Acts must be appealed to and the limitation shewn.

I have already quoted one, the Wesleyan Methodist, and have examined all the others and I fail to find any except that relating

to the Quakers and possibly the Jews, which justifies the argument that the power to marry conferred on the several clergy of the different churches named was limited either with respect to the place where the marriage was solemnized or to the religious faith or affiliations or connections of the contracting parties.

This law continued until the Code was passed and I again repeat that unless clear and distinct language can be shewn in the Code limiting and reducing the powers which those clergy at the time of its enactment possessed under the statutes I have cited, no Court can properly read such limitations and restrictions into the Code.

According to my construction of its language, article 129 C.C., confers powers as large as those which existed in the Act of 1861.

The clergy of the Anglican Church certainly did not derive their power to marry from the Act of 1861, though, as a matter of precaution, that Act expressly professed to give and declare the power.

I ask again, as I asked during the argument, where can you find any statute or law from the time of the conquest down to the passing of the Code, which in any way limited the power of the Anglican clergy to marry after licenses or publication of banns any two persons competent to intermarry on the ground of their religious faith or affiliations? If no statute impairing that power can be found then I venture to say it must be maintained unquestioned.

The same question may be put with respect to the clergy of or in communion with the Church of Scotland after the passage of the Act of 1827 conferring upon them express power to marry.

And it may also be put with respect to the clergy of the other Protestant denominations expressly mentioned in the Act of 1861 and in all these cases must receive the same answer that there exists no such statute or law.

Now what are the articles of the Code which control and govern the question we are discussing. They are, in my judgment, articles 128 and 129, and read as follows:—

> 128. Marriage must be solemnized openly, by a competent officer recognized by law.
>
> 129. All priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status, are competent to solemnize marriage. But none of the officers thus authorized can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion, and the discipline of the church to which he belongs.

There are other articles which have been invoked by counsel on both sides which are important to be considered, namely, articles 57 to 65, article 127, and articles 136 and following relating to "oppositions to marriage." But, as I have said, the

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two articles 128 and 129 are the controlling ones, and if they are, as I think they are, clear, intelligible and unambiguous, they are, in my opinion, conclusive of the question asked. They provide that a marriage must be solemnized openly, and by a competent officer, and that all priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status are such competent officers. There is no restriction upon their powers as to the persons whom they may marry beyond the one necessarily implied that such persons must be competent to contract matrimony with each other, nor is there any restriction upon the place where the marriage may be solemnized, nor as to the religious views, affiliations or church connection of either or both of the parties.

But article 129 expressly enacts that none of these officers can be "compelled" to solemnize marriage to which any impediment existed according to the doctrine and belief and discipline of the church to which he belonged.

The classes declared to be competent officers to solemnize marriage, embrace, it is conceded, priests and rectors of the Roman and Anglican churches, as well as clergymen of the different Protestant denominations who were, or might be, authorized to register acts of civil status.

The question raised is whether any and what limitations can be read into this 129th article, respecting the powers conferred on these rectors, ministers and other officers authorized by law to keep registers of acts of civil status.

My desire is not to go beyond the question submitted for our opinion. It assumes the competency of the contracting parties to marry each other and invites an opinion simply as to the competency or power of a non-Roman Catholic priest or clergyman to marry or solemnize marriage in the Province of Quebec between two Roman Catholics, or between two persons, one of whom is a Roman Catholic.

In my opinion the law does not render either one or other of such marriages so solemnized either illegal or null and void.

The first observation one would naturally make in reading article 129 is that on its face at any rate there is no limitation or restriction upon the competency of the officers who are authorized to solemnize marriage. Its language is as broad and general as it possibly could be, "all priests, etc., authorized by law to keep registers of acts of civil status are competent to solemnize marriage."

Their authority is general and there is nothing which expressly or impliedly limits their power to marry those persons only who are their own parishioners or members or adherents of their own church or congregation. It extends, in a word, to all persons who, being competent to intermarry, obtain a license

authorizing the priest or clergyman to marry them. The second part of the article is for the ease of the conscience of the priest or clergyman and provides that he cannot be *compelled* to solemnize a marriage as to which any impediment exists according to the doctrine and belief of his religion and the discipline of the church to which he belongs.

This conscience clause, as I may call it, is a reasonable, fair and necessary one in view of the unrestricted breadth of the officer's power to marry. No one would think it right to place a priest or clergyman in a position to be compelled to celebrate a marriage which the doctrine, belief and discipline of his church forbade him to celebrate.

The insertion of such a conscience clause in the article is, therefore, in view of the unrestricted power conferred by the first part of the article upon the priest or clergyman a reasonable and proper protection for him. It confirms the view that persons competent to celebrate marriages may receive applications to be married from people of different faith or religions, and if not prevented from doing so from conscientious reasons arising out of the rules, doctrine, or discipline of their church, such priest or clergyman may, under license, legally marry the persons so applying.

It also confirms the view that such officers or clergymen were not restricted in their powers to their own congregations or their own parishioners.

If their functions were restricted to the members of their own churches or to their own congregations, and if article 127 makes the rules of those churches or congregations binding upon their members, there would be no use in this conscience clause at all, because the clergyman manifestly could not be compelled to celebrate a marriage between two members of his own congregation or church the rules and discipline of which prohibited such marriage or created an impediment to its solemnization. If, on the contrary, his power to celebrate as to persons competent to marry each other by law is unrestricted, the clause was a reasonable and necessary one.

Mr. Mignault, however, contended that several limitations had to be read into the clause to make it compatible and consistent with other articles of the Code, and first he contended that not every one who can keep registers of civil status is competent to celebrate marriage, because those who register under article 70 and following religious vows or professions, are not so competent, but the answer is clear that those and those only who are authorized to keep registers of acts of civil status generally can celebrate marriage and not persons authorized merely to keep registers of limited acts such as those of religious professions.

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Then, as to the necessity of the marriage being solemnized at the place of the domicile of one or other of the parties, it is sufficient to say that article 63, which begins with this general enacting declaration, goes on to make provision that if solemnized elsewhere the person officiating must verify and ascertain the identity of the parties, plainly shewing that the rule was not obligatory or applicable to all cases and that if not observed the only effect would be to throw upon the person officiating the duty of verifying the identity of the parties.

Mr. Mignault took what from his standpoint was the only logical position possible with respect to the powers of solemnizing marriages possessed by non-Roman Catholic clergymen. He contended that they only had the power to marry those who were "members of the church" over which they respectively had spiritual control. Mere adherents of that church, or those who worshipped there regularly or irregularly would, therefore, if not "members of the church" be excluded from those powers. And by his contention, not only one, but both the contracting parties must be members of that church. The consequence would be that apart possibly from the Anglican Church no Protestant clergyman could marry two persons unless they were both members of the same church as that of the clergyman. If this extreme pretension prevailed, and each Protestant clergyman outside of the Anglican Church could marry only those who were "members" of his own particular church or denomination, the consequence, in view of the practice which has hitherto universally prevailed, would be somewhat appalling. Even if the limitation of the powers of the clergyman was extended beyond the "members" of his church so as to include those who were adherents and attendants regular or casual of it, the results would be startling indeed. No Baptist or Methodist or Presbyterian or Congregationalist could be legally married except to either a member or an adherent of his or her own denomination, and only members of the same denomination could be legally married who were domiciled or lived in the same place and were either members or adherents of that church. Not only, therefore, would this limitation prevent intermarriage between persons belonging to different denominations, but it would limit intermarriage between persons belonging to the same denomination to those who resided in the same place and were within the special limited jurisdiction of the officiating clergyman. Now, as the clergyman of those different denominations have no "parishes" or other specially limited territorial areas to which their spiritual jurisdiction is confined, it is apparent that the suggested limitation can have no foundation. It is one utterly inapplicable to these Protestant denominations and its attempted application to them would be absurd and deplorable in its results.

Many hundreds of marriages must have taken place since the

passage of the Civil Code in 1866 between persons who belonged to different denominations of Protestants or between members of the same denomination who lived in different parts of the province, and every one of them would be invalid. The only good marriages would be those solemnized by a clergyman between two persons both of whom were members of his own congregation and church and were resident in the same locality. Such a result need only to be stated to be repudiated as based upon a totally erroneous construction of article 129 and as imputing to the Legislature an intention almost inconceivable.

In addition to what I have said the limited construction put upon the article 129 by Mr. Mignault would leave a large portion of the non-Roman Catholic population of Quebec without any means of being legally married at all. Thousands of immigrants are coming yearly to Quebec. Many of them are not Roman Catholics. Some belong to the Greek Church; some do not belong to any Christian church. If the construction of article 129, which Mr. Mignault is driven logically to contend for, is maintained, none of these people could be married in Quebec at all.

And yet there does not seem to be any halting place between that construction of the article contended for by Mr. Mignault, and the broad construction which I submit is the correct one, and which gives unrestricted power to every priest, rector, minister and other officer authorized by law to keep registers of acts of civil status, to solemnize marriage under license between any two contracting parties not prohibited by law from intermarrying and irrespective of their religious beliefs or connections, or their residences or domiciles. Such marriages need not necessarily be solemnized in a church or chapel of the officiating clergyman. They may be solemnized (as outside of the Roman Catholic and Anglican churches is generally the case) at a private residence or other place and this from the absence of any requirement to the contrary. Those of the Protestant churches, outside of the Anglican, have, as I have said, no defined "parishes" or areas within which alone their jurisdiction extends. The members and adherents and persons who attend their religious services and form part of their congregations do not necessarily come from any particular defined locality. They may reside in any part of a city or in its adjacent suburbs. Locality, therefore, as determining the jurisdiction of the clergyman to marry, must be eliminated, and either the broad construction of article 129, which in determining the power and jurisdiction of the clergyman to marry, disregards alike the domicile and the religious opinions or connections of the parties, or the narrower one which confines such jurisdiction to the members of the church of the officiating clergyman, must be adopted.

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As a matter of fact, I understand that all these marriages by Protestant clergymen outside the Anglican Church and a large number of those within that church also are solemnized under license and not after publication of banns. The only security which the law provides in such marriages, against the existence of legal impediments, lies in the bonds which the applicants for the license are obliged to give before obtaining it.

Objections were raised that this broad construction, placed upon article 129, precluded the invocation or application of many of the articles of the Code providing for "oppositions to marriage." These articles, it was argued, would be without any effect if such a construction prevailed and their object to prevent clandestinity defeated. The short, and to my mind, complete answer to such objections is, first, that they apply equally forcibly to marriages solemnized by Roman Catholic priests under dispensation from the publication of banns by the bishop, and, secondly, that these articles were never intended to apply to marriages solemnized under license.

Their proper application and the only application which, it seems to me, gives them any efficacy and usefulness is with respect to marriages solemnized after publication of banns in the churches where parishes or other territorial boundaries limiting the clergyman's jurisdiction exists. Proper legal effect can be given to them and the object they were enacted to carry out, if they are held as applicable only to marriages so solemnized.

It was conceded at the argument, as I understand, that there never had been and was not now any doubt as to the validity of a marriage under license by a non-Roman Catholic clergyman, of two competent contracting persons, one of whom only was a Roman Catholic. But if that is so, if such marriages are legal and valid, then the entire force of Mr. Mignault's argument respecting the limited effect to be given to article 129, is destroyed. I am unable to appreciate the force of much of the reasoning against the validity of such marriages where both persons are Roman Catholics. I repeat again, I fail to find any logical resting place between the broad proposition that article 129 authorizes the solemnization of marriages by any of the persons mentioned in the article, between any two persons competent by law to intermarry irrespective altogether of the religious belief or affiliations or connections of either or both, and the one contended for by Mr. Mignault that the contracting parties must both be members of the church of the officiating clergyman and residents within his spiritual jurisdiction. If the non-Roman Catholic clergyman qualified to solemnize marriage under article 129, can legally do so between two persons, one of whom is a Roman Catholic, why can he not do so in the case where both parties are Roman Catholics?

The language of the article does not, in my opinion, permit of the drawing of any such distinction. It would seem to me that either the argument must prevail as to the absence of any limitations upon the power of the clergyman authorized to solemnize marriage beyond the competence of the contracting parties to intermarry, or the contrary one that non-Roman Catholic clergymen can only legally solemnize marriage between two members of the church or congregation of such officiating clergyman. If the latter limitation must be read into article 129, then what becomes of the concession that marriages solemnized by or before a Protestant clergyman between two competent contracting parties, one being a Roman Catholic, are good?

Article 127 of the Code was invoked as rendering null and void a marriage of two Roman Catholics unless solemnized by a priest of the Roman Catholic Church. But this article, in my judgment, has reference only to impediments to marriage existing in the *parties themselves* and has no reference to the competency of the officiating clergyman who solemnizes the marriage. From what I have already said, it will be apparent that in my judgment the competency of all priests and clergymen authorized by law to keep registers of Acts or civil status is unrestricted with respect to the marriage of all persons competent to intermarry irrespective of their religious faith. Once that conclusion is reached the answer to the question put to us is plain.

Article 127 must be construed, having regard to its place in the Civil Code and its context. We find the article in the chapter headed "Of the Qualities and Conditions necessary for contracting Marriage." And amongst the disabilities in that chapter enumerated are, want of puberty, impotency, minority, affinity and relationship. All disabilities in the parties.

The articles in the chapter previous to article 127, deal with these disabilities. Then article 127 says:—

> 127. The other impediments recognized according to the different religious persuasions, as resulting from relationship or affinity or *from other causes*, remain subject to the rules hitherto followed in the different churches and religious communities.

These words, "or from other causes," must be confined to those within the purview and scope of that chapter, they must be qualities and conditions existing in the parties themselves and not in the clergyman who may marry them. That whole chapter deals with the competency of the *parties* contemplating matrimony and section 127 must be confined to disabilities of that class. The competency of the officer solemnizing the marriage is dealt with and defined in the succeeding chapter headed, "Of the Formalities Relating to the Solemnization of Marriage." If you construe article 127 as extending in any way to the

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formalities relating to the solemnization of the marriage, you introduce hopeless confusion. The chapter in which article 127 is found deals with one subject-matter, namely, disabilities in the parties themselves, which now belongs exclusively to the Dominion Parliament to deal with. That in which article 129 is found deals with the subject-matter of the solemnization of marriage, with which the provincial Legislature is now alone competent to deal.

I would construe the words "other causes" following relationship or affinity not as *ejusdem generis* with these two disabilities simply, but with all the disabilities of the parties mentioned in the chapter and not as extending to any rules, regulations or decrees of any church relating to the place where the marriage should be solemnized or the particular priest or clergyman before whom it should be solemnized. But whatever they may cover beyond the disabililties expressly mentioned in the chapter, they cannot extend to the competency of the officiating clergyman who solemnizes the marriage. That is dealt with exclusively in the next chapter.

To put the construction upon article 127 contended for by Mr. Mignault, would not only do violence to the express language of article 129, but would, in my opinion, radically alter and change the law which up to the passing of the Code existed in Quebec as to the competency of at least Anglican and Church of Scotland clergymen to marry any two competent persons, irrespective of their religious affiliations or connections. To make such a radical change would require the use of clear and definite language which I do not find in the article invoked.

There is no half-way house or halting place between the two contentions. I adopt the broad construction of the article because I think it is a fair and reasonable construction of its language; and that such a construction has been practically adopted and followed ever since the Code was enacted.

If it is held that the language of the article is doubtful and ambiguous and we are driven to ascertain its meaning by reference to the state of the law anteceedent to the Code, then as I have attempted to shew there can be no reasonable doubt on that point, and the broad construction of the article ignoring the religious faiths or affiliations of the contracting parties to the marriage must be adopted.

I, therefore, would answer both questions (*a*) and (*b*) in the negative, holding that the law of the Province of Quebec does not render null and void, unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding which takes place in such province,

(*a*) between persons who are both Roman Catholics, or

(*b*) between persons, one of whom, only, is a Roman Catholic.

Third question:—

As I have answered both parts of this second question in the negative my answer to the third question is, perhaps, unnecessary, but to avoid misunderstanding I answer it in the negative.

IDINGTON, J.:—The questions submitted raise many grave issues. But the conclusions I have reached are such that, though I purpose answering each question, it seems to me my expositions of reason relative thereto will be better understood by my first disposing of sub-section (*a*) of the second question.

That question is as follows:—

> 2. Does the law of the Province of Quebec render null and void unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province,
>
> (*a*) between persons who are both Roman Catholics, or,
>
> (*b*) between persons, one of whom, only, is a Roman Catholic.

As I understand the contention set up, all who have been either in infancy or in later life baptized according to the rites of the Roman Catholic Church, fall within the definition in the question.

Men may, and women may, not find themselves honestly able to conform to the faith of those who procured their infant baptism, and yet be averse to and honestly unable to conform to the creed of another church. If the claim made be well founded they cannot intermarry; and neither man nor woman so situated can marry one who has conformed to the original faith of their baptism; yet it is suggested he or she so unable to conform may lawfully marry a pagan.

Though the language of the Code seems clear, and I accept the construction thereof contended for by Mr. Lafleur, I think it due to the argument, entirely founded on the law of France at the time of the conquest, put forward by Mr. Mignault, and to the need of clearing away, so far as I can, the misconceptions on which it appears to me to be founded, to deal briefly therewith.

In the articles of the Quebec capitulation, on the 18th September, 1759, the following concession appears:—

> The free exercise of the Roman religion is granted, likewise safeguards to all religious persons as well as to the Bishop, who shall be at liberty to come and exercise freely and with decency, the functions of his office, whenever he shall think proper and until the possession of Canada shall have been decided between their Britannic and Most Christian Majesties.

In the articles of the capitulation of Montreal, on the 8th September, 1760, appears the following:—

> Granted as to the free exercise of their religion; the obligation of paying the tithes to the priests will depend on the King's pleasure.

These were followed by and merged in the Treaty of Paris, 10th February, 1763.

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Article 4 ends thus:—

> His Britannic Majesty on his side agrees to grant the liberty of the Catholic religion to the inhabitants of Canada; he will consequently give the most precise and most effectual orders, that his new Roman Catholic subjects may profess the worship of their religion, according to the rites of the Romish Church, as far as the law of Great Britain permit.

How can there be found in such clear and express language anything except the liberty assured thereby to the inhabitants of Canada, whereby His Majesty's new Roman Catholic subjects "may profess the worship of their religion?"

The last part of the sentence is suggestive of restrictions conflicting with the pretensions set up for an extension of church power, not expressed.

How could it ever enter into the mind of any one that this language giving people individually a liberty to profess a religion, had in fact handed them over to another power or authority to prevent them from exercising the fullest liberty to depart from such profession of faith as and when and under such circumstances as they might, or any one or more of them might, desire and so far as they might desire?

Yet, in the last analysis the claim made is of a right in some one to deprive descendants of these people, or others coming, no matter whence, into Quebec, who have been baptized by the authority of the Roman Catholic Church here or abroad, of the liberty to intermarry unless in conformity with the rites of that church. Surely that is a claim of dominion which savours not of liberty.

Mr. Mignault answers by an appeal to the general principle relative to the rights of the conquered, as is usually conceded, to enjoy until changed the old law of property and civil rights, and to the effect of the Quebec Act passed in 1774. I will first examine the general principle and such facts as we have to apply it and then return to the consideration of that Act.

The Master of the Rolls, Sir William Grant, in *The Attorney-General* v. *Stewart*, 2 Mer. 143, at p. 160, is reported as citing, apparently with approval, a passage from Blackstone, vol. 1, page 100.

Lord Mansfield, in the case of *Campbell* v. *Hall*, Lofft's Reports 655, 1 Cowper 205 (Lofft's report being preferable, by reason of the arguments in the case given therein, to the report by Cowper), lays down the law broadly

> that the laws of a conquered country, continue in force until they are altered by the conqueror,

and again:—

> Neither has it hitherto been controverted that the King might change part or the whole of the law or political form of government of a conquered nation.

In 2 Peere Williams Reports, page 75 (A.D. 1722), is a note of an anonymous case wherein the Master of the Rolls said it was determined by the Lords of the Privy Council, upon an appeal to the King in Council, from the foreign plantations, amongst other things, as follows:—

> 2ndly. Where the King of England conquers a country, it is a different consideration; for there the conqueror, by saving the lives of the people conquered, gains a right and property in such people; in consequence of which he may impose upon them what laws he pleases. But,
>
> 3rdly. Until such laws given by the conquering prince, the laws and customs of the conquered country shall hold place; unless where these are contrary to our religion, or enact anything that is *malum in se* or are silent; for in all such cases the laws of the conquering country shall prevail.

This last form of expression of the opinion of the time commends itself as the most compatible with reason on the subject now in hand. Lord Mansfield had not to deal specifically with the question of religion.

Though in that tolerant spirit, which he had, he incidentally rebukes Coke's intolerance toward conquered infidels, he did not quarrel with the definitions I have quoted, which were before him.

As regards religion, the law of the conquered country here in question was not silent, but, as I conceive it, absolutely repugnant to the rights of the conquerors or those they invited there.

Surely, at least that part of the laws of a conquered nation which had been directly aimed at those professing the faith of the conquerors, could not be held to prevail, for an instant, over the conquering people.

Such incompatibility as existed between the respective laws of France and of England at the time in question, in relation to religion and marriage, rendered, I submit, the continuation of the law of the former, as applicable to any but those voluntarily conforming thereto, an impossibility in a free country. It was quite compatible with reason and a proper spirit of toleration to deal with the question as it was dealt with in the Treaty of Paris. The doing so could not imply that the disabling and penal laws of France bearing upon Protestants or others not professing the Roman Catholic religion must continue to operate in Quebec or only be held partially abrogated.

The remarkable development of eighteenth century freedom of thought in both countries might indicate an indifference.

Unfortunately, whatever spirit of toleration was then in fact abroad the laws of each of these countries at that time were essentially repugnant to each other's state religion and despite the influence of learning, literature and philosophy, such laws

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were maintained. From this condition of things, how can we infer the recognition of the marriage laws of France as being predominant?

The acts of the conqueror emphasize the contrary thereof.

> The Royal Proclamation of October 7th, 1763, foreshadowed a council and assembly of representatives of the people to make laws . . . . for the peace, welfare and good government, as near as may be agreeable to the laws of England . . . . and in the meantime, and until such assemblies can be called as aforesaid, all persons inhabiting in or resorting to our said colonies may confide in our Royal protection for the enjoyment of the benefit of the laws of our realm of England.

In the joint appendix submitted to us, the late Sir John Macdonald in his opinion relative to the power to issue marriage licenses, sets forth the following facts:—

> Express power to issue marriage licenses seems to have been given in every commission of every Governor-General of Canada, or in the instructions accompanying such commission.
>
> In the instructions addressed to the Hon. James Murray, as Captain-General and Governor-in-Chief of the Province of Quebec, dated 7th December, 1763 (the first Governor after the conquest), it is provided in the 37th paragraph, as follows:—
>
> "And to the end that the exclusive jurisdiction of the Lord Bishop of London may take place in our province, under your Government, as far as conveniently may be, we do think fit that you do give all countenance and encouragement to my exercise of the same, excepting only the collating to benefices, granting licenses for marriage and probate of wills, which we have reserved to our Governor and our Commander-in-Chief of our said province for the time being."
>
> All subsequent commissions or instructions seem to contain the same power.

If these acts of His Majesty with whom, on the high authority I have referred to, rested the power to modify the law, do not under the circumstances I have adverted to demonstrate sufficiently that the law of France in regard to marriage was thereby displaced, save what the treaty bound him to observe, I am at a loss to know what would.

We cannot forget in this regard the Royal Supremacy Act, which, if anything were needed, would supply the kingly authority and impliedly create a duty which presumably was observed.

The French law, so far as capacity for marriage or provision for its celebration is concerned, had thus been abrogated save so far as the liberty assured by the treaty to those professing the Roman Catholic faith.

The Quebec Act of 1774 set aside as of and from the 1st of May, 1775, the Royal Proclamation, the commission and ordinances made thereunder, as inapplicable under the circumstances, but by its terms "for the time being" clearly implied them as valid until said last date.

Then the following sections of said Act define the religious situation thereafter:—

5. And for the more perfect security and ease of the minds of the inhabitants of the said province, it is hereby declared that His Majesty's subjects professing the religion of the Church of Rome of and in the said Province of Quebec, may have, hold and enjoy the free exercise of the religion of the Church of Rome, subject to the King's supremacy, declared and established by an Act made in the first year of the reign of Queen Elizabeth, over all the dominions and countries which then did, or thereafter should, belong to the Imperial Crown of this realm; and that the clergy of the said church may hold, receive and enjoy their accustomed dues and rights with respect to such persons only as shall profess the said religion.

6. Provided, nevertheless, that it shall be lawful for His Majesty, his heirs or successors, to make such provisions out of the rest of the said accustomed dues and rights, for the encouragement of the Protestant religion, and for the maintenance and support of a Protestant clergy within the said province, as he or they shall from time to time think necessary or expedient.

Section 8 enacted that all His Majesty's Canadian subjects, the religious orders and communities only excepted, might

also hold and enjoy their property and possessions, together with all customs and usages relative thereto, and all others their civil rights in as large and ample a manner as if said proclamation . . had not been made, and as may consist with their allegiance to His Majesty . . . and that in all matters of controversy relative to property and civil rights, resort should be had to the laws of Canada as the rule for the decision of the same . . . until varied.

Ordinances touching religion, etc., were not to be in force without His Majesty's approbation, and nothing in the said Act was to prevent His Majesty and his successors from constituting courts of criminal, civil or ecclesiastical jurisdiction.

The "customs and usages" preserved to the people in section eight are relative only to their property.

The Royal supremacy is reserved and the clergy of the Roman Catholic Church are confirmed in their accustomed dues and rights "with respect to such persons only as shall profess the said religion."

The Protestant religion is to be encouraged and the maintenance of a Protestant clergy is provided for.

I fail to understand how, in face of all this, there could ever have been anything implied that would restrict the personal liberty of any one either baptized by the rites of the Roman Catholic religion or even professing same, from being married by any legally constituted authority.

In the treaty it was liberty for those "professing the worship of their religion" that was agreed to.

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In sweeping aside the proclamation, etc., it is also clearly expressed that "subjects professing the religion of the Church of Rome" may enjoy the free exercise of their religion. Nobody concerned themselves with those who had merely been baptized and later chose to resort elsewhere for marriage. How can such people be said to be professing the religion of the Church of Rome? How can they be heard to set up such a pretension to invalidate their own deliberate act?

The statement above as to the instructions given the Government of Canada relative to marriage licenses shews that the rights at least of the clergy of the Church of England, authorized by the Crown in regard to marriages, never were suspended; and the facts shew were continuously asserted.

Indeed, may it not be said that a legal duty rested upon them to officiate as witnesses and otherwise so far as necessary to render a proposed marriage valid for those asking it, no matter of what faith?

In *Davies* v. *Black* (1841), 1 Q.B. 900, Denman, C.J., assumes such full right and duty.

The statute of 32 Henry VIII. ch. 38, sec. 2, cited therein says in parenthesis, after referring to marriages of lawful persons ("as by this Act we declare all persons to be lawful that be not prohibited by God's law to marry").

This Act, though repealed as to pre-contracts, is said by some one to stand so far as its declarations relate to other matters.

Others than the clergy of the Roman Catholic Church, impliedly authorized by the terms of the treaty, and of the Church of England, authorized by what I have referred to, might require express authority to solemnize marriages, and such authority was given from time to time in a great many instances.

In 1795, an Act, 35 Geo. III. ch. 4 (L.C.), was passed imposing upon the clergy the duty of keeping registers of baptisms, marriages and burials. This applied equally to the Roman Catholic priest in charge of a parish and to the Protestant clergy doing the parochial or clerical duty of or for a parish or Protestant church or congregation, and revoked an ordinance of April, 1667, of the French King, and a declaration of the 9th April, 1736, of another French King, so far as relates to the registers there in question only.

A uniform system of such registrations and the enforcement thereof upon the clergy in question, thus constituted them all public officers, and, if it was not done before, thereby cut the connection in that regard, between the old law and the Roman Catholic clergy.

It casts no doubt on the right or duty of the Anglican clergy to perform marriage, but rather recognizes it.

From this time till the consolidation of the Lower Canada statutes in 1860, there were a number of Acts varying in form enabling various Protestant and other churches, or those in charge, to keep the like registers.

In relation to some of those as well as justices of the peace who had performed marriages there were confirmatory Acts passed.

Then, later, as to the Church of Scotland ministers, an Act for removing doubts, 7 Geo. IV. ch. 2 (L.C.), was passed. It not only was confirmatory of past ceremonies, but empowered as to the future as follows:—

> That all marriages which have heretofore been or shall hereafter be celebrated by ministers or clergymen of, or in communion with the Church of Scotland, have been and shall be held to be legal and valid to all intents and purposes whatsoever, anything in the said Acts or in any other Act to the contrary notwithstanding.

Another church, later, gets an Act enabling its minister or his successor to obtain and keep registers which when kept

> shall have the same effect as if it had been kept by any minister in this province of the Established Church of England or Scotland.

As to the Church of England, its clergy were not, since long before the conquest of Quebec, by law restricted from marrying any persons of any creed otherwise eligible to be married. The Lord Hardwicke Act never extended beyond England and Wales except so far as introduced by local legislation. The parallel claimed between that Act and the Quebec Code and its relation to the Roman Catholic church there fails sadly. Under the former any one but Jews or Quakers could get married, but under the latter none can, in that church, save those in actual communion with the church.

And the Church of Scotland had by the Act just quoted such comprehensive powers conferred upon its ministers or clergymen that I cannot see any restriction therein or reason for implying any.

Although some of the other enabling Acts are not in as express language as the latter, and the power to marry rests on the implication of the enactment enabling the ministers to keep registers, yet I see no restriction in the language used implying that they cannot register therein marriages of Roman Catholics who choose to apply therefor.

The question submitted does not impose upon us the interpretation of all these Acts.

If any doubt existed before the consolidation of the statutes it seems to have been thereby removed to a very large extent.

And then article 129 of the Code is as follows:—

> 129. All priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status, are competent to solemnize marriage.

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But none of the officers thus authorized can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion, and the discipline of the church to which he belongs.

The authority to keep registers is made the basis of action, yet the conscience of him applied to is properly spared from the discharge of a duty which the doctrine or belief of his religion or discipline of his church forbids. The language used dispels all doubt.

I have carefully considered the many suggestions and arguments put forward to cut down this express language, which to my mind is as clear as it is enlightened, but I find no warrant for cutting it down.

So far from the historical argument helping to do so, it seems to effectually destroy any of the pretensions for reading into the Code what is not there.

It would be rather anomalous to find the Parliament of Old Canada sanction, either in the Consolidated Statutes of Lower Canada or the Code, amendments that would cut down the privileges that the liberality of Lower Canada had extended to the Anglican and Presbyterian churches and probably others.

Nor do I think article 127 furnishes ground for doubt.

I may observe that Mr. Mignault's argument that the statutes enabling Protestant clergymen to marry are confined in their operation to marriages between those belonging to the same faith or form of religion as the clergymen so enabled and performing the marriage ceremony, must if well founded lead to remarkable and, I venture to think, undesirable results. If it is correct, then an Anglican cannot be married in Quebec to a Presbyterian woman or *vice versa;* and so on through the whole list of those other churches of which the ministers or clergy are enabled to perform the ceremony.

The language of those Acts does not, in my opinion, save possibly in the case of the Jews and Quakers, warrant any such contention.

Indeed, if correct, what authority would a Roman Catholic priest have to solemnize marriage between a Catholic and a Protestant? It is no answer to say that by the rules of the Roman Catholic Church a dispensation can be had from the church authorities permitting such marriage. The Code, which is the law for all, treats all alike and is the basis of action and limit of authority for each and all.

The Roman Catholic Church may forbid its priests to solemnize marriage in such cases unless in the case of a proper dispensation. That is its right which no one can complain of, but when it so directs and grants a dispensation it does not thereby add to the statutory authority.

Counsel did not argue against the possibility of the marriage

of a Catholic and Protestant under the law of Quebec and the sub-question (*b*) of the second question was not argued.

Not only does the Code fail to make any distinction between the powers given each of those authorized to keep registers save in the details leading up to the actual solemnization, but also the declaratory statute of the 14 & 15 Vict. (1851) ch. 175 (Canada), was evidently designed to put an end to discrimination or preference.

As to these disturbing suggestions and their bearing on past marriages, I may refer to the case of *Catterall* v. *Sweetman*, 1 Rob. Ec. R. 304, at pp. 317 and 320. Dr. Lushington held that as the Act there in question, being a New South Wales Act, much like many of the Acts of Quebec, did not expressly declare a marriage supposed to have taken place under the Act yet not attended with all the formalities prescribed in the Act, null or to be null by reason of such omissions, it could not be held null. See also *Catterall* v. *Catterall*, 1 Rob. Ec. R. 580.

I have no hesitation in answering the second question in both its sub-divisions in the negative.

Before proceeding to dispose of the first and third questions which I propose treating together as the answers must in the main be founded on the same reasons, I desire to call attention to the nature of the bill submitted. Its brevity may be commendable, but thereby blending too many things in one sentence is very confusing. If a marriage ceremony, as it assumes, has been "duly performed according to such laws" as it refers to, does it need ratification? Again is the "duly performed" referred to in that phrase to be taken as relating only to the validity of the ceremony itself, notwithstanding the differences in religion, etc.? Or is it intended to cure any and every want of capacity in the parties? And is it intended to prevent any questions being raised anent any impediment that may have existed and which, according to the law of the place where the marriage took place, may have rendered the marriage null or voidable, although the ceremony itself may have been perfect so far as mere form is concerned?

Again the retrospective part of the bill might from some points of view be well maintained; yet the prospective feature of it be quite untenable, and *vice versâ*.

The legislative validating of marriages which have been called in question for want of authority in the officer who had performed the ceremony or made the record thereof where ceremony was not required, or for the non-compliance with other details required by law in relation to marriage, has many precedents.

We have examples before us in the Joint Appendix filed herein containing the Acts of 44 Geo. III. (1804), ch. 2 (Lower

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Canada), and 1 Geo. IV. (1821), ch. 19 (Lower Canada). Each of these avoids some of the objectionable things in this bill.

If there are other existing marriages liable to be called in question for similar wants of form or by reason of any impediment, it may be that Parliament, having assigned to it the exclusive jurisdiction over the subject of marriage, has jurisdiction to declare such marriages good or to be held good. In that sense, part of the bill may be well founded.

There are, however, cogent reasons leading to the conclusion that in order to satisfactorily remedy such a state of things in Canada, concurrent legislation on the part of Parliament and of the local Legislature would be the safer plan.

When a question was raised of cutting down the old number necessary to constitute a grand jury, such a course was adopted and some corporations or corporate powers are founded on concurrent legislation.

I may point out further that the bill as framed extends to foreign marriages as well as those which may be supposed to have taken place in Canada. Is it competent for Parliament or for it and a Legislature combined thus to interfere,

It has been pointed out that the enabling Acts dealing with Jews and Quakers respectively, seem confined to cases of parties of the same faith as the officiating officer performing the marriage ceremony. In such case, clearly the concluding part of the first clause of this bill would hardly be a proper exercise of the power of Parliament unless by way of concurrent legislation such as I have suggested.

The second clause of the bill deals with the rights and duties of the married parties and of their children, the issue of such marriages, in a very sweeping manner. For aught we know, many cases may exist where all the questions involved have been tried out in a competent court and adjudicated upon long ago.

The provincial Legislature, it has been said, may take one man's property and give it to another, but Parliament cannot do this except in some way incidental to its execution of a power exclusively assigned to it.

Does not this second clause go too far?

I cannot, therefore, answer this question by a simple yes or no; nor can I segregate as sub-section (*b*) suggests, the good from the bad. The bill, if passed as it stands, might operate in the North-West Territories, of which nothing was said in the argument.

I can only answer by indicating what in my opinion are the limits of the power of Parliament in this regard and leave it for those concerned to decide if any part of this bill falls within same.

The important question raised in argument and by these questions is that of the relative powers given Parliament and the provincial legislatures respecting marriage, the former being assigned the exclusive legislative authority over "marriage and divorce" and the latter over "the solemnization of marriage."

It seems to me that in order to appreciate clearly the relation of these powers, we must assume, for argument's sake, the Dominion to have exercised all its powers and enacted a Code relative to all the substantial questions involved in marriage and divorce, and then ask ourselves what is in such case implied in the words "solemnization of marriage." Can anything be done, in way of solemnization, after due compliance with everything required or possible to be required, when the former power has been exhausted, to add to the legal strength of the tie thereby formed or change the nature of the obligations thereby incurred or the consequences to flow therefrom?

If we found such apparently conflicting powers in any other instrument, how should we interpret them?

At once we should seek for the plain ordinary meaning of the terms "marriage" and "the solemnization of marriage."

If we turn to the Century Dictionary, we find marriage defined, 1st, "the legal union of a man with a woman for life," etc. 2ndly. "The formal declaration or contract by which act a man and a woman join in wedlock." 3rdly. "The celebration of a marriage, a wedding." And again, "civil marriage, a marriage ceremony conducted by officers of the state, as distinguished from one solemnized by a clergyman."

If we turn to Murray, we find, amongst others, this definition, "Entrance into wedlock; the action or an act of marrying; the ceremony or procedure by which two persons are made husband and wife." And if we turn to the "Century" again for the meaning of "solemnization" we find that defined as "The Act of solemnizing; celebration." If we turn to the Imperial Dictionary "solemnization" is thus defined:—

> The act of solemnizing; celebration. Soon after followed the *solemnization* of the marriage. Bacon.

The title of 4 Geo. IV. ch. 76, has been referred to as justifying the giving of an extended meaning to the term "solemnization of marriage."

The Century Dictionary refers me to the Book of Common Prayer and quotes therefrom: "The day and time appointed for solemnization of matrimony."

The second section of said 4 Geo. IV. ch. 76, in terms requires the publication of banns for three Sundays preceding "the solemnization of marriage." When banns are replaced by license the latter, as well as the former, I submit, do not necessarily form a part of "the solemnization." It was quite ap-

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propriate in a plenary parliament to call such an Act one for solemnization of marriages. It is quite a different thing, when powers are or may be as here divided, to use the name of an Act to supplement the dictionary.

I submit Lord Hardwicke's Act also in its recital distinguishes clearly the publication of banns from the solemnization of matrimony.

If we look at any passages incidentally discussing these questions, we find solemnization refers invarably to the ceremony. And one of the best illustrations is, accidentally as it were, supplied by Pollock and Maitland in their chapter on marriage in the history of English law. At foot of page 377, in vol. 2, a case in itself well worth considering is referred to and ends thus: "They preferred the unsolemnized to the solemnized marriage." In the chapter on Marriage Laws of Scotland, in Eversley on Domestic Relations will be found examples of how other notices may be substituted for banns and the latter may be used in Scotland for a marriage to take place in England.

If we found a party given, for valuable consideration, the comprehensive power, possession or property, indeed the whole, determined to use it and to another assigned the mere right to define the form of asserting such right, of which there were many modes known, and the latter refused to apply either of those that could be satisfactorily used in the exercise of the substantial power, what would we be apt to hold in such case? Would we interpret the instrument so that the power and indeed the purpose thereof would be defeated? Or would we so hold that he attempting to defeat the whole purpose or convert it into something else should succeed?

However that may be, this is not an ordinary instrument. It is but the outline of what was meant to found and form the government for, a great state. And as I have heretofore said, we must in the interpretation of its terms and construction of it as a whole, view it if we can as statesmen should, even if we be not such. We must summon to our aid history and especially constitutional history, and some knowledge of the social structure if we would understand aright how to harmonize the various parts when apparently conflicting, and as here by the literal meaning of the terms, even in actual conflict.

"Marriage and divorce" literally cover the whole field and leave nothing for the words "solemnization of marriage."

We know that those engaged in the formation of this frame of government had first assigned the whole field to the Dominion Parliament, and as an historical fact that the power assigned to the provincial Legislatures as it stands was the result of representation made by those having a care for religion.

We know also as a matter of history that marriage amongst the Romans, it is said even from the time of the twelve tables, might be the result of consent merely, though concurrently therewith for centuries, forms of solemnization were almost universally adopted, and as the use thereof died away mere consent became almost universally, for centuries, the common mode of constituting marriage; that by degrees as the Christian religion gained the ascendancy and its bishops greater control, the sanction of the Christian Church's solemnities was advocated, and in many places added by law or practice in various ways; yet that, outside of England, consensual marriage prevailed over western Europe till the Council of Trent, and thereafter its decrees prevailed directly in some places, indirectly in others, until in modern times men's views so changed that in France and elsewhere the law treated the matter in an entirely different way by substituting the civil officer as the witness and his records as the means of perpetuating the necessary legal evidence of that upon which so much depends.

It is common knowledge that this did not and does not satisfy the hearts and minds of vast numbers of people of Roman Catholic and Protestant churches. Even, of those who care little for the usual religious ordinances, many think the solemnities of a church marriage, or marriage by a clergyman, even if not in a church, tend to add to the strength of the bond of union by the greater sanctity of the occasion and a degree of sentiment that the coldness of a magistrate's office is destitute of.

The wise men having in charge the formation of our Confederation, tried to satisfy this respectable feeling by inserting the power given the Legislatures relative to the solemnization of marriage. It fitted in with the past and no jar was given to the state or to the feelings of any one.

But after all, what does it amount to in law? The substantial part of the whole field or subject-matter was assigned to the Dominion. And, before going further, let us examine the language so assigning it in section 91 of the British North America Act.

Parliament is

> to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces; . . . it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated.

Could language more comprehensive be used to give efficiency to the power over the subjects of "marriage and divorce" which are amongst those so enumerated? And when heed is given to the words "notwithstanding anything in this Act" can there be

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any doubt that, if a provincial Legislature either refused or failed to furnish adequate means of solemnizing any marriage between those Parliament had declared capable of marriage, and of whom in such case it had declared that by their consent they were to be held as married to all intents and purposes, they must be in law by virtue thereof held to be married? Can there be any doubt in such a case that Parliament would be the only power which could, by direct enactment or by decree of any divorce Court it had constituted, dissolve such a union as might have been formed by virtue of such legislation? Or can there be any doubt of the competency of Parliament to invoke its exclusive power over the criminal law and to declare that any one so married should on marrying during the life of the other party thereto, unless the tie were dissolved by Parliament or by a divorce Court of its creation, be guilty of bigamy? Or can there be any doubt that all the laws that Parliament has enacted or may enact relative to the crime of failing to support a wife or child, would be applicable in such a case?

The word "marriage" is not, as I conceive its use in this Act, to be interpreted as only such form of marriage as the laws of England had deemed marriage, or part of this country at the time of Confederation had deemed such.

It is to be taken for the measuring of the power, in the widest sense that the word can have a meaning in any civilized country, including, for example, the widest sense in which any one of the Court engaged in resolving the case of *The Queen* v. *Millis*, 10 Cl. & F. 534, would have held it to mean; or, for example, in the sense that so long prevailed over Western Europe and up to recent years in Scotland; in short, consensual marriage of any kind.

In *Beamish* v. *Beamish*, 9 H.L. Cas. 274, it was suggested, at page 353, that the ruling in *The Queen* v. *Millis*, 10 Cl. & F. 534, had not been held to extend to the colonies and is supposed to be left open. And see the case of *McLean* v. *Cristall*, Perry Oriental Cases, 75, there cited, but not in our library. No argument was made here, expressly on that point. It may be open to argue that such holding as in the *Millis Case*, 10 Cl & F. 534, is not, and that the holding by Sir William Scott in *Dalrymple* v. *Dalrymple*, 2 Hagg. Cons. R. 54, is a law in Canada unless where declared otherwise. See also *Lightbody* v. *West et al.* (1902), 87 L.T. 138, at p. 141. Parliament in such case may not need to regard solemnization as necessary to constitute marriage. It is, however, not necessary to, and, in absence of argument directed thereto, I cannot press that point further than suggestion.

Even if the *Millis Case*, 10 Cl. & F. 534, is law here, it would, I conceive, be quite competent for Parliament to enact accord-

ing to the exigences of each case. It might either enact that a consensual marriage, as indicated above, of such persons as it declared eligible, should be held valid, in cases of the default of the legislature of any province to provide for all those therein found eligible to intermarry, such suitable mode or modes of solemnization of marriage as would adequately enable them to be married; and it might also alternatively enact that such persons so consenting, pursuant to its authority, should be held to be married, upon their conformity with any one of such existing forms of solemnization of marriage as a local legislature might have, by any competent Act required, or might thereafter so require, or by such mode of civil marriage as it might provide.

It might also, if necessary, provide for cases of intermarriage in the cases of parties domiciled in different provinces.

On this head of the conditional legislation by Parliament, see the case of *The Attorney-General for Ontario* v. *The Attorney-General for the Dominion*, [1896] A.C. 348, and especially at 369, and Cooley on Constitutional Limitations, pp. 164 and 165, and notes thereto. I see strong arguments against the assumption by Parliament of dispensing with local forms of solemnization so long as reasonably provided within what I have no doubt was the original purpose.

There is not, I conceive, any difficulty in working out harmoniously the seemingly conflicting provisions so that the purpose thereof, to which I have adverted above, may meet the views and proper feelings of all, so long as the aspirations of free men are respected and not sought to be controlled by some power or authority free people are entitled to disregard.

I am not implying that there must of necessity be either in Parliament conditional legislation or concurrent legislation therein and in the legislatures. For I have no doubt that in the case of a conflict between the two powers, brought about by any legislature engrafting upon its form of solemnization something in the nature of an impediment or right to dissolve the tie of marriage believed by those concerned to have been constituted, that the power of Parliament should be held to be paramount on this subject of the complete constitution of the legal status of husband and wife.

To hold otherwise, would be to give to the power naming a mere form, the power to swallow up the substantial power given over the whole field. Indeed, that was the attitude in argument to such an extent that it seemed to be thought that to give it validity marriage must have a provincial form observed and that if the legislature of a province saw fit to attach any such condition as it chose to any form of solemnization it provided it could thereby debar those refusing to comply therewith, from

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marrying even if such conformity involved the impossible thing of a man honestly professing a faith he had not. It is idle to say that case has not arisen, for it is the very case that elaborate argument in effect says has arisen; indeed, is the root of the whole matter in controversy.

I need not dwell upon the desirability of precautions being taken against secret marriages or the case of those under parental or other guardianship committing youthful folly. I need not elaborate the question of clandestinity. But when we find clandestinity has been given a definition which implies that those once baptized in a certain church must conform to the marriage ceremony of that church and all the regulations thereof, as conditions to be observed preceding the ceremony, or remain unmarried, or if marrying elsewhere, that then such marriage carries in it by virtue of clandestinity an impediment invalidating it, I submit that is *ultra vires* any provincial legislature to enact.

I am glad to say I have found that Quebec never did legislate in any such way or attempt any such things.

But the claim has been made and seems to have been maintained in some cases. Whatever may be the law as to these cases under past legislation, they can be no longer valid once Parliament takes possession of the field assigned to it by the British North America Act, respecting marriage and divorce.

Once it has exhaustively dealt with the power assigned to it, then it will be clearly incompetent for any local legislature to do more than provide for or require submission to such mode of solemnization, as it sees fit. These modes cannot properly impose any religious test which honest men and women cannot accede to, nor enact any such impediment to marriage, if Parliament see fit to declare otherwise.

It might as well enact that the solemnization forms it prescribed were only to apply or be available in the case of a black-haired man marrying with a fair-haired woman, or a fair-haired man with a black-haired maiden.

Another view is presented for which much can be said. It is this, that while Parliament has the plenary power which the language of the Act is capable of, and it may be held must mean; yet it may be well within the power of the Legislature to enact any reasonable mode of solemnization to be observed before the consummation of the marriage and add for default thereof such reasonable sanction in the way of penalties as may be calculated to induce the due observance thereof.

Thus effect is given to all the language used and probably the full effect intended.

It has been assumed such legislative power over solemnization implies of necessity control of all marriage licenses and,

indeed, all that precedes and leads to the solemnization. I cannot agree in this. I think it is quite competent for Parliament to provide and insist upon a Dominion license for such cases as it enables a solemnization to be provided for by a provincial Legislature, or such other cases as it may constitute a marriage by way of a marriage by consent; not only the idle form that the license has too often become, but one designed to secure compliance with such set of rules for determining and declaring who, in the judgment of Parliament, can marry, and who must not. Parliament alone has the power to determine all questions relevant thereto, and can debar any provincial license from having any effect unless and until the conditions precedent which Parliament has enacted have been found to have been satisfied or complied with.

Once these Parliamentary conditions have been fulfilled, the province can impose no prohibitive barrier under pretext of providing for solemnization. I do not say that a license required by a province merely as a preliminary to solemnization, would be, as, of course, *ultra vires* a provincial Legislature. I need not follow that subject further. I desire only to indicate wherein the assumption heretofore made relative to the question of marriage license as necessarily part of the "solemnization of marriage" within the British North America Act leads to error, indeed is, I submit, a misconception involving or resulting from confusion of thought.

In itself, I see nothing of material consequence. I do see, however, that a sanction is sought therein for what seems unwarranted ground taken to give a vitality to the doctrine of clandestinity and thereby constitute it a matter of undue importance and, indeed, an impediment.

By using in argument the accidental application thereof in the Code, counsel seemed to think it might by this means be imported into the interpretation to be given the Act I am now dealing with. We must, if we would clearly apprehend these provisions of the British North America Act, lay aside the Code for a moment.

I think no foundation should be laid by an extension of the minor one of the supposed conflicting claims to create future mischief or make a source of grievance where none should exist. The utmost publicity can be secured by either Parliament or legislature without the local legislature or those resting on its authority creating an impediment and constituting a divorce Court to try the question of that impediment.

It seems to me all such things as impediments of any kind and consequence thereof including the judicial power to pass thereon must rest in and be dealt with by the power of Parliament. A clear perception being had of what solemnization of

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marriage means, and I think it means no more, no less, than it really is, and the rest is clear and the respective spheres of legislative action are then made clear.

If the bill in question were made to cover the whole ground I have indicated as within the power of Parliament, it would assuredly enable people, so long as otherwise eligible, to marry though now possibly by local legal conditions unable to do so. It could be made thereby clear that, notwithstanding any differences in the religious faith of those so marrying and without regard to the religion of the person performing the ceremony they must be held as married.

If the bill in question, as it stands, can be read in any of its parts so as to fall within this power which I have indicated Parliament possesses then such part may be held competent for Parliament to enact.

I need not repeat my difficulties in the way of finding such part.

I assume, however, from the whole submission of the questions before us, that the root of the trouble is to be found in the religion of the parties to be married and the religion of the officer who may be appointed to perform a marriage ceremony differing from those to be married.

I have no hesitation in answering that Parliament can so effectively deal with the matter that there can be no difficulty in Roman Catholics marrying each other or a Roman Catholic and a Protestant marrying each other without resorting to a priest of the Roman Catholic church, appointed by it for the purposes of the marriage service or ceremony, to perform the ceremony of marriage; and hence can remove or dispense with any condition of things, by reason of religion, that may be now supposed in law to debar such marriages. It cannot, however, impose on the clergy of that or of any other church against the will of the church the duty of performing such ceremony.

I apprehend that this answers substantially what questions one and two are in truth aimed at.

I have already indicated how I think the retrospective part of the bill should be dealt with. I may add that in the judgment in *The Attorney-General for Ontario* v. *The Attorney-General for the Dominion*, [1896] A.C. 348, at p. 366, it is stated by Lord Watson that the Dominion Parliament's enactments, so far as within its competency, must override provincial legislation, but that Parliament has no authority conferred upon it to repeal directly any provincial statute; and that can only be effected by a repugnancy between its provisions and the enactments of the Dominion.

On this principle the Court pronounced therein against the authority of Parliament to repeal, by the Canada Temperance

Act of 1886, the old Provincial Act of 1864, and proceeded to lay down in express terms the limits of authority in this regard as follows:—

> It appears to their Lordships, that neither the Parliament of Canada nor the provincial Legislatures have authority to repeal statutes which they could not directly enact.

I am not clear that this part of the bill does not infringe in principle on what is thus laid down, and must be observed in legislating.

I have assumed that though question three is put alternatively I am not entitled to take it for granted that my personal view as to question two will ultimately prevail. Until it does, I presume I am expected to answer the third question and have accordingly done so.

I may be permitted to point out that the condition of the law as existent in any province in relation to these questions of marriage and divorce continues until changed by competent authority. But it has never, since the British North America Act came in force, been competent for any local legislature to change any of these things falling within the subject matter of marriage and divorce.

I may also be permitted to point out that divorce in said Act means and must cover every matter of substance or form that the word implies and is not, in my humble opinion, to be confined to the ordinary divorce bills passed by Parliament.

As to the objections strongly pressed by counsel for Quebec that we should not answer the second question, I may observe that incidentally to dealing with the like questions in a recent reference I assumed that private rights might be touched and urged all I could in the same direction as counsel do now argue as ground of refusal to answer. The Judicial Committee's judgment indicates such objections were hardly worthy of notice. If I understand their Lordships aright, the statute creates this Court *pro tanto* an advisory board. They suggest the answers need not bind. But, I respectfully submit, we and the other colonial Courts have been told more than once that their Lordships' judgments bind us at least and we follow them. Hence their judgment in this case must bind us and all colonial Courts, notwithstanding the large powers of self government, the judgment informs us Canada is possessed of.

I admit this case involves in a two-fold way what I had conceived to be the vicious principle of interrogating judges.

It involves, I respectfully submit, the sweeping aside of the modern constitutional doctrine of separating the judicial, legislative and executive functions of government and I fear imperils private rights in a way that seems to deprive those concerned of trial by due process of law.

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The answer is the statute is held by the Court above as binding us, and I respectfully submit in such case the duty is clear and I have tried to discharge it, feebly it may be, but as well as I know how. I find no power given therein to remonstrate. I am not, as a Privy Councillor possibly is, entitled by constitutional law and custom to remonstrate. I have only the limits of a statute to define my duty once the statute is held as it has been not to be *ultra vires* and to be operative despite the indirect results likely to bear on private rights.

The ultimate consequences of this grave change in our mode or form of government the men of later times alone can accurately comprehend and deal with. I fear Quebec is late.

My answers, therefore, are as follows:—

As to the first question; it is an impossible bill as it stands.

If I must answer categorically, then I say as follows:—

The retrospective part would be good as part of a scheme for concurrent legislation by Parliament and Legislatures confirming past marriages which probably neither can effectively do.

The prospective part, so far as possible to make it an effective prohibition of religious tests may be good, but doubtful, and the probable purpose can be reached by a better bill.

As to the second question, I answer "No."

As to the third question, sub-section (*a*) I answer yes, to be concurred in by the respective Legislatures of provinces concerned; and to sub-section (*b*) I answer yes, if and when a province fails to provide adequate means of solemnization.

Duff, J.

DUFF, J.:—The first and third questions must, in my opinion be answered in the negative. I agree generally with the reasons given by my brother Davies in support of this view, but I desire to add two observations. First, I should not wish to express any opinion upon the question of what observances in point of form were necessary or sufficient to constitute a valid marriage in the provinces other than Quebec at the date of the passing of the British North America Act. The point has not been discussed and in the absence of argument I do not feel qualified to deal with it in a satisfactory manner. Secondly, the doctrine of necessarily incidental powers has never been defined with precision. I do not think it has reached that point of development at which it is safe or wise to attempt to formulate it definitely; and it ought, I think, to be applied only with great caution. It can have no possible application to the question before us. The union effected by the British North America Act was the result of a compact among the colonies thereby brought together. The Act itself, in the first two paragraphs of the preamble, expressly recognizes the federal character of the

union to be created. With respect to legislative powers, some of the powers possessed by the provinces so united by the Act were assigned to the Dominion, others were specially reserved to the provinces themselves and in Lord Watson's well-known words "in so far as regards those matters which by section 92 are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion and as supreme as it was before the passing of the Act." *Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*, [1892] A.C. 437.

It has been found in applying the Act that the fields of legislative jurisdiction in some cases overlap. In such cases, either authority may legislate and when conflict occurs in the common territory it is settled that the Dominion legislation must prevail. But outside any such common domain, each has exclusive dominion over the field assigned to it; and the failure of a province to legislate, however capricious or unreasonable its conduct may appear, affords no ground or excuse for the invasion by the Dominion of a sphere which is wholly withheld from its jurisdiction. The remedy in such a case does not lie by way of appeal to the Dominion Parliament but rests with the body that in the last resort exercises the political sovereignty of the province itself. The special provisions of section 93 as Mr. Smith observed, only bring into relief the rigour of the general rule.

Legislation in terms of the proposed bill and any legislation on lines suggested in the third question would, in my judgment, be legislation on the very subject of "Solemnization of Marriage" which, by section 92, is withdrawn from the general subject of marriage and assigned to the provinces exclusively, and such legislation consequently would be *ultra vires* of Parliament.

As to question 2, which reads as follows:—

> 2. Does the law of the Province of Quebec render null and void unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province?
>
> (*a*) between persons who are both Roman Catholics, or
>
> (*b*) between persons one of whom, only, is a Roman Catholic.

Both branches of this question must, in my opinion, be answered in the negative. The question is whether, in the cases mentioned, or either of them, the requirements of the law in respect of all other matters being duly observed, Catholic priests alone are competent to celebrate marriage. The central provisions of the Civil Code relating to this subject are found in articles 128 and 129. The first of these requires that marriage shall be solemnized openly, and by a competent officer recognized by law.

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Article 129 is in the following words:—

> 129. All priests, rectors, ministers, and other officers, authorized by law to keep registers of acts of Civil Status, are competent to solemnize marriage.
>
> But none of the officers thus authorized can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion and the discipline of the church to which he belongs.

By chapter 20 of the Consolidated Statutes of Lower Canada, 1860, which was in force at the time the Code became law, the priests and ministers of the Protestant churches or congregations mentioned in sections 16 and 17 of the Act were authorized to keep registers of acts of Civil Status, that is to say, of baptisms, marriages and burials. By the express terms of article 129, therefore, all such priests and ministers are, in respect of the solemnization of marriage, competent officers "recognized by law" within the meaning of article 128. In the case of marriages by the Roman Catholic clergy the marriage must in the absence of a dispensation by the proper authority, be preceded by the publication of banns as required by articles 57, 58 and 130. Protestant ministers are, however, authorized by the provisions of articles 59 and 59(*a*) to solemnize marriage in the absence of banns, where the parties "have obtained and produce" a marriage license under the hand and seal of the Lieutenant-Governor. It is my opinion that except in cases in which there is some specific statutory restriction, a Protestant minister, competent to celebrate marriage by reason of being authorized to keep a register of acts of civil status has, when acting pursuant to such a license, authority to solemnize matrimony between any two persons lawfully capable of contracting marriage together, and that his authority is not in any way restricted by reason of the religious faith or the ecclesiastical affiliations of such persons.

Mr. Mignault's first and principal contention is a general one and it is this: although, he says, according to the words of article 129 read literally, such a minister is competent to celebrate marriage between any two parties capable under the law of entering into that relation with one another, nevertheless, reading that article in connection with other provisions of the Code dealing with the subject and by the light of the history of the law, it must be construed as conferring only a limited authority; and that authority so limited is to solemnize marriage between persons who are, or one of whom is, a member of the communion to which the officiating minister belongs and domiciled in the parish of which he is in charge where that communion has connected with it a parochial system, or between persons who are or one of whom is a member of the communion

and of the congregation to which he ministers where there is no such system.

According to this view, a Presbyterian clergyman is incompetent to marry two unbelievers or two Anglicans; and the view it is admitted if accepted must necessarily involve the conclusion that the law of Quebec makes no provision for the marriage of persons who are not connected with any of the religious persuasions whose ministers are specifically authorized by a statute to keep registers of acts of Civil Status. One cannot, of course, bring oneself to adopt a construction having such consequences without examining very critically the reasoning upon which it is based; and it may be observed that we are asked, in adopting it, to refuse to give effect to the words of the articles quoted according to their ordinary meaning, and to arrive at this most extraordinary result by discovering in the law a restriction which the authors of it have left unexpressed. The main argument by which this interpretation is supported, may be stated in this way. It is said that according to the law in force at the time the Civil Code came into effect the jurisdiction of priests and ministers in respect of the solemnization of marriage was limited to persons who were members or one of whom was a member of their respective churches and congregations. It is argued that on this subject of marriage the provisions of the Code were intended to be declaratory of the law as it then existed and that it is only by construing it in the manner now proposed that full effect can be given to its various provisions on this subject.

A brief reference to the history of the law upon the points in controversy is therefore necessary.

The provisions of the law relating to the solemnization of marriage in force in Quebec, at the date of the cession (1763) in so far as we are concerned with them are stated by Pothier (Bugnet's Edition) 6th vol., articles 349, 354 to 360. It was essential to the validity of a marriage that it should be celebrated "*in facie ecclesiæ*" and, in the absence of a dispensation, only after the publication of banns; and the general rule was that the ceremony must be performed by the "proper curé" of the parties; that is to say, by the curé of the parish in which one of the parties was domiciled. It was, however, competent to the bishop, or to a curé acting with the permission of the bishop or with the permission of the "proper curé" of the parties, to perform the ceremony. The law further required the officiating priest to record in an official register a statement of the particulars of each marriage solemnized by him, which was signed by him, by the parties to the marriage, and by at least two witnesses of the ceremony. Under the French Régime the public exercise of the Protestant religion was not tolerated by the law

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of Canada, and, consequently, the curé within the meaning of this law was necessarily a Roman Catholic priest. The change of sovereignty, which took place in 1763, naturally brought in its train substantial modifications. The conquest was followed by the influx of a considerable Protestant population, coming in part from the United Kingdom and in part from the British colonies to the south. Steps were immediately taken by the Imperial Government (as appears from the Instructions to Governors in 1763, 1768, 1775, and 1786; see Shortt and Doughty, pp. 139, 140, 141, 217, 218, 425-427, 556-559) for the introduction of a beneficed Protestant clergy under the patronage of the Crown and subject to the ecclesiastical jurisdiction of the Bishop of London; and later under the sanction of the Quebec Act, 1774, and the Constitutional Act, 1791, and other Imperial legislation, provision was made for their support out of the public funds of the colony. It was from the outset assumed that these clergy were competent to solemnize marriage, and it is admitted that from the first, marriages were in fact solemnized by them. No express statutory authority in this behalf was conferred upon the clergymen of the Church of England until 1861; but during the century which had then elapsed since the conquest, various Acts of the Canadian legislatures had conferred authority to celebrate marriage upon the ministers of other Protestant denominations, and these and other statutes shew that the competency of the Anglican clergy in this respect had always been assumed by the legislative authorities; and there can be, I think, no possible question (apart altogether from the implications arising from the change in the sovereignty itself) that a grant of such authority was involved in the provisions to which I have referred, which are found first in the royal instructions to the governors, and afterwards in the Imperial legislation.

From the date of the cession down to the passing of the Quebec Act in 1774, "such laws were in force" (to use the words of Baron Parke, speaking for the Judicial Committee in *Beaumont* v. *Barrett*, 1 Moo. P.C. 59, at p. 75, "as the King, by his supreme authority, may choose to direct," subject always, of course, to the provisions of the Treaty of Paris, which the King had no constitutional authority to violate. Chitty, Prerogatives, p. 29. There seems to be no reason to doubt that an effective "direction" in this regard might be given, by commission or by instructions under the King's sign manual, as well as by order-in-council: *Cameron* v. *Kyte*, 3 Knapp 332, at p. 346. The instructions which accompanied General Murray's Commission contain a sufficient declaration that the royal supremacy in matters ecclesiastical extends to Quebec, and this necessarily involved such alterations in the existing law as might be re-

quired to confer on the clergyman appointed to benefices under the authority of the Crown the jurisdiction to solemnize marriages. This jurisdiction was confirmed by the Quebec Act which expressly recognizes the royal supremacy as declared by 1 Elizabeth ch. 1.

The contention made by Mr. Mignault is that all grants of authority to marry, made since the cession, whether by express statutory enactment or otherwise, were subject to the condition that one at least of the intended consorts should be a member of the communion and congregation of the minister performing the ceremony. Whether the competence of these ministers in this regard was so limited is altogether a question of the intention of the law making competence. I think there is overwhelming evidence against the existence of an intention so to limit their authority except in those few cases (I think there is only one) in which the restriction is expressly declared.

First, as to the Church of England. In the Instructions to the Governors already referred to, we find repeatedly expressed intentions with regard to the status of the Anglican Church in Canada and with regard to cognate matters, which appear to be incompatible with the view that at that time any idea was entertained of placing any restriction upon the jurisdiction of its clergymen in respect of the celebration of marriage. (See Shortt and Doughty at the pages already referred to.) In 1795, an Act was passed, 35 Geo. III. ch. 4, requiring the Protestant clergy in charge of parishes, churches and congregations to register in official registers to be kept by them "all baptisms, marriages and burials as soon as the same shall have been by them performed." (Section 1). There is in this statute no express declaration touching the legal competency to celebrate matrimony of the clergy to whom the Act was intended to apply; their competency in that respect is assumed. There can be no doubt that the Act applied to all clergymen of the Church of England in charge of parishes, churches and congregations; and what is noteworthy for our present purpose is that the Act contains no hint of any limitation upon the authority of the ministers affected by it in respect of the classes of persons who might contract marriage under their ministry. The language of the Act of 1860, ch. 20, Consolidated Statutes of Lower Canada, section 16, is absolutely unqualified.

> All regularly ordained priests and ministers of either of the said churches

(meaning churches and congregations in communion with the United Church of England and Ireland or with the Church of Scotland)

> have had and shall have authority validly to solemnize marriage in Lower Canada.

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The case of the Church of Scotland is equally clear. An Act passed in 1827, 7 Geo. IV. ch. 2, enacts

> that all marriages which have heretofore been or shall hereafter be celebrated by ministers or clergymen of or in communion with the Church of Scotland, have been and shall be held to be legal and valid to all intents and purposes whatsoever;

and this sweeping declaration is in substance repeated in the provision above quoted from the Act of 1860. With respect to other Protestant denominations, a series of statutes was passed during the period that elapsed between 1829 and 1861, authorizing the ministers of various denominations and communions in charge of churches or congregations to keep registers of baptisms, marriages and burials. In some cases, the authority to solemnize marriage is given expressly; in others, it is given by implication. In one case only, in the Act relating to the Society of Friends, the enabling provisions of the Act are limited in their application to marriages between persons one of whom is a member of the communion according to whose usages the ceremony is to be performed. An intention to create a similar restriction is indicated, although not very clearly expressed, in the Act of 9 & 10 Edw. IV. ch. 75, which relates to persons who profess the Jewish religion. There may be, although our attention has not been called to them, other special cases in which similar restrictions are imposed by special statutes. The existence of such isolated instances is not material to my present purpose, which is to point out that the legislative enactments dealing with this subject of solemnization of marriage by Protestant clergymen and ministers, before the Code came into force, are expressed in such terms as to negative the theory that, as a rule, the authority of such clergymen and ministers in respect of that subject was intended to be or was regarded as affected by any restriction such as that now contended for.

The alteration effected in the law of marriage, as it stood at the time of the cession, by this recognition of the competence of all Protestant ministers to celebrate marriages was fundamental. The law in force under the French Régime pre-supposed two things; a single church in union with the State, and a complete, or at all events, a very extensive parochial system. Given these two things, the application of the law was simple and certain; but to marriages celebrated by the ministers of Protestant denominations, having no parochial organization connected with them, some important requirements of that law became impossible of application. The rule, for example, which in effect limited the jurisdiction of the curé of a given parish to the solemnization of marriage between persons, one of whom was domiciled within his parish, is a rule which utterly fails of application to the matrimonial jurisdiction of the minister of a Protestant church or congregation whose jurisdiction in that

behalf has no relation whatsoever to a defined territory or to the connection of the parties with his particular faith or communion.

The theory of the older law, namely, that there is one curé who, for the purposes of celebrating marriage, is the "proper curé" of the parties (or at most two, one of whom is their "proper curé") necessarily falls to the ground where marriages by such an officer are in question. For this reason, I am unable to agree with Mr. Mignault's argument that article 63 of the Civil Code, read together with the provisions of the law relating to oppositions, requires us to hold that the law of Quebec, as it stands to-day, is framed upon the assumption that, with regard to any two intended consorts about to be married in that province, there is one person who is solely qualified, or a fixed, limited and ascertained number of persons who are exclusively qualified, to celebrate marriage between them. So to hold would, in my judgment, be tantamount to disregarding the course of legislation on this subject during the century succeeding the conquest.

This view of the powers of the Protestant clergy derived from these various sources is confirmed by the law and practice relating to marriage licenses. It is not disputed that the practice of solemnizing marriages without the publication of banns, and in disregard of any supposed requirement that marriage should be celebrated *in facie ecclesiæ*, under the authority of a license granted by the Crown, became at an early date a general practice among Protestant ministers. Prior to the year 1871 there appears to have been no statutory enactment expressly authorizing the granting of such licenses in Quebec; the granting of them was considered to be a proper exercise of the royal prerogative and the practice received statutory recognition in various enactments,—for example, 35 Geo. III. ch. 4, sec. 4 (which was reproduced in the Consolidated Statutes of Lower Canada, 1860, ch. 20, sec. 6) and article 59 of the Civil Code. Provision was made by ch. 4 of the Consolidated Statutes of Lower Canada, 1860, sec. 1, for the application of the fund derived from these licenses in liquidation of the "Rebellion Losses" debentures, and no doubt appears to have been entertained at any time as to the validity of them or as to their sufficiency in point of law to legitimize marriages solemnized with publication of banns at any time or place when acted upon by a Protestant minister in charge of a church or congregation of any of the various communions where ministers were invested with a general authority to keep registers of acts of Civil Status.

This view is clearly correct. At common law authority in respect of marriage licenses was vested in the King as an incident of the royal supremacy in matters ecclesiastical.

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Such licenses, of course, were not confined to dispensations from the publication of banns. Licenses were granted for the solemnization of marriage at any convenient time and place. (Halsbury, Laws of England, "Ecclesiastical Law," par. 1388, note (*h*)); and dispensation from observance of the requirement that the marriage should take place *in facie ecclesiæ* was one of the normal objects of a marriage license. The statute of Henry VIII. (25 Hen. VIII. ch. 21), vested a right to grant such dispensations in the Archbishop of Canterbury, but the statute left the Royal Prerogative unimpaired. Chitty, Prerogatives, p. 53. The effect of the Commission and Instructions to the Governors of Quebec between the Treaty of Paris and the Quebec Act was, to vest in the Governors the legal authority and possibly even the sole legal authority, (see paragraph 32, Instructions 7th Dec. 1763), to exercise this dispensing power in the colony. The existing law of Quebec was to that extent amended through the exercise of the legislative authority of the Crown as evidenced by the Royal Instructions. The Quebec Act, in recognizing the royal supremacy, recognized the existence of this incident of the Prerogative as part of the law of Quebec, and licenses for the solemnization of marriage without banns, and at any time and place, continued to be issued under the authority of the Governor in professed exercise of the Prerogative down to the enactment of the Civil Code in 1866. In granting these licenses the Governors acted under the authority of these Instructions. (Paragraph 37 of the "Instructions to Governor Murray" of 7th December, 1763, is the typical provision.) The following interesting observations are taken from an article by the late Mr. Justice Girourard in 3 Revue Critique, p. 282:—

> La licence n'est pas seulement une dispense de la publication des bans; c'est encore un ordre, un décrêt à tout ministre protestant de marier les parties qui y sont désignées, sans bans, à l'endroit et à l'heure qu'il leur plaira, pourvu qu'il n'y ait pas d'empêchement. Jusqu'à ces dernières années, elle émanait uniquement du Bureau des Prérogatives, *Prerogative Office*, au nom du Gouverneur-Général du Canada, et elle était expédiée par les agents, répandus dans toutes les parties du pays, qui signaient comme *Deputy-Governors*. Dans la pratique, ces licences étaient signées en blanc par le *député gouverneur*, et remises à une foule de gens qui les remplissaient et les vendaient. En voici la formule textuelle:—
>
> "To any Protestant minister of the Gospel.—Whereas there is a mutual purpose of marriage between ———— for which they have desired my licence and given bond, upon condition that there is no lawful let or impediment, pre-contract, affinity or consanguinity, to hinder their being joined in the holy bonds of matrimony; these are therefore to authorize and empower you to join the said ———— in the holy bonds of matrimony, and them to pronounce man and wife."
>
> Avant le code, il n'y avait aucune loi dans le pays qui autorisait l'émission de ces licences; néanmoins, le droit n'en a jamais été nié

> à la couronne, dont il est, paraît-il, une des prérogatives; et c'est parce qu'il est un droit de prérogative royale qu'il existe dans ce pays, sans y avoir été introduit par une législation spéciale.

In 1871 an Act was passed by the Legislature of Quebec (now reproduced in articles 1494 to 1499 of the Revised Statutes of Quebec (1909)), providing that such licenses should be furnished to all persons requiring them who should previously have given a bond in the form prescribed by the statute. The bond is conditioned upon there being no

> lawful let or impediment, pre-contract, affinity or consanguinity, to hinder their being joined in Holy Matrimony and afterwards their living together as man and wife.

In other words, all parties capable of intermarrying are entitled to obtain a license authorizing the marriage of them by any competent Protestant minister without reference to the place of residence or the religious creed of either of them. This seems hardly consistent with the view that, as a rule, the competence of Protestant ministers in respect of the solemnization of marriage is subject to restrictions with reference either to the domicile or to the religious faith of the parties; and, of course, the practice established by this system of granting marriage licenses to all persons competent to intermarry was, and was intended to be, utterly subversive not merely of the letter, but of the principle of the older law by which, as a rule, marriage must be celebrated, *in facie ecclesiæ*, and by the incumbent of the parish of one of the parties.

I think, therefore, that the proposed construction of article 129 cannot be supported. It was freely admitted by Mr. Mignault (and with him I agree) that assuming his construction of that article to be rejected, an affirmative answer to this question if supported at all could only be justified on one of the two following grounds:—

The first of these grounds is that the effect of article 127 is to incapacitate Roman Catholics from contracting a valid marriage in the absence of a Roman Catholic priest.

That article reads as follows:—

> 127. The other impediments recognized according to the different religious persuasions, as resulting from relationship or affinity or from other causes remain subject to the rules hitherto followed in the different churches and religious communities.
>
> The right, likewise, of granting dispensations from such impediments appertains as heretofore, to those who have hitherto enjoyed it.

It is asserted, and it is not disputed, that in the eye of the Roman Catholic Church, clandestinity is an impediment; but the question is, is it an impediment within the meaning of this article? I desire to refrain from saying anything as to the effect of the article upon a marriage affected by an impediment within

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the meaning of it. For the purposes of this opinion, all that it is necessary for me to say is this: article 127 is grouped with other articles in a chapter which professes to deal with impediments arising out of some personal disability which incapacitates two given persons from intermarrying, that is to say, which disqualifies them from intermarrying under the ministry of a clergyman who, if it were not for such disability, would be competent to validly solemnize matrimony between them. That chapter is followed by another which deals with a different subject, namely, the formalities connected with marriage; and in this latter chapter the qualifications of those persons who are competent to celebrate marriage are dealt with. The impediment that, according to the discipline of the Roman Catholic Church, arises out of the absence from the ceremony of a priest of that church is not an impediment arising from incapacity in the parties themselves in the sense of the chapter in which this article occurs; it is, on the other hand, a matter of the class dealt with in the chapter following. It is, therefore, a matter which (in accordance with the scheme of classification adopted by the authors of the Code) would rather fall to be dealt with in the second than in the first chapter. It appears, consequently, to be opposed to principle to construe the general phrase "other causes" found in article 127 as embracing such an objection as we are considering.

This view of article 127 is borne out by a reference to the passage in the codifiers' report referring to this article. That passage leaves little doubt upon one's mind that in framing the article the codifiers had no thought of an objection of the kind referred to in this question. The following is the passage which is on page 179 of the first report of the Commissioners:—

> There are, in the collateral line, as resulting from relationship and affinity, other impediments which are not of a general character, but applicable only to members of churches or religious congregations, which admit them, as forming part of their dogmas or belief; such is the relationship, in the degree of cousins-german and other more distant degrees, in which marriage is forbidden, according to doctrine of the Roman Catholic Church, although not according to that of Protestant churches.
>
> As that species of impediment could not be governed by general provisions, it became necessary to leave it subject to the rules followed up to the present time by the different churches which recognize it.
>
> It was necessary, at the same time, to leave to the authorities, entitled to grant dispensations from such impediments, the power to do so for the future.
>
> These two objects are provided for by article 11*a*, which is new.

The last point made by Mr. Mignault is this: Roman Catholics, he says, are in a special position by reason of the provisions of the Treaty of Paris, and because of that special position ought

to be held to be excluded from the jurisdiction of Protestant clergymen in respect of marriage in the absence of some express provision of the law bringing them within that jurisdiction. It is said that by the provisions of that treaty a guarantee was given to the Roman Catholic Church that the exclusive authority which the clergy of that church enjoyed under the French régime to celebrate marriages between persons who had been received into its communion should be maintained. I cannot agree with this view.

The Instructions to the Governors to which I have already referred, and other contemporary documents as well as the Quebec Act itself, shew conclusively that the view taken by those who were charged with the duty of giving effect to the treaty rights was that the "liberty" conserved by the treaty, whatever its extent, was guaranteed to "His Majesty's new subjects" as individuals; and that there was no undertaking to maintain the corporate authority and jurisdiction asserted by the Church as such. These documents afford a *contemporanea expositio* which cannot be ignored; and the construction they suggest appears to accord with the natural reading of the words of the Treaty of Paris themselves.

Some passages in the documents may perhaps be usefully quoted. In a letter dated 13th August, 1763, from Lord Egremont, the Secretary of State, to Mr. Murray, apprising him of his appointment as Governor, the following account is given of the negotiations relating to the 4th article of the Treaty of Paris:—

> For tho' the King has, in the 4th article of the Definitive treaty, *agreed to grant the Liberty of the Catholick Religion to the Inhabitants of Canada;* and though His Majesty is far from entertaining the most distant thought of restraining *His new Roman Catholick Subjects from professing the Worship of their Religion according to the Rites of the Romish Church*: Yet the conditions, expressed in the same Article, must always be remembered, viz.: *As far as the Laws of Great Britain permit*, which laws prohibit absolutely all Popish Hierarchy in any of the dominions belonging to the Crown of Great Britain, and can only admit of a Toleration of the Exercise of that Religion; This matter was clearly understood in the Negotiation of the Definitive Treaty; the French Ministers proposed to insert the words, *comme ci-devant*, in order that the Romish Religion should continue to be exercised in the same manner as under their Government; and they did not give up the Point, till they were plainly told that it would be deceiving them to admit those Words, for The King had not the power to tolerate that Religion in any other Manner, than *as far as the Laws of Great Britain permit*. (Shortt and Doughty, p. 123.)

The 32nd paragraph of the Instructions, dated Dec. 7th, 1763, is in these words:—

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> You are not to admit any ecclesiastical jurisdiction of the See of Rome or any other foreign ecclesiastical jurisdiction whatsoever, in the province under your government. (Shortt and Doughty, p. 139.)

This is repeated in the Instructions to Sir Guy Carleton, in 1768, in paragraph 31, and continued in the Instructions to the Governors as late at least as 1786, (Shortt and Doughty, p. 217).

The Instructions to Sir Guy Carleton, of 1775, contain more elaborate prohibitions against the exercise of any ecclesiastical jurisdiction incompatible with the royal supremacy (which, in the meantime had been expressly recognized by the Quebec Act) in paragraphs 20 and 21. (Shortt and Doughty, pp. 425, 426, 427). The 2nd clause of the first of these paragraphs is in the following words:—

> Secondly, That no Episcopal or Vicarial Powers be exercised within Our said Province by any Person professing the Religion of the Church of Rome, but such only, as are essentially and indispensably necessary to the free exercise of the Romish Religion; and in those cases not without a License and Permission from you under the Seal of Our said Province, for, and during Our Will and Pleasure, and under such other limitations and restrictions as may correspond with the spirit and provision of the Act of Parliament, "for making more effectual provision for the Government of the Province of Quebec;" And no person whatever is to have holy orders conferred upon him, or to have the Cure of Souls without a License for that purpose first had or obtained from you.

And in the 8th clause there is this:—

> That such ecclesiasticks as may think fit to enter into the Holy State of Matrimony shall be released from all penalties to which they may have been subjected in such cases by any authority of the See of Rome.

These clauses are reproduced in the Instructions to Lord Dorchester, of the year 1786. These provisions were not the result of inadvertence; they were passed only after the most careful consideration of all questions of right as well as of policy involved, including of course, as of primary importance, the meaning and effect of the treaty stipulation now relied upon. The following passage from the Report of Sir Alexander Wedderburn, December 6th, 1772 (see Shortt and Doughty, pp. 298 and 299), indicates the principles upon which the Government proceeded in framing the provisions on this subject in the Quebec Act as well as the Instructions of January, 1775:—

> The religion of Canada is a very important part of its political constitution. The 4th article of the Treaty of Paris, grants the liberty of the Catholic religion to the inhabitants of Canada, and provides that His Britannic Majesty should give orders that the Catholic subjects may profess the worship of their religion according to the rites of the Romish Church, as far as the laws of England will permit. This qualification renders the article of so little effect, from

the severity with which (though seldom exerted) the laws of England are armed against the exercise of the Romish religion, that the Canadian must depend more upon the benignity and the wisdom of Your Majesty's Government for the protection of his religious rights than upon the provisions of the treaty, and it may be considered as an open question what decree of indulgence true policy will permit to the Catholic subject.

The safety of the State can be the only just motive for imposing any restraint upon men on account of their religious tenets. The principle is just, but it has seldom been justly applied; for experience demonstrates that the public safety has been often endangered by those restraints, and there is no instance of any State that has been overturned by toleration. True policy dictates then that the inhabitants of Canada should be permitted freely to profess the worship of their religion; and it follows, of course, that the ministers of that worship should be protected and a maintenance secured for them.

Beyond this the people of Canada have no claim in regard to their religion, either upon the justice or the humanity of the Crown; and every part of the temporal establishment of the church in Canada, inconsistent with the sovereignty of the King, or the political government established in the province may justly be abolished.

The exercise of any ecclesiastical jurisdiction under powers derived from the See of Rome is not only contrary to the positive laws of England but is contrary to the principles of government, for it is an invasion of the sovereignty of the King, whose supremacy must extend over all his dominions, nor can His Majesty by any act divest himself of it.

. . . .

The point then, to which all regulations on the head of religion ought to be directed, is to secure the people the exercise of their worship, and to the Crown a due controul over the clergy.

The first requires that there should be a declaration that all the subjects in Canada may freely profess their religion without being disturbed in the exercise of the same, or subject to any penalties on account thereof, and also that there should be a proper establishment of parochial clergymen to perform the offices of religion.

The present situation of the clergy in Canada, is very fortunate for establishing the power of the Crown over the church. It is stated, in the reports from your Majesty's officers in Canada, that very few have a fixed right in their benefices, but that they are generally kept in a state of dependence, which they dislike, upon the person who takes upon him to act as bishop, who, to preserve his own authority, only appoints temporary vicars to officiate in the several benefices.

It would be proper, therefore, to give the parochial clergy a legal right to their benefices. All presentations either belonging to lay pastors or to the Crown, and the right in both ought to be immediately exercised with due regard to the inclinations of the parishioners in the appointment of a priest. The Governor's license should

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in every case be the title to the benefice, and the judgment of the temporal Courts the only mode of taking it away. This regulation would, in the present moment, attach the parochial clergy to the interests of Government, exclude those of foreign priests, who are now preferred to the Canadians, and retain the clergy in a proper dependence on the Crown. It is necessary, in order to keep up a succession of priests, that there should be some person appointed whose religious character enables him to confer orders, and also to give dispensations for marriages; but this function should not extend to the exercise of a jurisdiction over the people or the clergy; and it might be no difficult matter to make up to him, for the loss of his authority, by emoluments held at the pleasure of the Government.

The maintenance of the clergy of Canada was provided for by the payment of one-thirteenth part of the fruits of the earth in the name of tythe, and this payment was enforced by the Spiritual Court. It is just that the same provision should continue, and that a remedy for the recovery of it should be given in the temporal Courts; but the case may happen that the land-owner is a Protestant, and it may be doubted whether it would be fit to oblige him to pay tythes to a Catholic priest.

The design was, while allowing the fullest liberty of worship according to the rites of the Church of Rome, to preserve scrupulously the Prerogative of the Sovereign as the head of the Church. This object was strictly observed in the Quebec Act. The provisions contained in the existing Commission and Instructions were abrogated as from May 1st, 1775, and it was provided that in all matters of controversy relating to property and civil rights resort should be had to the laws of Canada. But the King's supremacy in ecclesiastical matters were also expressly declared, a declaration involving (it may be observed in passing), this consequence, that in such a matter as marriage in which civil rights under the law of Canada had their birth in the exercise of ecclesiastical jurisdiction, the King became the fountain of jurisdiction. This view of the effect of the Act was strictly adhered to in the framing of the Instructions to Governors down, at all events, to the date of the "Constitutional Act." And, indeed, three-quarters of a century after the conquest (as late as the year 1842), the authority of the Crown as head of the Church appears to have been invoked at the instance of the Roman Catholic Bishop of Montreal in respect of the establishment of a Roman Catholic Metropolitan See in British North America. On that occasion the following opinion was given by Sir Frederick Pollock and Sir William Webb Follett (a lawyer second to none of the great lawyers of his time):—

Sir,—We have the honour to acknowledge the receipt of your letter dated the 16th of October last, stating that the Reverend M. Power having been deputed by the Roman Catholic Bishop of Montreal to submit for the approval of Her Majesty's Government a

proposition for dividing the Diocese of Kingston into two distinct sees, and for "the formation of an ecclesiastical province to be composed of all the British North American provinces under one Archbishop or one Metropolitan See;" and further stating, that you had received Lord Stanley's directions to state that, as preliminary to advising Her Majesty as to the course which it might be expedient to take in respect to this application, His Lordship would wish us to report to him our opinion whether, adverting to the "Act of Supremacy," and any other Acts of Parliament relating to the exercise within the Queen's dominions of the religion of the Church of Rome, and also adverting to the terms of the capitulations of Quebec and Montreal, in 1759 and 1760, and to the statutes 14 Geo. III. ch. 83; 31 Geo. III. ch. 31, and 3 & 4 Vict. ch. 35, any authority is vested in the Queen to regulate, or in any manner interfere with, the appointment of Roman Catholic bishops or archbishops in Canada, or to determine what the number or what the character of the ecclesiastical functionaries of the Roman Catholic Church in that province shall be?

In obedience to his Lordship's commands, we have considered the subject referred to us with great care, and beg leave humbly to report that we think, under the terms of the Treaty of Paris of 1763, and of the statute, 14 Geo. III. ch. 53, sec. 5, and with reference to the provisions of the statute of 1 Elizabeth, Her Majesty has an authority vested in her to interfere with, and to make regulations respecting, the appointment of Roman Catholic bishops and archbishops in Canada; and with respect to the particular proposal which is mentioned in the letter, we think that the consent of the Crown is properly asked for, and that it may be lawfully given to, the division of the Diocese of Kingston into two sees, if Her Majesty, in her discretion, shall think fit to do so. (Forsyth "Cases and Opinions on Constitutional Law," p. 51.)

At the date when this opinion was given, the Crown no doubt would have abstained from interference in the affairs of the Roman Catholic Church except at the instance of the authorities of that Church themselves. With the progress of modern ideas it may be assumed that, in 1842, English statesmen had learned the wisdom of leaving to each church not only the care of the spiritual welfare of its adherents, but the regulation of all matters strictly pertaining to ecclesiastical jurisdiction as well. These documents, however, to which I have referred, shew how repugnant the present proposed construction of the treaty would have been to the ideas of the generations of English statesmen and lawyers who were responsible for carrying its provisions into effect. By the light of history, the argument that in the 4th article the Crown gave bonds to the Hierarchy of the Church of Rome to maintain its ecclesiastical authority over the subjects of the King in Canada, will not bear examination; it falls to pieces in one's hands.

It is proper to observe that in the discussion of this question

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I have confined myself to the case in which a license has been obtained and the clergymen performing the marriage ceremony acts under the authority of it. In my view of the points in controversy, it is not necessary to consider other cases. I pass no opinion, therefore, upon the question whether, in the absence of a license (and where consequently the publication of banns is a necessary preliminary to the ceremony of marriage) the banns having been published in one church by one priest or minister, the ceremony can, at the discretion of the parties, be validly solemnized at any convenient time or place, and by any priest or minister. The point was discussed, but I express no opinion upon it.

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ANGLIN, J.:—I have already stated my concurrence in the reasons assigned by Mr. Justice Davies for answering the first question submitted in the negative. I am, however, unable to agree in his reasons and conclusions in regard to question No. 2, and must, therefore, express my own views upon it.

Since the majority of the Judges of this Court are of the opinion that the Dominion Parliament does not possess jurisdiction to legislate in respect of the subject-matter of question No. 2, it is difficult to perceive how an answer to it can be useful either to Parliament or to the Governor-General in Council. It concerns the interpretation of a provincial law dealing with a matter within the exclusive jurisdiction of the provincial Legislatures. I find it almost impossible to believe that it was expected that in the event of this Court answering questions Nos. 1 and 3 in the negative it should proceed to answer this second question which would thus have become purely academic.

I think we might well have acted upon the suggestion presented by the Deputy of the Minister of Justice, when, towards the close of the argument, he said:—

> If your Lordships conclude, therefore, that there is jurisdiction, I submit that on no consideration which has been or can be suggested should your Lordships fail to advise upon every point that has been placed before you. On the other hand, if it be determined that there is no jurisdiction to enact the bill a different situation is before your Lordships.
>
> . . . . .
>
> If it appears on the reading of this submission that there is in effect one interrogation, that it is divided into clauses having regard to what might follow from the different views which the Court might entertain, it is quite open and proper for the Court no doubt, to submit that in view of the opinions which are handed in upon certain parts of the interrogation it becomes unnecessary, in the view of the Court, to answer the rest. And if the Government upon that submission, entertain a different view, I presume the Government would communicate that to the Court for further consideration.
>
> . . . . .

The Court, in its superior knowledge of the constitution and the working of the laws, may upon the consideration of these questions see reason instead of answering categorically to submit points for the consideration of the Government with regard to the matter. That is the situation here. I submit that the matter is in your Lordships' hands here as one interrogation arising out of a situation created in view of the public agitation and the introduction of this bill.

. . . .

MR. JUSTICE DUFF:—If the substance of No. 1 and No. 3 is answered in the negative—assuming that the substantial question which is to be found in these two questions is answered in the negative?

Mr. Newcombe:—If that be the purpose of your Lordship's question I concede immediately that it is a case in which it would be proper for your Lordships if you so consider to submit an inquiry to the Government or to submit any suggestion which your Lordships within the limitation of the Lord Chancellor's judgment may deem proper.

Moreover, counsel representing the Province of Quebec have stated to us the view of the Government of that province (the legislation of which can alone be affected) that, while in the event of the reply to either the first or the third question being in whole or in part in the affirmative, this second question might properly be answered, a reply should not be given to it if the other questions should be answered wholly in the negative. They insisted that an expression of opinion by this Court upon the law of Quebec, whatever answer should be given to the second question, especially if it should not be unanimous, and if the Privy Council should, as seems not improbable, decline to deal with this part of the reference, must have a disturbing effect, inasmuch as it would cast doubt upon the status of many married persons in that province and upon the rights of a still larger number of persons in regard to property. They have also called our attention to the fact that there is at present pending, in the Superior Court at Montreal, in Review, a case *inter partes* in which the very point covered by clause (*a*) of the second question is presented for judicial determination. They further stated that no case has ever come before the Courts of the Province of Quebec in which the validity of such marriages as are dealt with by clause (*b*) of the second question has been challenged.

In delivering the judgment of the Privy Council in the recent case of the *Attorney-General for the Province of Ontario et al.* v. *the Attorney-General for the Dominion of Canada*, [1912] A.C. 571, known as the Companies' Reference, the Lord Chancellor after alluding to the refusal by Lord Herschell, when delivering the opinion of the Judicial Committee in the *Fisheries Case* (1898), A.C. 700, at p. 717, to answer one of the questions there put "upon the ground that so doing might pre-

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judice particular interests of individuals" and referring to the questions propounded in the *Companies Case*, [1912] A.C. 571, at page 589, as:—

> a series of searching questions very difficult to answer exhaustively and accurately without so many qualifications and reservations as to make the answers of little value,

added that:—

> The Supreme Court itself can, however, either point out in its answer these or other considerations of a like kind, or can make the necessary representations to the Governor-General in Council when it thinks right so to treat any question that may be put.

Upon carefully weighing all these considerations, it seemed to me to be eminently proper that before proceeding to deal with the second question we should respectfully represent to the Governor-General in Council the undesirability in our opinion of our answering it since the view of the majority of the Judges of this Court is that the Parliament of Canada is entirely without jurisdiction to legislate in the direction suggested; and that we should proceed to reply to that question only upon being officially informed that it is the wish and the intention of the Governor-General in Council that it should be answered notwithstanding the negative reply made to the other questions propounded.

But a majority of my learned brothers have reached the conclusion that we should answer the second question without making any such representation. In deference to their views I proceed to express my opinion upon it.

Being charged to define and declare the civil law of the Province of Quebec upon this question to the best of our ability, it is, in my opinion, our duty as judicial officers of a Canadian civil tribunal to consider and to give effect to the ecclesiastical law, whether of the Catholic or of any other church, so far, but so far only, as it is found to be incorporated in the common (civil) law or the legislature has seen fit to recognize and adopt it and to give civil efficacy to it. We are in nowise concerned with the policy, the propriety or the impropriety, the desirability or the undesirability, of whatever course the Legislature has in this regard seen fit to pursue in the exercise of its discretion, which, within the ambit of the jurisdiction committed to it by the Imperial Parliament is, for all Judges of Civil Courts in this country, supreme.

I desire to call attention to the fact that we have no evidence before us of the law of the Catholic Church bearing upon the questions submitted, other than what is furnished by the documents which have been admitted and are printed in the joint appendix. Except in so far as it is admitted, that law would

require to be proved as any other matter of fact. I necessarily proceed upon the assumption that the admitted documents state it as fully as is necessary for the disposition of the questions submitted.

The Civil Code of Lower Canada became law in 1866—the year preceding Confederation. The Legislature which enacted it had complete jurisdiction over the subject of marriage in the then Province of Canada. The Fifth Title of the Civil Code deals with marriage. The first chapter of that title treats:—

> "Of the qualities and conditions necessary for contracting marriage" (*Des qualités et conditions requises pour pouvoir contracter mariage*); the second "Of the formalities relating to the Solemnization of Marriage"; the third "Of opposition to marriage"; the fourth "Of actions for annulling marriage."

In the first chapter are grouped a number of articles enumerating various impediments which render persons incapable of validly contracting marriage and stating several conditions precedent the non-observance of which, when applicable, invalidates marriage: (*vide* articles 148-155 C.C.).

The last article of the first chapter, No. 127, reads as follows:—

> 127. The other impediments recognized according to the different religious persuasions, as resulting from relationship or affinity or from other causes, remain subject to the rules hitherto followed in the different churches and religious communities.
>
> The right likewise of granting dispensations from such impediments, appertains, as heretofore, to those who have hitherto enjoyed it.

Inasmuch as "relationship" and "affinity" exhaust the genus to which they belong, it is obvious that the "other causes" referred to in article 127 cannot be restricted to impediments *ejusdem generis* with consanguinity and affinity. That would be to deny any effect to the words "other causes." The other causes are therefore necessarily impediments of another kind "recognized according to, the different religious persuasions" —presumably of the parties. Confining the inquiry to the particular subject-matter before us, our attention has been directed to a Decree of the Council of Trent which, subject to a modification to be presently noted, admittedly was in force in, and was recognized as binding by, the Catholic Church in Lower Canada in 1866. That decree contains the following paragraph:—

> Qui aliter quam praesente parocho, vel alio sacerdote de ipsius parochi seu ordinarii licentia, et duobus vel tribus testibus matrimonium contrahere attentabunt, eos sancta Synodus ad sic contrahendum omnino inhabiles reddit, et hujusmodi contractus irritos et nullos esse discernit, prout eos praesenti decreto irritos facit et annullat.

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In the translation furnished to us in the joint appendix this passage is thus rendered:—

> With regard to those who marry otherwise than in the presence of the parish priest, or of the priest who has his permission or that of the Ordinary, and in the presence of two or three witnesses; the Holy Council renders such persons wholly incapable of contracting marriage in that way, and declares the marriages thus contracted null and void as, by the present decree, it dissolves and annuls them.

Under this decree where it is in force and unmodified it is perfectly clear that according to the law of the Catholic Church the marriage of a Catholic contracted otherwise than in accordance with its requirements is invalid. The impediment thus created is known as clandestinity.

Taken by itself, article 127 would clearly have the effect of giving recognition to this impediment as affecting the civil validity of marriages between Catholics in the province and to do so is, in my opinion, beyond doubt within its purpose.

Apart from the contention that by other facultative statutory provisions every clergyman or minister of religion authorized to keep a marriage register is empowered to solemnize marriage between any man and woman, whatever their religion, with which I shall presently deal, the only objection made at bar to the construction which I have put on article 127 is based upon its collocation. It is asserted that the impediment created by the Tridentine Decree concerns merely the qualification of the person before whom marriage is to be solemnized. Upon that assumption it is argued that this cannot be one of the "other impediments" referred to in an article which is found in a chapter devoted to impediments and conditions that affect the capacity of the parties to the marriage; that the "other impediments" covered by article 127 must, under the rule *noscuntur a sociis*, be of that character. While this contention would have much force if the assumption on which it is based were unimpeachable, it will be observed that the Tridentine Decree purports not merely to prescribe "the presence of the parish priest or of the priest who has his permission or that of the Ordinary" as a condition of the validity of the marriage, but that it purports to affect directly the capacity of the parties themselves by declaring them to be "*omnino inhabiles*"—wholly incapable of thus contracting marriage. It professes to create a veritable *inhabilitatio personarum*. Article 127 C.C. deals with "impediments recognized according to the different religious persuasions" . . . "*empêchements admis d'après les différentes croyances religieuses.*" In order to give full effect to these words, it seems to me incontrovertible that we must for the purpose of article 127 regard any impediment defined by a re-

ligious body as possessing the character which that body declares it to have and as producing the effects which that body ascribes to it.

When it is declared by the Catholic Church that Catholics are incapable of contracting marriage except in the presence of the parish priest, or of the priest who has his permission or that of the ordinary, the expressed intention of the church is to attach a personal incapacity to the parties. If the impediment thus created is to be accepted as it is "recognized by the religious persuasion" and as "subject to the rules of the church" it follows that it is properly included under article 127 C.C. as an impediment which affects the capacity of Catholics to contract marriage.

By the Benedictine Declaration, originally published in 1741, for "those places subject to the sway of the Allied Powers in Belgium" and the Town of Maestricht, and subsequently extended to the Church of Canada and Quebec, as appears by the replies given by the Holy Council of the Propaganda under Clement XIII., in the year 1764, to the vicars of the Diocese of Quebec, and published in 1865 by Mgr. Baillargeon, administrator of that diocese, it is provided that:—

> In regard to those marriages which . . . are contracted without the form established by the Council of Trent, by Catholics with heretics, wherever a Catholic man marry a heretic woman or a Catholic woman marry a heretic man . . . if perchance a marriage of this kind be actually contracted there wherein the Tridentine form has not been observed, or in the future (which may God avert) should happen to be contracted, His Holiness declares that such a marriage, if no other canonical impediments occur, is to be deemed valid, and that neither one of the persons in any way can, under pretext of the said form not having been observed, enter upon a new marriage while the other person is still alive.

Marriage between a Catholic and a non-Catholic was, therefore, exempted by the Benedictine Declaration from the operation of the decree of the Council of Trent and the impediment which would otherwise have affected at least the Catholic party to such a marriage was thus removed.

Such, according to the documents submitted to us, was the law of the Catholic Church on this subject at the time when the Civil Code of Lower Canada was enacted. It was conceded at bar by counsel instructed by the Dominion Government to support an affirmative answer to the second question that the presence of the word "hitherto" in article 127 precludes the inclusion within it of impediments created or revived by any subsequent laws or decrees of any religious body and that, in the absence of other recognition by the Legislature, the recent papal decree known as "*Ne Temere*" does not affect the civil validity of marriages contracted in that province. Although its mean-

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ing would perhaps have been clearer had the word "hitherto" preceded the word "recognized" I think that article 127 fairly read may be given the construction which Mr. Mignault put upon it and which he stated had been universally taken to be correct.

By article 156 C.C. it is provided that:—

> 156. Every marriage which has not been contracted openly, nor solemnized before a competent officer, may be contested by the parties themselves and by all those who have an existing and actual interest, saving the right of the Court to decide according to the circumstances.

Having regard to the terms of the Act providing for the codification of the laws of Lower Canada, which directs the commissioners in every case to express the existing law and where they should think proper to suggest an amendment to indicate the same as a suggestion, and to the report of the codifiers which, upon a question as to the purpose of such a provision as that contained in article 156, must, in view of their instructions, be entitled to very great weight, *Symes* v. *Cuvillier*, 5 App. Cas. 138, at p. 158, there can be no doubt that this article was intended to express the existing law as to the consequences of clandestinity in the solemnization of marriage. As a guide to its interpretation, we are referred by the codifiers to Pothier on Marriage, Nos. 361, 362 and 451. The authority of Pothier as an exponent of the Civil Law of France, which prevailed in Lower Canada prior to 1866, as I shall presently have occasion to shew, is so conclusive that other reference seems unnecessary.

In No. 361, Pothier declares that the penalty of parties who have had their marriage celebrated by an incompetent priest is the nullity of their marriage. In No. 362, he adds that the nullity of marriages celebrated by an incompetent priest is not merely relative but is absolute and can be cured only by a new celebration of marriage by the curé of the parties or with his permission or that of the Bishop. He refers to certain cases in which, after public and long continued cohabitation, the courts have refused to hear parties who sought to have their marriages avoided on the pretext that they had been celebrated by incompetent priests. The explanation of the judgments in these cases is not, he adds, that the marriage celebrated by an incompetent priest can ever be valid, or that the vice which attaches to it can be purged by any lapse of time, but that having regard to the circumstances of the cases the applicants were unworthy of being heard and that it should be presumed that the law had been observed and that the priest who had celebrated the marriage had received the permission of the curé. He further says in No. 363 that:—

> The celebration of marriage in the face of the church by the proper curé is not a matter of pure form; it is an obligation which our laws

impose on parties who wish to contract marriage from which the parties subject to it cannot withdraw themselves.

The intention having been to reproduce the existing law, we find in this text of Pothier the explanation of the purpose and extent of the discretion which the concluding words of article 156 reserved to the Courts. No doubt is thereby cast on the absolute nullity of the marriage not solemnized before a competent officer, which is declared in the same terms and may be asserted by the same class of persons as is provided in the case of the nullity of incestuous marriages. (*Vide* article 152.)

But, although the impediment to the marriage of Catholics otherwise than in accordance with its requirements created by the Tridentine Decree should, because that decree so defines its operation be deemed to affect the capacity of Catholics to contract marriage for the purpose of its inclusion within article 127 C.C., it nevertheless has to do directly with the solemnization of marriage, and the right to impose or to remove it as a condition of the civil validity of marriage rests exclusively with the provincial Legislatures for the reasons stated by Mr. Justice Davies in dealing with the first question.

To summarize:—

According to the law of the Catholic Church, the marriage of two Catholics solemnized otherwise than as prescribed by the Tridentine Decree is void. That impediment of the church law is recognized and adopted by article 127 of the Civil Code of Lower Canada, and provision is expressly made for judicially establishing such nullity (article 156). By reason of the exempting clauses of the Benedictine Declaration the marriage of a Catholic with a non-Catholic is not subject to this condition under the civil law.

A careful analysis of other provisions of the Civil Code in the light of the history of the civil law of Lower Canada leads to the same conclusion independently of any recognition or adoption of the law of the Catholic Church in regard to marriage. This aspect of the question is fully considered by Mr. Justice Jetté in *Laramée* v. *Evans*, 25 L.C. Jur. 261, and by Mr. Justice Lemieux, sitting in the Court of Review, in *Durocher* v. *Degré*, Q.R. 20 S.C. 456, at p. 471. I shall not do more than outline my views upon it.

By article 40 of the Ordinance of Blois (1579), provision was made for the publication of banns, the public celebration of marriage in the presence of four witnesses and the registration of the same—the whole subject to the penalties decreed by the church councils.

By article 12 of the Edict of Henry IV. (1606), it was ordained that marriages not entered into and celebrated in the

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church and with the form and solemnity required by article 40 of the Ordinance of Blois be declared void by the ecclesiastical Judges.

By the Declaration of Louis XIII. (1639), which directed that the Ordinance of Blois should be strictly observed, and interpreted it, it was ordained that proclamation of banns should be made by the curé of each of the contracting parties and that at the celebration of the marriage four trustworthy witnesses should assist,

> besides the curé, who shall receive the consent of the parties and shall join them in marriage according to the form practised in the church.

All priests were expressly forbidden to celebrate any marriage except between their true and ordinary parishioners without the written permission of the curés of the parties or of the diocesan bishop; and it was further ordained that a good and faithful register should be kept of the marriages as well as of the publication of banns, or of dispensations and permissions which should have been granted. Pothier in his Treatise on Marriage, says:—

> It is necessary for the validity of a marriage not only that it shall be celebrated in the face of the church, but also that the priest who has celebrated it shall be competent (No. 354). The priest competent for the celebration of marriages is the curé of the parties. The curé of the parties is the curé of the place where they have their ordinary residence (No. 355). Every other priest who has not the permission either of the bishop or of the curé of the parties is incompetent to celebrate it. This is what results from the declaration of 1639 which, after having ordained that the curé must receive the consent of the parties adds: "All priests are forbidden to marry other persons than their true parishioners, without the written permission of the curés of the parties or of the bishop (No. 360)."
>
> The presence of the curé required by our laws for the validity of marriages is not purely a passive presence; it is an act and a ministration of the curé, who must receive the consent of the parties and give the nuptial benediction. That results from the terms of the declaration of 1639, where it is said that the curé will receive the consent of the parties, and will join them in marriage, following the form practised in the church (No. 350).

See the opinion of Mr. Justice Willes advising the House of Lords in *Beamish* v. *Beamish*, 9 H.L. Cas. 274, at pp. 317 to 324.

Enacted before the establishment of the Superior Council in Canada in 1663, the "Ordinance of Blois," the "Edict of Henry IV.," and the "Declaration of Louis XIII." were each *proprio vigore* in force in Quebec prior to and at the time of the conquest.

By subsequent ordinances of the French Kings, notably that of April, 1667, and that of April, 1736, further provision was

made for the keeping of registers in all parish churches and for their form and the entries to be made therein.

While there has been some controversy as to the effect upon the foregoing laws of the articles of capitulation of the cities of Quebec and Montreal and of the Treaty of Paris (1763), the great weight of authority supports the view that they remained in force after the cession of Canada to Great Britain. See *Stuart* v. *Bowman* (1851), 2 L.C.R. 369; *Wilcox* v. *Wilcox* (1857), 8 L.C.R. 34.

The Anglican Church was not introduced into Canada as an established church. The exclusive authority of Catholic parish priests to celebrate marriage would, however, be held not to extend to the new Protestant inhabitants of Canada and the right of clergymen of the Anglican Church to solemnize marriage between them would be deemed to have been introduced without express legislation as a result of the acquisition of the country by Great Britain. In my opinion, the Anglican clergy after the conquest also shared with the Catholic priests the right under the civil law to solemnize the marriages of Protestants with Catholics, although the validity of such marriages if not solemnized before the Catholic curé, under the law of the Catholic Church dates only from 1764. This seems to me to be the necessary result of the situation as recognized by their Lordships of the Privy Council in *Brown* v. *Les Curé, etc., de Notre Dame de Montréal*—(The "*Guibord Case*") L.R. 6 P.C. 157, at pp. 206-7, and of the doctrine enunciated in *Long* v. *The Bishop of Cape Town*, 1 Moo. P.C. (N.S.) 411, at p. 461.

> The Church of England, in places where there is no church established by law, is in the same situation with any other religious body—in no better, but in no worse, position.

While British settlers in British colonies and in conquered and ceded territory are themselves entitled to the benefit of their own marriage laws, and are unaffected in this respect by the laws of the country (*Lautour* v. *Teesdale*, 8 Taun. 830), the latter, nevertheless, as part of the private law (Salmond on Jurisprudence, p. 484; Holland on Jurisprudence, p. 168), govern the inhabitants until altered by the competent jurisdiction of the new sovereignty: Halleck on International Law (4th ed.) vol. 2, p. 516; Blackstone (Lewis ed. 1902) vol. 1, pp. 107-8.

The Royal Proclamation of 1763 and the instructions given to the Governors between 1763 and 1774 are invoked in support of the contention that during this period the English common law was in force in Canada. I am unable to accept this view. (See Chief Justice Hey's Report, 1 L.C. Jurist, Appendix.) But whether it be or be not well founded, by the Quebec Act passed by the Imperial Parliament in 1774. It is expressly enacted (s. 4) that the

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Proclamation (of the 7th October, 1763) so far as the same relates to the said Province of Quebec, and the Commission under the authority whereof the Government of the said province is at present administered and all and every the Ordinance and Ordinances made by the Governor-in-Council of Quebec for the time being relative to the civil government and the administration of justice in the said province . . . be and the same are hereby revoked, annulled and made void from and after the first day of May, 1775.

Sections 5 and 8 of the Quebec Act are as follows:—

5. And for the more perfect security and ease of the minds of the inhabitants of the said province, it is hereby declared that His Majesty's subjects professing the religion of the Church of Rome, of and in the said Province of Quebec, may have and hold the free exercise of the religion of the Church of Rome subject to the King's supremacy, declared and established by an Act made in the first year of the reign of Queen Elizabeth over all the dominions and countries which then did, or thereafter should, belong to the Imperial Crown of this realm; and that the clergy of the said church may hold, receive, and enjoy their accustomed dues and right with respect to such persons only as shall profess the said religion.

8. And be it further enacted by the authority aforesaid, that all His Majesty's Canadian subjects within the Province of Quebec, the religious orders and communities only excepted, may also hold and enjoy their property and possessions, together with all customs and usages relative thereto, and all others their civil rights, in as large, ample, and beneficial manner as if the said Proclamation, Commissions, Ordinances and other Acts and Instruments had not been made, and as may consist with their allegiance to His Majesty, and subjection to the Crown and Parliament of Great Britain, and that in all matters of controversy relative to property and civil rights, resort shall be had to the laws of Canada as the rule for the decision of the same; and all causes that shall hereafter be instituted in any of the Courts of justice to be appointed within and for the said province by His Majesty, his heirs and successors, shall with respect to such property and rights be determined agreeably to the said laws and customs of Canada, until they shall be varied or altered by any Ordinance that shall from time to time be passed in the said province by the Governor, Lieutenant-Governor or Commander-in-Chief for the time being, by and with the advice and consent of the legislative council of the same, to be appointed in manner hereinafter mentioned.

No new provisions had been made for the keeping of the registers of baptisms, deaths and marriages in Canada between the date of the cession and the year 1795, when the statute 35 Geo. III. ch. 4 (L.C.) was passed. In section 1 it enacts:—

That from and after the first day of January, which will be in the year subsequent to the passing of this Act, in each parish Church of the Roman Catholic communion, and also in each of the Protestant Churches or congregations within this province, there shall be kept by the rector, curate, vicar, or other priest or minister doing the parochial or clerical duty thereof two registers of the same

tenor, each of which shall be reputed authentic, and shall be equally considered as legal evidence in all Courts of justice, in each of which the said rector, curate, vicar or other priest or minister, doing the parochial or clerical duty of such parish or such Protestant church or congregation, shall be held to enregister regularly and successively all baptisms, marriages and burials so soon as the same shall have been by them performed.

Section 10 declares that certain registers of the Protestant congregation of Christ Church, Montreal, shall

have the same force and effect to all intents and purposes as if the same had been kept according to the rules and forms prescribed by the law of the province.

Section 11 contains a similar provision in regard to other defective registers; and section 15 of the same statute is as follows:—

15. And be it further enacted by the authority aforesaid, that so much of the twentieth title of an Ordinance passed by his most Christian Majesty, in the month of April, in the year one thousand six hundred and sixty-seven, and of a declaration of his most Christian Majesty of the ninth of April, one thousand seven hundred and thirty-six, which relates to the form and manner in which the registers of baptisms, marriages and burials are to be numbered, authenticated or *paraphé*, kept and deposited and the penalties thereby imposed on persons refusing or neglecting to conform to the provisions of said Ordinance and declaration, are hereby repealed, so far as relates to the said registers only.

In view of these statutory provisions it would seem incontrovertible that the French law as it existed at the time of the conquest had continued in force in regard to the keeping of marriage registers. Chief Justice Sewell, in *Ex parte Spratte*, Stu. K.B. 90, decided in 1816, says:—

The British statute, 14 Geo. III. ch. 83, commonly called the Quebec Act declared the law of Canada, as it stood at the conquest, to be the rule of decision in all matters of controversy and civil rights.

He adds, at page 96, that:—

The right of keeping a register of baptisms, marriages and sepultures, with the power of rendering the entries thus made *actes authentiques*, or records, which by the twentieth title of the Edict of 1667 was at the conquest vested in the then parish priests of Canada was, by law, considered to be so vested in them not by reason of their spiritual or ecclesiastical character, but because they were by law the acknowledged public officers of the temporal government . . . Under the Ordinance of 1667, which was the law antecedent to the statute 35 Geo. III. ch. 4, the keeping of registers was entrusted to the curés of the Catholic Church and to their successors in office and to such only; and the curés were vested with this authority as priests in holy orders recognized to be such by law and as public officers in their respective stations. The late provincial statute (1795) does not change the character or qualifications of the persons to whom the keeping of registers is now

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to be entrusted. It extends the power of keeping registers to Protestant ministers, but still requires that all persons keeping registers, whether Catholics or Protestants, shall be priests in holy orders recognized to be such by law and to be competent officers in their respective stations. . . . In conformity to this general declaration and to the Ordinance of 1667, the fourth section of the Statute also especially enacts "that every marriage shall be signed in both registers by the clergyman celebrating the marriage" who must necessarily be a priest in holy orders recognized to be such by law, since by the law of Canada a marriage can only be celebrated by such a character.

The learned Chief Justice, of whom Mr. Justice Lemieux rightly observed that he

> has left a great name in the jurisprudence contemporaneous with the events which followed the Quebec Act,

clearly considered that in Canada, from the time of the conquest, Catholic priests and clergymen of the Church of England were recognized by law as equally entitled to solemnize and to keep registers of marriage, the former for Catholics and the latter for Protestants, and that the Quebec Act was declaratory of this right, which was further recognized by the provincial Act of 1795.

When we find that down to 1866, when the Civil Code was enacted, there is no trace of any other civil authority for the solemnization of marriage by Catholic priests and that their right to solemnize marriage and to keep registers of civil status prior to that time has never been questioned, and when we find that right recognized in the Civil Code as something unquestionably existing, the conclusion seems to be inevitable that, as a result of the reservation in the articles of capitulation of their rights and privileges, and the free exercise of their religion to the inhabitants of Quebec and Montreal, the assurances in section 5 of the Quebec Act to the clergy of the Catholic Church that they should "hold, receive and enjoy their accustomed dues and rights with respect to such persons only as shall profess the said (Catholic) religion," the provision of section 8 that His Majesty's Canadian subjects within the Province of Quebec should hold and enjoy all their civil rights, and the continuation of the laws of Canada as the rule for the decision of all matters of controversy relative to property and civil rights—the respective rights of the Catholic clergy and laity *inter se* as they existed at the time of the cession in regard to marriage were preserved.

The French law, so far as it could be applied, governed the keeping of registers by the Anglican clergymen, as the Act of 1795 establishes.

The criminal law of England was, by the Quebec Act, expressly declared to be the law of the province. Commercial and maritime laws of England were subsequently specially intro-

duced. But in all matters of "civil rights" the law of Canada, as it stood at the conquest, was declared to be and remained "the rule of decision." Whether marriage in Quebec should be regarded in the civil Courts as a civil contract, or, as would seem to be the better opinion, should be deemed a religious contract producing civil effects, it is for all civil purposes governed by the civil law, and, in view of the foregoing provisions, there can be no reasonable doubt that that law in Lower Canada has been since the conquest, as is declared by Chief Justice Sewell, the civil law which was in force at the time of the conquest. In *Citizens Insurance Co.* v. *Parsons*, 7 App. Cas. 96, Sir Montague Smith in delivering the judgment of the Privy Council, at pp. 110-111, said:—

> the law which governs civil rights in Quebec is in the main the French law as it existed at the time of the cession of Canada and not the English law which prevails in the other provinces. . . .
>
> It is to be observed that the same words "civil rights" are employed in the Act of 14 Geo. III. ch. 83, which made provision for the government of the Province of Quebec. Section 8 of that Act enacted that His Majesty's Canadian subjects within the Province of Quebec should enjoy their property, usages, and other civil rights, as they had before done, and that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada, and be determined agreeably to the said laws. In this statute the words "property" and "civil rights" are plainly used in their largest sense.

Under the civil law of Quebec at and after the conquest the marriage of two Catholics could only take place in the presence of the curé of the contracting parties or of a priest authorized by him or by the bishop, and all priests were forbidden without such permission to celebrate any marriage other than between their true and ordinary parishioners. (Declaration of Louis XIII., 1639.)

In 1804 and again in 1821 statutes were passed validating marriages which had been theretofore solemnized before Protestant dissenting ministers and justices of the peace. In each of these Acts it is expressly provided that they shall not extend to any future marriages.

As is very clearly pointed out by Mr. Justice Jetté in *Laramée* v. *Evans*, 25 L.C. Jur. 261, the Act of 1827, authorizing clergymen of the Church of Scotland to keep marriage registers and to solemnize marriages, and the subsequent Acts authorizing the ministers of various dissenting bodies to keep registers of baptisms, marriages and burials were all procured, not with a view of affecting the position and rights of the Catholic Church and its clergy and laity, but because of the opinion maintained by Chief Justice Sewell, and generally asserted by the Anglican body that clergymen of that church were alone competent to

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marry Protestants. The purpose of the legislation would appear to have been to relieve dissenting Protestant bodies from that disability by giving to the ministers of those denominations the legal right to keep registers and to solemnize marriage primarily if not solely for the purposes of their respective congregations.

1860 these Acts were consolidated in chapter 20 of the Revised Statutes of Lower Canada. Sections 16 and 17 of that Act are as follows:—

> 16. The Protestant churches or congregations intended in the first section of this Act, are all churches and congregations in communion with the United Church of England and Ireland or with the Church of Scotland, and all regularly ordained priests and ministers of either of the said churches have had and shall have authority validly to solemnize marriage in Lower Canada, and are and shall be subject to all the provisions of this Act. 35 Geo. III. ch. 4; 7 Geo. IV. ch. 2, sec. 2.
>
> 17. This Act extends also to the several religious communities and denominations in Lower Canada, mentioned in this section, and to the priests or ministers thereof, who may validly solemnize marriage, and may obtain and keep registers under this Act, subject to the provisions of the Acts mentioned with reference to each of them respectively, and to all the requirements, penalties, and provisions of this Act, as if the said communities and denominations were named in the first section of this Act.

There follows a list of the various dissenting bodies which had obtained special statutes.

I read these provisions as declaratory of the right of the ministers of the several religious bodies therein named (Anglican, Scotch and Dissenting) to solemnize within the limits of the territory for which they are authorized to keep registers, all marriages (subject to article 63 C.C. and to the special limitation in the case of Quakers imposed by 23 Vict. ch. 11) except those which the law by other provisions renders them incompetent to solemnize. This, in my opinion, meets the objection so much insisted on at bar that, if the argument presented by Mr. Mignault should prevail, there would be no provision in the Quebec law for the solemnization of marriages between dissenting Protestants of different religious beliefs or for the marriage of infidels or pagans, or of persons attached to no particular religious denomination.

With matters in this position, the Legislature appointed the Commission for the codification of the civil law with instructions to express in the Code the existing law. The report of these commissioners upon the portion of the Civil Code which deals with the subject of marriage contains the following passages:—

> With the object of preserving to everybody the enjoyment of his own usages and practices according to which the celebration of marriage is entrusted to the ministers of the worship to which he belongs several provisions are inserted in this title which although

new in form nevertheless have their source and *raison d'être* in the spirit, if not in the letter, of our legislation. . . . Since a change such as that operated by the Code Napoleon, which has secularized marriage and has entrusted the celebration of it as well as the keeping of the registers to officers of a purely civil character without any intervention being required on the part of religious authorities, seems in no wise desirable in this country it has become necessary to renounce the idea of establishing here in regard to the formalities of marriage uniform and detailed rules.

The majority of the Commissioners thus express their opinion:—

The publicity required by the first part of article 128 is with the object of preventing clandestine marriages which are with good reason condemned by every system of law. An Act so important which interests many others besides the parties themselves should not be kept secret and the best method of preventing that happening is to render obligatory the publicity of the celebration. The word "openly" (*publiquement*) has a certain elasticity which makes it preferable to any other; being susceptible of a greater or less extension it has been employed in order that it may lend itself to the different interpretations, which the different churches and religious congregations in the province require to give it according to their customs and usages and the rules which are peculiar to them from which it is desired in no way to derogate. All that has been sought is to prevent clandestine marriages. Thus, those marriages which shall have been celebrated in an open manner and in the place where they are ordinarily celebrated according to the usages of the church to which the parties belong are reputed to have taken place openly (*publiquement*).

Taking up the Code and reading it, as it must be read, in the light of the foregoing facts, we find the following provisions which call for consideration in dealing with the question submitted:—

128. Marriages must be solemnized openly, by a competent officer recognized by law.

This is the fundamental provision designed to prevent clandestinity.

Of almost equal importance, having the same object, and being the natural sequence of the provisions enacted for the same purpose, regarding the publication of banns in the church or churches to which the parties belong (articles 130-3 and 57-8 C.C.) is article 63, which says:—

63. The marriage is solemnized at the place of the domicile of one or other of the parties. If solemnized elsewhere, the person officiating is obliged to verify and ascertain the identity of the parties.

The latter sentence obviously provides for such exceptional cases as those of persons having no fixed residence (*vagi*) or no residence in the province. The form in which the article is expressed would be inexplicable if it were not thereby intended

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to prescribe that as a general rule marriage must take place at the domicile of one of the parties. I see no reason why this provision should not apply to Protestants as well as Catholics. The policy which underlies it so requires.

"Domicile" in this article means place of residence: *McMullen* v. *Wadsworth*, 14 App. Cas. 631, at p. 636, and, in the case of Catholics, and probably of Anglicans, who have parochial organization, it means the parish in which the parties, or one of them resides. In the case of a person belonging to a religious body having neither parochial organization nor its equivalent, or of a person belonging to no church, domicile would probably mean the municipality in which he resides. The Catholic parish in Quebec is legally recognized. See R.S.Q., 1909, arts. 4296 *et seq.* It is in the parish church, private chapel, or mission, and for the territory attached to it that the registers are kept (article 42 C.C.). It is the proper curé of the parties, *i.e.*, the parish priest, who is authorized to solemnize the marriage. It is at the church and within the territory for which he is authorized to keep registers that he is empowered to officiate. While in country places the parish and the municipality are coterminous, such cities as Montreal and Quebec are divided into many parishes of which the territorial limits are well defined, and only within them is the curé authorized to discharge his functions and to exercise his rights as parish priest. Every consideration points to his parish being for the purpose of article 63 the domicile of the Catholic at all events.

Publication of banns in the church to which the parties belong, marriage at the domicile and solemnization by a competent officer are the great safeguards provided by the Code against clandestinity. In all countries where the civil law prevails, territorial limitation of the jurisdiction to solemnize marriage appears to have been established for that purpose—a policy inspired, no doubt, by the Tridentine Decree.

To further ensure obedience to the legal prohibitions in respect to consanguinity, pre-contract and mincrity, the non-observance of which clandestinity too often serves to cloak, the Code has provided (articles 136 *et seq.*) for formal oppositions being made to marriages by interested persons. The efficacy of these provisions depends upon the restrictions imposed as to the place, time and publicity of solemnization by the articles to which allusion has just been made. Article 1107 of the Code of Civil Procedure, which must be read with the provisions of the Civil Code (article 144 C.C.) requires that the opposition shall be served "upon the functionary called upon to solemnize the marriage," and article 61 C.C. directs that the disallowance of an opposition shall be "notified to the officer charged with the solemnization of the marriage." (See also article 1109

C.P.Q.) By article 65 C.C. the "Act of Marriage" which the celebrant is required to prepare and sign, must *inter alia* state "that there has been no opposition or that any opposition has been disallowed." These provisions accord only with the view that in the ordinary case and as a general rule there must be some one, or at most two defined and ascertainable functionaries charged with the celebration of a marriage and that the jurisdiction of the competent officer mentioned in article 128 is necessarily territorially restricted as indicated in article 63; and that is the only logical outcome of the provisions of articles 130 *et seq.* The purpose of such provisions and their efficacy to attain the object sought by the Legislature—the prevention of clandestine marriages, incestuous marriages, bigamous marriages and marriages between minors without the consent of parents—are well stated by Mr. Justice Lemieux in *Durocher* v. *Degré*, Q.R. 20 S.C. 456, at pp. 488 *et seq.* To hold, as is maintained by those who contend for a negative answer to both branches of the second question, that every officer authorized to keep a marriage register is competent to solemnize the marriage of any two persons who come before him, whatever their residence and whatever their religion, provided only they produce to him a license from the Crown, is to destroy at once and completely all the elaborate safeguards which the Legislature has provided to prevent those manifest evils. As put by Mr. Justice Lemieux:—

> Can it be supposed for an instant that the codifiers, after having ordained the publication of marriage (*a*) in the church of the parties; (*b*) before a public officer belonging to the worship of the parties; (*c*) by their curés; (*d*) and after having left to the religious authorities to whom the parties are subject the discretion of granting or of refusing the dispensation of such publication would, after providing for all this series of formalities to be carried out by the curé and the religious authorities in the church of the parties, have left persons after all free to contract marriage before no matter what minister and of a different religion. The idea seems to us neither reasonable nor probable.

Articles 42, 44 and 45 now call for attention:—

> 42. Acts of civil status are inscribed in two registers of the same tenor, kept for each Roman Catholic parish church, private chapel or mission, and for each Protestant church or congregation or other religious community, entitled by law to keep such registers, each of which is authentic, and has in law equal authority.
>
> 44. The registers are kept by the rector, curate, priest, or minister having charge of the churches, congregations, or religious communities or by any other officer entitled so to do.
>
> In the case of Roman Catholic churches, private chapels or missions, they are kept by any priest authorized by competent ecclesiastical authority to celebrate marriages or administer baptism and perform the rites of burial.

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45. In the case of Roman Catholic churches, private chapels or missions, the register must be granted under the name mentioned in the certificate of authorization by the bishop, the ordinary of the diocese, the vicar general, or the administrator; and the priest on presenting the register for authentication must exhibit the certificate of authorization.

In these articles the Code expressly recognizes the power of the Catholic bishop to appoint priests for the solemnization of marriage and to confer upon them the requisite authority. Their right to keep civil registers is made to depend upon this authorization of the bishop and their competence to solemnize marriage for civil purposes is in turn made to depend upon their being so authorized to keep registers. (Article 129.)

This latter article, which reads as follows,

129. All priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status, are competent to solemnize marriage.

But none of the officers thus authorized can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion and the discipline of the church to which he belongs,

is the sheet-anchor of those who contend that every officer authorized to keep a marriage register is competent to solemnize any and every marriage. It is, on its face, not a facultative provision. It is declaratory of a legal competence already existing—which in the case of ministers of dissenting bodies had been conferred by the statutes consolidated in the C.S.L.C., 1860, ch. 20, and by subsequent similar acts. It is necessarily general in its terms. It must, as must every provision of the Code, be read with the other articles and be so construed that their efficacy shall not be destroyed. It is consistent with the limitations which the provisions above discussed necessarily entail. Having regard to the facts that solemnization by their proper curé or by a priest acting with his authority or that of the ordinary, was an essential condition of the validity of marriage by the civil law of Canada at the time of the conquest, that this continued to be the law in respect to Catholics after the conquest, that the instructions to the codifiers were to express the existing law, that in their report they say their object has been to preserve to everybody

the enjoyment of his customs and practices according to which the celebration of marriage is entrusted to the ministers of the worship to which he belongs,

and that they inserted numerous provisions in the Code compatible only with that intention, I have not the slightest doubt that, upon a proper construction, article 129 cannot be read as conferring the general and indiscriminate power to solemnize marriage which Mr. Lafleur felt compelled to contend for and

which would inevitably entail upon the province the very evils which the whole tenor of its enactments in regard to marriage makes it clear it was the purpose of the Legislature of Quebec to obviate.

I am of the opinion that under the various provisions of the Civil Code, quite apart from any impediment created by the laws of the Catholic Church, it is essential to the validity of the marriage of two Catholics in the Province of Quebec that the celebrant should be the parish priest of one or other of them or a priest acting with his permission or with that of the bishop. Since the marriage may be solemnized at the domicile of either party (article 63) this requirement of the civil law seems to be inapplicable to the marriage of a Catholic with a non-Catholic. The effect of the other articles of the Civil Code relating to marriage, which reproduced the provisions of the civil law as it stood at the conquest with some subsequent legislative modifications, therefore harmonizes with that of article 127 C.C., which recognizes and adopts for Catholics the law of the Catholic Church as it stood in 1866 in regard to impediments to marriage other than those enumerated in the preceding articles of the first chapter of the title on marriage. On no other construction of the various articles of the Code dealing with marriage can the obvious policy of the Legislature be carried out or can due effect be given to them all. This conclusion is in accord with the great weight of the jurisprudence of the Province of Quebec. In addition to *Laramée* v. *Evans*, 24 L.C.J. 235; 25 L.C.J. 261, and *Durocher* v. *Degré*, Q.R. 20 S.C. 456, already cited, I may refer to *Globensky* v. *Wilson*, M.L.R. 2 S.C. 174; *Vaillancourt* v. *Lafontaine*, 11 L.C. Jur. 305; and *Valade* v. *Cousineau*, Q.R. 2 S.C. 523.

Against the view supported by these authorities there are only the decisions of two Judges of first instance—one in *Delpit* v. *Coté*, Q.R. 20 S.C. 338, in effect overruled within two months by the Court of Review in *Durocher* v. *Degré*, Q.R. 20 S.C. 456, and the other in *Hébert* v. *Clouâtre*, 6 D.L.R. 411, 41 Que. S.C. 249.

The effect of the provisions of the statutes and of the Code in regard to marriage licenses must still be considered. Although addressed "to any Protestant minister of the Gospel," the license does not confer upon him the power or authority to solemnize marriage. (Articles 128 and 129.) That is derived from the law in the case of Protestant clergymen and in the case of Catholic priests from the bishop, whose authorization to solemnize marriage carried with it by law the right to keep marriage registers for civil purposes (articles 44 and 45 C.C.), that right in turn involving the civil competence of the priests so authorized to solemnize marriage. (Article 129 C.C.)

In the Catholic Church the bishop has the power to dispense

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with the publication of banns. The French law in force in Lower Canada recognized that right for civil purposes, and by articles 59 and 134 C.C. it is continued. The license issued by the Crown is nothing more than a substitute or an equivalent in the case of Protestants for the bishop's dispensation from the publication of banns, which Catholics must obtain if they wish to be married without such publication, and probably also from the obligation of marriage in the church. It is urged that it also does away with the requirement of marriage at the domicile, but I more than doubt that.

Article 57 prescribes that:—

> before solemnizing a marriage, the officer who is to perform the ceremony must be furnished with a certificate establishing that the publication of banns required by law has been duly made; unless he has published them himself, in which case such certificate is not necessary.

By article 59 (*a*) it is provided that:—

> In so far as regards the solemnization of marriage by Protestant ministers of the Gospel marriage licenses are issued by the department of the provincial secretary under the hand and seal of the Lieutenant-Governor, who, for the purposes thereof, is the competent authority under the preceding article.

The issue of a license to a minister to solemnize a projected marriage does not confer on him the requisite power to do so. It is an authority to the minister to be chosen, if he be competent by law, to proceed with the marriage without proof of the publication of banns and probably elsewhere than in his church. If the minister be otherwise incompetent to solemnize the marriage, the license has no greater validating effect upon it than it would have if the parties were legally incompetent to contract marriage. The minister is personally protected from any action or liability for damages by reason of any legal impediment of which he was not aware, article 59 (*a*); but beyond that the license has no saving force.

That marriage licenses issued by the Crown are intended solely for Protestants is made clear by a reference to article 59(*a*) and to the R.S.Q. (1909), arts. 1494, 1495, 1497, 1498 and 2943. The provisions for licenses are confined to the solemnization of marriage by Protestant ministers and the fees derived from them are by law devoted to Protestant superior education.

There is nothing, therefore, in the provisions of the law regarding licenses inconsistent with the view that a marriage between Catholics in the Province of Quebec can be validly solemnized only by the curé of one of the parties or by a priest authorized by him or by the bishop.

I express no opinion as to what persons should, for civil purposes, be deemed subject as Catholics to the impediment which has been under discussion. That question has not been asked.

Before concluding this opinion I think it right to direct attention to the important, but too often overlooked, provisions of articles 163 and 164 of the Civil Code, which are as follows:—

163. A marriage although declared null, produces civil effects, as well with regard to the husband and wife as with regard to the children if contracted in good faith.

164. If good faith exist on the part of one of the parties only, the marriage produces civil effects in favour of such party alone and in favour of the children issue of the marriage.

My conclusions in regard to the second question are that in the Province of Quebec marriages between persons who are both Catholics solemnized before a Protestant clergyman or minister are civilly invalid; marriages between persons one of whom only is a Catholic, commonly called mixed marriages, which would otherwise be legally binding, are civilly valid whether solemnized before a Catholic or a Protestant clergyman or minister. These results flow from the provisions of the civil law of that province taken by themselves; and also from the law of the Catholic Church, so far as it is given civil effect by article 127 of the Civil Code. The recent decree known as "*Ne Temere*" I understand not to be within article 127 C.C. It has not received any other legislative recognition and has, therefore, no civil effect.

I would answer the second question submitted, as to clause (*a*) in the affirmative, and as to clause (*b*) in the negative.

I answer the third question in the negative for the reasons which Mr. Justice Davies has assigned in support of the negative answer to the first question.

As was so aptly pointed out by Mr. Smith, the special and unique provision made by section 93 of the British North America Act for federal remedial legislation, intended as a protection to religious minorities in educational matters, precludes the idea that, in regard to other subjects assigned to the exclusive jurisdiction of provincial Legislatures any general overriding legislative power is vested in the Dominion Parliament.

I would, in addition, merely direct attention to the omission of the Province of Quebec from the 94th section of the British North America Act, which provides for Dominion legislation for uniformity in the laws of Ontario, Nova Scotia and New Brunswick as to property and civil rights, subject to the approval of the provincial Legislatures, as affording another argument of some cogency in support of the negative answer to the third question. "The Province of Quebec is omitted from this section," says Sir Montague Smith, speaking for the Privy Council in *Citizens' Insurance Co.* v. *Parsons*, 7 App. Cas. 96, at p. 110, "for the obvious reason that the law which governs property and civil rights is in the main the French law as it

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existed at the time of the cession of Canada and not the English law which prevails in the other provinces."

There cannot be the slightest doubt that the representatives of Lower Canada insisted that, from the subject of "marriage," which, in the original draft of the confederation pact, was given in its entirety to the Dominion Parliament, should be taken out and assigned to the exclusive legislative jurisdiction of the province, "the solemnization of marriage," in order that the complete control of the Legislature of the Province of Quebec over all that pertains to that subject should be assured and that there should be a constitutional guarantee against federal interference with the provisions of its civil law, carefully framed to suit local conditions, in a matter so vital to civil rights.

Per Curiam.

The following announcement was made by the Chief Justice with respect to the Reference:—

To both branches of the first question, the Chief Justice, Mr. Justice Davies, Mr. Justice Duff, and Mr. Justice Anglin answer "No."

The answer of Mr. Justice Idington is:—

"It is an impossible bill as it stands. If I must answer categorically, then I say as follows: The retrospective part would be good as part of a scheme for concurrent legislation by Parliament and Legislatures confirming past marriages which probably neither can effectively do. The prospective part so far as possible to make it an effective prohibition of religious tests may be good, but doubtful, and the probable purpose can be reached by a better bill."

To the second question—the Chief Justice asks permission to decline to answer the first branch of this question, for the reasons given in the attached memorandum. (See p. 335 *ante*.)

To the first branch of the question—Mr. Justice Davies, Mr. Justice Idington and Mr. Justice Duff answer "No." To that first branch the answer of Mr. Justice Anglin is "Yes."

To the second branch of question No. 2—the Chief Justice, Mr. Justice Davies, Mr. Justice Idington, Mr. Justice Duff and Mr. Justice Anglin, answer "No."

To the third question—The Chief Justice, Mr. Justice Davies, Mr. Justice Duff and Mr. Justice Anglin answer "No."

Mr. Justice Idington's answer is:—

"As to the third question, sub-section (*a*) I answer 'yes' to be concurred in by the respective Legislatures of provinces concerned and as to sub-section (*b*) I answer 'yes' if and when a province fails to provide adequate means of solemnization."

Answers accordingly.

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Quebec Court of Review, Pagnuelo, Charbonneau, and Dunlop, JJ.

SALE (§ II E—44)—WARRANTY—DUTY OF SELLER TO TEST.

Where machinery is sold with a warranty that it shall work to the satisfaction of the purchaser, it is the duty of the seller to thoroughly test it, under conditions similar to those in which it is to be used before delivering the machine to the purchaser.

Statement

APPEAL by defendant company from the judgment of the Superior Court, district of Joliette, DeLorimier, J.

The appeal was dismissed and the judgment below affirmed by the Court of Review.

The facts disclosed were as follows: On August 9, 1905, defendant company through its agents, Coutu and Robillard, sold a windmill and tank outfit to plaintiff to be erected and installed on plaintiff's property at Ste. Elizabeth.

By the warranty on the reverse side of the contract, plaintiff's exhibit No. 1, the company undertook to guarantee that its windmills and other goods were constructed solidly and of first class material, and that it would make good any part found defective, either by construction or poor quality of material, provided the parts were forwarded to the company's workshop. The outfit arrived at the end of August, 1905, and Geoffrion, one of the company's employees, erected it. He worked for about eight days, and before leaving it, as there was no wind to try it, Geoffrion tested it and found it all right. During the week that Geoffrion was on plaintiff's farm, he instructed plaintiff and his son as to how the windmill should be worked. He explained the pump, regulator and other parts of the apparatus. The day after Geoffrion left, a wind arose and the windmill half filled the tank before it stopped. Plaintiff investigated the matter and found that a small piece of pipe had been broken, and he drove to St. Félix de Valois and requested Coutu, the company's sales agent, to have the part adjusted. Several days passed before the part was adjusted and after that Bonin got the water all right, and when the company's employee visited the premises he discovered that the reason for the irregularity in the working of the windmill was that sand was being introduced into the intake pipe and thence into the pump, and the pump was thus becoming clogged, rendering the action of the windmill irregular. Robillard, the company's employee, suggested to Mr. Bonin that he should either buy a filter so as to prevent the sand or gravel from getting into the pump, or he should be more careful and from time to time clean the pump of the gravel and sand that was bound to enter therein.

Mr. Robillard declared that the entry of the sand and gravel into the intake pipe was caused by heavy autumnal rains. Plain-

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tiff complained that the tank was leaking. Robillard explained to Bonin that all wooden tanks were bound to leak and sweat for some months after they were installed, and that plaintiff should keep on screwing up the hoops which encompassed the tank.

J. E. Ladouceur, for plaintiff.

E. Hébert, for defendant; *A. G. Brooke Claxton*, K.C., counsel.

The following opinion was handed down.

Dunlop, J.

DUNLOP, J.:—Plaintiff's action was served on the 20th November, 1905, and in it he complains that the pipe installed at the bottom of the well was badly placed, that the tank leaked, the regulator would not work and the float would not act, and prayed that the contract be set aside and that he be awarded $104.00 damages. The defendant pleaded in effect that the outfit was properly erected; that the company was willing to make good any parts that were defective or broken through defective material; that the irregularity in the working of the windmill was not due to any defect in the outfit, but to plaintiff's inability or unwillingness to follow the instructions given to him as to how he should run and care for the outfit; that a part was broken owing to plaintiff having permitted sand to enter and clog the pump, and that plaintiff, previous to the action, had used and was still using the windmill and obtaining water therefrom. The judgment dissolves the contract and condemned defendant to pay $31.00 for various small items. The Court based its judgment, in my opinion, correctly, upon the grounds that defendant undertook to erect the outfit to the entire satisfaction of plaintiff; that defendant's employee, Geoffrion, after completing the installation of the outfit, should have waited until a favourable wind arrived by which he could have tested the outfit, instead of contenting himself with testing it by hand; further, that defendant's tank was sweating and leaking, and finally, that the windmill was so broken up that it could not be repaired. The employees of the defendant sent to repair the mill failed to give satisfaction to the plaintiff, who protested the defendant on the 17th of October by letter of his attorneys.

It may be remarked that the plaintiff never thought of repudiating his contract. He required the windmill in question and he was perfectly able and responsible to pay the price agreed on. He had no interest except the interest of obtaining a suitable windmill. The outfit in question has never been installed as it should have been, according to the guarantees expressed in the contract. It has not been installed so that it could be used for the purpose destined.

It was the duty of the defendant to erect and install the outfit so that it would work properly and to see that all necessary accessories were there to give the result guaranteed. Now it has been proved that it has not been so installed, and this certainly was a fault on the part of the defendant. The proof shews that the outfit in question has deteriorated and cannot now be properly installed, and as it has not been installed to the satisfaction of the plaintiff, he has the right to take the present proceedings. I am of opinion that the judgment is justified by the proof, and that it should be confirmed in all respects, with costs against the defendant in both Courts.

Appeal dismissed.

Re McKAY.

Ontario High Court, Middleton, J. June 26, 1912.

1. WILLS (§ III G 8—156)—CONSTRUCTION—DISTRIBUTION PER CAPITA.

The grandchildren of a testator take *per capita* under a testamentary provision that, after the expiration of the period fixed for the payment of certain charges upon a designated amount of money, such sum should become the residue of the testator's estate and be divided among his surviving grandchildren.

2. WILLS (§ III G 8—156)—CONSTRUCTION — DISTRIBUTION PER STIRPES.

Grandchildren of a testator will take *per stirpes* under a will directing that a certain portion of the testator's estate should be divided into as many parts as he had children surviving him, which were to be invested by his trustees and the interest paid to his children, which sums so set apart to them were given to the issue, if any, of such surviving children, and in the event of any child dying without issue, that the amount of the portion that would have gone to such issue, if any, should be divided among the other children of the testator, share and share alike.

3. WILLS (§ III G 7—151)—CONSTRUCTION — ATTEMPTED POSTPONEMENT OF BEQUEST OF INCOME AFTER BENEFICIARY'S MAJORITY.

A direction in a will that a bequest of the income from a sum of money to the sons of the testator shall be paid to them when they attain the age of 27, is ineffective to prevent payment to them of the accrued income at their respective majorities.

4. WILLS (§ III H—172) — TRUSTEES — DISCRETION — AUTHORITY TO PAY MEDICAL EXPENSES OF BENEFICIARIES WHEN "DEEMED PROPER."

Where trustees are empowered by a will to pay such medical expenses of a beneficiary as they "deem proper" they are the final authority and the Court will not order re-coupment in favour of such beneficiary of a claim for medical expenses for which only the beneficiary or her husband is directly liable, and which the trustees have rejected in good faith.

Statement

MOTION by the executors and trustees under the will of Hugh McKay, deceased, upon an originating notice, for an order determining certain questions arising upon the construction of the will.

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The motion was heard at the London Weekly Court on the 22nd June, 1912.

J. B. McKillop, K.C., for the London and Western Trust Company, executors.

F. P. Betts, K.C., for the widow, Ellen McKay.

T. G. Meredith, K.C., for James R. McKay, and other adult children of the testator.

J. M. McEvoy, for Ethel M. Parker, a married daughter.

P. H. Bartlett, for Mary McKay and F. C. McKay, infant children.

W. R. Meredith, for grandchildren and unborn issue of children.

Middleton, J.

MIDDLETON, J.:—The late Hugh McKay died on the 3rd July, 1897, leaving an estate of upwards of $60,000, personalty. He left him surviving his widow and eight children, all the children being at that time infants. Since his death two of the children—Gordon Alexander McKay and Nellie Irene McKay—have died, while yet infants and unmarried.

By his will, dated in September, 1896, the testator bequeathed all his property to his executors upon trust to get the same in and to invest and hold it upon the trusts set forth.

The various trusts mentioned are so ill-defined, confused, and contradictory, that it is impossible with any certainty to grasp what was in the mind of the testator.

He first directs that, from the moneys realised, $35,000 be set apart, and thereout and out of its accumulations there be paid to the wife for five years an annuity of $1,500, for the next five years an annuity of $1,200, and during the rest of her life an annuity of $1,000. Upon her death or remarriage, this fund "is to become part of and to form the residue of my estate." The annuity is to be used by the wife in the maintenance of herself and such of the children as shall elect to reside with her; and upon her death "the above sums" are to be paid to the guardian named, for the maintenance of any infant children until they attain age.

By the next clause of the will, the fifth, the "remainder" of his estate is to be divided into as many parts as he shall have children living at the time of his decease; and these shares are to be invested, the interest arising to be paid to each daughter when she attains the age of 21, and to the son when he shall attain 27. But, in case of the sickness of any of the children, the trustees are to have power, if they deem proper, to pay for the medical and other attendance; the amount so paid to be deducted "from the residue of my estate, and in the event of any child electing to enter a profession or to attend a university the trustees may provide from the residue of my estate and charge

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to the interest of such child sufficient money for the aforesaid purpose." Each daughter is also to have $400, and each son $500 when married, "such sums to be deducted from the residue of the estate."

By the sixth clause, the principal sum invested for each son and daughter is given "to their issue, if any;" but, in the event of any son or daughter dying without issue, the amount of the portion that would be his if he had lived is to become part of the principal and to be equally divided among the other children, share and share alike, and "to be governed by paragraph No. 5;" the widow of any son to have a third interest paid to her during widowhood. By the same clause, the "residue of my estate is to be divided among my surviving grandchildren, and the interest accruing thereon to be paid to my children, each to share and share alike."

Two theories are put forward as to the construction of the will.

It is argued by Mr. T. G. Meredith and those in the same interest that the testator has contemplated two distinct funds: the first consisting of the $35,000 to be held for the widow, which he designates "the residue of my estate;" the other, which he designates "the remainder of my estate," is everything beyond this $35,000. This "remainder" is to be divided into eight portions, one to be held for each child; and it is contended that the primary idea with reference to this fund is, that it is to remain intact for the children. The $35,000, erroneously called the "residue," is to be resorted to in the first place for the payment of the widow's annuity. The annuity would not exhaust the income derived from the fund. Upon this fund there was also to be cast the special payments for the maintenance of the family. The medical expenses and expenses of a kindred type are, by clause 5, directed to be borne by "the residue." Moneys spent for educational purposes, while to be first paid from this residue, are to be ultimately charged "to the interest of" the child. The allowance upon marriage is also directed to be paid from the residue, but there is no provision in this case that it should be charged against the child's interest.

It is then argued that the testator has attempted, with reference to what he calls "the remainder," to create an estate tail in his personal estate. The income is to be invested until each daughter attains the age of 21, when she is to receive the income of her share, including accumulations. The income on the share of the son is to be invested until the son attains the age of 27, when he is to receive the income, including accumulations. The principal invested is to go to the issue of the son or daughter who dies, and in the event of a son or daughter dying

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without issue, then the shares of the other children are to be augmented, subject to the dower provision made for the widow of a deceased son. When the residuary estate, so-called—that is, the $35,000—is free from its primary burden of providing an income for the maintenance of the wife and family at home, or the minor children in the case of her death, then this residue is to be divided among the testator's surviving grandchildren.

The opposing theory, advocated by Mr. W. R. Meredith, in the interests of the grandchildren, is, that the $35,000 is set aside for a temporary purpose merely. Upon the death of the widow it is to form part of the residue, and there is but one residual fund to be dealt with. Upon the death of the children, this residual fund is to be divided, share and share alike, among the then surviving grandchildren; the children having in the meantime shared in the income derived.

No third theory for the construction of the will has been suggested.

Each theory has its defects. The theory advocated by the children involves the rejection of the words "to be part of," in the clause dealing with the $35,000, where the testator directs it upon the death of the wife "to become part of and to form the residue of my estate." Yet the opposite theory presents a similar difficulty, as it involves the rejection of the words "to form," found in the same expression. It is also unlikely that the testator would mean to postpone the division of the estate until the death of the last surviving child, and that this should be the time when the surviving grandchildren would take.

I am inclined to accept the first theory, with some modifications. It appears to me that the period for which the residue is to be held under clause 4 is the death or marriage of the wife and the attaining of age of the youngest surviving child, whichever is latest. Up to that time this fund is to be resorted to for the purpose of maintaining the family; and in the meantime, I think, the trustees had the right to resort to it also for the purpose of medical and kindred expenses and for the payment of the marriage portions of both sons and daughters; and I would fix this as the period of survivorship, when the division amongst the grandchildren is to take place. Until then, any interest arising from this $35,000, not used in the payment of the widow's annuity or the substituted annuity for the maintenance of minor children, should be divided among the children equally.

This gives meaning to both branches of the seemingly self-contradictory clause at the end of paragraph 6.

What then is the position with reference to the share of the children in the so-called remainder—the sums that were directed to be divided and allocated to them respectively after the $35,000 had been set apart?

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Mr. T. G. Meredith contends that there is an absolute gift to the children, because this is an unsuccessful attempt to create an estate tail in personalty. I do not agree with this. It appears to me that it is a gift of each share to the executors to hold in trust for the child during life, and upon the death of the child the principal of each share is given to the issue, if any, of the child absolutely, and, in the event of the death of the child without issue, then the shares fall into the fund of the surviving children and are to be governed by paragraph 5; which I understand to mean, to be held upon the trust indicated, the income to be given to the other children for life. It is not a gift to the child "and his issue," which I agree would be absolute.

The result of this is, that the shares of the children in everything over the $35,000 will ultimately be distributed among the grandchildren *per stirpes*, while the grandchildren will share in the $35,000, when it comes to be divided, *per capita*. The children are given nothing but the interest; the interest on the shares being theirs absolutely; and the attempt to postpone payment in the case of sons to the age of 27 being nugatory, on well-understood principles. The right of the children to receive interest on the $35,000 will terminate on the arrival of the period of distribution.

Several orders have been made by the Court dealing with this estate, and increasing the allowances for maintenance. The first order was made on the 16th May, 1898, in the matter of the estate and in the matter of the infant children. The widow had claimed certain insurance money, and the order recites, as a term of its being made, that she was to withdraw all claims thereto. The allowance was increased from $1,500 to $2,300 per annum; the infant Gordon Alexander to have no part or share therein save that the executors were to retain out of this $2,300, $166.66 for his support and maintenance; this increased allowance to be charged against the estate of the infants other than Gordon Alexander.

By another order, dated the 24th May, 1902, it is declared that the children under paragraph 5, take vested interests in the income of the estate, and are entitled to have the same or a sufficient portion applied for maintenance respectively. The same order provides that the allowance for maintenance be increased for a period of four years to $2,500 per annum; this increased allowance to be charged against the respective shares of the infant children other than Gordon Alexander.

On the 23rd February, 1903, an order was made for payment of $200 for two years for the education of infants. No provision is made how this shall be charged.

On the 27th June, 1905, an order was made directing payment by the trustees of the medical expenses of Gordon Alex-

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ander McKay, these expenses amounting to $555. No provision is made as to how this shall be charged.

On the 23rd of March, 1906, a further order is made for payment of $600 for medical treatment of Gordon Alexander McKay.

On the 1st June, 1906, the allowance under the 4th paragraph of the will is made $2,000 for a period of three years, to be charged in equal proportions against the children, other than Gordon Alexander McKay.

On the 30th June, 1906, an order is made providing that out of the share of Gordon Alexander McKay, moneys may be expended for his medical treatment.

On the 10th July, 1909, the annual allowance is continued at $2,000 for two years; and on the 10th June, 1911, this is continued for a further period of three years; this order providing that the increased allowance shall be charged against the shares of the children other than Gordon Alexander.

I am not called upon to consider the validity of these orders or their propriety. Effect must be given to them according to their terms. The increased allowances must be charged as they direct, against the shares, in which, in my view, the children had only a life interest. The annual payments authorised by the testator must be charged to the $35,000 fund.

The accounts should be made up and taken upon that basis.

On this application, the married daughter Ethel M. Parker asks for a direction that the executors should pay to her a sum to recoup her for medical and kindred expenses. I do not think that I can make any such order. She is married, and, *primâ facie*, her husband ought to bear any such expenses. But, apart from that, the payments for medical and kindred expenses are payments which the executors "deem proper." The executors in this case expressly state that they do not deem the payments now sought to be proper. They are the final authority.

Save as expressly directed by the orders of the Court, my view is that the payments for medical expenses must be borne by the $35,000; advances for educational purposes must be borne by the shares of each child; and that the orders of the Court dealing with specific sums must be given effect to in accordance with their terms.

Where no specific direction has been given with reference to the costs of different applications, costs should be charged in the same way as the sums dealt with by the order.

I think that the foregoing covers all the different matters discussed, and that there ought to be no difficulty in making out accounts upon the footing indicated.

Costs of all parties of this application should be allowed out of the $35,000 fund.

Order accordingly.

LANDRY (defendant, appellant) v. **McCALL** et al. (plaintiffs, respondents).

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Quebec King's Bench (Appeal Side), Archambeault, C.J., Lavergne, Cross, Carroll, and Gervais, JJ. February 26, 1912.

1. FRAUDULENT CONVEYANCES (§ IV—16)—SALE—KNOWLEDGE OF TRANSFEROR'S FINANCIAL POSITION—ANNULMENT.

Where an insolvent firm sells its property, subject to a right of redemption, to a person who is aware of its insolvency, and uses the proceeds to pay certain creditors to the prejudice of the others, the sale will be annulled at the suit of the latter as being in fraud of their rights.

2. INSOLVENCY (§ IV—16)—RIGHT OF CREDITORS TO RANK ON ESTATE—PRIORITIES—PREFERENCE.

All creditors (apart from privileged creditors) are entitled to share alike in the proceeds of their debtor's property and if some alone receive the proceeds the others are prejudiced, even if the property be sold for its full value, and although a right of redemption has been reserved by the debtor; and the purchaser cannot ask that the objecting creditors exercise this right of redemption on the debtor's behalf.

3. FRAUDULENT CONVEYANCES (§ IV—19)—ANNULMENT OF SALE—RIGHT TO RECOVER BACK PURCHASE MONEY—RESERVATION OF REMEDY.

The purchaser as against whom a sale by an insolvent is set aside as fraudulent to the purchaser's knowledge cannot demand that if the sale be annulled he should be refunded the purchase price from the estate, but as the purchaser's money has gone to pay certain creditors, the Court in annulling the sale will reserve to him any recourse which he may have after the affairs of the insolvent firm are wound up.

Statement

ACTION to set aside the sale of a stock of goods as fraudulent against creditors. The judgment appealed from and which is confirmed, GERVAIS, J., dissenting, was rendered by the Superior Court, Roy, J., on May 10, 1911.

Gagnon, Sasseville & Gagnon, and *J. N. Pouliot*, K.C., for the appellant.

Fiset, Tessier & Tessier, and *A. Marchand*, for the respondents.

Archambeault, C.J.

ARCHAMBEAULT, C.J. (translated):—This is a paulian action (*actio pauliana*).

On June 20, 1910, a commercial firm named J. O. Couture & Bros., sold to the appellant certain goods and movable effects set out in a list attached to the contract for the sum of $3,500 with the right of redemption during the period of one year. The respondents were at that time creditors of the firm of Couture & Bros. in a sum of about $1,800. They pretend that the sale of June 20, was made at a time when the firm was to the appellant's knowledge insolvent and that its effect was to withdraw the goods which were sold from the recourse of the creditors of the firm and of the respondents themselves in particular. They ask in consequence that the sale be annulled as fraudulent.

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The appellant has answered to the action that the firm of Couture & Bros. was not insolvent at the time of the sale and was not rendered insolvent by the sale; that he acted in good faith, not believing that the firm was insolvent, and in order to allow it to pay its most pressing debts; that the sale price was in fact used to discharge certain debts of the firm; and that as the contract included a right of redemption the creditors could always take back the goods that were sold on repaying the sale price.

The Court of first instance maintained the action. I am of the opinion that this judgment is well founded.

It is shown that the appellant at the time the deed of sale in question was passed had been in business relations with the Coutures for ten years. On the 6th of July, 1910, fifteen days after the sale, the firm made a judicial abandonment of its property. The appellant fyled a claim for a sum exceeding $11,000.00 and it is shown that the firm also owed him on the 20th June, 1910, a sum of $3,000 for promissory notes and that on the next day, June 21, he obtained two hypothecs, one for $1,000 and one for $2,000, from two of Coutures' relations upon property belonging to them, in consideration of the transfer which he made to them of these two notes. The day before the sale, on the 19th of June, the appellant got the wife of J. O. Couture, who was the manager of Couture Bros., to sell him some real property belonging to her for the sum of $2,000 subject to a right of redemption. The appellant admits that he did not pay this $2,000 to Mrs. Couture and that he only gave her about $200. These actions are certainly of such a nature as to create a strong presumption that the appellant knew or at least suspected that the firm was insolvent or about to become so and that he was consequently taking precautions to protect himself against this insolvency. It is also shown that the appellant that the Couture firm had been sued by the Banque Nationale, by one Arthur Fournier and by one J. Z. Roy for small sums forming altogether an amount of about $500. The firm was unable to settle these small claims. J. O. Couture, the head of and manager of the firm, had acquainted the appellant with the firm's affairs. The appellant knew that unless the firm obtained a sum of about $20,000 it could not continue its operations. It was then that the appellant had the sale of 20th of June made to himself, so as to allow the Coutures to satisfy the most pressing creditors immediately and thus to obtain a delay in which to find the $20,000 which they required. Under these circumstances it seems evident that the appellant knew of the insolvency of the firm of Couture & Bros. and that in purchasing the goods and effects which were sold to him he knew that he was infringing the rights which the Couture creditors

had over this property. But the law does not allow such arrangements. They are declared fraudulent and may be annulled at the suit of the creditors.

It is not necessary that fraud should exist in the worst sense of the term. A fraudulent understanding between the third party and the debtor is not required. It suffices that the debtor should be insolvent and that the third party should know of this insolvency to constitute fraud within the meaning of the law. Article 1035 C.C. declares that:—

> An onerous contract made by an insolvent debtor with a person who knows him to be insolvent is deemed to be made with intent to defraud.

Laurent, vol. 16, p. 517, says that the Cour de Cassation has held that a third party is an accomplice when he is aware of the debtor's insolvency and knows consequently that the action which he is about to take will cause prejudice to the creditors.

The fact that the appellant has paid the full value for the property which he has bought does not prevent the action from being fraudulent. Laurent, vol. 16, p. 509, says:—

> Il se peut, que le prix porté à l'acte soit réel et qu'il soit l'expression de la juste valeur de la chose; la vente n'en serait pas moins frauduleuse si elle avait été faite pour soustraire l'immeuble vendu aux poursuites des créanciers et si le prix n'avait pas tourné à leur profit.

Aubry & Rau, vol. 4, p. 135, say the same thing. An insolvent creditor has no right to donate or to sell his property which is the common pledge of his creditors. A third party who knows of his insolvency has no right to assist him in the execution of such a design.

Neither does the fact that the sale contains a clause of redemption affect the question. A debtor cannot oblige his creditors to re-purchase the property which he has sold so as to replace it in his patrimony. It should never have left the latter and it should return without expense to the creditors.

Finally the appellant pretends that the deed should not be annulled because the product of the sale has served to pay a certain number of the creditors. A debtor has no right to distribute the value of his property among his creditors himself. He cannot pay some and leave others aside. I quite admit that if the appellant had established that the debts which had been discharged were privileged claims and preferable to the respondents' claim the action should have been dismissed. In that case there would indeed have been no prejudice to the respondents, and the existence of a prejudice is an essential condition to the plaintiff's success in a *paulian action*. But no such proof has been made in the present case. A list of the creditors who received the moneys arising from the sale of June 20 is in the record. They are ordinary creditors with the exception perhaps

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of several labourers and wood-men whose united claims hardly amount to three or four hundred dollars. For all these reasons I am of opinion to confirm the judgment of the Court of first instance.

CARROLL, J. (translated):—Was the appellant aware of the insolvency of the firm of J. O. Couture & Bros. on the date of the contract of sale subject to redemption on June 20, 1910?

If we take into account the previous business relations between the appellant and the firm, and the latter's financial position at this date of June 20, we can come to no other conclusion than that he knew of the insolvency.

What were these business relations? It is shewn that they extended over nearly ten years; that the firm owed him on this date according to its statement of July 5, 1910, the sum of $10,600, and that after the abandonment of property the appellant fyled a sworn claim for the sum of $11,119.20. In this claim he declares that the sum which was due him on June 20, included interest at 7 per cent., upon hypothec for $3,100 and that the firm had failed to pay him this interest since July 11, 1901. It is also shewn that on the same date of June 20, the firm owed him a further sum of $3,000 for promissory notes which it gave to him on the following day in consideration of other deeds which were entered into on June 21, 1910. It therefore owed him on the 20th of June, a total sum of $14,119.20 and this sum included arrears of interest for nearly nine years, namely from July 11, 1901, on a debt of $3,100.

What was the financial position of the Couture firm, to the appellant's knowledge, towards its other creditors on this date? It is shewn that it then owed the Eastern Townships Bank the sum of $20,000 and the Banque Nationale another sum of $10,000; that the Molsons Bank had refused to make it any advances; that it had been sued by several creditors, three of whom had obtained judgment against it by default; that several days previously its manager had endeavoured to obtain further advances from the Banque Nationale and delay from several of the creditors; that these advances and this delay had been refused; that it no longer had the necessary money to pay its employees' wages. It was under these circumstances that the firm, in order to avoid the execution of the judgments rendered against it, and to pay its employees' wages, transferred to the appellant under this sale subject to redemption the balance of its assets of which it could dispose, namely, all the goods and movable effects which served for the carrying on of its business.

It is shewn that the sum of $3,500, which represented the price of these movable effects, was only advanced to the appellant by the Molsons Bank upon his personal guarantee and credit. The appellant's conduct shews that he knew that this

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sum of $3,500 could only prevent the firm going into liquidation for a few days. Indeed, on the eve of this sale and on the morrow, he hastened to secure a portion of his claim against the firm, namely, a sum of nearly $5,000, by means of authentic deeds granted to him by Stéphane Couture, Etienne Couture and the wife of J. O. Couture, who was manager of the insolvent firm. These persons, who were not members of the firm, consented to hypothecate or transfer their property and they only received in consideration for these hypothecs or transfers promissory notes for the sum of $3,000 due by the firm to the appellant. These facts are of a nature to create a very strong presumption that the appellant was then aware of the firm's insolvency and advanced the further sum of $3,500, representing the value of its plant, for the purpose of obtaining security for the part of his claim against the firm. Therefore, according to art. 1035 C.C., this contract, which was made by the firm, then insolvent, with the appellant, who was then aware of this insolvency, is deemed to have been made with the intention to defraud and we have no need to seek for the *consilium fraudis*.

Did this contract have the effect of injuring the other creditors of the firm as provided by art. 1033 C.C.? The property of a debtor is the common pledge of his creditors, which means that the property which composes a debtor's patrimony is liable in a general way for the payment of all his debts and that it is applicable as a whole for all and each of his creditors. (Beaudry-Lacantinerie, Obligations, vol. 1, p. 553). The appellant admits in his factum that this sum of $3,500 which represents the sale price which the appellant paid for the plant, was wholly employed in paying the creditors of the insolvent firm; it is shewn that among these creditors there were several who were the holders of judgments which they had obtained against the firm. There is no proof that the creditors who were so paid were privileged creditors; the evidence shews on the contrary that they were for the most part ordinary creditors. The firm's abandonment of property occurred a few days after these payments were made, and it is in evidence, from the statement furnished by the curator to the insolvency, that the total sum realized from the sale of all its property, movable and immovable, only amounts to the sum of $8,903.60 against liabilities of $58,110, and that this sum of $8,903.60 was not even sufficient to meet a single hypothec, namely, that in favour of the Banque Nationale. This plant or this sum of $2,400 which represents its value therefore formed part of the patrimony of the creditors of the insolvent or bankrupt firm at the time the deed of sale was entered into. Under art. 1036 C.C. no creditor had the right to be paid in preference to another creditor out of the product of the plant; these payments are considered

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fraudulent and injurious to the other creditors. (Art. 1033 C.C.)

It is objected that if the judgment of the lower Court is to be maintained the respondents would enrich themselves at the appellant's expense in the sum of $3,500 which represents the sum which the latter paid at the time the deed which is attacked was entered into. This objection would be well founded if it were shewn that this sum had been used to pay those who are entitled to it under a judicial distribution; but the evidence shews that it was used principally to pay creditors who had not received anything under such a distribution. In effect when the cost of liquidation had been deducted from the sum of $8,903 which represents the product of the assets the balance would only suffice to discharge a small portion of the privileged claims.

The objection that this sum of $2,400 would represent an insignificant fraction for each of the privileged creditors who are entitled to it cannot be taken into consideration, for under the provisions of our Civil Code regarding the avoidance of contracts and payments made in fraud of creditors the respondents in the present case represent all the other creditors of the insolvent firm.

But they say that the appellant paid $3,500 into the patrimony of the insolvents and in reality he only drew out $2,400 since this sum represents the consideration for his payment of $3,500. In this case the creditors or the respondents are not third parties as regards the appellant as to the payment of this sum, they are his representatives and as the sale in question is subject to redemption these creditors are free to exercise the right of redemption by repaying the sale price to the appellant who has enriched to that extent the debtor of the respondents who are his representatives.

This argument would apply if the appellant, when he entered into the contract with the insolvent firm knowing its insolvency was not reputed to have contracted with the intention to defraud, under art. 1045 C.C., and if the contract had not had the effect of allowing the insolvent firm to pay out of the product of the sale of its plant, to the prejudice of its other privileged creditors, those creditors who had received nothing out of the product of this rolling stock under a regular distribution, all of which is in violation of arts. 1033 and 1036 C.C. Indeed as Beaudry-Lacantinerie whom I cited a moment ago explains (No. 646):—

> Si donc le débiteur a agi en fraude des droits de ses créanciers, il ne pourra plus être considéré comme les ayant représentés. Les créanciers deviennent alors des tiers, par rapport à l'acte frauduleux, et ils peuvent en faire prononcer la nullité. Il est trop juste que le

débiteur ne puisse pas compromettre par des aliénations ou autres actes frauduleux le droit de gage général qu'il a conféré à ses créanciers sur tous ses biens en s'obligeant.

The curator who represents the creditors could not exercise the right of redemption by taking the sum of $3,500 out of the assets of the insolvent firm to reimburse the appellant, in doing so he would have ratified to the prejudice of the privileged creditors the illegal and irregular payments which had been made to the ordinary creditors out of this sum of $3,500. If this sum of $3,500 has served to discharge the claims of certain privileged creditors the opposant (appellant) can avail himself of his rights which are reserved to him under the judgment now rendered when the affairs of the insolvent firm are wound up. In a recent case of *Tracadie Lumber Co.* v. *Bugaud*, this Court by one of the *considérants* of its judgment which reads as follows unanimously adopted this interpretation:—

> Whereas it has nevertheless been established by the evidence that the defendants respondents paid Bugaud a further sum of $6,000 to get him to consent to the said sale and it is stated that this sum has served to discharge other creditors of the insolvent to that extent; consequently, on this point it is proper to reserve all the rights which the defendant respondent could invoke when the affairs of the insolvent Bugaud are settled.

I am of the opinion to confirm the judgment.

Gervais, J.

GERVAIS, J., dissenting (translated):—The appellant asks for the reversal of the judgment rendered by the Superior Court of the district of Rimouski, on May 10, 1911, which maintained the paulian action which the respondents brought against him and the firm of J. O. Couture & Bros. in consequence of a sale of the plant of the Coutures' lumber business for $3,500 subject to redemption which the latter made to the appellant on June 20, 1910, before Mtre. Girard, notary.

On June 20, 1910, the appellant, who wished to obtain this sum, got the Molsons to lend it to him upon notes of the Coutures which he endorsed, and on a transfer to the bank, as a pledge, of the rights he had under the sale. The amount of this loan up to the last cent was used in paying three judgments against the Coutures and the claims of wood-men and other workmen for salary, all of which were privileged claims, as is established by the sworn statement made by one of the insolvents on the 29th August, 1910, and fyled in the record. On the 10th of October, 1910, before judgment was rendered on the appellant's petition in revendication of the property which he had thus bought, declaring him the owner of the property, the appellant and the curator (*mis-en-cause*) agreed to have the property sold judicially under the curator's authority in order to avoid costs and any subsequent disputes.

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The sale took place the same day, October 10, 1910; the goods were sold for $2,400, and the appellant again became the purchaser, but he did not pay the price as he claimed to have paid it at the time the deed of sale was entered into, or to have the right to withhold it, as a privileged creditor, out of the price of the thing which had thus been sold without a desistment on his part from his rights of ownership which resulted from the first deed of sale. By the conclusions of their action, although it was brought after the judicial sale, the respondents ask either that the goods be returned to the curator or that the price at which they were adjudicated should be paid to him, but in this case they deny that any vendor's privilege upon the price exists in the appellant's favour and they also make no offer to repay the loan or price of $3,500 which the appellant paid to the benefit of the Coutures and their creditors.

The action partakes in reality of the nature of a contestation of the collocation in an order of distribution; the appellant, however, has accepted the contestation of it as a paulian action pure and simple.

It is a general rule that collocations cannot be contested before the order of distribution is made. Under the circumstances, however, in view of the nature of the issue, the Court need not consider this point.

The respondents obtained judgment against the appellant condemning him to pay to the *mis-en-cause*, the curator to the insolvency, the sum of $2,400, being the price of the appellant's property.

The provisions of the judgment are as follows:—

> Consequently, this Court, deciding upon the merits of the contestation by the defendant Arthur Charles Landry doth declare that the deed of sale on June 20, 1910, is annulled to all legal intents; that the sum of $2,400 which represents the price of the movable property mentioned in the said deed as well as the said movable property form part of the assets of the said firm of J. O. Couture & Bros.; and the said defendant is condemned to return them or their value, namely the said sum of $2,400 to the curator to the insolvency of the said firm, within fifteen days from the date of the present judgment, for the benefit of the creditors of the said firm according to their respective rights, reserving to the said defendant all legal recourse; the present action is consequently maintained and the contestation of the same by the said defendant is dismissed with costs, including one half of the costs of trial upon both the said contestations.
>
> Deciding upon the merits of the contestation by the said defendants, Joseph Oscar Couture, Pierre Couture and Joseph Couture, the said contestation is dismissed with costs, including one-half of the costs of trial upon both the said contestations.

By their action the respondents ask that the deed of sale of June 20, 1910, be annulled, that the property which formed the

object of it be returned to the hands of the curator to the insolvency and that the appellant be denied any right of preference or other right upon these goods.

By his plea the appellant denies all knowledge of the insolvency of the Coutures as well as any fraud on his part by reason of the sale in question; he declares himself ready to return the goods in question upon being reimbursed their price of $3,500.

After a general denial to the plea, the respondents proceed to trial. By this it was established: —

That the firm of J. O. Couture & Bros. was insolvent on the 20th June, 1910;

That the appellant was perhaps ignorant of this fact in view of the prosperous statements which the Coutures shewed him;

That it may be doubted in view of the actual advances which the appellant made, whether he knew of the disordered condition of the firm's finances;

That the appellant by his purchase on June 20, 1910, only wished to tide the firm over a temporary financial crisis;

That the value of the goods sold for $3,500 was fixed by judicial sale at $2,400;

That this $3,500 went entirely to the profit of the insolvents' patrimony by preventing seizures and extinguishing certain privileged claims against them.

The appellant's action in obtaining security or hypothecs on real estate from the insolvents' relations about the time the contract of June 20, 1910, was made, to guarantee the payment of other debts of the insolvents in his favour, has not caused the creditors of the firm any prejudice.

The judicial sale of the property, as we have seen, is not attacked.

The only questions to be decided in regard to this action, which is a paulian action on its face, but which is rather an action in contestation of a future order of distribution, and which the parties have accepted as a means of airing their disputes, are as follows:—

(1) *Was there such fraud on the part of the appellant as is sufficient to cause the sale of June 20, 1910, to be set aside?*

To answer this question it is necessary at the outset to set out the principal rules of our law in regard to the nature and effects of fraud in connection with the revocation of Acts done by an insolvent debtor in favour of his creditors.

Our Code, like the French Code, the old French law and the Roman law, lays down several rules in this respect.

We shall try to enumerate them as shortly and as clearly as possible.

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1st rule: In any question of fraud there are two elements which are necessary and which must be distinguished, the *consilium fraudis* and the *eventus damni*.

2nd rule: In matters of fraud a distinction must be made between the gratuitous and onerous contract of alienation.

3rd rule: Acts of alienation by onerous title can only be annulled to the extent of the pecuniary prejudice caused.

4th rule: There is presumption of fraud in the case of contracts of alienation made by an insolvent debtor, including gratuitous contracts of alienation subject always to the restriction that such contracts cause pecuniary prejudice.

5th rule: The paulian action is always only a personal action; the maxim *resoluto jure dantis, resolvitur jus accipientis* does not apply; when the creditor and the acquirer are in the presence of each other the latter should be put in the more favourable position.

6th rule: The presumption of fraud in the case of a gratuitous contract is always *juris et de jure*, in the case of an onerous contract it is always only *juris tantum*.

7th rule: In the case of an onerous contract it is, therefore, necessary to prove both the intent to defraud and the actual fact of defrauding.

8th rule: When the creditor and the acquirer are in the presence of each other the latter should have the preference when he has acquired the goods of the debtor who held them as result of the neglect of the creditor to prevent their alienation by seizure or otherwise.

These rules are fixed according to the authors and the jurisprudence.

The theory in regard to fraud as a cause for revocation of contracts made to the profit of creditors is found among others in articles 655, 743, 744, 745, 802, 803, 805, 885, 886, 993, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1040, 2023, and 2090 C.C. All these articles of our Code explain complete and correct the French Code as well as the old law which according to Bédaride seems to have departed from the French Code.

Applying these principles to the present case, what must we decide? The appellant did not enrich himself to the extent of one cent as result of the sale of June 20th, 1910, even although we admit he was aware of the Coutures' insolvency.

The $3,500 which the appellant lent, if we admit that the sale in question was only a contract of pledge, did not serve to pay the ordinary creditors; on the contrary, it only served to extinguish certain judgments and privileged claims which, had they still existed, would have prevented the respondents from obtaining more of the sale price of the insolvents' goods or even as much as they would do otherwise.

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The appellant paid $3,500 into the insolvents' patrimony, but in reality he only drew out $2,400, as this latter sum represents the consideration for his payment of $3,500. The respondent creditors are not in this case in the position of third parties towards the appellant with respect to the payment of this sum; they are his representatives. The creditors are only in the position of third parties when they invoke a prejudice which has been caused by their debtor in collusion with some one who has acquired from him.

Again, the sale in question is subject to redemption, and the creditors are, therefore, free to exercise this right of redemption on reimbursing the price to the appellant, who has to that extent enriched the debtor of the respondents who are his representatives.

To decide to the contrary would be to allow the respondents to enrich themselves at the expense of the appellant. The respondents in respect of goods worth $2,400 would obtain this sum under the judgment of the Court of first instance without taking into account the $3,500 paid on June 20, 1910, or $5,900 in all.

This, therefore, is not a case of fraud, for fraud results only from the existence of both the fraudulent intent and the prejudice.

(2) *Are not the respondents obliged to repay the appellant the sum of* $3,500 *if they wish to exercise the Coutures' rights of ownership in the goods which they sold to the appellant on June* 20, 1910?

The paulian action exists in consequence of the maxim *fraus omnia corrumpit* which applies to the dissolution of all contracts and particularly to the revocation of contracts made by an insolvent debtor. But in this latter case there is this restriction that fraud does not operate to annul onerous contracts of alienation unless there is fraud, that is to say, unless pecuniary prejudice is caused on the part of the person acquiring. Also in this latter case the maxim *fraus omnia corrumpit* does not go so far as the other maxim *resoluto jure dantis, resolvitur jus accipientis*, although the first maxim may give rise to the revocation of all deeds, discharges, renunciations, judgments and other contracts.

An onerous contract of alienation made by an insolvent debtor but for actual value and for good faith without pecuniary prejudice on the part of the purchaser is, therefore, valid. The creditor can under such circumstances only demand that a person who has acquired the goods should restore them, upon paying the price or consideration for the contract.

Moreover, in the present case the creditors, namely, the respondents, far from suffering a loss, have reaped a profit; for goods worth $2,400 they have received $3,500.

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Here, as in France, a hypothec granted by a fraudulent purchaser has been held valid. We may cite the case of *Normandin* v. *Carmelite Nuns of Hochelaga*, 3 D.C.A. 329, decided in appeal, and which has since established the jurisprudence; Cassation, 1869, Sirey, 69-1-110; Demolombe, vol. 25, No. 225; Aubry & Rau, vol. 4, p. 140; Paris, April 9, 1898, Sirey, 1900-1-72, 1900-2-235. We may also cite a judgment of the Cour de Cassation in Chapuis —*Holtzer* v. *Azevedo*, Sirey, 1874-1-264:—

> Attendu que les conclusions posées par les demandeurs, tant en appel qu'en première instance, tendaient uniquement à faire déclarer nul l'acte intervenu entre Azevedo et les époux Colson, par la raison que cet acte était simulé, sans cause sérieuse, et le résultat d'une fraude organisée entre les parties dans le but de soustraire les biens des époux Colson à l'action de leurs créanciers légitimes; que le jugement, dont la cour s'est approprié les motifs, déclare qu'il n'est pas prouvé qu'Azevedo ait connu la fraude à laquelle ont eu recours les époux Colson et qu'il ait voulu s'y associer par le crédit qu'il leur a ouvert;
>
> Rejette, etc.

We should also cite Esmein's criticism in regard to the judgment of the High Court of the Netherlands in the case of *Société Anonyme la Banque Nationale Hypothecaire* v. *C. F. O. Knol, de Marees van Swinderen, O. Knol and K. Olthoff*, March 28, 1884, Sirey, 1885-4-9.

According to Esmein the Dutch Code and the French Code make the same provision; they both only lay down the principle of the paulian action and as to its conditions and effects they rely on the former jurisprudence (see the summary inserted in our Code under the articles already cited). Esmein says that the traditional view according to which the maxim *resoluto jure dantis, resolvitur jus accipientis*, does not apply to acts of alienation by the insolvent debtor, is correct. According to him the creditor only has a personal action against the debtor and the acquirer who has participated in his fraud. In this case the person who has acquired in good faith is given the preference.

This is also the doctrine of Capmaus, Huc, vol. 7, No. 223, Beaudry-Lacantinerie & Barde, 2nd ed., vol. 1, No. 667; Garsonnet, la revocation des actes du débiteur en fraude des droits de ses créanciers, No. 114.

Finally, we may note the judgment in the case of *Felix* v. *Alcaros*, Sirey, 1900-1-72:—

> L'annulation d'une vente d'immeubles pour cause de fraude aux droits des créanciers du vendeur n'est pas opposable aux créanciers hypothécaires de bonne foi de l'acheteur.

All the more, under our Code, which limits the exercise of the paulian action more closely than in France and only allows it up to the extent of the pecuniary prejudice which has been caused.

There is no reason to annul the present sale or rather contract of pledge to secure an actual loan, which was made in good faith without fraud.

The appellant is, therefore, entitled to be reimbursed the amount of the purchase price under the deed of June 20, 1910.

(3) *Can a sale subject to redemption be a fraudulent act within the meaning of arts.* 1032 *et seq. C.C.?*

A sale subject to redemption like all onerous contracts made in good faith and for value cannot, as a general rule, constitute a fraud inasmuch as the right of redemption stipulated in favour of the defendant may be exercised by his creditors at will. All the authorities which we have just cited apply *a fortiori* to such a sale. Moreover, the respondents in the present case speak of the sale in question as a hypothec.

Here we have more than is necessary to shew that the judgment of first instance is ill founded. If a hypothec given by a debtor in favour of a creditor in good faith and for an actual advance is good and valid, so much the more must we so recognize and admit the sale made by the debtor of some of his goods for a price which was actually paid. There is, therefore, error in the judgment of first instance, and I am of opinion to reverse it.

Appeal dismissed; GERVAIS, J., *dissenting.*

Re WEBBER et al.

Nova Scotia Supreme Court, Ritchie, J. July, 1912.

1. EXTRADITION (§ I—4)—IRREGULAR ARREST ON TELEGRAM—RE-ARREST AFTER ISSUE OF WARRANT.

While a telegram from the authorities in the foreign country asking for the arrest of a fugitive criminal is not alone sufficient to justify an arrest, it is not an objection to an extradition warrant of arrest issued upon a sworn information that the information was not based upon personal knowledge, but merely upon such telegraphic communication.

2. EXTRADITION (§ I—4)—ILLEGAL ARREST—DISCHARGE FROM CUSTODY NOT A PRE-REQUISITE TO RE-ARREST.

Where the original arrest or imprisonment upon an extradition charge has been illegal as made without warrant upon a request by telegram, it is not necessary that the prisoner should be first discharged from the illegal custody in order to hold him under good process subsequently issued in a criminal matter.

[*R.* v. *Richards*, 5 Q.B. 926, referred to; *Hooper* v. *Lane*, 6 H.L.C. 443, distinguished.]

3. EXTRADITION (§ I—3)—BANKRUPTCY OFFENCES—FRAUDULENT CONCEALMENT OF PROPERTY.

Extradition will be ordered for an offence under the Federal Bankruptcy Act of the United States, sec. 29B, which enacts that "a person shall be punished by imprisonment for a period not to exceed two years, upon conviction of the offence of having knowingly and fraudulently,

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while a bankrupt, or after his discharge, concealed from his trustee any of the property belonging to his estate in bankruptcy," such enactment being similar in its terms to sec. 417 of the Canadian Criminal Code, sub-sec. 2, which is in effect a bankruptcy law.

[*R.* v. *Stone* (No. 2), 17 Can. Cr. Cas. 377, followed.]

THIS was an application to Ritchie, J., at Chambers, for a writ of *habeas corpus*, for the release of defendants.

The motion was refused.

The defendants (H. Webber and C. Webber) had been arrested by the chief of police at Halifax, on receipt of a telegram from the assistant district attorney at Boston, Mass., setting out an indictment found by the grand jury for a violation of the United States Bankruptcy Act, sec. 29B, by the fraudulent concealment of property from the trustees in bankruptcy.

On the day following the first arrest, the prisoners while still in custody were re-arrested under a warrant issued by Wallace, County Court Judge, on an information laid before him and were held for examination before him as extradition commissioner.

Joseph B. Kenny, for the prisoners.
W. J. O'Hearn, for the United States.

Ritchie, J.

RITCHIE, J.:—A telegram is not a legal answer to an application for *habeas corpus*. There must be a complaint or information under oath. Such complaint or information need not be made upon personal knowledge. Information and belief based upon the telegraphic communication is sufficient, and a warrant based thereon is good. This is the course of procedure which should have been adopted in the first instance in this case, and there was no necessity for arresting on the telegram alone.

Since the *habeas corpus* proceedings were commenced, but before the service of the process, an application was made to Judge Wallace under the Extradition Act for a warrant, which the learned Judge granted under section 10 of the Act. I have no doubt this warrant was properly granted. The learned Judge heard such evidence as in his opinion justified the issue of the warrant. The information disclosed an offence which, if committed in Canada, would have been indictable under sec. 417 of the Code. I agree with the judgment on this point in *The King* v. *Stone* (No. 2), 17 Can. Cr. Cas. 377, at 392. The warrant is in my opinion a good answer in law.

But Mr. Kenny raises the point that the original arrest and imprisonment being illegal, the Webbers must be discharged from such illegal imprisonment before they can be held under the warrant. This point cannot prevail.

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I distinguish *Hooper* v. *Lane*, 6 H.L.C. 443, in the House of Lords, on the ground that the process being dealt with in that case was civil, not criminal process. In *Hooper* v. *Lane*, the sheriff had two civil writs in his hands against B. One, at the suit of L., was a valid writ; the other, at the suit of A., was an invalid writ. Under this writ the arrest was made, and it was held that a warrant under the writ issued at the suit of L. was not an answer to an application for discharge. I think the case is not applicable. It is, I think, the law that if a man is arrested under bad criminal process, and, while he is illegally in custody, good criminal process comes to the sheriff, such process is a good answer to an application for discharge. See *The Queen* v. *Richards*, 5 Q.B. 926; Hurd on Habeas Corpus, p. 251. The application for discharge is refused.

Discharge refused.

DEMERS (defendant, appellant) v. **BYRD et al.** (plaintiffs, respondents).

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Quebec King's Bench (Appeal side), Archambeault, C.J., Trenholme, Lavergne, Carroll, and Gervais, JJ. January 24, 1912.

1. MECHANICS' LIENS (§ VIII—74)—CLASS OF ACTION—BUILDERS' AND WORKMEN'S PRIVILEGE—ARTICLE 2013*b* C.C. (QUE.)—NATURE OF SUIT NECESSARY TO PROLONG IT BEYOND A YEAR.

Where article 2013*b* C.C. (Que.) provides that a builders' and workmen's privilege exists only for one year from the date of registration unless a suit be taken in the interval, the suit required is a hypothecary action to enforce the privilege and a personal action against the debtor does not suffice.

2. MECHANICS' LIEN (§ VIII—74)—HYPOTHECARY ACTION IN QUEBEC.

The action to enforce a mechanics' lien (builders' privilege) under art. 2013*b* of the Civil Code (Que.) is a personal hypothecary action if the property is still in the debtor's hands or an action in declaration of hypothec if it has passed into the hands of third parties.

Statement.

THE judgment which is appealed from and which is reversed was rendered by the Superior Court, Saint-Pierre, J., on December 29, 1910.

Desaulniers & Vallée, for the appellant.

Foster, Martin, Mann, Mackinnon & Hackett, for the respondents.

Gervais, J.

GERVAIS, J. (translated):—The appellant inscribes in appeal from a judgment rendered by the Superior Court at Montreal on December 29, 1910, which condemned him as a third party in possession to relinquish the property known as No. 528 of the official cadastre of the St. Louis ward, Montreal, unless he preferred to pay to the respondents a sum of $1,521.81 in settlement of the price of installing electric light in the Théâtre des Nouveautés, built on the property in question while it was the

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property of the last but one predecessor in title of the appellant, namely, the Comic Opera Company of Montreal, and which price was secured by a builder's privilege.

The facts in the case may be summarized as follows: In the month of November, 1901, Charles Guay, an electric contractor, installed a new electric lighting system in the property known as the Théâtre des Nouveautés, lot No. 528 of the official cadastre of St. Louis Ward, Montreal, which then belonged to the Comic Opera Company of Montreal; he completed the work on December 6, 1901. On December 9, 1901, Guay registered against the property a privilege for the value of his work, namely, the sum of $1,521.81. In the same month of December, 1901, the Comic Opera Company went into liquidation; Messrs. Horace Dubreuil and Treffle Dubreuil were appointed joint liquidators on February 19, 1902. On February 2, 1902, Guay sued the Comic Opera Company and he obtained judgment against it on the 21st February, 1902, for the amount of his account of $1,521.81. On September 22, 1902, Guay transferred his judgment to Munderloh & Co., the respondents. During the month of March, 1904, Mr. Mann, one of the respondent's attorneys, took it into his head to prepare a copy of the transfer and certifying it himself in the name of the respondent's attorneys, filed it at the office of Messrs. Dubreuil the liquidators, who, at the trial, through Mr. Treffle Dubreuil, admitted the receipt of this letter on March 26, 1904.

On February 17, 1906, the liquidators sold the property in question to Mr. Zenon Fontaine and the latter re-sold it on March 2, 1906, to Louis Demers, the appellant's *prête-nom*. Upon his demand for authorization to sell the real estate to Mr. Fontaine, the liquidator, Mr. Treffle Dubreuil, had obtained an order authorizing the closing of the liquidation.

Under these circumstances the respondents took an action in declaration of their builder's privilege against Louis Demers, that is to say, the appellant's *prête-nom* and he, by an exception based on the failure to serve the debtor with the transfer of the judgment of February 21, 1902, from Guay to the respondents, had the action dismissed by a judgment of this Court on the 24th December, 1907.

The respondents on January 15, 1908, had the transfer of the judgment of February 21, 1902, served upon the company, its liquidators, and the two Demers. Then the present action for declaration of privilege was brought and the appellant pleaded to it on April 21, 1908.

Among other grounds the appellant alleges: (1) Failure to serve the transfer of the judgment of February 21, 1902, in consequence of the extinction of the company upon the conclusion of the liquidation according to the order of March 2, 1906; (2)

Failure to bring an action in declaration of Guay's privileged claim according to art. 2013*b* C.C.

The respondents' reply to this defence is a general denial.

The trial was confined to completing the proof of the facts already set forth in the pleadings.

The respondents opposed oral proof of the liquidation.

The order of March 2, 1906, speaks, it is true, of the liquidation which is to be closed; but there was never any order declaring it closed and rendered after the report of liquidation.

Let us now consider the value of the two grounds of appeal.

Was there failure to serve the debtor, the Montreal Comic Opera Company, with the transfer of judgment from Guay to the respondents?

This Court decided the question in December, 1907, by reversing the judgment of the Superior Court for the district of Montreal on this ground alone.

Have the respondents since that time regularized their position? Is the company absolutely extinguished?

No final closing of its affairs seems to have taken place if we refer to the order of March 2, 1906. The liquidator was authorized to close its affairs. Did he do so? The Court does not know. The appellant wished to make verbal proof of this, but the respondents properly objected.

Moreover, is not the appellant, who is the holder of the property which he bought from the company, the representative of the company as regards the privileged or hypothecary creditors, or other rights with which the property is charged? Can he set up the failure or disappearance of his vendor which prevents the service of a transfer of a claim against it in order to avoid payment of this claim? We do not think so. Moreover, until the abrogation of the organic letters patent of the company, and even afterwards, the law will always set up the representation of the company in order to complete the matters which it had begun during its active or useful life and which have not been included in the universality of the property which formed the object of the liquidation.

In any case if we accept the theory of Du Caurroy, who refutes Toullier in vols. 3 and 5 of *La Thémis*, the appellant and the respondents are third parties as regards one another since their rights flow from a common predecessor, the Comic Opera Company of Montreal. Consequently, under the circumstances it must be admitted that if the appellant as a third party could invoke the failure to serve the transfer of judgment he cannot do so for the excellent reason that this judgment was served upon the debtor and its liquidator.

What are we also to say to Mr. Mann's letter serving the transfer of judgment, which the liquidator admits in his evidence

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that he received, as he, moreover, made known to the respondents' attorneys by his letter of March 26, 1904.

Then in the absence of a complete liquidation did not the company and its liquidator have capacity to receive service of the transfer of the judgment of February 21, 1902, in January, 1908, as such liquidation had not applied to the transfer of Guay's claim to the respondents.

There was, therefore, a regular service of the judgment subsequent to the judgment rendered by this Court in December, 1907. Consequently the exception of *res judicata* based on the judgment rendered on December 24, 1907, by this Court, cannot be set up, for the good reason that the present action is based upon new allegations of transfer and service in January, 1908.

Was Guay's action decided on February 21, 1902, such an action as required by art. 2013*b* C.C., that is to say, an action to interrupt prescription or for declaration or realization of the builder's privilege?

It is very difficult to decide this point. In order to succeed we must call the history of law and comparative legislation to our assistance.

These privileges spoken of by arts. 2013 and following only exist for the most part under our law since 1894. Up till that time, under our Code, following the Code Napoleon which had maintained the old French law with the addition of several restrictive modifications, especially that of the double minutes and of registration at the registry office, only the architect and the principal contractor could acquire a privilege.

Towards 1894 certain unscrupulous persons began to have houses for renting built by contractors and sub-contractors who were men of no substance. The immediate result was that many workmen, suppliers of material and sub-contractors were ruined and there was an outcry for remedial legislation. As generally happens in Parliament under such circumstances the required remedy was not sought in a logical and intelligent modification of existing laws. Nevertheless, the privileges of articles 2013 and following of the Civil Code existed under the old law. The masons' privilege for instance has always existed since the law: Licet C. *qui potior in pign*; Charondas, Book X, rep. 79; La Peyrère, Letter P, No. 74. At a later date this privilege was extended; Ferrière, vol. 2, p. 1219, No. 20. The mason and other workmen who have worked at the building or repairing of a house have a privilege upon the house or upon their work without any stipulation to that effect according to the ordinance of Louis XIV., December 22, 1665. The same ordinance created in favour of those who had advanced money for the building or repairing of the house a privilege upon the latter for the amount of the advances. It is evident

that at Paris in 1695 after the great period of building at that time, as in Montreal in 1894, people had houses built without paying for them or in any case without wishing to pay for them. The ordinance of 1665 is singular in that it has a retroactive effect; our law of 1894 only speaks for the future. Our legislators in 1894 needed only to study the law prior to the Codes in order to create a right of preference in favour of the workmen, sub-contractor and supplier of materials along side of the contractor and architect without upsetting our legal theories in regard to the registration of privileges. But our legislators thought it was better to borrow from Ontario a ready made law which was indeed inspired by the old French law but had been considerably changed. Let us consider the consequences of this unfortunate legislative borrowing. A member copied an act of the Province of Ontario entitled "An Act respecting Liens of Mechanics, Wage Earners, and others," without saying so and without considering its bearing or its sense. This law is now found in ch. 153 of the Revised Statutes of Ontario 1897, which reproduces the Act, 59 Viet. ch. 35; the Act 65 Viet. ch. 24; the Act 53 Viet. ch. 57; ch. 126 Revised Statutes of Ontario 1887; ch. 120 of the Revised Statutes of Ontario 1877, and finally the original Act of 1873, 56 Viet. ch. 27.

In the Province of Ontario as in all countries where English law prevails a distinction is made, among other divisions of actions, between personal actions, which do not imply notice to the public that the defendant's property is under the hands of justice; and real actions or those accompanied by a seizure which imply such a public notice by the simple fact of the issuance of a writ. In the latter case but not in the former there is *lis pendens*, that is to say, no one is allowed to acquire the object of the suit unless he frees it from the plaintiff's claim. This is the English common law which has been modified in various countries especially since 1839. Thus in the State of New York notice of actions which involve *lis pendens* must be entered in a register kept by the Court. So it is in the Province of Ontario, where we find that notice of *lis pendens* must be given by being entered in a similar register as well as registered by the registrar. Thus in studying the legislation of Ontario the action for declaration of a builder's privilege has at first been declared an action which involves *lis pendens* and then an action giving rise to the registration of a special notice with the registrar independently of the registration of the privileged claim.

In this regard we may quote several passages: First of all there is Form 6, of ch. 153 R.S.O. 1897, concerning the notice of action which must be registered:—

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Form 6, Certificate for registration.
Style of Court and cause.
Date.....

I certify that the above named plaintiff has commenced an action in this above Court, to enforce against the following land (describing it) a claim of mechanics' lien for $.....

Then there is paragraph 2 of art. 24, ch. 153, R.S.O. 1907, which says:—

> Every lien which has been duly registered under the provisions of this Act shall absolutely cease to exist after the expiration of ninety days after the work or service has been completed or materials have been furnished, or placed, or the expiry of the period of credit, where such period is mentioned in the claim of lien registered, unless, in the meantime, an action is commenced to realize the claim under the provisions of this Act, or an action is commenced in which the claim may be realized under the provisions of this Act, and a certificate registered as required by the next preceding section.

Section 23 of ch. 126, R.S.O. 1887, says the same thing. So says section 20 of ch. 120, R.S.O. 1877. Section 4, ch. 27, of the law of 1873, says in its turn:—

> Such lien shall absolutely cease to exist within ninety days after such work shall have been completed, or material or machinery furnished, or the expiry of the period of credit, unless in the meantime proceedings shall have been executed to realize such a claim under the provisions hereinafter contained, and a certificate of *lis pendens* thereof be registered in the proper registry office, which certificate may be granted by the Judge or Court before whom the proceedings are instituted.

Such formalities it is said do not exist under our law. The statement may be partly admitted; for our law as we shall see affords as much protection as the law of the Province of Ontario to the third party who has acquired real estate subject to a builder's privilege which has been registered but has not been realized within the delay of one year or the survival of which beyond a year has not been assured by an action in law brought under such conditions of publicity as are sufficient to put the third party on his guard.

In the old French law, the present French law and our own law there exists a very old maxim, "*res transit cum suo onere*"; except in the case of all those contracts transferring property and which are subject to registration in our law according to the German form.

For some years now, the seizure of immovable property alone requires to be announced by a notice filed with the registrar and this for the sole benefit of those hypothecary creditors who have filed their address with him for the sum of 50 cents each.

Seizure of movable property as well as the action for declaration of hypothec and other actions to revoke, annul, dissolve or set aside contracts although the property seized is put out of

commerce or its surrender is asked during the action or seizure, do not according to Voet require to be accompanied by any notice to the registrar or Judge. And yet the right of alienation in favour of third parties is suppressed as regards the person whose property is seized or the defendant in an action for declaration of hypothec: see art. 715 C.P., art. 2074 C.C. The purchaser must be on his guard. We repeat the appellant must be on his guard, since he has bought the lot of land No. 528 of the official cadastre of St. Louis ward, in Montreal, without concerning himself as to the validity of Guay's privilege against which moreover he could not guard himself in the absence of the formality of a notice of action under the English system of Ontario, that is to say, a notice of *lis pendens*.

But is the appellant in such an unfortunate position as that after all?

Our new law is derived almost word for word from the law of Ontario which requires the person who claims a privilege as builder, workman or supplier of materials to register his claim within thirty days from the completion of the work and to be paid within a further delay of ninety days under pain of losing his privilege unless he causes the privilege to survive the ninety days by taking an action to have his privilege declared, that is, to "realize" it as the Ontario law says. This action must be accompanied by a new notice to the registrar just as in the case of *lis pendens*, according to Form 6 which we have quoted.

Sections 24, 25, 26, 31 and 35 of ch. 153, R.S.O. 1897, explain that in theory in this action it is necessary to make all the allegations of an action in declaration of privilege; that in the contestation there is a determination of the account and establishment of the additional value given, etc., and that the sale of the property is made in a special manner.

This is the legislation which inspired the adoption of the law of 1894. This law is very careful to protect the builder but it is very careless about protecting a third party who acquires the property subject to the uncontrolled privilege which has been granted to the builder. Under these circumstances, has the third party no means to protect himself?

In the present case the appellant was sued in 1908 for a privilege which was registered in 1901 and which in our opinion had expired since the month of December, 1902, for the very good reason that the right of preference or privilege referred to in art. 2013*b* C.C. only exists "for one year from the date of the registration unless a suit be taken in the interval or unless a longer delay for payment has been stipulated in the contract," and no such suit has yet been taken unless it is that taken in 1908 against the appellant.

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Indeed, the first thing to be noticed is that all these privileges are restricted, temporary and ephemeral; their survival for more than a year after their registration can only result from judicial intervention which in this case in order to protect third parties is called upon to replace by its publicity, that publicity which results from registration.

A second remark. Art. 2013*b* C.C., it is true, does not say what action must be taken. It is also true that in its actual terms it only speaks of the action of the Ontario law, and this with reason. But we must add that art. 2013*b* does not speak of it explicitly because under the law of the Province of Quebec there is an action of just the same nature as that created by the law of Ontario and under art. 2074 C.C. the bringing of this action paralyzes the defendant's right of alienation even when he is a third party who holds the property, and serves as a public notice towards third parties who would acquire the property, as in the case of the appellant, not to purchase the property subject to litigation without discharging the claimant's debt. But art. 2013*b* speaks of an action similar to that which prevails in Ontario, as it says that in order to preserve his right of preference or privilege, that is, his right to receive payment of his claim before other parties, he must under his guarantee ask for it within a year. What action must he take then? In our opinion art. 2013 is not silent on this point since it says not that the personal debt, the prescription of which apart from the privilege is five years or possibly thirty years, but that the right of preference or a privilege itself is fatally and irremediably prescribed by one year unless a suit be taken within a year of the registration. Evidently this is a suit where it is a question of a privilege which is about to expire applying to the Courts to obtain an extension of life. Certainly no less publicity should be given to the third party who holds the property by this action than by the registration in regard to the privilege. The action and the judgment are acts which continue the privilege; they are, just as is the action to interrupt prescription, acts which announce the old title to a real right, that is to say, the registration of Guay's right of privilege to be paid in preference to the other creditors: article 1983 C.C.

Article 2013*b* can according to the general rule only give rise to an action of the same nature as the right which it would exercise. But this is a real and immovable right; therefore the action is real and immovable. See Garsonnet and the other authors.

But what do we find in the record in regard to Guay's action? It is simply an action on account for goods furnished and services rendered at St. Catherine Street without any illusion to lot No. 528 or to the registration of the privilege upon this lot in December, 1901.

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The appellant, if he read this action at the office of the Superior Court of Montreal, could certainly not expect that the respondents were still desirous of availing themselves of the privilege in question which according to law and as would appear visiting the registry office had been extinct since the month of December, 1902.

In our opinion the action required by art. 2013*b* is an action in declaration of privilege to insure its extension beyond the year and a day.

It is a personal hypothecary action against the debtor in possession or an action in declaration of hypothec against a third party in possession; the latter is better known than the former among the old authors as its usefulness is discussed by them whereas the other always existed of right; it is an action in realization of pledge: De Pign & Hyp. du C.

The hypothecary action properly so called has its origin in customary law. The Roman law only knew of the *quasi-servian* action or action in revendication. It is like the English action "on foreclosure": Ferrière, vol. 2, p. 408, No. 6.

Ferrière, Coutûme de Paris, vol. 2, p. 4, nos. 12 et 13, says:—

> Encore quand les débiteurs sont possesseurs des choses qu'ils ont obligées, pour les sommes qu'ils doivent et les rentes qu'ils ont constituées, l'action hypothécaire, qui compéte à leur créanciers, concourt avec la personnelle; encore néanmoins que la personnelle est la principale et l'hypothécaire n'en est que l'accessoire; parce que l'hypothèque constituée au profit du créancier n'est que pour la suite du prêt qui est fait débiteur.
>
> Mais à faute de paiement, en vertu de l'obligation ou de la condamnation obtenue contre le débiteur, on fait saisir, crier et adjuger par décret, les héritages du débiteur obligé et condamné. Bacquet, vol. 1, p. 251, No. 172, *in fine*.

Domat, Lois Civiles, p. 228:—

> Celui qui a un droit d'hypothèque, n'en a pas moins l'action personnelle contre son débiteur, c'est pourquoi il peut intenter les deux actions concurremment; et si le créancier a exercé l'action personnelle, cette action ne fait point obstacle à son droit personnel.

Both the written law and the Custom of Paris therefore recognize the personal hypothecary action.

So does contemporary law.

> 50.—Est donc réelle, l'action hypothécaire par laquelle un créancier fait valoir contre un tiers détenteur son droit de privilege immobilier ou d'hypothèque. Garsonnet, Procédure Civile, vol. 1, No. 319, 2nd edition.

The hypothecary action exercised against the debtor and the option of heirship, etc., follow within the category of "Mixed Actions." "Cela tient, pour la première, à ce que le défendeur y est tenu en qualité de débiteur et de tiers-détenteur": Garsonnet, Procédure Civile, vol. 1, No. 332, 2nd edition.

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The difference between the action in declaration of hypothec and the personal hypothecary action may well be said to consist entirely in the fact that in the first case the defendant may be freed from the action by abandoning or giving up the property whereas in the second case the defendant cannot do so and is bound to submit first to the sale of the hypothecary property and then to the sale of all his other property movable and immovable.

The personal hypothecary action is historically and legally the action par excellence which results from the contract of obligation and hypothec.

The action in declaration of hypothec is only an alleviation which custom has introduced in favour of him who is not personally indebted, that is to say, the third party in possession.

Our jurisprudence has always admitted without dispute the exercise of the personal hypothecary action which is always so useful on account of the paralysis of the right of alienation which it effects under art. 2074 C.C. which is specially necessary in order to the exercise of the privilege upon immovable property under art. 2013*b*. He who has an action in declaration of hypothec has *a fortiori* a personal hypothecary action.

Article 2013*b* does not say the contrary; nor does the jurisprudence of any of our Courts. The history of legislation in regard to privileges under our law, comparative legislation, the divisions of actions under our law, the nature of things and art. 2013*b* force us to the conclusion and we conclude that the action to prolong the life of a privilege should mention the privilege before the Court and such an action can only be an action in declaration of privilege involving notice of *lis pendens* to third parties in possession, as in Ontario, under art. 2074 C.C. *Lex plus fovat liberationi quam obligationi*, says Voet.

The second ground of the appeal is in our opinion well founded.

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ARCHAMBEAULT, C.J. (translated):—The law of 1894 speaks of a suit. What are we to understand by this suit? Is it a suit to establish the claim judicially? Is it a suit to realize a privilege? The first interpretation does not seem to me to be acceptable. An action partakes of the nature of a right. Here it is a question of a real right. The action should be of the same nature; or at least a mixed action.

In my opinion the object of the suit is not to inform third parties. They are already informed by the notice of registration. The law declares that the privilege exists only for a year. On the expiration of the year it is extinct. The law adds, however, that the privilege will continue beyond a year if a suit is brought within the year or if a longer delay has been granted to

the debtor to fulfil his obligations. This provision was necessary. Of course if a delay extending beyond a year had been given to the debtor by the creditor it would be impossible for the latter to sue for the realization of his claim whether the immovable was still in the debtor's possession or whether it had passed into the possession of a third party. A privilege is only the accessory of a claim and if the claim which it secures is not due the privilege cannot be exercised. A suit is therefore impossible and for this reason the legislator had to prolong the existence of the privilege until the date when the claim became due.

On the other hand it was also necessary to prolong the existence of the privilege beyond the year and for so long a time as its realization was retarded by the exercise of the action and the delays which law suits may always give rise to. Otherwise the debtor or the holder of the property would always be able to cause the creditor to lose his privilege. It would only have been necessary to contest the latter's action brought within the year and to prolong the contestation until the year had expired. When the year's delay had expired the privilege would have ceased to exist.

It is said that the law simply requires a suit and that therefore a suit against the personal debtor is sufficient; that all that is necessary is to establish the claim and its amount judicially. But why require a judicial contract when the conventional contract already exists? A judgment indeed is only a judicial contract. The claim may be and generally is already established by the contract between the parties. What, then, is the object of a judicial contract? What can be the use of obtaining a personal judgment against the debtor? The law declares that the privilege only exists up to the amount of the additional value given to the property by the work done or the material furnished. The judgment against the debtor could add nothing to this guarantee which the law gives to the other creditors or to the third party in possession. The law simply speaks of a suit without adding the mode of procedure as is the case with the law of Ontario. The reason is that our Code already contained all the necessary provisions to carry into effect the new provisions which this legislation introduced. The suit will be either a personal hypothecary action if the debtor is still in possession of the property or a hypothecary action for the surrender of the property if it has passed into the hands of third parties.

We know that the personal hypothecary action exists in our law. This question is no longer open to discussion. It has been settled by the jurisprudence: *Leclair* v. *Filion*, 7 R.L. 427, 428; *Lebrun* v. *Bédard*, 21 L.C.J. 157; *Bernier* v. *Carrier*, 4 Q.L.R. 45.

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In this last case Judge Dorion says that the doctrine is based in principles which cannot be contested.

The advantage of the personal hypothecary action is due to the provision of art. 2074 C.C. which declares that the alienation of the property by the holder against whom the hypothecary action is brought is of no effect against the plaintiff unless the new purchaser deposits the amount of the debt, interest and costs due to the suing creditor.

The provision of art. 2013*b*, which declares that the privilege continues to exist after the expiration of the year if a suit is taken, is in harmony with the provisions of art. 2074. The moment a hypothecary action is brought the rights of the creditor who is suing can no longer be imperiled. His privilege exists for as long as his claim, and even the alienation of the property cannot be set up against him.

I conclude from the foregoing that what the legislator desired in 1894 was on the one hand to facilitate the acquisition of privileges in favour of the builder, workman and supplier of materials; and on the other hand to replace the permanent privilege of the old law by a temporary privilege which was first fixed at two years and afterwards at one. It was also desired that property should not be burdened for an indefinite period in favour of the persons who constructed the building which might be erected upon them. A creditor must realize his privilege within a fixed delay or else he only keeps his personal claim against debtor.

The appeal is maintained and the respondents' action is dismissed with costs.

Appeal allowed and action dismissed.

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FARQUHARSON v. FARQUHARSON.

Prince Edward Island Court of Chancery, Fitzgerald, V.C. March 28, 1912.

1. WILLS (§ III G—120)—CONSTRUCTION—RIGHT OF POSSESSION — RENT FREE.

A gift by will of the "right to remain in a dwelling-house free from rent" made in favour of a person named and of his family, is to be construed as a restriction upon a prior devise of a life estate in these and other lands to another; it does not confer any estate in reversion but a continuing right of possession during the life of the life-tenant and possibly until the closing of the estate by the division directed to take place after the death of the life-tenant.

Statement

HEARING of questions arising upon the construction of a will.

W. S. Stewart, K.C., for complainants.

K. J. Martin, for defendants.

FITZGERALD, V.-C.:—Clause 7 of the late Donald Farquharson's will reads as follows:—

> It is understood that the said Richard Seymour and his family shall have the right to remain in their present dwelling free from rent, but subject to such other conditions as my executors may impose.

It is admitted that this clause must operate either in restriction of the life estate devised to testator's wife in an earlier portion of the will, or as an estate in reversion, vesting after the wife's death. This will, very inaccurately drawn by the testator himself, is necessarily difficult of construction. But so far as I am enabled to gather from it the intention of the testator, I think the first position must prevail. My reason for so holding shortly are: That the testator by the first paragraph in his will clearly desired that the property in these proceedings sought to be partitioned, viz., his homestead and two double tenement houses, should on his wife's decease not vest in any particular devisee, but "be divided between his children in the same proportion as his present estate." And consequently to vest one of the dwellings in one of these double tenements in a particular child, would defeat the testator's desire to have the whole divided in the proportions named and at the time named.

There is also in the words used in the above quoted clause, an evident reference to present conditions, the devisee is "to remain in his present dwelling," not to become possessed after the happening of any other event.

The testator also apparently knew how to create a life estate with reversion over, as also an absolute fee, for he devises all these estates by his will, and when he uses the words "right to remain in," he may fairly be presumed to mean nothing more than a temporary right of possession. It is evident also that it was in the testator's mind that a number of years would elapse before the executors could close his estate. Some bequests he makes payable in eight years and some in ten years after his decease, and he directs that the residue of his estate "be divided several years hence." It is also clear by the will that all the rents arising "from the property from houses on these grounds" —the locus here—were to be paid to his wife.

It is quite possible, therefore, to give effect to this clause, keeping in view the whole tenor of the will, and the testator's evident wishes, so far as they are apparent, by construing it as a restriction of the life estate in the whole property given to the wife, a reservation out of it of a right to retain possession by a son and his family of one dwelling without the payment of this rent to the wife. Such possession continuing certainly during her life, with a possibility of an intention that it continue until the closing of the estate.

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This construction gives this son and his family—the family being most in the testator's mind—a home until the final division of the lands between himself and his brother and sisters. The other construction sought to be put upon this clause by the defendant, Richard Seymour Farquharson, necessarily does violence to all these considerations, and forces an unnatural construction upon the words used, viz., the creation of an estate in reversion, not apparently contemplated. And of what estate? For the life of the son only, or for the lives of his family as well? Certainly not for the son's life alone, as the testator by his will clearly evidences an intention to provide for them irrespective of his son. If forced to do so, it would be extremely difficult to define what estate is given by these words, and to whom, and for what duration. They are, however, easily interpreted as a continuing right of possession for a fairly definite period.

I, therefore, hold, that after the death of Mrs. Farquharson the testator's direction that these premises "shall be divided between my children" must prevail, and that any right of occupation in Richard Seymour Farquharson and his family, then ceased. The usual order for sale will be made.

Order for sale.

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Alfred B. CUSHING and Arthur T. Cushing (defendants, appellants) v. Richard H. KNIGHT (plaintiff, respondent).

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. June 4, 1912.

1. SPECIFIC PERFORMANCE (§ I A—5)—DEFAULT ON DOWN PAYMENT—STIPULATION FOR PAYMENT CONTEMPORANEOUSLY WITH EXECUTION OF AGREEMENT—OUTSTANDING MORTGAGE.

Where an agreement for the sale of land expressly stipulates for a down payment of $10,000 on a $33,750 purchase, and there is outstanding a mortgage (of which the purchaser had notice prior to the agreement) which amounts to less than the balance of the purchase price, if the purchaser refuses on an objection to title based upon the outstanding mortgage to make the down payment, the vendor is entitled upon reasonable notice to cancel the contract, and where such notice is given and the purchaser still refuses to comply he cannot afterwards enforce specific performance.

[*Knight* v. *Cushing*, 1 D.L.R. 331, 20 W.L.R. 28, reversed; and see as to the remedy of specific performance generally, annotation 1 D.L.R. 354, and as to want of title, annotation 3 D.L.R. 795.]

2. SPECIFIC PERFORMANCE (§ I A—5)—SALE OF LANDS—DOWN PAYMENT DEFAULT—ABANDONMENT—REPUDIATION—RIGHT TO RESCIND.

Where an agreement for the sale of land expressly requires payment of $10,000 on the purchase price contemporaneously with the execution of the document and where the purchaser prior to the execution thereof knew of an outstanding mortgage amounting to much less than the subsequent instalments of the purchase price, his explicit refusal to comply with the provisions for the $10,000 payment gives

his vendor the right to treat such refusal as an abandonment, or, at least, a repudiation of the agreement entitling the vendor to rescind. (*Per* Idington, J.)

3. VENDOR AND PURCHASER (§ I E—25)—NON-COMPLIANCE WITH EXPRESS AGREEMENT—REPUDIATION—RESCISSION.

Where, under an agreement for the sale of land a purchaser by his refusal to comply with an express provision of the document requiring a certain down payment on the purchase price repudiates the agreement thereby entitling the vendor to rescind, and where the vendor thereupon gives reasonable notice of rescission, and at the expiry of the time given the purchaser still refuses to comply, the contract is at an end and the purchaser cannot later insist upon specific performance. (*Per* Idington, J.)

4. VENDOR AND PURCHASER (§ III—38)—NOTICE—SALE OF LAND—OUTSTANDING MORTGAGE—NOTICE OF POSSIBLE TERMS—PRESUMPTION.

Where a purchaser enters into and signs an agreement for the purchase of land with prior notice of an outstanding mortgage, he ordinarily will be presumed to know that the mortgage may be in terms which do not permit of pre-payment of the mortgage money before maturity. (*Per* Idington, J.)

5. VENDOR AND PURCHASER (§ III—35)—SALE OF LAND — OUTSTANDING MORTGAGE—PURCHASER'S RIGHT IN PAYING ENTIRE PURCHASE PRICE TO PROTECTION.

Where a purchaser under an agreement to purchase lands with prior notice of an outstanding mortgage has paid certain instalments and the amount of the unpaid instalments is approximately the amount of the outstanding mortgage, and where he is electing, pursuant to the agreement to pay up the entire balance of purchase money he is thereby entitled to force the vendor to redeem the mortgage so outstanding, no matter how unexpectedly onerous that may prove to the vendor. (*Dictum per* Idington, J.)

6. SPECIFIC PERFORMANCE (§ I A—5)—SALE OF LAND—EFFECT OF PURCHASER'S INJECTING FRESH CONDITION INTO AGREEMENT.

Where a purchaser, under an agreement to purchase lands, insists upon something unprovided for in the agreement as a *sine qua non* of his performing his own express obligations under the contract, he thereby raises an impassable barrier to his own action for specific performance. (*Per* Idington, J.)

7. VENDOR AND PURCHASER (§ I E—28)—SALE OF LAND—DEFAULT ON PAYMENT CONTEMPORANEOUS WITH AGREEMENT.

Where an agreement for the sale of lands expressly requires payment of $10,000 on the purchase price contemporaneously with the execution of the agreement and the purchaser refuses to comply with this requirement, the vendor's obligation to sell did not become absolute. (*Per* Duff, J.)

[*Ridgway* v. *Wharton*, 6 H.L. Cas. 238, followed.]

8. TENDER (§ I—2)—SUFFICIENCY OF—SALE OF SPECULATIVE PROPERTY—DEFAULT ON PURCHASE PRICE—ULTIMATE TENDER—NEW CONTRACT.

Where a purchaser under an agreement of sale of lands refused to comply with an express provision for payment of a substantial down payment on the purchase price of lands of speculative value of which he does not receive possession, and after a long interval without taking any action until the property had greatly increased in value offers such down payment to the vendor, the latter will not be compelled to accept the same for the reason that it would, in effect, be constituting a fresh contract. (*Per* Duff, J.)

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9. VENDOR AND PURCHASER (§ I B—5)—SALE OF LANDS—DOWN PAYMENT—CONSIDERATION FOR EXECUTION OF AGREEMENT.

Where an agreement for the sale of lands expressly requires the payment of a fixed large instalment on the purchase price in "cash on the signing of this agreement," the consideration for this payment is the execution of the agreement itself, that is to say, the constitution of the relationship of vendor and purchaser between the parties and the promise or undertaking of the vendor to sell and convey. (*Per* Anglin, J.)

10. VENDOR AND PURCHASER (§ I B—5)—SALE OF LAND—OUTSTANDING MORTGAGE—VENDOR'S TITLE—DOWN PAYMENT.

Where an agreement for the sale of land expressly requires a certain down payment contemporaneously with the execution of the agreement, the purchaser is not entitled (as against an outstanding mortgage of which he had prior notice amounting to less than the remaining purchase instalments) to require the vendor to shew title to the land before making the down payment. (*Per* Anglin, J.)

11. VENDOR AND PURCHASER (§ I E—25)—SALE OF LAND—DEFAULT BY PURCHASER ON EXPRESS REQUIREMENT OF CONTRACT—RESCISSION AFTER NOTICE AGAINST DEFAULT.

Under an agreement for the sale of land, where the property is of a speculative character and time therefore of the essence of the agreement, where the purchaser has refused to comply with an express requirement of the contract for a large down payment on the purchase price, a four day notice by the vendor for payment, or, in the alternative, for cancellation is reasonable, and, on the purchaser continuing in default beyond the period so fixed by the notice, the vendor is entitled to treat the agreement as cancelled. (*Per* Anglin, J.)

Statement

APPEAL from the judgment of the Supreme Court of Alberta, *Knight* v. *Cushing*, 1 D.L.R. 331, by which the judgment of Simmons, J., in favour of the defendants, was reversed, Harvey, J., dissenting, and the action of the plaintiff was maintained with costs.

The present appeal was allowed and the action was dismissed.

Ewart, K.C., and *C. F. Adams*, for the appellants.

Wallace Nesbitt, K.C., *C. C. McCaul*, K.C., and *J. E. Wallbridge*, for the respondent.

Fitzpatrick, C.J.

THE CHIEF JUSTICE:—This appeal is allowed with costs in this Court and in the Supreme Court of Alberta, *in banco*, and the action is dismissed with costs.

Davies, J.

DAVIES, J., concurred in the opinion of Anglin, J.

Idington, J.

IDINGTON, J.:—These parties executed an agreement for the sale and purchase of half of two lots in Edmonton for the sum of $33,750, of which the sum of $10,000 was to be paid, by the express terms of said agreement, "on the signing of this agreement, the receipt of which is hereby acknowledged." This provision for payment proceeded to provide also that $10,750 should be paid in a year, $8,000 in two years and $5,000 in four years. A mortgage existed for $15,000 and interest at seven per

cent. per annum in favour of a third party and covering the whole of said lots, but did not fall due till a few months after the last of said payments of purchase-money. The respondent refused to pay the $10,000 payable on the execution of the agreement he had signed unless specific provision was made therein for the early severance of the mortgage so that each half would bear a determinate share in case it became desirable for him later on to have paid off what was to be borne by the half he was buying. He had signed with full knowledge of the existence of this mortgage and as a man of education and ordinary sense must have been alive to these possible complications before he signed the agreement; especially so as that had been preceded by a payment of $100 and a receipt therefor given him setting forth above terms of payment upon which the completed agreement was to be framed.

I pass by a mass of evidence in regard to an alleged verbal understanding providing for this outstanding mortgage as at best only confusing the questions to be solved. It is admitted as fact that respondent knew of this mortgage when he signed the agreement.

The plain language of the agreement required payment of $10,000 contemporaneously with the execution of the document. And when respondent refused to comply, with such express language binding him, he gave appellants the right to treat such explicit refusal as an abandonment or at all events repudiation of the agreement entitling them to rescind. They rescinded accordingly after having given four days to respondent to consider his position. The latter chose, at the end of four days, to insist on their amending the agreement before paying over the $10,000. How could he more clearly repudiate that agreement? His hope of getting a new agreement to suit him is no answer. The demand made, if complied with, might have turned out an impossibility for appellants to have fulfilled.

If the agreement had not by its terms impliedly excluded, as the judgment appealed from maintains, in acceding to respondent's claims all right to interest in this $10,000, it might have been urged with greater fairness that it was only to be considered as an instalment to be postponed till title passed. Moreover, by paying the $10,000 at the time of signing the respondent risked nothing. The balance of the purchase-money after such payment exceeded by over $7,000 the total mortgage. The respondent had a right under the agreement to proceed, after paying the $10,000 deposit, to insist on the title being made out before going further, and, before next payment, being made good on due protection being given him against the complications he professes to have dreaded. And in case of his electing the right given in the agreement to pay up the entire purchase-money he

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could have forced the appellant to redeem the mortgage no matter how unexpectedly onerous that might have proved to appellants.

Of course the collateral verbal agreement might have modified this. I am passing no opinion upon that, but upon the agreement which is sued upon and must be construed as it reads. This agreement was the outcome which the parties to the previous receipt anticipated.

If the agreement could be treated as not executed at all, then there was nothing but that receipt to be considered; imperfect by reason of the mutual intention that it should be followed by and be only the foundation for such agreement. And if such a receipt so given is to alone constitute the foundation for this action there seem to be many difficulties in respondent's way.

The Statute of Frauds, the verbal understanding and what seems, in light thereof, very like equivocal conduct on part of respondent in claiming something unprovided for therein as a *sine qua non* of his proceeding to close up the transaction, furnish, I incline to think, impassable barriers to his resting an action of specific performance on the receipt alone. He knew about the mortgage before writing his solicitor and when he instructed him to look at the title and if that found right to hand over the cheque, he ought at least to have told him that he knew of this mortgage and perhaps have told him his understanding as to that. As I read his letter it shews he thought the agreement completely executed and ready for the investigation of title and if that satisfactory then to hand over the cheque. He has seen fit to sue upon it and surely he cannot be heard to say now it was not executed. If so, then all else merged therein save possibly the collateral verbal agreement if evidence can warrant it being held such.

In my view his action fails and this appeal should be allowed with costs.

Duff, J.

DUFF, J.:—I think the appeal should succeed on the ground that the cash payment of ten thousand dollars not having been made the appellants' obligation to sell (and, consequently, their obligation to shew a good title) did not become absolute.

From the first the parties contemplated the execution of a formal contract of purchase. The evidence of the agent is precise that, according to his understanding with the respondent, the sum mentioned was to be payable upon the execution of that contract; and it is clear enough that the appellant Alfred B. Cushing, who acted for his brother as well as for himself, always had the same view of the arrangement.

The fact that such a formal agreement was contemplated is, as Lord Cranworth said in *Ridgway* v. *Wharton*, 6 H.L. Cas. 238, strong evidence that the parties did not intend finally to bind

themselves until that agreement should be completely constituted and there is a great deal to be said for the view that, according to the evidence, read as a whole, the legal position of the parties up to the time of the execution of the agreement of the 12th September was that the appellants had made an offer of sale in terms of the receipt which they had precluded themselves from revoking until a reasonable time had elapsed to enable the parties to prepare and execute a formal instrument. It is, however, not necessary to consider what the legal position of the parties might have been if the document of the 12th of September had never been executed. That instrument was prepared in accordance with the original intention of both parties and with the object of setting forth the terms of their agreement in final and binding form. It was executed by the appellants first and afterwards by the respondent; upon it the respondent sues; and it evinces, in my judgment, in the clearest way the intention of both parties that a condition precedent to the constitution of any obligation to sell on the part of the appellants was the payment of ten thousand dollars down. The parties do not, it is true, in formal terms provide that the payment of that sum is to be a condition; but the intention that it should be so is manifested by the frame of the agreement as a whole, the stipulations of which pre-suppose that this payment has already been made and shew unmistakeably that it is upon the basis of this assumed state of facts that the parties are contracting.

In this view it is, perhaps, unnecessary to notice the point made upon the last paragraph of the agreement. This paragraph applies, of course, only to default in respect of payments to be made in future. I cannot understand, I may add, the contention that the respondents after refusing to comply with this condition, can (after the time fixed for payment has long passed and the property has greatly increased in value) fasten a contract to sell upon the appellants by offering now to make the cash payment stipulated for. With great respect, to give effect to that contention would seem to be constituting a fresh contract.

ANGLIN, J.:—In my opinion, on a proper interpretation of the contract for the specific performance of which the plaintiff sues, the consideration for the payment by him of the sum of $10,000 "cash on the signing of this agreement" was the execution of the agreement itself—the constitution of the relationship of vendors and purchaser between the parties—the promise or undertaking of the vendors to sell and convey. The plaintiff was not entitled to require the vendors to shew their title to the land in question before payment of this sum of money: the agreement specially provides otherwise.

Anglin, J.

If the parol evidence may be looked at for this purpose (which, I think, more than doubtful), it seems to me to make it

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reasonably clear that it was well understood that the $15,000 mortgage (the existence of which, as a single charge on the land in question and other property for the whole amount secured, the plaintiff relies on as a justification for his refusal to pay the $10,000 until this incumbrance had been removed or had been so apportioned that the land which he was purchasing would stand as security to the mortgagee for only $5,000) would remain unchanged until the transaction should be closed by the purchaser paying the entire purchase money, either at the time stipulated, or in advance under the provision for that purpose.

The property in question was of a speculative character to the knowledge of both parties. Time was of the essence of the agreement. The defendants' notice giving the plaintiff four days within which to pay the $10,000, with cancellation as an alternative, was, in the circumstances, reasonable, and on his default they were entitled to treat the agreement as cancelled unless they had bound themselves not to do so. I find nothing which so binds them.

The express provision in the agreement for rescission by notice in the event of default in payments refers, in my opinion, not to the $10,000 cash payment, but to the subsequent payments which the purchaser covenanted to make. That provision the defendants do not invoke and it does not affect whatever rights accrued to them on the plaintiff's refusal to pay the $10,000. As already stated, his default, in my opinion, gave them the right to withdraw and cancel. That right they have exercised—I think legally and efficaciously.

I would, for these reasons, allow this appeal with costs in this Court and in the Court *en banc*, and would restore the judgment of the learned trial Judge.

Brodeur, J.

BRODEUR, J.:—I agree with the views expressed by Mr. Justice Duff. This appeal should be allowed with costs in this Court and in the Court *en banc*, and I would restore the judgment of the trial Judge.

Appeal allowed with costs.

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New Brunswick Supreme Court, Barker, C.J., Landry, McLeod, White, and Barry, JJ. April 19, 1912.

1. ACTION (§ I B 3—17)—FALSE IMPRISONMENT—STATUTORY NOTICE—LIBERAL CONSTRUCTION.

The notice of action required under sec. 84 of 49 Vict. (1886) ch. 25 (N.B.) in respect of a claim for damages for false imprisonment is to be construed liberally, and it is sufficient if the notice substantially informs the defendant of the ground of complaint.

[*Jones* v. *Bird*, 5 B. & Ald. 837; *Howard* v. *Remer*, 2 El. & Bl. 915, 23 L.J.Q.B. 60.]

2. ACTION (§ I B 3—17)—FALSE IMPRISONMENT—NOTICE OF ACTION UNDER SEC. 84 OF 49 VICT. (1886) CH. 25 (N.B.)—REQUISITES—JOINT NOTICE.

While a notice of action, under sec. 84 of 49 Vict. (N.B.) 1886, ch. 25, in a false imprisonment case brought jointly against the officers who issued the warrant and the constable who executed it may be objectionable on the ground that the notice does not set forth the grounds of each officer's liability, yet, if it clearly states the part which each took in the commission of the wrong, the joint notice is sufficient, because the arrest and imprisonment of the plaintiff were in law the joint act of both officers.

[*McGilvery* v. *Gault*, 17 N.B.R. 641, 19 N.B.R. 217, referred to.]

3. ACTION (§ I B 3—17)—FALSE IMPRISONMENT—NOTICE OF ACTION—REQUISITES AS TO FORM—ATTORNEY'S PLACE OF ABODE.

Under sec. 84 of 49 Vict. (1886) ch. 25 (N.B.), prescribing that the name and place of abode of the attorney shall be endorsed on the notice of action, it is sufficient if they appear anywhere in the notice.

[*Baxter* v. *Hallett*, 10 N.B.R. (5 All.) 544; *McGilvery* v. *Gault*, 17 N.B.R. 641, 19 N.B.R. 217, referred to.]

4. OFFICER (§ II C—85)—STATUTORY DEFENCE—"LAWFUL" ACTS—MEANING OF "LAWFULLY."

An "unlawful" act is one contrary to law, common or statutory, and a defence by statute that the defendant "lawfully acted by virtue of his office" is sustainable only where the act in question was done "lawfully" so far as the other party is concerned.

[*Fawcett* v. *York and N. Mid. R. Co.*, 16 Q.B. 610; *R.* v. *Clarence*, 22 Q.B.D. 23, referred to.]

5. FALSE IMPRISONMENT (§ II B—11)—FALSE ARREST—STATUTE RESPECTING THE PROTECTION OF CONSTABLES.

In an action against a constable for false arrest and imprisonment the statute respecting the protection of constables C.S.N.B. 1903, ch. 64, sec. 2, requiring demand for perusal and copy of the warrant on which the plaintiff was arrested does not apply where it is admitted that the constable was not acting "in obedience to a warrant of a justice."

6. EVIDENCE (§ II M—362*b*)—ONUS OF PROOF—FALSE IMPRISONMENT—WILLINGNESS TO GO TO GAOL.

In an action against a town treasurer and a constable for false arrest and imprisonment, where the defendants set up that the plaintiff, if imprisoned, was not imprisoned against his own free will, the onus is upon the defendants to prove plaintiff's willingness to go to gaol.

7. EVIDENCE (§ II M—362*b*)—FALSE IMPRISONMENT—WILLINGNESS TO GO TO GAOL—FAILURE TO RESIST THE ARREST, NOT EVIDENCE OF WILLINGNESS.

In an action against a town treasurer and a constable for false arrest and imprisonment, where the defendants set up that the plain-

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tiff, if imprisoned, was not imprisoned against his own free will, the fact that the plaintiff when arrested by the constable did not resist but went willingly to gaol under the arrest does not prove or tend to prove the defendants' plea, it being a legal duty not to resist the arresting officer.

8. APPEAL (§ VII M 4—588)—MISDIRECTION—INSTRUCTIONS — REFERENCE TO CONTEXT OF JUDGE'S CHARGE.

Upon a motion for a new trial on the ground of misdirection, the expressions objected to are to be interpreted by the meaning conveyed as they are associated with the context, and the question of misdirection is to be determined upon a fair and reasonable construction of the entire charge given to the jury.

9. EVIDENCE (§ XI C—770)—RELEVANCY AND MATERIALITY—CHARACTER—PREVIOUS IMPRISONMENT FOR DEBT—DAMAGES.

In an action for false imprisonment for non-payment of a municipal tax, the fact that the plaintiff had been previously arrested and held within the prison limits for debt is not relevant on the question of quantum of damages.

10. NEW TRIAL (§ II—8)—MISDIRECTION — INSTRUCTIONS — SUBSTANTIAL WRONG NEGATIVED.

A new trial is not granted on the ground of misdirection, unless, in the opinion of the court, some substantial wrong or miscarriage has been thereby occasioned.

[*Bray* v. *Ford*, [1896] A.C. 44, referred to.]

11. NEW TRIAL (§ II—8)—MISDIRECTION—INSTRUCTIONS—JUDGE'S OPINION ON FACTS.

It is not misdirection for the judge to tell the jury his opinion upon a question at issue before them, if he expressly leaves that question to them to settle.

[*Smith* v. *Dart*, 14 Q.B.D. 105, 108, referred to.]

12. DAMAGES (§ III G—152)—QUANTUM—FALSE IMPRISONMENT—PERSON AND CHARACTER INJURED—LATITUDE OF JURY.

Upon the quantum of damages, in an action for false imprisonment, where the person and character are injured, it is difficult to fix the limit, and a new trial will only be granted on the ground of excessive damages where the verdict of the jury is so large as to be perverse and the result of gross error or there were undue motives or misconception.

[*Gough* v. *Farr*, 1 Y. & J. 477; *Praed* v. *Graham*, 24 Q.B.D. 53, referred to.]

13. DAMAGES (§ III G—152)—QUANTUM — FALSE IMPRISONMENT — ELEMENTS FOR JURY FIXING DAMAGES.

The jury may take into consideration as to the quantum of damages, in an action for false imprisonment the following elements: time lost, business interrupted, physical and mental suffering, the indignity, circumstances of family, and condition of gaol, cost of release as well as the illegal restraint itself as distinct from all else.

[Sedgwick on Damages, secs. 461-463, and sec. 49, specially referred to.]

Statement

ACTION for false arrest and false imprisonment. Tried before McKeown, J., and a jury at the York sittings of the King's Bench Division on October 24 to 26, 1911. Verdict entered for the plaintiff for $300 with leave reserved to the defendants to

move to enter a verdict for the defendants or for a nonsuit or for a new trial or that the damages be reduced.

Statement

The plaintiff, a resident of the town of Marysville, York county, was arrested by the defendant Saunders, the town marshal of Marysville, and also a provincial constable on January 30, 1911, under an execution or warrant for dog taxes issued by the defendant Sloat the town treasurer against the plaintiff on January 3, 1911. Marysville was incorporated by Act 49 Viet. ch. 25. By sec. 47, sub-sec. 27 of this Act authority is given "to impose a tax by way of license on the owners or harbourers of dogs." Sec. 50 provides that penalty for non-payment of licenses may be recovered on suit before the mayor or councillor or police magistrate enforced by warrant of distress and that proceedings shall be taken in the name of the town of Marysville. On May 5, 1908, the town passed a by-law to the effect that owners or harbourers of a dog should pay a tax of one dollar in each year, which tax should be collected in the same manner as other taxes and rates in Marysville. The plaintiff was arrested on execution issued under this by-law for non-payment of his dog tax for the year 1910. He was arrested on Monday a little after two o'clock, taken to the county gaol and locked up, and remained there until two o'clock on the following Wednesday, when he was discharged upon habeas corpus. The costs of obtaining his discharge upon *habeas corpus* were $65.00, for which the plaintiff had given his obligation to his solicitor.

Further facts are stated in the judgment of the Court delivered by Barry, J.

Argument

February 14 and 15, 1912. *Crocket*, K.C., for the defendants moved to set aside the verdict for the plaintiff and to enter a verdict for the defendants or for a nonsuit, or for a new trial or for reduction of damages. I will not attempt to argue the legality of the by-law passed by the town of Marysville, or of the execution upon which the plaintiff was arrested. I claim that the notice of action is insufficient under 49 Viet. ch. 25, sec. 84. The notice was addressed to the two defendants jointly, describing one as town treasurer, the other as constable, but not indicating that the latter had any official position in the town. There is a statement that the treasurer acted maliciously and without probable cause but there is no statement that the constable acted maliciously and without probable cause in executing the process.

[McLEOD, J.:—The object of the notice is to give a man an opportunity to offer amends. The notice is ample for that.]

Crocket, K.C.:—The notice alleges an offence against Sloat only. In *McGilvery* v. *Gault*, 17 N.B.R. 641, a notice was held defective because it did not state the cause of action explicitly.

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This notice does not state that the defendant Saunders was acting as a town officer. Neither does the notice describe a joint cause of action, and the name and place of abode of the attorney is not endorsed on the notice although the attorney's business address is inside the notice. The notice of action stated a claim for maliciously issuing a warrant but there is no evidence of any malice. The evidence fails to shew that the defendant acted unlawfully, within the meaning of sec. 84 of the Act. We say the constable acted lawfully because the execution was regular on its face and he was acting as town marshal. If he was acting as constable then he is protected by C.S. 1903, ch. 64, sec. 2, because no demand was made by the plaintiff for a perusal and copy of the warrant upon which he was arrested. There was no evidence that the plaintiff was arrested against his will. The evidence indicates that he wished to be arrested in order to be able to bring an action against the town. The Judge took this matter out of the hands of the jury. I claim misdirection also in telling the jury that they were to disregard the fact that plaintiff had been arrested before. The plaintiff was on the gaol limits at the time of arrest. That would make a great difference in damages for injured sensibilities. The Judge also charged that it made no difference whether the constable acted maliciously or not. I claim the damages were excessive. The plaintiff was out of work and aside from damages for indignity the only pecuniary damage was $65 for procuring discharge on *habeas corpus*. No costs are recoverable unless there is evidence that costs have been paid. He was imprisoned only three days. There was no loss of wages, no loss of time and no evidence of injury by confinement. I may say there was an offer to suffer judgment by default.

[BY THE COURT:—You cannot draw the Court's attention to an offer to suffer judgment by default.]

Crocket, K.C.:—I cite the following: *Doe* v. *Cahill* (1853), 7 N.B.R. 650; *Sewell* v. *Olive* (1859), 9 N.B.R. 394; *Marks* v. *Newcombe* (1883), 22 N.B.R. 419; *Gosden* v. *Elphick* (1849), 4 Ex. 445; *White* v. *Hamm* (1903), 36 N.B.R. 237; *Robinson* v. *Tapley* (1880), 20 N.B.R. 361.

Phinney, K.C., for the plaintiff, *contra*:—The execution was not sufficient on its face. It directs a levy on the goods within the county of York whereas it should be on goods within the town of Marysville. Saunders swears he is not a constable for the county of York. He is a provincial constable and a town marshal of Marysville. He says he was acting as a town marshal but the execution is directed to a constable of York county. That should have called his attention to the irregularity. The town

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treasurer had no right to issue the execution under any circumstances. In regard to the notice of action it was a narration of the circumstances drawn with considerable care and certainly sufficiently to put defendants on notice. Where a justice acted wholly without jurisdiction in making an arrest no allegation of malice is necessary: *Melanson* v. *Lavinge* (1906), 37 N.B.R. 539. There is no need of two separate notices of action: *Kelly* v. *Barton* (1895), 26 O.R. 608; *Scott* v. *Robertson*, 26 O.R. 452; *McGilvery* v. *Gault*, 17 N.B.R. 641, 19 N.B.R. 217; *Ward* v. *Outhouse* (1882), 22 N.B.R. 220; *Hicks* v. *Faulkner* (1878), 8 Q.B.D. 167; *Cave* v. *Torre* (1886), 54 L.T. (Eng.) 87, 515.

The defendant argues that no matter how irregularly the town officials may act, if they act as town officials they are protected by sec. 84 of the Incorporation Act, but that is no answer to the plaintiff's damages. The provision for demand of perusal and copy of warrant is for the protection of officers in the administration of the criminal law: *White* v. *Hamm* (1903), 36 N. B.R. 237.

It is claimed that there was no evidence that the arrest was against the plaintiff's will.

[BY THE COURT:—You need not argue that point.]

Phinney, K.C.:—It is true Markey was on the limits but he works within the three mile limit so it was no restriction on his liberty.

[BARKER, C.J.:—Being on the limits for debt does not necessarily hurt a man's reputation.]

Phinney, K.C.:—I cite further: *Ingraham* v. *Parks* (1879), 19 N.B.R. 101, *Williams* v. *Currie* (1845), 1 C.B. 841; and Order 39, r. 6.

Crocket, K.C., in reply, cited C.S.N.B. 1903, ch. 57.

April 19, 1912. The judgment of the Court was delivered by

Barry, J.

BARRY, J.:—This action was brought by the plaintiff, a resident of the town of Marysville, against George R. Sloat, treasurer of the town, and Fraser Saunders, the town marshal—who is also a provincial constable, for the illegal arrest and imprisonment of the plaintiff by the town marshal on the 30th of January, 1911, upon what has been spoken of as an execution or warrant for dog taxes issued by the town treasurer against the plaintiff on the 3rd day of the same month. It appears, by the evidence, that before issuing the warrant, the town treasurer had two conversations with the plaintiff, in both of which he was told of the former's intention of issuing the

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execution unless a tax of one dollar for harbouring a dog in 1910, was paid, and that the plaintiff upon both occasions repudiated his liability and refused to pay the tax. The town marshal also, before executing the execution had two conversations with the plaintiff, the latter of them on the Saturday preceding the Monday of his arrest, in which he was asked to pay the tax, but which he absolutely refused to do, saying, when the town marshal informed him that he had a warrant against him, "All right, I won't pay it, the gaol is handy and I am here." The plaintiff was arrested on Monday the 30th of January, a little after two o'clock in the afternoon, was taken to the county gaol and locked up, and remained there until two o'clock in the afternoon of the following Wednesday, when he was discharged by Judge Wilson upon proceedings in the nature of *habeas corpus*. When I say he remained in gaol during this time, and while it is perhaps true that he was theoretically in the custody of the gaoler during the forty-eight hours mentioned, it may be noticed as illustrating the lenient character of the imprisonment to which the plaintiff was subjected, that during that time, the gaoler twice allowed the plaintiff out on his own parole, once on Tuesday afternoon, when he was allowed to go to the Waverley hotel to get a cup of tea, and again on Wednesday morning, when he went to Lindsay's restaurant for the purpose of obtaining some refreshment.

At the time of his arrest the plaintiff was not a well man; he had been sick off and on and under a physician's care for a month before his arrest, and continued in a poor condition of health for two months after his discharge. Dr. Fisher, his family physician, who gave evidence at the trial, says the plaintiff was suffering from what he termed dry pleurisy, complicated with catarrh of the stomach and dyspepsia; and although the doctor does not say, in so many words, that while he was in gaol the plaintiff's condition became worse, he does say that his condition was worse when he first saw him after his discharge from gaol, than it was when he last saw him before his incarceration, leaving one to draw the natural inference that the plaintiff's illness did in fact become aggravated by his confinement in the gaol.

The plaintiff, we are told, is a respectable man although of somewhat humble circumstances in life, an unskilled labourer, unable to write, and one who, about the time that this trouble overtook him, was employed as the driver of a team for Mr. Hatt of Marysville, and earning $1.50 per day when working, which, on account of ill-health, he was not able to do all the time. In the payment of his solicitor, for serving papers, and for gaol fees, it cost the plaintiff $65 to obtain his discharge upon *habeas corpus;* at the time of the trial this sum had not

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been all paid, but the plaintiff had given his obligation for it. These costs and charges besides his loss of time while in gaol, were, I think, all the actual damages that the plaintiff proved at the trial. Without any *habeas corpus* proceedings he would have obtained his liberty by effluxion of time on Thursday at two o'clock, or twenty-four hours after he did actually obtain it, the deputy sheriff, a witness at the trial, stating that the commitment under which he was held authorized his detention for three days only. For four years before the time of the trial the plaintiff had been, and was then still a debtor confined to the gaol limits of the county of York upon civil process. I mention this circumstance because, at the trial, it was put forward in mitigation of damages that the plaintiff could not, with any shew of reason claim damages for the imprisonment in the gaol when he was in contemplation of law already in gaol.

The cause was tried before McKeown, J., and a jury at the York *nisi prius* sittings in the month of October last, and resulted in a verdict in favour of the plaintiff for $300. Having regard to the amount of the verdict, the circumstances surrounding the arrest, the expenses and loss of time that followed as a consequence, and his condition in life are all matters that must necessarily be looked at when one of the grounds urged upon this appeal as a reason for a new trial, *i.e.*, excessive damages, comes to be considered, and it was for that reason that I have referred to them here.

An alternative motion on behalf of the defendants was made to us at the last term, asking that a verdict be entered for the defendants, or for a nonsuit, or for a new trial, or for a reduction of the damages. I may say at once that after full consideration of the arguments addressed to us and a careful perusal of the evidence, I am of the opinion that the defendants are not entitled to succeed on any branch of their motion.

It appears by the report of the trial that at the trial some attempt at justification of the arrest under colour of legal process was made by the defendants, they were claiming that the execution was issued under the authority of a by-law passed by the town of Marysville, acting within the powers given by its act of incorporation and the acts in amendment thereof, but in opening his argument before us Mr. Crocket very frankly stated —and in doing so, he was, I think, well advised—that he was not going to attempt to support either the legality of the by-law or the regularity of the process under which the plaintiff had been arrested. We can, therefore, approach the consideration of the other questions arising in the case, with these very important facts in the plaintiff's favour, admitted, viz., that the by-law under which the warrant to arrest the plaintiff was issued is *ultra vires* the town council of the town of Marysville;

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the execution of warrant was unauthorized and therefore bad; and that there was not in law or in fact any justification whatever for the arrest or imprisonment of the plaintiff.

The grounds upon which the defendants argued that the verdict should be entered for them are three, viz: (1) The notice of action is insufficient as required by 49 Viet. (1886), ch. 25, sec. 84 (an Act to incorporate the town of Marysville); (2) The evidence fails to establish the cause of action stated in the notice; and (3) The evidence fails to shew that the defendants or either of them acted *unlawfully*, within the meaning of sec. 84 of the above-mentioned Act. The section of the Act referred to is as follows:—

> No action shall be brought against any person for anything done by virtue of an office held under any of the provisions of this Act, unless within three months after the act committed, and upon one month's previous notice thereof in writing, in which the cause of action and the Court in which it is to be brought shall be explicitly stated, and the name and place of abode of the attorney endorsed thereon, and the action shall be tried in the county where the cause of action arose. The defendant in any such action may plead the general issue and give special matter in evidence. If it appear that the defendant lawfully acted by virtue of an office held under the provisions of this Act, or that the cause of action arose in another county, the jury shall give him a verdict. If on the trial of any such action, the plaintiff shall not prove the action brought, notice thereof given within the time limited in that behalf, the cause of action stated in the notice, and that it arose in the county where brought, he shall be nonsuited, or the verdict may be for the defendant.

Specifically, the objections to the notice of action, are: that it is addressed to two officers instead of one—to George R. Sloat, town treasurer of the town of Marysville, and to Fraser Saunders, of the same place, constable; that there should have been two notices, one to each; that the notice to Saunders should have been addressed to him as an officer of the town and not as a constable; addressing it in a general way to a constable does not fulfil the requirements of the Act, since it conveyed no intimation to Saunders that the action proposed to be brought against him was to be brought for something done by him by virtue of an office held under the town; the notice describes, not a joint action against both defendants, but a single action against Sloat, or two separate actions, one against each; and lastly, that the name and place of abode of the attorney is not endorsed on the notice.

The notice is addressed to "George R. Sloat, town treasurer of the town of Marysville in the county of York and Province of New Brunswick, and Fraser Saunders of the same place, constable." It is subscribed by J. D. Phinney, who describes himself as "of the city of Fredericton in the county of York

(whose place of business and address for service is 450, Queen street, Fredericton) attorney and solicitor for the said Philip Markey." The notice informs the defendants that after the expiration of one calendar month from the time of the service of it upon them, a writ of summons will be sued out of His Majesty's Supreme Court of New Brunswick, King's Bench Division, against them for the false imprisonment of the plaintiff; then the part that each defendant played in the commission of the wrong complained of is explicitly indicated, Sloat's part consisting in the issuing of the execution (which is set out verbatim in the notice) placing it in the hands of Saunders and instructing him to execute it, and Saunders' part, arresting the plaintiff, conveying him to Fredericton and delivering him to the keeper of the gaol—the defendants thus jointly causing the plaintiff to be imprisoned in the common gaol of the county of York for three days, which is the wrongful act complained of and in respect of which the plaintiff notifies them that he purposes bringing an action.

Now, it does seem to me that this notice could have left in the minds of the defendants no doubt as to what the action proposed to be taken against them was for. In general, a notice of action ought not to be construed with great strictness—at least not with the same strictness as used formerly to be required in pleading—and so long as it informs the party substantially of the ground of complaint, it will suffice: *per* Abbott, C.J., and Bayley, J., in *Jones* v. *Bird*, 5 B. & Ald. 837. It ought to be construed liberally; *per* Crompton, J., in *Howard* v. *Remer*, 23 L.J.Q.B. 60. In a case in this Court relied on by the defendants, *McGilvery* v. *Gault*, 17 N.B.R. 641, which will, in many respects, be found similar to the one before us, the action was brought jointly against the justice who issued the warrant and the constable who executed it; the notice was held defective in that it alleged a joint trespass against the justice and constable, but failed to clearly set forth the grounds of the justice's liability. No such objection can be taken to the notice here, because, as I said before, the part which the town treasurer took in the commission of the wrong complained of is clearly and explicitly stated in the notice. And when this same case, after the second trial, again came before the Court, on the motion for a new trial it was held that the arrest and imprisonment of the plaintiff was in law the joint act of the magistrate and constable and a notice so alleging it was sufficient. *McGilvery* v. *Gault*, 19 N.B. R. 217. While it is usual to state the address and addition of the party to whom the notice is given, this is not absolutely necessary unless the statute requires it, and the statute here does not require it: Chit. Arch. Q.B. Prac. 1290; neither is it necessary to state whether the action is to be a joint or several

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An attorney may be described in a notice of action as of the place of his office: *Roberts* v. *Williams*, 1 Gale 315; or as of his residence: Lb. 4 Dowl. 486; in this case the attorney is described in both ways; describing him generally of a large town would not be sufficient, but this would be different if the town were a small one: 1 Tidd Pr. 28; Chit. Arch. Q.B. Pr. 1292. Under a statute requiring the name and place of abode of the plaintiff's attorney to be endorsed on the notice of action, it was held by this Court that if the name and abode of the attorney appear anywhere on the notice, it is sufficient; *Baxter* v. *Hallett*, 10 N.B.R. (5 All.) 544; followed in *McGilvery* v. *Gault*, 17 N.B.R. 641.

It is provided by the section which I have quoted of the town of Marysville Incorporation Act, that, if it appear at the trial that the defendant lawfully acted by virtue of an office held under the provisions of the Act, the jury shall give him a verdict. The second ground upon which the defendants ask to have a verdict entered for them is based upon this provision of the statute, and they ask to have the verdict entered for them because they say the evidence fails to shew that the defendants or either of them acted unlawfully. But how does it lie in the mouths of the defendants to say that the defendants did not act unlawfully, when it is admitted that the whole proceedings, the issue of the warrant and the arrest thereunder, were illegal and void? A moment's consideration will, I think, demonstrate the futility of this objection. "Lawfully" means lawfully so far as the other party is concerned: *Fawcett* v. *York and N. Mid. Ry.*, 16 Q.B. 610; and the ordinary import of the word "unlawfully" is of an act which is forbidden by some definite law, and does not embrace that which is merely immoral: *per* Stephen, J., at p. 41, in *R.* v. *Clarence*, 22 Q.B.D. 23. Everyone understands unlawfully as meaning that which is contrary to law, illegally, wrongfully. It is a word frequently used in indictments in the description of the offence; it is necessary when the crime or offence did not exist at common law, and when a statute describing an offence, uses the word: ....., 1 Mood. C.C. 339; but it is unnecessary whenever the offence existed at common law, and is manifestly illegal: 1 Chit. Cr. Law, 2nd ed., 241.

The grounds upon which a nonsuit is asked to be entered for the defendants are two, viz.: (1) No demand for a perusal and copy of the warrant upon which the plaintiff was arrested; and (2) no evidence that the imprisonment or detention of the plaintiff was against his will. In regard to the first of these grounds, it is said in ch. 64 Con. Stat. 1903, "Respecting the protection of constables" (sec. 1), that the expression "constable" means a constable, police or other officer, or any person

acting in his aid; and that the expression "justice" means a justice of the peace, a stipendiary or police magistrate, and any other person having by law authority to issue a warrant commanding a constable to perform any duty specified therein. (Sec. 2) Before any action shall be brought against a constable or other officer for anything done in obedience to a *warrant of a justice*, a demand in writing of the perusal and copy of such warrant, signed by the person making the same, shall be served upon him personally or left at his usual place of abode for the space of six days; and (sec. 3) if after such demand, and a compliance therewith, an action be brought against any such person, without making the justice a party thereto, on the proof of such warrant upon the trial, judgment shall be given for the defendant, notwithstanding any want of jurisdiction in the justice. If the action be brought against any such person jointly with the justice, then on proof of such warrant, judgment shall be given for the constable.

There can be no doubt that Saunders, in arresting the plaintiff, was acting as a constable. He was in fact, a provincial constable appointed under ch. 57 Con. Stat. 1903, and as such was *ex officio*, a constable of every county of the province, and is by that chapter entitled to the protection afforded to constables by chapter 64. He tells us in his evidence that in arresting the plaintiff he was acting in the capacity of constable, and that that is so is not disputed by the plaintiff, because in the notice of action he addresses him as a constable. If, therefore, Saunders was acting in obedience to the warrant of a justice, he would be entitled to the protection afforded to constables generally under the statute, and if no demand or perusal and copy of the warrant was made upon him before action brought, which there was not, the plaintiff cannot recover as against him. Sloat was neither a justice of the peace, a stipendiary, or a police magistrate. It, therefore, becomes important to inquire whether, in the words of the statute, he was a "person having by law authority to issue a warrant commanding a constable to perform any duty specified therein." Sloat, as town treasurer, is authorized by sec. 77 of the Act already mentioned, to issue for non-payment of rates and taxes assessed against residents of the town, an execution in the form prescribed by the Act. Assuming that he as town treasurer had the necessary authority to issue, for the collection of a dog tax or dog license, such an execution as is prescribed for the collection of ordinary rates and taxes—which I do not think he had—a comparison of the execution so prescribed with the one upon which the plaintiff was arrested will shew that in issuing the latter, Sloat far exceeded his authority. The execution issued is not the one prescribed by the Act at all, but something very different. It

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is not necessary, in order to point out this difference, to enter upon any lengthy examination of the two papers, or to institute a comparison between the one authorized and the one issued, because we are relieved of this necessity by the admissions of the defendants' counsel. If it be true then, that the town treasurer had not by law authority to issue the execution which he did commanding the constable to perform the duty specified in it, it is clear that the constable cannot be said to have been acting in obedience to the warrant of a justice as defined by the Act, and that, consequently, no demand in writing of a perusal and copy of the warrant before action brought was necessary, and that upon this ground the defendants must fail.

The second ground for a nonsuit may be shortly disposed of. It is argued that there is no evidence to shew that the plaintiff was imprisoned or detained against his will; it is even suggested that he in fact connived at his own arrest and formulated this scheme of procuring his own arrest as a commercial proposition in order to get an action against the town where he resided, and in this way obtain a money compensation in the nature of damages. We do not, as a rule, find in this part of the world where we live, people resorting to such means for the purpose of augmenting their incomes. We do not find them going to gaol of their own free will. There may have been cases of the kind, but in my own experience I have never met with them. A careful perusal of the evidence satisfies me that there is not the slightest ground for this contention of the defendants. The plaintiff's evidence leaves upon one's mind, or it does upon mine, at all events, the impression that he considered his arrest as an inexcusable indignity put upon him, and in his cross-examination this is made doubly plain by his resentment of the questioning of the defendants' counsel as to whether he had ever been in gaol before; he strongly resented the imputation which he thought the question carried with it, and characterized it as insulting. This certainly is not the language or behaviour of a man who went to gaol of his own volition in order to make money out of his imprisonment. In no sense does his evidence support the view put forward by the defendants as was, very properly, I think, intimated to the jury by the Judge at the trial.

The grounds upon which a new trial is asked for, may be reduced to two, viz.: Misdirection of the trial Judge; and Excessive damages. Seven distinct instances of what is claimed to be misdirection are stated in the notice. The first five of these instances occur in four consecutive pages, 135 to 139 of the report of the charge, the last two on page 145. In order to discover whether there has been misdirection in a Judge's charge, it is not, I apprehend, the proper way to single out a passage, a

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sentence or expression here and there, detach it from the context and, viewing it alone, say here we have misdirection. Scarcely any charge would bear scrutiny of such an unfair examination. On the contrary, the context, the charge as a whole should be carefully looked at when the meaning or construction from that, which viewing it alone, might be put upon an isolated expression, is often found to be either entirely changed or greatly modified. Now, that, I think, is the case here, and in order to shew the general scope of the Judge's charge and to demonstrate the extent to which the passages objected to are tempered and moderated by what proceeds and what follows them, I shall quote—even at the danger of becoming tedious, for I see no shorter way—nearly the whole of that part of the Judge's charge in which the first five of what are said by the defendants to be the objectionable passages, occur; the passages objected to being italicized:—

> He (the plaintiff) took the ground from the start that he did not intend to pay it (*i.e.*, the dog tax). Under these circumstances it is for you to say whether he invited his own arrest. He did not pay, he said in two or three conversations he had with the officers, he was not going to pay. When the officer told him what he would have to do, he said he was ready to go. It is for you to say—*it seems to me so far removed from any connivance such as I have pointed out that it is difficult to say it with the same breath.* When a constable is armed with a piece of paper to take a man, the paper may be wrong. I am not saying that a man is not justified in resisting arrest when the paper carries with it no authority; yet I do say this, it is an offence to resist a constable in the execution of his duty, and it would be a better thing, as a matter of course, to submit to the constable and go to gaol than to attempt to oppose him though the person who is arrested thinks he is not liable to go under the paper. It would be better for him to go and get his liberty in the regular manner than to set up suppositions of his own, which he thinks are right, against the forces of the law. A constable is duly appointed and he has an authority behind him, and it is better for every good citizen to recognize that authority. If a man, a constable, has a paper against another man with which to take that man to gaol, it is the man's duty to go. If he is wrongfully arrested there is a way for him to get out, either by paying the money, or giving bail, or by getting out as this man did, or whatever way the law allows. I would say in connection with that, that the defence—while you are the absolute judges of the fact—points to the statement made by the plaintiff that he was ready to go, and the further statement that "the gaol is handy and I am here." I may say while these statements are open to the observations which have been made by the counsel for the defence, that they are further open to the interpretation that it was in the mind of the plaintiff to resist absolutely the payment of the money and nothing else. It is for you to say. It is a question of fact. I will take the findings upon the facts from you, and you will take the law from me. I do not wish to express any opinion, but I feel it my duty

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to say that the law requires proof of facts. *In connection with the proof of this fact, the statement made here by the plaintiff would not, it seems to me, in any way come up to what the law requires in that regard.* However, I will leave it for your consideration. . . .

I would further say to you that there has been quite a little talk, one way and another, about the plaintiff having been in a suit and having been arrested, and it is suggested because he gave bail two or three years ago, and that there has been nothing done on it, therefore he would be in a sense imprisoned now, if the bail is alive. That has been put before you as a suggestion that it has not done Mr. Markey very much damage. *I think I am right in saying to you that, whether or not Mr. Markey had been arrested before, (in) October,* 1898, *does not make a particle of difference with reference to the damage which was done by this arrest.. You would not require me to tell you that, in order for you to appreciate it. I just mention it. Disregard that consideration altogether.* The only way it could come in would be as to whether he was right when he said he had not been arrested before. Sometimes facts get so complicated that it is necessary to go into all the cases, and to see who is incorrect in his recollection and who is telling the truth. If you think the plaintiff was mistaken in connection with one statement, you may infer that he may be mistaken in others. The only way would be when you come to consider the statement the plaintiff makes with reference to the injury which his imprisonment did him, you would have a right to consider his truthfulness as an element by which it might be more or less affected. That is the only way. A man might be unfortunate enough to be arrested every year of his life; that would not justify somebody coming and putting him in gaol, who had no right to. The fact of his being out on bail now—if the bail holds—I think there is a provision in the law now that bail does not last for more than a certain length of time; whether it expires, or you have to make application for discharge, I am not prepared to say at the present time—*but even if the bail be good and be considered to be alive, that would not be an excuse to these people and would not make the injury a particle less, nor (should it) be considered by you in coming to a conclusion what the damages will be.* . . .

There are just one or two other matters which I wish to speak of to you. I have spoken with reference to the amount of damages. There are some cases in which the law recognizes that a man is entitled to damages, a good deal more than what the exact amount of the injury that was done. That is vindictive or exemplary damages. This is not one of these cases. *There are cases where a man has transgressed the law, and by reason of his technical injury, the plaintiff gets nominal damages. I don't think that is this case either. A man's damages in connection with a case of this nature would be measured by the injury which the man sustained In this case the plaintiff was taken from his home and work and put in gaol and kept there for a couple of days.* It is claimed that his health was injured. I suppose you followed the evidence as much as I have. While I wish to leave the matter to you with the utmost fairness, I have not been able to see very clearly the evidence as to injury to the man's health. Dr. Fisher stated his condition was not as good when he came out of

gaol as when he went in, but he cannot say he got worse when he was in gaol. You can give him damages for the arrest—and if you think it was a consequence—for any injury he received in gaol that would affect his health.

The portion of the Judge's charge which I have been quoting and which contains five of the passages objected to does not seem to me to be otherwise than proper. It is a fair and moderate comment upon the evidence, and whenever the Judge is found expressing his own opinion upon the facts, it will also be found that the determination of those very questions is finally left to the jury to settle.

It remains to consider the last two objections to the Judge's charge, which are to be found in that portion of it which follows. It will be observed that in the first of the passages the Judge was speaking of liability generally and not of damages. Had he been speaking of the quantum of damages and giving the jury a standard by which they might assess them, I should be disposed to think the charge, in this particular, objectionable. But it is clear he was not so speaking.

I am asked also to say something to you in connection with the defendants' acting in good faith and believing they were doing their duty. I think that is pretty well admitted—that these defendants believed they were doing their duty—both of them. I think the defendant Saunders gave some evidence on that question. *If the defendant Sloat acted in excess of his jurisdiction and issued a void execution, it would not make a particle of difference whether he believed he was doing his duty or did not. That is my direction. If the warrant was wrong, as I told you it was wrong, whether he thought he was doing right or thought he was doing wrong makes no difference with reference to his liability in this suit.* I am asked to call attention to a case the effect of it being that a jury found $40 damages, while the damages proven were only $2. That is, the man proved actual damages to the extent of $2, and a jury gave him a verdict for $40. A new trial was moved for and the Court said the damages were not excessive; the jury were not limited to the actual damage, but could give him an amount to compensate him for the cost he was necessarily subjected to in bringing an action. *So I say to you, you are not to press unduly on these defendants, thinking that they have somebody behind them, neither are you to consider this man is just a poor man, and five dollars or ten dollars or fifty or one hundred dollars would be an enormous amount for him. Rather look at it from the standpoint of compensation for the damage he has sustained in connection with his loss of time and the expense he has been put to.*

A new trial is not granted on the ground of misdirection, unless in the opinion of the Court, some substantial wrong or miscarriage has been thereby occasioned: O. 39, r. 6; *Bray* v. *Ford*, [1896] A.C. 44; *Floyd* v. *Gibson*, 100 L.T. 761; *Anthony* v. *Halstead*, 37 L.T. 433; *Tait* v. *Beggs*, [1905] 2 Ir. R. 525; and it is not misdirection for the Judge to tell the jury his opinion upon a question at issue before them, if he expressly leaves that question to them to settle: *Smith* v. *Dart*, 14 Q.B.D. 105, at 108; and the Court will not grant a new trial, if satisfied that the

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jury, if rightly directed, would have returned the same verdict; *per* Esher, M.R., in *Merivale* v. *Carson*, 20 Q.B.D. 275 at 281.

For myself I cannot see where there has been any wrong or miscarriage of justice here; with the Judge's charge I think the defendants should upon the whole be satisfied, for in some respects it was extremely favourable to them; and in the circumstances of this case, I do not think that they could reasonably expect anything but an unfavourable verdict should it be again be submitted to a jury.

There remains the question of excessive damages. In actions of false imprisonment and other injuries to the person, or character, although the rule remains that only such damages are recoverable as naturally flow from the wrongful act, there is no standard by which the money value of such injuries may be measured, and the only limit to the damages to be awarded is that they must be reasonable in amount. Where the person or character is injured, it is difficult, if not quite impossible, to fix any limit, and the verdict is generally a resultant of the opposing forces of the counsel on either side tempered by such moderating remarks as the Judge may think the occasion requires. It must not be supposed, however, that even cases of this sort are quite beyond rule. If that were so there could be no such thing as new trial for excessive damages. In cases of contracts a rule can be applied to the facts so accurately, as to make the amount a mere matter of calculation. In cases such as this one is, the rule goes no further than to point out what evidence may be admitted and what grounds of complaint may be allowed for. But when this is done, the amount of damages is entirely in the disposition of the jury. A new trial will only be granted where the verdict is so large as to satisfy the Court that it was perverse, and the result of gross error; or when it can be shewn that the jury have acted under the influence of undue motives or misconception: *Gough* v. *Farr*, 1 Y. & J. 477; *Praed* v. *Graham*, 24 Q.B.D. 53.

It is said in Sedgwick on Damages, 8th ed., secs. 461-3 and sec. 49, a treatise which has upon many occasions received the approval of Canadian Courts, that in an action for false imprisonment, damages may be recovered for the plaintiff's loss of time and the interruption of his business; as a compensation for the bodily and mental suffering and for the indignity; evidence may be given of the circumstances of the plaintiff's family and of the condition of the gaol as bearing on the mental suffering resulting from the imprisonment; the expense of obtaining release from imprisonment may be recovered; and under a proper averment, counsel fees in procuring the plaintiff's discharge may be recovered, if the plaintiff has become liable for them, although they have not been actually paid. For the illegal restraint of

the plaintiff's personal liberty compensation may be recovered, and this is something different from either the loss of time or the physical injury or the mental suffering caused by the imprisonment; it is of the same general character of the latter, and the measurement of the compensation must necessarily be left entirely to the jury.

I would not, for under the law as it has been stated I believe we cannot, disturb the verdict on the ground of excessive damages, but would dismiss this motion with costs.

Rule refused with costs.

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1. INTOXICATING LIQUORS (§ II A—37)—OBJECTIONS TO PETITION FOR LICENSE—INJUNCTION—2-3 GEO. V. (ALTA.) CH. 8, SEC. 26.

The question of the validity of requisitions for a poll under section 124 of the Liquor License Ordinance, C.O. (N.W.T.) 1898, ch. 89, as amended by statute 2-3 Geo. V. (Alta.) ch. 8, sec. 26, should be decided before, rather than after, the poll, and the Court will, therefore, grant an interim injunction restraining the taking of the poll until after the trial of an action brought to determine the validity of the requisitions.

Statement

THE plaintiff, who claims to be a duly qualified elector in license district No. 3, brings this action against the defendant who is a member of the Board of License Commissioners for the Province of Alberta to restrain him from taking a poll of the electors of such district under certain requisitions presented to him in the months of August and September, 1911, to ascertain whether or not any licenses shall be granted for the sale of liquors within the limits of the district. His present application is for an order that the defendant be so restrained. The statement of claim alleges that these requisitions are defective in ten different respects which defects are set out with some detail in the pleading. It further alleges that the defendant proposes to command the taking of a poll pursuant to these requisitions in either October or November, 1912.

A preliminary injunction order was granted with costs to be in the cause.

Frank Ford, K.C., and *O. M. Biggar*, for the plaintiff.
L. F. Clarry, and *C. A. Grant*, for the defendant.

Walsh, J.

WALSH, J.:—Counsel for the plaintiff stated that he was not prepared upon this application to prove all of the defects in the requisitions which are alleged in the statement of claim and he practically confined himself to those which according to his contention are apparent upon the face of the requisitions and

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of the accompanying affidavits. These in brief are, (*a*) that none of the persons who witnessed the signatures to the requisitions have sworn that the signers constitute one-fifth of the electors of the district; (*b*) that, eliminating from the requisitions those the signatures to which are verified by affidavits made before some one other than a justice or a notary public, such requisitions are not signed by one-fifth of the electors of the district; (*c*) that in many instances the addresses of the requisitionists as set opposite their signatures are of places without the limits of the district, for which reason these persons are thus shewn not to be voters within the district; (*d*) that the affidavits shew that the requisitions were not signed within thirty days of their respective dates and (*e*) that these requisitions if they warrant a poll at all only authorize one which should have been held in October or November, 1911, and they cannot be acted upon as the defendant now proposes to act upon them.

These requisitions were prepared and presented to the defendant as a member of the Board in August, 1911, under the provisions of sec. 124 of the Liquor License Ordinance. This section imposes upon the defendant the duty of commanding the taking of a poll of the electors in the October or November next ensuing the presentation of the requisitions, if he is satisfied that the names attached to the requisitions are those of duly qualified electors within the district and

> after the person or persons who have witnessed the signatures to the said requisition shall have sworn before a justice or a notary public:—
>
> (*a*) That he the said witness or they the said witnesses were present and saw the said electors sign the said requisition.
>
> (*b*) That the said electors signed the said requisition within thirty days of the date of such affidavits.
>
> (*c*) That the signers constitute one-fifth of the electors of said district (estimated as above).

The words, "estimated as above" in clause (*c*) refer to the portion of the section which requires the requisitions to be signed by "a number of electors of the district (estimated as near as may be at least one-fifth of the total number of electors of the district, the basis of such estimate being the number of electors who voted at the last election of a member of the Legislative Assembly)."

It appears from an affidavit filed in support of this motion that the defendant informed the deponent "that he has made calculation and there were 12,320 voters in license district No. 3" and this is not denied by the defendant. Upon this estimate therefore the signatures of 2,464 electors were necessary to the numerical sufficiency of these requisitions. It was stated by counsel for the plaintiff on the argument that there are 4,089 signatures to the requisitions. I have not counted them, but

from my examination of the originals I am satisfied that they bear many more signatures than the necessary 2,464. The trouble is though that there are not 2,464 of these signatures which are verified by affidavits made before a justice or a notary public. Mr. Ford stated in the argument that only 1,483 of the signatures were thus verified. I have gone through the original requisitions and have only been able to find 1,434 signatures verified by affidavits made before either justices or notaries public. All of the other affidavits are sworn before persons describing themselves as commissioners for taking affidavits. I must assume upon the material before me (notwithstanding Mr. Grant's contention to the contrary) that these persons are simply commissioners and nothing more and that being so, it is manifest that the signatures of the required number of requisitionists are not proven by affidavits made before either one of the two sets of officials named in the section.

The original affidavits of execution are in compliance or at least, in attempted compliance with the requirements of clauses (*a*) and (*b*) which I have set out above in full but they do not contain anything whatever to meet the requirements of clause (*c*). There is, however, attached to each requisition a statutory declaration made in each instance at a date later than the date of the original affidavit of execution the body of which reads as follows:—

> 1. That I was the witness to the signature of the electors whose names are on the requisition hereunto annexed and was present and did see the said electors sign the said requisition.
>
> 2. That each and all of those whose names are signed to the said requisition are British male subjects of the full age of twenty-one years and have resided in the Province of Alberta for at least twelve months and in the electoral district where they now reside for at least three months immediately preceding the date of their so signing and that they are not unenfranchised Indians!

Each of these declarations is made, so far as I have been able to examine them, by the party who made the original affidavit of execution which is upon the requisition to which the declaration is attached. These declarations were taken I fancy to supplement the affidavits of execution in the respect in which they were deficient by their omission to cover the requirements of clause (*c*). However this may be these affidavits of execution and statutory declarations are all of the material before me as constituting the proof offered to the defendant under these clauses (*a*), (*b*), and (*c*).

Sub-sections 2 to 13 of sec. 124 were repealed by sec. 26 of ch. 8 of the Statutes of Alberta, 2 and 3 Geo. V. and certain other sub-sections substituted therefor. By sub-sec. 2 of this sec. 26 a new sub-section was added to sec. 124 which was passed as was admitted by counsel for the plaintiff as a result

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of the requisitions with which I am now dealing and of the difficulties which arose in having the poll taken in October or November of last year. Some difficulties in placing a proper construction upon this section were suggested in argument. Whatever its proper construction may be, it is not contended that it can cure any of the defects which there may be in the requisitions for it expressly provides that "the validity, invalidity, or other status of such requisitions or of any other proceedings heretofore had or taken in regard to the taking of such poll shall be in no wise affected by the passing of this act."

At the close of the argument I asked if the parties were willing to treat this as a motion for judgment. Mr. Grant, for the defendant consented that my judgment upon this motion should, subject to the right of either party to appeal, conclude the matter as though given upon the trial of the action. Counsel for the plaintiff would not consent to this and without the consent of all parties I do not think that I have any power to deal with the matter otherwise than as it has come before me, that is as a motion to restrain the defendant until the trial. That being so, I think that it is neither necessary nor proper that I should upon this interlocutory application, express any opinion as to whether or not the defects in the proceedings upon which the plaintiff relies are fatal to the validity of the requisitions or attempt to place a construction upon the amending act of last session. Those are questions for the Judge who tries the action and he might be embarrassed in the proper trial of the action if I attempted now to decide the questions which he must decide at the trial. All that I should do, I think, is to satisfy myself whether or not there is a substantial question to be investigated and, if there is, whether or not the *status quo* should be preserved in the meantime.

In my opinion the validity of the requisitions upon which the defendant proposes to act is open to very serious question. There can be no doubt but that the affidavits are defective in the particulars to which I have referred. Whether or not these defects are fatal to the validity of the requisitions or can be cured under the provisions of sub-sec. 12 of sec. 124 is a substantial question to be investigated as is also the effect which is to be given to the new sub-section of last session if these defects are not fatal. I am not concerned with the other irregularities alleged in the statement of claim for there is no proof of them before me. That being so, I think it much better that these questions should be disposed of before rather than after a poll is taken. The taking of a poll will put the province to some cost and involve the contending parties in great expense all of which would be wasted if in the final result it should be determined that the same was unlawfully taken. It

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is, I think, better to have the validity or invalidity of the proceedings authoritatively determined before rather than after the bitterness and expense of such a contest as this especially when the delay will not seriously prejudice the requisitionists, for if the provisions of the old sec. 124 apply to this voting the poll upon these requisitions should have been taken last year and therefore cannot be taken at all now while if the new sub-section of last session applies the defendant "may appoint such day as he may deem proper" for that purpose.

The order will go therefore, as prayed, until the trial of the action. The plaintiff must, however, speed the trial. If the defendant delivers his defence by the 25th instant the plaintiff must set the action down for trial at the November sittings at Edmonton and if he fails to do so the injunction will be *ipso facto* dissolved without further order on the 5th day of November, 1912, the opening day of the sittings. If the defence is not delivered by the 25th inst. this condition will be thereby removed. I, of course, could not, if I would, attempt to dictate to the Judge who takes these sittings as to the actual trial of the case. All that I can do is to order it on the list. The costs of this application will be in the cause. I have placed in one bundle the requisitions which according to my examination of them have affidavits made before a proper officer and have placed the rest of them in another bundle. If they are kept thus separated it will render their examination at any subsequent stage of the action more easy.

Preliminary injunction granted.

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PINCHEBECK v. STRONG.

Alberta Supreme Court, Walsh, J. October 15, 1912.

1. INTOXICATING LIQUORS (§ II A—37)—OBJECTIONS TO PETITION FOR LICENSE—INJUNCTION—2-3 GEO. V. (ALTA.) CH. 8, SEC. 26.

The question of the validity of requisitions for a poll under section 124 of the Liquor License Ordinance, C.O. (N.W.T.) 1898, ch. 89, as amended by statutes 2 and 3 Geo. V. (Alta.) ch. 8, sec. 26, should be decided before, rather than after, the poll; and the Court will, therefore, grant an interim injunction restraining the taking of the poll until after the trial of an action brought to determine the validity of the requisitions.

Statement

THIS is a motion for an injunction against the same defendant as in *Gross* v. *Strong*, 6 D.L.R. 843, and upon exactly the same grounds and precisely the same state of facts, with a few immaterial changes, the requisition in this case being for a poll under sec. 124, in license district No. 2. The affidavits and statutory declarations are identical in form with those in the *Gross* case.

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A preliminary injunction order was granted with costs to be in the cause.

F. Ford, K.C., and *O. M. Biggar*, for the plaintiff.

L. F. Clarry, and *C. A. Grant*, for the defendant.

WALSH, J.:—In this case the evidence is that there are 5,180 voters in the district, so that the signatures of 1,036 electors are necessary to the validity of the requisitions. I have in this case examined the original requisitions and the affidavits and statutory declarations attached and, according to my examination, only 891 of these signatures are verified by affidavits sworn before justices of the peace or notaries public.

For the reasons which I have given in the *Gross* case the injunction will go against the defendant in this action, restraining him from holding a poll in license district No. 2 until the trial of the action, upon the same terms and conditions as those which I have directed in the *Gross* case.

The costs of the application will be costs in the cause.

Preliminary injunction granted.

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MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases decided by local or district Judges, Masters and Referees.

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Ontario High Court, Riddell, J., in Chambers. October 30, 1912.

INTERPLEADER (§ II—20)—*Form of Issue as to Ownership.*]—Appeal by the Art Museum of Toronto from an interpleader order made by the Master in Chambers.

RIDDELL, J.:—The late Goldwin Smith lived with Mrs. Goldwin Smith at "The Grange." At the time of the death of Mrs. Smith, there was at "The Grange" an autograph book containing a collection of autographs of various persons of distinction. The book continued in the drawing-room of "The Grange" until the death of Mr. Smith. Mrs. Smith made a will whereby she appointed her husband and others executors: and her husband and Mr. G. Larratt Smith took out letters probate. In this will such provisions are to be found that it may be that Thomas Fraser Homer Dixon is the legatee of this valuable book, if it were in fact the property of Mrs. Smith. Mr. Smith also made a will, under which, it is admitted, the book became the property of the Art Museum of Toronto, if it were in fact the property of the late Mr. Smith. The executors representing the two estates stand neutral: but applied for an order to have the matter determined, as both Dixon and the Art Museum claimed the book.

The Master in Chambers made the following order:—

"1. It is ordered that the said claimants do proceed to the trial of an issue . . . to inquire whether the autograph book bequeathed by the last will and testament of the late Goldwin Smith was the property of the said Goldwin Smith at the time of his death.

"2. And it is further ordered that in such issue Thomas Fraser Homer Dixon is to be plaintiff, and the Art Museum of Toronto is to be defendant, and that pleadings be delivered by the respective parties in the same manner as in an action going to trial, and that the question of costs and all further questions be dealt with by the Judge before whom such issue shall be tried.

"3. And it is further ordered, upon the consent of both claimants, that the said autograph book remain in the joint

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custody of the applicants (the executors) pending the decision of the Court on the said issue."

I do not think the issue directed by the Master is the proper one. If the book was the property of Mr. Smith, it is admitted that the Museum is entitled to it. It was in Mr. Smith's possession after his wife's death—and not as executor apparently. It was not administered by the executors as being of Mrs. Smith's estate. In the absence of other evidence, Mr. Smith must be taken to have been the owner at the time of his death, and the Art Museum its present owner. Accordingly, if an issue is to be directed at all, it is right that the Art Museum should be a party and the party defendant. But Dixon stands in a different position. He has no right to the book at all unless (1) it belonged to Mrs. Smith, and (2) he is entitled thereto under her will. He would not have any locus standi in the premises at all unless he could prove that, if the book were Mrs. Smith's, he would be entitled to it. The matter could not be determined by simply deciding "whether the autograph book . . . was the property of the said Goldwin Smith at the time of his death." Such an issue might be sufficient if the executors of Mrs. Smith were asserting a claim, but the present is quite a different case.

What Dixon must take upon himself to establish is, that he—not simply the estate of Mrs. Smith—is entitled.

The appeal must be allowed with costs to the appellant (and the executors) in any event. The order will be amended by striking out in paragraph 1 all the words after the words "Goldwin Smith" where they first occur, and substituting the following "is the property of Thomas Fraser Homer Dixon as against the Art Museum of Toronto."

R. C. H. Cassels, for the appellant. McGregor Young, K.C., for Thomas Fraser Homer Dixon, the respondent. G. Larratt Smith, for the executors.

DE LA RONDE v. OTTAWA POLICE BENEFIT FUND ASSOCIATION.

(Decision No. 2.)

Ontario High Court. Trial before Riddell, J. May 13, 1912.

BENEVOLENT SOCIETIES (§ III—10)—*Police Benefit Fund—Right to Retiring Allowance.*]—After the judgment delivered by RIDDELL, J., on the 29th April, 1912, 3 D.L.R. 328, the parties did not agree, as it was suggested they should; and the learned Judge proceeded to dispose of the case as follows:—It would at first sight appear that clause 10 was adverse to the plaintiff's claim; but a careful examination of that clause shews that such is not the case. That provides for a report being made by the

trustees to the Board of Police Commissioners, and for what is to be done in case the trustees and the Board disagree. Nothing of that kind took place here; and, consequently, clause 10 does not apply. Clauses 18 and 19 are specific that certain sums "shall be paid;" and these must be given effect to. Clause 14 provides that no money is to be paid out by the treasurer unless ordered by the board of trustees; but that difficulty may be got over by making the trustees parties and directing them to give such an order. No doubt, the Board of Commissioners will sanction the same. Judgment directing the pleadings to be amended by making the trustees defendants; declaring the plaintiff entitled to $1,000 from the fund; and directing the trustees (as a board) to give an order to the treasurer for payment of $1,000 and interest from the date of the writ of summons. The defendants to pay the costs. A. E. Fripp, K.C., for the plaintiff. M. J. Gorman, K.C., for the defendants.

WALKER and WEBB v. MACDONALD.
(Decision No. 2.)

Ontario High Court. Trial before Falconbridge, C.J.K.B. September 26, 1912.

COSTS (§ I—11*a*)—*Third parties.*]—This action and the action of Graham against the same defendants were disposed of by the judgment 6 D.L.R. 501, 4 O.W.N. 1. The question of the third parties' costs of this action was afterwards mentioned by counsel. The Chief Justice said:—As a matter of precaution, the defendants claimed indemnity over against G. J. Foy, Limited. They did this for their own protection. In the result they have not needed that shield. And, therefore, they ought to pay the third parties' costs in this action—to be set off pro tanto against their claim and costs in the Graham suit. G. F. Shepley, K.C., for the defendants. E. J. Hearn, K.C., for the third parties.

ARMSTRONG v. TOWN OF BARRIE.

Ontario High Court. Trial before Falconbridge, C.J.K.B. September 27, 1912.

HIGHWAYS (§ IV A—127)—*Nonrepair—Injury to Pedestrian.*]—Action for damages for injuries sustained by the plaintiff by falling into a hole in a highway. The learned Chief Justice said that, even if he were to ignore the testimony of one A. E. Patterson, who was said to have a contingent interest in the result of this action, the evidence adduced by the defendants was overwhelming as to the condition of the area and sidewalk. The plaintiff must be quite in error as to the manner in which he met with the accident. Action dismissed with costs, if exacted. A. E. H. Creswicke, K.C., for the plaintiff. J. H. Moss, K.C., for the defendants.

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BELL TELEPHONE CO. v. AVERY.

Ontario High Court, Falconbridge, C.J.K.B. August 31, 1912.

INJUNCTION (§ III—137)—*Blasting in Streets—Skill and Care — Addition of Parties.*] — Motion by the plaintiffs to continue an injunction and for leave to add parties. The learned Chief Justice said that leave would be given to add A. Avery & Son as defendants if the plaintiffs were so advised. The interim injunction granted by the Local Judge was of most innocuous character; it restrained the defendants "from negligently and without due skill and care blasting upon the streets of North Bay in proximity to any portion of the plant of the plaintiffs so as to destroy or injure the said plant or any part thereof." The law holds the defendants to an application of diligence, skill, and care in carrying on their operations; and the injunction does not restrain the proper execution of this work. Injunction continued to the trial. Costs of the application to be costs in the cause unless the trial Judge shall otherwise order. R. McKay, K.C., for the plaintiffs. G. H. Kilmer, K.C., for the defendants.

FEE v. MacDONALD MANUFACTURING CO.

(Decision No. 2.)

Ontario Divisional Court, Boyd, C., Latchford, and Middleton, JJ. September 25, 1912.

MORTGAGE (§ I D—18*a*)—*Registration—Absence of Interest in Creator of Charge—Cloud on Title—Damages.*]—Appeal by the defendant company from the judgment of SUTHERLAND, J., 3 D.L.R. 884, 3 O.W.N. 1378. The Court varied the judgment below. The judgment as varied is as follows: Declare that the defendant company have no right to any money coming to Margaret Lang. The defendant company to pay the plaintiffs' costs of the action. As against the defendant Henry Lang, action dismissed without costs. The defendant company to pay the costs of the appeal. R. S. Robertson, for the defendant company. A. E. H. Creswicke, K.C., for the plaintiffs and the defendant Henry Lang.

RICKART v. BRITTON MANUFACTURING CO.

(Decision No. 1.)

Ontario High Court, Cartwright, M.C. October 10, 1912.

PLEADING (§ I J—65)—*Statement of Claim—Motion for Particulars after Delivery of Defence, but before Examination for Discovery—Plaintiffs Resident Abroad—Default in Payment of Interlocutory Costs.*]—Motion by the defendants for particulars of certain paragraphs of the statement of claim. The statement of defence had been delivered, but there had been no examin-

ation of the plaintiffs for discovery. The Master said that it followed, under Smith v. Boyd, 17 P.R. 463, that the motion was at least premature at present.—It was submitted that the one plaintiff who was resident in the Province would not be competent to give the defendants the information to which they were entitled, and which was necessary for their defence; and it was said that, as the other plaintiffs were resident in the United States, it would be an expensive proceeding to examine them. The Master said that this might be met by the decision in Lick v. Rivers, 1 O.L.R. 57; and the defendants could urge in support of a similar order, if such was found necessary, that the plaintiffs were in default in respect of the payment of over $230 of interlocutory costs. Without deciding anything as to that, it was enough to say at present that the motion should be dismissed, with costs in the cause to the plaintiffs, but without prejudice to its renewal after discovery, if still considered necessary. C. G. Jarvis, for the defendants. J. G. O'Donoghue, for the plaintiffs.

LAKE ERIE EXCURSION CO. v. TOWNSHIP OF BERTIE.
(Decision No. 2.)

Ontario Divisional Court, Mulock, C.J.Ex.D., Clute, and Riddell, JJ. October 9, 1912.

BOUNDARIES (§ II B—10)—*Allowance for Road—Encroachment—Failure to Prove—Erection of Fence—Removal—Injunction—Dedication—Estoppel.*]—Appeal by the plaintiffs and cross-appeal by the defendants from the judgment of KELLY, J., 4 D.L.R. 585, 3 O.W.N. 1191. The Court dismissed the plaintiffs' appeal without costs and allowed the defendants' cross-appeal without costs. C. A. Moss, for the plaintiffs. E. D. Armour, K.C., and G. H. Pettit, for the defendants.

MOSHIER v. TOWNSHIP OF EASTNOR.

Ontario High Court, Riddell, J. October 10, 1912.

MUNICIPAL CORPORATIONS (§ II G 3—240)—*Non-completion of Drain—Negligence—Damages—Mandatory Order—Referee's Report—Appeal.*]—An appeal by the defendants from the report of A. B. Klein, of Walkerton, as special referee, finding that the defendants were guilty of negligence in not completing certain drainage works; that the plaintiff was entitled to $800 damages; and that the defendants should be ordered to complete the works. Upon a perusal of the evidence, the learned Judge found that the Referee was wholly justified in his conclusions. There were no questions of law which required examination or discussion. Appeal dismissed with costs. J. H. Scott, K.C., for the defendants. D. Robertson, K.C., for the plaintiff.

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SANDWICH LAND IMPROVEMENT CO. v. WINDSOR BOARD OF EDUCATION.

(Decision No. 2.)

Ontario Divisional Court, Mulock, C.J.Ex.D., Clute, and Riddell, JJ. October 9, 1912.

INJUNCTION (§ I J—78a)—*Public Schools—Expropriation of Land for Site—Restrain Arbitrators from Proceeding—School Sites Act, 9 Edw. VII. ch. 93—Remedy by Summary Application to County Court Judge—Dismissal of Action—Costs.*]—Appeal by the plaintiffs from the judgment of KELLY, J., 3 O.W.N. 1150, 3 D.L.R. 423. The appeal was dismissed. The Court dismissed the appeal with costs. D. W. Saunders, K.C., for the plaintiffs. C. A. Moss, for the defendants.

BROWN v. GRAND TRUNK R. CO.

Ontario High Court, Cartwright, M.C. October 10, 1912.

VENUE (§ II A—22)—*Change—Failure to Set Case down at Proper Time—Avoidance of Delay.*]—Motion by the plaintiff to change the venue from Beleville to Toronto. The motion was made for similar reasons to those in Taylor v. Toronto Construction Co., 1 D.L.R. 644, 3 O.W.N. 930. The action was begun on the 30th March, 1911.

The plaintiff's claim was for damages for the death of her husband on the 24th November, 1910. The cause was at issue nearly a year ago, and notice of trial was given for the jury sittings at Belleville at the end of February, 1912; but, by an oversight, the case was not set down. A new notice of trial was given in due time for the sittings commencing on the 16th September, 1912. But, owing to the absence of the agent of the plaintiff's solicitors, the case was again not set down. No other jury cases were set down within the time required by 9 Edw. VII. ch. 34, sec. 63 (2); and, under the further provisions of that section, the jurors were notified not to attend, so that there was no way of getting the action tried at that time. It was stated that, on this appearing, other arrangements had been made by the defendants' counsel and witnesses, on the supposition that the case could not be heard until the spring sittings. The Master said that Belleville was admittedly the proper place of trial in this case. The delay, however unfortunate for the plaintiff, was not in any way attributable to the defendants; and there was nothing to distinguish this case from the Taylor case, supra. Motion dismissed with costs to the defendants in any event. R. U. McPherson, for the plaintiff. Frank McCarthy, for the defendants.

DICK & SONS v. STANDARD UNDERGROUND CABLE CO.
(Decision No. 1.)

Ontario High Court, Riddell, J., in Chambers. October 9, 1912.

APPEAL (§ XI—720)—*Leave to Appeal to Divisional Court from Judge in Chambers—Con. Rule 777(3) (a), (c).*]—Motion by the defendants for leave to appeal from an order of BOYD, C., 4 O.W.N. 57, whereby he allowed an appeal from an order of a Local Judge, forever staying the action. RIDDELL, J., said that it was, he thought, admitted—at all events it was plain—that the conditions of Con. Rule 1278, i.e, 777 (3) (a), were not present here; and, as he agreed with the Chancellor in the disposition he had made of the matter, clause (c) does not apply either. Motion dismissed with costs to the plaintiffs in any event. G. H. Levy, for the defendants. E. C. Cattanach, for the plaintiffs.

ROBINSON v. REYNOLDS.
(Decision No. 2.)

Ontario Divisional Court, Mulock, C.J.Ex.D., Clute, and Riddell, JJ. October 9, 1912.

BROKERS (§ II B—12)—*Employment of Agent to Sell Land—Purchaser Procured by Agent Refusing to Carry out Purchase—Right to Commission—Contract—Scope of—Finding—Appeal.*]—Appeal by the plaintiffs from the judgment of BRITTON, J., 4 D.L.R. 63, 3 O.W.N. 1262. The appeal was dismissed. The Court dismissed the appeal with costs. G. H. Watson, K.C., for the plaintiffs. C. A. Moss, for the defendant.

BLACK v. CANADIAN COPPER CO.
(Decision No. 2.)

Ontario High Court, Riddell, J., in Chambers. October 9, 1912.

PLEADING (§ I J—65)—*Motion before Delivery of Defence—Absence of Affidavit—Nuisance—Damages.*]—An appeal by the defendants from the order of the Master in Chambers, 5 D.L.R. 890, 4 O.W.N. 62. RIDDELL, J., said that, so far as was made to appear, the telegram of the plaintiff's solicitor might be absolutely correct—the defendants might have been fully informed of all the acts of negligence on their part, and the fullest particulars of damage might have been given to the defendants. But, aside from that consideration, it was quite too early to move, and the order of the Master in Chambers was the right one. RIDDELL, J., agreed that the case would probably be tried by a Judge without a jury; but said that in any case the defendants were not at present injured. Appeal dismissed. Costs to the plaintiff in any event. H. E. Rose, K.C., for the defendants. C. M. Garvey, for the plaintiff.

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KARCH v. KARCH.
(Decision No. 3.)

Ontario Divisional Court, Boyd, C., Latchford, and Middleton, JJ. September 27, 1912.

DIVORCE AND SEPARATION (§ V C—58)—*Alimony—Custody of Children.*]—Appeal by the plaintiff from the judgment of KELLY, J., 4 D.L.R. 250, 3 O.W.N. 1446, in an action for alimony, awarding the defendant (the husband) the custody of the children. The Court dismissed the appeal without costs. H. Guthrie, K.C., for the plaintiff. W. E. S. Knowles, for the defendant.

JAMIESON v. GOURLAY.

Ontario High Court, Latchford, J. November 1, 1912.

APPEAL (§ VIII.—510)—*Breach of Contract—Reference—Contradictory Evidence—Finding of Master.*]—Appeal and cross-appeal from the report of the Master at Ottawa upon a reference by the trial Judge to ascertain what damages, if any, the plaintiff had suffered by any breach by the defendant of the contract between the parties, as construed by the Court. There was a breach by the defendant of the contract, and the resulting damages were found to be $248.83. The amount was not affected by a clerical error stating the number of feet in the eight rafters not supplied to be 43, instead of 430. The plaintiff appealed to have the damages increased; the defendant to have them diminished. The learned Judge said that he had read the voluminous evidence. Upon the reference, as at the trial, it was contradictory upon almost every point in issue. The very able Judge who tried the case expressed his difficulty in arriving at a satisfactory conclusion, where "either the plaintiff or the defendant was stating what was untrue, and doing so deliberately." The position of the Master was one of equal difficulty. His conclusions were upon matters of fact, and there was no ground for disturbing them. Appeal and cross-appeal dismissed. As to costs, it might well be that the cause of the breach of the contract was the insistence of the plaintiff that the defendant should supply timber not called for by the agreement as interpreted by the Court. But the defendant was not thereby justified in failing to deliver what the contract required him to furnish. The plaintiff should have the costs of the reference. As success at the trial was divided, there should be no costs of the action to either party. J. R. Osborne, for the plaintiff. R. J. Slattery, for the defendant.

SEAMAN v. SAUBLE FALLS LIGHT AND POWER CO.

Ontario High Court, Middleton, J. November 1, 1912.

WATERS (§ II D—95)—*Injury to Mill by Flooding—Unprecedented Spring Freshets—Failure to Shew Fault on Part of Defendants—Damages.*]—An action to recover damages sustained by the plaintiff, in the spring of 1912, through the breaking of a dam on the Sauble river, whereby the plaintiff's mill was flooded and partly undermined, and a quantity of lumber was, it was said, carried away and lost. The learned Judge finds that in the spring of 1912 floods were unusually severe; it was abundantly proved at the trial that they were unprecedented. The plaintiff did not really attempt to controvert this, but sought to shew that the disaster had taken place before the water reached a height which could be regarded as abnormal. The plaintiff failed in this attempt—upon the evidence. Upon the circumstances disclosed, the learned Judge is unable to find any liability on the part of the defendants; and he arrives at this conclusion with the less regret because, as he considers, there was an altogether unjustifiable attempt on the part of the plaintiff to inflate his claim for damages. The amount to be allowed to the plaintiff, if he should succeed in a higher Court, should be very much less than the amount claimed, and should not exceed $585. While the action fails, and must be dismissed with costs, the defendants went to more expense than necessary in having so many witnesses present to testify to the serious nature of the spring floods, and that they should not on taxation be allowed for more than three witnesses called to give general evidence of this kind. W. S. Middlebro, K.C., for the plaintiff. R. McKay, K.C., and C. S. Cameron, for the defendants.

Re CARNAHAN.

Ontario High Court, Riddell, J., in Chambers. October 12, 1912.

INFANTS (§ I B—5)—*Money in Hands of Trustees—Payment for Maintenance.*]—Motion by the grandmother of an infant for an order authorising trustees to pay her a sum for the maintenance of the infant, out of moneys of the infant in their hands—not in Court. The learned Judge reluctantly yielded to the authority of Re Wilson (1891), 14 P.R. 261, and Re Coutts (1893), 15 P.R. 162, and made the order asked for. The minutes to be settled by the Official Guardian, and to be spoken to before the Judge, if necessary. G. M. Gardner, for the applicant. F. W. Harcourt, K.C., Official Guardian, for the infant.

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ROGERS v. NATIONAL PORTLAND CEMENT CO.

Ontario High Court, Cartwright, M.C. November 2, 1912.

DISCOVERY AND INSPECTION (§ IV—20)—*Default—Failure to Justify—Con. Rule 454—Order for Plaintiff to Attend at his own Expense.*]—Motion by the defendants, under Con. Rule 454, to dismiss the action for the default of the plaintiff to submit to examination for discovery. The default was admitted, and also that the plaintiff had no legal or technical ground for non-attendance. It was said that the plaintiff's solicitors thought they were being unfairly dealt with by defendants' solicitor, and that he was trying to prevent or delay the examination of Calder, an officer of the defendants. The Master said that the correspondence might be open to this construction; but there was no undertaking as to Calder, nor was it necessary to have inspection of the defendants' productions before the plaintiff submitted to examination. The only course open was, therefore, to direct the plaintiff to attend again at his own expense, on 48 hours' notice to his solicitors. Costs of the motion to the defendants in the cause. Grayson Smith, for the defendants. F. R. MacKelcan, for the plaintiff.

WALKER v. WESTINGTON.

Ontario High Court, Trial before Britton, J. October 18, 1912.

WATER (§ II G—128)—*Diversion of Surface Water by Adjoining Owner—Trespass—Injunction—Damages—Costs.*]—Action by one of the co-owners of lot 10 in the 8th concession of the township of Hamilton against the owner of the adjoining lot 9 for an injunction against throwing water upon lot 10 and for damages. At the trial, the plaintiff abandoned the claim for damages, admitting that so far no damage had been sustained. BRITTON, J., said that, no damage being shewn, and the plaintiff asking for general relief and protection, not against any particular thing, such as obstruction in a stream, or continuing an open ditch, but that the defendant be restrained from committing in future any trespass by causing surface water to flow upon the plaintiff's land, an injunction should not be granted. The learned Judge was also of opinion, upon the evidence, that the plaintiff failed upon the main ground of his action, viz., that the defendant wilfully and wrongfully diverted water from its natural course and turned it upon lot 10. The questions were wholly questions of fact. Action dismissed with costs fixed at $100. The learned Judge said that the defendant's conduct before action warranted the relief of the plaintiff from the payment of some portion of the costs. F. D. Boggs, K.C., for the plaintiff. J. B. McColl and J. F. Keith, for the defendant.

ALSOP PROCESS CO. v. CULLEN.

Ontario High Court, Cartwright, M.C. October 12, 1912.

VENUE (§ II B—22)—*Infringement of Patent of Invention—R.S.C. 1906 ch. 69, sec. 31—"May."*]—This was an action for infringement of the plaintiffs' patent by the defendant, who resided at Woodstock, as was admitted. The plaintiffs laid the venue at Toronto. The defendant moved to change it to Woodstock, in reliance on R.S.C. 1906 ch. 69, sec. 31, which is a statutory re-enactment of the provision in the Patent Act, and was judicially interpreted in Aitcheson v. Mann, 9 P.R. 253, 473, where it was held "that the word 'may,' as governed by the context of the Act, was obligatory, and not merely permissive" (as contended now for the first time in the Master's experience), "and that the reasonable construction of the Act was that the venue *must* be laid at the place of sittings of the Court in which the action is brought nearest to the residence or place of business of the defendant." In accordance with this decision, the venue was changed to Woodstock; costs to the defendant in any event. Grayson Smith, for the defendant. R. McKay, K.C., for the plaintiffs.

ALSOP PROCESS CO. v. CULLEN.

(Decision No. 2.)

Ontario High Court, Cartwright, M.C. October 16, 1912.

PLEADING (§ I S—145)—*Statement of Defence—Infringement of Patent for Invention—Attack on Patent Process—Offers of Settlement—Venue.*]—In an action for an alleged infringement by the defendant of the plaintiffs' patent process for bleaching and ageing flour, the plaintiffs moved to strike out paragraphs 10, 11, 12, and 13 of the statement of defence as being embarrassing and irrelevant.—The 10th paragraph alleged that the plaintiffs' "process has been condemned and prohibited by legislative enactments in Minnesota and other States of the American Union, and has been condemned by public health boards in Great Britain and Europe, as being injurious to the health of the persons consuming the flour so bleached or aged and as being a fraud upon the innocent purchasers of the flour so aged or bleached." The Master said that this attack on the character of the plaintiffs' process was fully set out in the 9th paragraph, which was not objected to by the plaintiffs. The 10th paragraph, therefore, at best only indicated evidence in support of the 9th paragraph; and it did not seem possible that the opinions said to have been given by legislatures or health boards would be receivable at the trial of this action. If the allegations in the

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9th paragraph were to be pressed at the trial, they must be supported by the testimony of experts and others given there, and tested by cross-examination and weighed in the judicial balance. For this reason, as well as in view of the decision in Canavan v. Harris, 8 O.W.R. 325, this paragraph should not be allowed to stand. See too Blake v. Albion Life Assurance Society, 35 L.T. R. 269, 45 L.J.C.P. 663, 4 C.P.D. 94.—Paragraphs 11 and 12 alleged certain offers of settlement made by the plaintiffs to the defendant before action. The Master said that these offers (even if admitted) were not relevant to the issues and could not be given in evidence even as to damages.—Paragraph 13 set out that Woodstock should be the place of trial. On a substantive motion (4 O.W.N. 114) effect was given to that contention; and it was now immaterial whether this paragraph was struck out or not. But perhaps it might as well go with the others.—Costs of this motion to the plaintiffs in the cause. R. McKay, K.C., for the plaintiffs. Grayson Smith, for the defendant.

Re HEWARD AND STEINBERG.

Ontario High Court, Riddell, J. October 14, 1912.

VENDOR AND PURCHASER (§ I C—10)—*Petition under Statute—Title.*]—Petition by a purchaser under the Vendors and Purchasers Act. The learned Judge, after consideration, said that he thought, on the whole, that the vendor had shewn a good title. Declaration accordingly. No costs. H. H. Shaver, for the petitioner. A. H. F. Lefroy, K.C., for the vendor.

DEUTSCHMANN v. VILLAGE OF HANOVER.

Ontario Divisional Court, Riddell, Kelly, and Lennox, JJ. October 15, 1912.

HIGHWAY (§ IV A 6—156)—*Nonrepair—Fall on Sidewalk—Findings of Fact—Liability of Municipal Corporation.*]—An appeal by the defendants from the judgment of the Judge of the County Court of the County of Grey, in favour of the plaintiffs, in an action in that Court to recover damages for injuries sustained by the plaintiff Lydia Deutschmann by a fall on a sidewalk in the village of Hanover, alleged to be out of repair, and for damages resulting therefrom to her husband and co-plaintiff. Judgment was given for the plaintiff Lydia for $400 and for her husband $50. The appeal was heard by RIDDELL, KELLY, and LENNOX, JJ, RIDDELL, J., said that enough appeared upon the notes of evidence to justify the findings of fact made at the trial, and that the County Court Judge had correctly applied the law. KELLY and LENNOX, JJ., concurred. Appeal dismissed with costs. I. F. Hellmuth, K.C., and W. H. Kirkpatrick, for the defendants. D. Robertson, K.C., for the plaintiffs.

SMYTH v. HARRIS.
(Decision No. 1.)

Ontario High Court, Riddell, J. October 15, 1912.

INJUNCTION (§ II—134*a*)—*Interim—Restraining Nuisance—Locus Standi of Plaintiffs—Enlargement of Motion—Leave—Speedy Trial.*]—Motion by the plaintiffs for an interim injunction restraining the defendant from operating his plant for the consumption of offal, etc., in such a way as injuriously to affect the plaintiffs' enjoyment of their neighbouring properties. RIDDELL, J., said that he had come to the conclusion that at least some or one of the plaintiffs could not be said to have no locus standi. Instead of now disposing of the motion, the learned Judge enlarges it before himself at the opening of the Toronto non-jury sittings on Monday the 4th November; reserving leave to the plaintiffs to bring on the motion sooner if the defendant is delaying in pleading or otherwise, or if for any other reason the plaintiffs may be advised to apply. It is manifest that a trial should be had without delay. H. E. Rose, K.C., for the plaintiffs. E. F. B. Johnston, K.C., and F. E. Hodgins, K.C., for the defendant.

KEENAN WOODWARE MANUFACTURING CO. v. FOSTER.

Ontario Divisional Court, Boyd, C., Latchford, and Middleton, JJ. October 24, 1912.

CONTRACTS (§ II D 4—185)—*Supply of Timber Bolts—Breach—Counterclaim—Damages.*]—An appeal by the defendant from the judgment of the Judge of the County Court of the County of Grey, in favour of the plaintiffs, for the recovery of $500 upon their claim with costs, and dismissing the defendant's counterclaim with costs. The action was to recover $500 paid by the plaintiffs to the defendant for getting out timber bolts under a contract, or $500 damages for breach of the contract. The counterclaim was for damages for breach of the contract. The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ. The judgment of the Court was delivered by BOYD, C., who said that the breach of contract was not on the part of the defendant, as the County Court Judge had found, but on the part of the plaintiffs. The defendant had the quantity of bolts ready to be shipped at a proper place, and the plaintiffs made default in providing means for their transportation according to the contract, as the Court construed it. The action, therefore, failed. Upon the counterclaim, the Court allowed the defendant $199. Appeal allowed with costs; action dismissed with costs; and judgment for the defendant upon the counterclaim for $199 with costs. W. M. Douglas, K.C., for the defendant. W. S. Middleboro, K.C., for the plaintiffs.

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STEWART v. HENDERSON.

Ontario High Court, Cartwright, M.C. October 23, 1912.

DISCOVERY AND INSPECTION (§ IV—20)—*Relevancy of Questions—Scope of Examination—Production of Document.*]—Motion by the plaintiff for an order for further examination for discovery of the defendant and directing him to answer certain questions which he refused to answer, on the advice of counsel. The action was to recover a commission of 10 per cent. under an agreement made between the parties, in contemplation of a sale of an alleged valuable secret process for converting iron into steel. The agreement was in writing and anticipated a sale to Sir Donald Mann. No such sale actually took place. By the statement of claim it was alleged that a sale or agreement for sale had been made nominally with Sir William Mackenzie, but that this was done in the temporary absence of Sir Donald Mann, and that this contract was really made with Sir Donald Mann's business partners and associates, and that he was interested with them in the undertaking, and that the plaintiff was, therefore, entitled to the commission of 10 per cent. The statement of defence set out the transactions between the plaintiff and defendant. In the concluding paragraph it was said that the defendant "did everything in his power to close a contract for the sale of the said process . . . but the said defendant was unable to close the said contract or induce the said Sir Donald Mann to take up the contract for the said process or become interested therein or to continue the said negotiations in reference thereto." The Master said that on these pleadings the issue was clearly raised as to whether a sale had really and in effect been made to Sir Donald Mann or not; and everything was relevant to that issue which might (not which must) assist the plaintiff, or which might, directly or indirectly, enable the plaintiff to advance his case or damage that of his adversary: see Bray's Digest of Discovery (1904), art. 10, p. 4. The questions as to whether the secret process formula was deposited with the Bank of Commerce would at first be sufficiently answered if put in the shape in which counsel for the defendant was willing to have the same answered. Then, if the answer was in the negative, certain questions asked upon the examination might properly follow, so as to clear up what on the face of the depositions was obscure. The contract, whatever it was, made with Sir William Mackenzie, should certainly be produced. It was admitted that such a document was in existence. For this purpose the defendant must attend again at his own expense. If, on the face of the contract with Sir William Mackenzie, there was no mention of any interest of Sir Donald Mann or of the other business associates of Sir William Mackenzie named

and set out in the statement of claim, the defendant could be asked as to his knowledge, information, and belief as to this. If he had none, the matter would rest there for the present.—Some opposition was made to the motion on the ground of a secret process being in question. The Master said that this should not be imperilled; and at present none of the questions asked required answers that would in any way be injurious to the secrecy of the defendant's formula. The fact of its present location and the reason of its being there might assist the plaintiff in his claim, and would, therefore, be relevant on discovery—however fatal to the defence: Flight v. Robinson, 8 Beav. 34, cited in Bray on Discovery, where it was said: "One of the chief purposes of discovery is to obtain from the opponent an admission of the case made against him." So long as an examination is directed to relevant matters, it should not be too strictly limited. To do so might impair or even altogether destroy its usefulness. Costs of the motion to the plaintiff only in the cause. Grayson Smith, for the plaintiff. Casey Wood, for the defendant.

SUNDY v. DOMINION NATURAL GAS CO.
(Decision No. 2.)

Ontario Divisional Court, Boyd, C., Latchford, and Middleton, JJ. October 22, 1912.

CONTRACTS (§ II D—157)—*Supply of Natural Gas—Breach—Damages.*]—Appeal by the defendants from the judgment of SUTHERLAND, J., 4 D.L.R. 663, 3 O.W.N. 1575. The Court dismissed the appeal with costs. J. Harley, K.C., for the defendants. J. A. Murphy, for the plaintiffs.

BOLAND v. PHILP.
(Decision No. 2.)

Ontario Divisional Court, Boyd, C., Latchford, and Middleton, JJ. October 21, 1912.

CONTRACTS (§ I E 5—97)—*Contract for Sale of Land—Formation of—Husband of Vendor—Authority—Statute of Frauds—Specific Performance.*]—Appeal by the plaintiff from the judgment of KELLY, J., 5 D.L.R. 81, 3 O.W.N. 1562. The Court dismissed the appeal with costs. W. R. Smyth, K.C., for the plaintiff. J. J. Gray, for the defendants.

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WALLACE v. CANADIAN PACIFIC R. CO.

Ontario High Court. Trial before Sutherland, J. October 14, 1912.

RAILWAYS (§ IV A 3—100)—*Liability to Minors—"Stealing Ride" on Cow-catcher—Evidence—Nonsuit.*]—Action by Edward G. Wallace, an infant, by his father as next friend, to recover damages for injuries alleged to have been caused by the negligence of the defendants in permitting the plaintiff to ride upon the cow-catcher of an engine, from which he fell. At the conclusion of the case for the plaintiffs, a motion was made on behalf of the defendants to dismiss the action. The learned Judge reserved judgment; and, subject thereto, the defendants put in their evidence, and the case went to the jury on questions submitted. The learned Judge now said that, having further considered the motion, he thought that it should be granted. He was unable to see that any evidence was submitted on the part of the plaintiffs from which it could be properly inferred that any of the alleged acts of negligence on the part of the defendants set out in the statement of claim caused or contributed to the accident. But, in any event, upon the undisputed facts as disclosed by the evidence of the plaintiffs the sole cause of the accident was the deliberate, disobedient, and negligent conduct of the injured boy himself. He had been warned by his parents, the defendants' employees, and others, as to the danger, and appreciated it. He voluntarily assumed the risk of getting on the cow-catcher of the engine, when he saw that those in charge of it were not looking, and remained on it until the engine was put in motion. On then attempting to jump off, he fell, and the accident occurred. Action dismissed with costs, if asked. A. E. Fripp, K.C., for the plaintiffs. D. L. McCarthy, K.C., and W. L. Scott, for the defendants.

AIKINS v. McGUIRE.

Ontario High Court, Cartwright, M.C. October 14, 1912.

DISCOVERY AND INSPECTION (§ IV—20)—*Persons for whose Immediate Benefit Action Prosecuted—Con. Rule 440—Affidavit—Insufficiency.*]—In this action for specific performance, the defendant moved for an order, under Con. Rule 440, for the examination for discovery of Poucher and Percy, two persons alleged in the statement of defence to be partners of the plaintiff in the transaction in question. The only evidence in support of the motion was an affidavit of a member of the firm of the defendant's solicitors, which said: "F. B. Poucher and John Percy have admitted to me that they are interested in the lands in question in this action." The allegations as to this interest in the statement of defence were denied in the reply; and, there-

fore, the Master said, did not afford the defendant any assistance at this stage. It was admitted that the agreement on its face was with the plaintiff alone. And, even if the affidavit was to be given full effect to, it was not sufficient, for two reasons. It might be perfectly true that Percy and Poucher were interested in the lands "in question," without it being possible to hold that they were persons "for whose immediate benefit" the action was being prosecuted. Further, any such admissions by Percy and Poucher were not in any way binding on the plaintiff—nor, in face of his denial in the reply, could they be used against him. Reference to Stow v. Currie, 14 O.W.R. 61, 223, and cases cited; Minkler v. McMillan, 10 P.R. 506; Moffat v. Leonard, 8 O.L.R. at p. 520. Motion dismissed with costs to the plaintiff in the cause. If hereafter the defendant thinks it well to renew this motion, and that he can then support it by sufficient evidence, he may do so. J. T. White, for the defendant. A. F. McMichael, for the plaintiff.

SMYTH v. HARRIS.
(Decision No. 2.)

Ontario High Court, Cartwright, M.C. October 24, 1912.
Ontario High Court, Middleton, J. October 25, 1912.

PLEADING (§ I S—145)—*Statement of Claim—Action to Restrain Nuisance — Joinder of Plaintiffs — Property Rights and Interests — Embarrassment — Prejudice — Joinder of Causes of Action — Election — Attorney-General.*]—Motion by the defendants (1) to strike out the names of Robins Limited and F. W. Tanner and F. W. Gates as plaintiffs; (2) to compel the plaintiffs to amend by electing in which plaintiff's name the action will proceed, to strike out the other name or names, and to stay the action meanwhile; (3) to strike out of paragraph 1 of the statement of claim the clauses beginning "The plaintiffs Robins Limited" and "The plaintiffs Tanner and Gates," or to compel the plaintiffs to disclose what interest those plaintiffs have; (4) to strike out that part of paragraph 4 beginning "On the last occasion," as contrary to Con. Rule 298 and embarrassing, and also the words "and property," for the same reason; (5) to strike out of paragraph 4 the clauses dealing with Robins Limited and Tanner and Gates; (6) to strike out such parts of those paragraphs as referred to the Toronto City Estates Limited and the Monarch Realty and Securities Corporation Limited, and alleged a consent; (7) to strike out paragraph 6 as unfair, irrelevant, and calculated to prejudice the trial; (8) to strike out paragraph 9 or stay the action until the Attorney-General should be made a plaintiff.

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The action was to restrain the defendants from continuing a nuisance. See the note of a motion before RIDDELL, J., 4 O.W.N. 134. An appeal from the order of RIDDELL, J., was pending when the present motion was made. Dealing with the first, third, fifth, and sixth branches of the motion, the Master said that Robins Limited and Tanner and Gates alleged that they had a substantial interest in and were occupants of and had the management and sale of tracts of land within a mile of the defendants' factory; but it now appeared that the Robins block was vested in the Toronto City Estates Limited, and the Tanner and Gates blocks in the Monarch Realty and Securities Corporation. Both of these companies had signified their willingness to be joined as plaintiffs, and notice had been given of an application to the trial Judge for that purpose. As to the interest of Robins Limited and Tanner and Gates, it was understood that particulars had been given or would be given forthwith. It seemed, therefore, that no injury or embarrassment could accrue to the defendants by these allegations: Warnik v. Queen's College, L.R. 6 Ch. 716, cited in Odgers on Pleading, 5th ed., p. 21.—As to the second branch of the motion, it was argued that here there was no transaction or series of transactions within the meaning of Con. Rule 185, as shewn by Mason v. Grand Trunk R.W. Co., 8 O.L.R. 28, where it was said by Anglin, J., that several plaintiffs cannot join "where the only connection between their several and distinct grievances is the motive or purpose by which they suggest that the defendant was actuated." The Master said that in that case the learned Judge approved of what was said on this point by Lord Macnaghten in Bedford v. Ellis, [1901] A.C. 1, 12; and a perusal of that case was conclusive against the present motion on this point.—As to the fourth branch of the motion, the Master said that it did not seem in accordance with the present practice to strike out any part of the first clause of paragraph 4 of the statement of claim. If the plaintiff Smyth had no "property rights" which were injuriously affected, this would appear at the trial and be dealt with accordingly. But to that tribunal it belonged, and there it must be sent. Nor did there appear to be any embarrassment to the defendants in the statement that, on the last occasion when the plaintiff Smyth requested them to abate the nuisance, their answer was that they "could do nothing towards stopping the nuisance." This, if not denied or explained, might be of weight in deciding the Court to grant a remedy by way of injunction, instead of giving time to see if some remedy could not be devised.—As to the 7th branch of the motion, the Master said that paragraph 6 was irrelevant, and should be struck out: Pender v. Lushington, 6 Ch. D. 70, at p. 75. The only question was, whether the defendants were violating the maxim "sic utere

tuo ut alienum non lædas." If it is held that they are acting within their rights, their motives cannot be inquired into. Otherwise an inquiry might be necessary as to the value and sales of all the adjacent property. The inconvenience of such an addition to the present inquiry was sufficiently obvious.—The 8th branch of the motion was based on the statement that the defendants by their operations "are continuing to inflict the wrongs complained of herein upon the neighbourhood in general and the plaintiffs in particular." The Master said that these last words seemed to render any decision on this point unnecessary. Where a nuisance which is a public nuisance inflicts on an individual some special or particular damages, he has a private remedy: Odgers Broom's Common Law, p. 232. This was sufficiently alleged for the present. If it should afterwards appear that the Attorney-General should have instituted an information, this objection could be raised and given effect to at the trial, or even later, as in Johnston v. Consumers' Gas Co., 23 A.R. 566, where it was so held in the Court of Appeal.—The order made was, that paragraph 6 of the statement of claim be struck out, and that the defendants should at once plead so that the order of RIDDELL, J., should not be interfered with so long as in force. Costs of this motion to the plaintiffs in the cause. F. E. Hodgins, K.C., for the defendants. H. E. Rose, K.C., for the plaintiffs.

The defendants appealed from the order of the Master in Chambers, and the appeal was argued by the same counsel before MIDDLETON, J., in Chambers, on the 25th October, 1912. The learned Judge said that the question of law sought to be raised by the appeal was not within the jurisdiction of the Master; and the Master's order should be affirmed; the right to raise the question of law in any appropriate way being reserved to the defendants. Costs to the plaintiffs in any event.

THOMSON v. McPHERSON.

(Decision No. 2.)

Ontario Divisional Court, Mulock, C.J.Ex.D., Sutherland, and Middleton, JJ. October 31, 1912.

CONTRACTS (§ IV F—371)—*Sale of Interest in Mining Company—Indefinite and Incomplete Agreement—Time Deemed of Essence—Abandonment—Rescission—Caution.*]—Appeal by the plaintiff from the judgment of KELLY, J., 3 D.L.R. 269, 3 O.W.N. 791. The Court dismissed the appeal with costs. R. C. H. Cassels, for the plaintiff. A. D. Crooks, for the defendant McPherson. W. N. Tilley and G. W. Mason, for the defendant Lobb.

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DELAP v. CANADIAN PACIFIC R. CO.

Ontario High Court. October 29, 1912.

PLEADING (§ I P—130)—*Extension of Time for Delivery—Special Grounds.*]—Motion by the defendants to extend for three months from the 12th October, 1912, the time for delivery of the statement of defence. The Master, after stating the nature of the action, and the proceedings and negotiations which had taken place, said that, considering the large amount of the plaintiff's claim, the death of the former general solicitor of the defendants, with whom the oral agreement upon which the action was founded was alleged to have been made, and the mass of correspondence and other documents necessary for consideration in order to prepare a full and definite statement of the grounds of defence, a reasonable time should be granted. Order made extending the time for delivery of the statement of defence until the 23rd November, 1912. Costs in the cause. Angus MacMurchy, K.C., for the defendants. F. Arnoldi, K.C., for the plaintiff.

WALL v. DOMINION CANNERS CO.

Ontario High Court, Cartwright, M.C. October 30, 1912.

PLEADING (§ I S—145)—*Motion to Strike out Portions—Irrelevancy — Embarrassment — Motion for Particulars before Pleading—Practice—Affidavit—"Arrangement" for Transfer of Shares—Particulars of Time, Place, Persons, etc.*]—This action was brought against the company and two individuals to compel "the defendants to transfer to the plaintiff 100 shares of common stock in the defendant company." The company moved, before pleading, for particulars of the statement of claim and to strike out paragraphs 5, 6, and 7 as embarrassing. The motion was supported only by an affidavit of a clerk in the office of the defendant company's solicitors, stating that he had charge of this case; that he had read over the statement of claim; and had been advised by counsel and verily believed that it would be impossible for the defendants to proceed with the trial or to have a fair trial until the particulars sought had been delivered. He was also advised by counsel and verily believed that paragraphs 5, 6, and 7 were embarrassing, and should be struck out. The Master said, as was said in Smith v. Boyd, 17 P.R. 463, that a motion for particulars at this stage should be based on the defendant's inability to plead. To say that the particulars were necessary for the trial was premature—all such particulars could be obtained on discovery. Also, as was said in

Todd v. Labrosse, 10 O.W.R. 772, such an affidavit should be made by one of the defendant company's officers, and not by a clerk of the solicitors, who could know nothing except what he had been told. These objections, however, were not pressed by the plaintiff. The substance of the plaintiff's claim was, that two years ago, he was induced to continue in the service of the defendant company, at their request and that of the individual defendants, two of the directors. As a consideration for so doing, "it was arranged between the plaintiff and all three defendants that he should be granted 100 shares of the common stock of the defendant company" (paragraph 4). "But the defendants, although they have several times promised to grant the stock, have refused to do so" (paragraph 7). The defendant company now asked for particulars of when and where such arrangement was made, and whether it was verbal or in writing. The Master said that, considering the lapse of time and the fact of the defendant being a corporation, these facts should be given, and it should also be stated by whom these shares were to be granted and at what date. Particulars shewing "who were present at the time such arrangement was made" should not be given, unless they were officers or agents of the company, in which case they would be material facts on which the plaintiff could rely.—The defendants asked to have portions of paragraphs 5, 6, and 7 of the statement of claim struck out as embarrassing. The parts of paragraphs 5 and 7 objected to stated only that the plaintiff had not received the 100 shares, though the defendants had frequently promised to give them. The part of paragraph 6 objected to stated the reasons of the desire of the defendants to retain the services of the plaintiff, and why it was easy and natural for the individual defendants to make the alleged offer, as they had been allotted a large block of the common stock for work which was mostly all done by the plaintiff himself. The Master said that he saw nothing irrelevant or embarrassing in these statements, to warrant their excision. Order as above indicated. Costs of the motion to be in the cause to the plaintiff only, as well for the reasons already given as because, after serving a demand for particulars on the Toronto agents of the plaintiff's solicitors, the present motion was launched without waiting for any reply to that demand. M. L. Gordon, for the defendant company. Frank McCarthy, for the plaintiff.

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STUART v. BANK OF MONTREAL.

Ontario High Court, Cartwright, M.C. November 1, 1912.

DISMISSAL AND DISCONTINUANCE (§ I—2)—*Involuntary—ment of Claim—Sufficiency of Information already Given—Delay in Moving.*]—Motions by the defendants for particulars of the statement of claim and for further examination of the plaintiff for discovery. The cause was at issue before vacation. A demand for particulars of the statement of claim was served on the 6th May. This was not complied with; and nothing further was done about it by the defendants at that time. The case was set down on the non-jury list at Toronto, on the 4th September, and was, therefore, liable to be put on the peremptory list on or after the 26th September. The plaintiff was examined for discovery on the 21st October, and made what seems to have been full and candid answers to the questions asked. The action was brought in effect to redeem the one-half share of the plaintiff's deceased father in certain lands which, in October, 1900, were conveyed by the deceased to *his* father, John Stuart. The deed, though absolute in form, is alleged to have been only by way of security for moneys advanced; and it was said that this was within the knowledge of the defendant bank and its officers at the time when these, with other lands, in July, 1904, were conveyed by John Stuart to the bank in satisfaction of his own liabilities to that institution. In the 8th paragraph of the statement of claim it was alleged as follows: "During the negotiations for the transfer of his property, the said John Stuart notified the defendant bank that he was not the owner of the property in question . . . but had only an interest in the same by way of security. The defendants Braithwaite and Bruce had the like knowledge before such negotiations for transfer began." In the 9th paragraph it was alleged that for several years prior to July, 1904, the defendant Bruce had been solicitor for John Stuart, and until the 5th July, 1904, acted as solicitor for him, as well as for the Bank of Montreal. The demand for particulars was in the usual detailed form, asking when and where and in what circumstances John Stuart notified the bank as alleged in paragraph 8, and the name of the person or persons to whom such notice was given. This was repeated as to Braithwaite and Bruce, and also as to Bruce, as alleged in the 9th paragraph. Numerous letters were produced, and it was apparently on that of the 5th July, 1904, from John Stuart to Bruce that the plaintiff mainly relied, taken together with the correspondence as a whole. He also said that his grandfather notified the bank "verbally—just directly before the settlement." The Master said that as to these facts the plaintiff must rely on his grandfather's evidence at the trial. He was not bound to get all these details from his grandfather before-

hand and communicate them to the defendants, who had denied any notice. It would, therefore, be a matter for the trial and for the ultimate tribunal to say whether the defendants had notice, as the plaintiff alleged, and what effect was to be given to it. The plaintiff had apparently given all the information on the matters in question that he had or ought or was bound to have. There is no fiduciary relationship between himself and his grandfather—it might be that they were adverse, though the plaintiff must rely on his grandfather's evidence, if any was thought necessary, beyond the correspondence and the fact of the dual position of the defendant Bruce. The motions failed on the merits; and also it might be that the defendants were too late, after doing nothing since the 6th May last. The delay was said to have been caused in part by the plaintiff having obtained an order on the 10th July for examination de bene esse of John Stuart, which was never acted on. But this did not account for the previous two months' inaction. Motions dismissed; costs to the plaintiff in the cause. H. A. Burbidge, for the defendants. W. M. Douglas, K.C., and W. J. Elliott, for the plaintiff.

RAT PORTAGE LUMBER CO. v. HEWITT et al.

Manitoba King's Bench. Trial before Prendergast, J. October 17, 1912.

MECHANICS' LIEN (§ III—13)—*Priorities over Mortgage—Reference.*]—This is a mechanics' lien action whereby the plaintiff seeks to recover $2,266.84 for work done and materials supplied from May 31 to Oct. 31, 1910, on a house built by defendant Hewitt for defendant Wye, and the defendant company are mortgagees of the premises in question under a mortgage registered June 1, 1910, the plaintiffs' lien having been filed on November 25 following.

Judgment was given for the plaintiffs for part of claim with an order of reference.

E. Anderson, K.C., for plaintiffs.
B. L. Deacon, for Hewitt.
A. C. Ferguson, for Wye.
A. E. Dilts, for Huron & Erie Loan Co.

PRENDERGAST, J.:—The statement of claim sets out that the work was done and material supplied at the request of both Hewitt and Wye, and that the defendant company had notice of the plaintiffs' lien prior to paying any part of the mortgage moneys and paid part of the same after registration of the lien.

Hewitt's defence is to the effect that on July 16, 1910, after he had performed part of the contract, the same was taken over by Wye with the plaintiffs' consent, on the understanding by

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all parties that Wye should pay for the labour and material already done and supplied or to be done and supplied, and that he (Hewitt) was thereby discharged.

Wye's defence is in substance that his contract with Hewitt, after certain variations and adjustments, was for $4,860.75; that, without notice of the plaintiffs' lien, he paid to Hewitt and to workmen and material men, after Hewitt had abandoned, sums aggregating $3,874.82, leaving a balance of $985.93 in his hands; that the said balance is more than 20 per cent. of the value of the work done and material supplied, and that he has always been willing and ready to pay the same,—and he brings the said amount into Court.

The loan company, in their defence, claim priority of registration, and deny that they paid out any part of the mortgage moneys after notice of the lien or after the lien was registered.

It appears that defendant Wye, as owner, and defendant Hewitt, as contractor, entered into the building contract in question (exhibit 9) on April 15, 1910, and that the price or consideration of $5,000.00 therein set forth was subsequently reduced to $4,860.75 upon certain changes being made in the work called for by the plans.

Hewitt having then called upon Mr. Anselbrook, the plaintiffs' local manager, submitted to him a bill of quantities of lumber which he would require on the contract, for the purpose of having a quotation of the company's prices. This was done by Anselbrook delivering to Hewitt an estimate, or tender as it was called (exhibit 2), wherein the total appears at $1,585.00, and sending him a few days later a letter (exhibit 3), wherein this last amount is reduced to $1,533.00, which last figure Hewitt accepted.

Anselbrook was aware that the bill of quantities submitted to him would not cover the whole contract, but had apparently agreed to supply, on the same basis, what further material would be required.

On June 2nd, the plaintiffs, who, as I understand, had then delivered for $1,075.68 of material on the premises, had not yet received anything for the same, and it moreover had come to their knowledge that Hewitt was being sued by the J. H. Ashdown Co., and that other material men were threatening to file liens on the property. As a consequence Anselbrook first had an interview with Hewitt, who declared his willingness to give him an order on Wye for the full amount of this first estimate of $1,533.00, and then went to see Wye. On this interview between Anselbrook and Wye in the latter's office, the present issue depends.

Anselbrook's version is, in short, to the effect that after representing to Wye that he had supplied Hewitt with the stated

quantity of lumber on the contract and so far received nothing for it, he insisted that he should be given assurances of being paid or he would file a lien for the same and stop further deliveries, and that Wye, after saying that he realized that in dealing with Hewitt he was dealing with a man of straw, stated that he would pay for the past deliveries as he had had to do already with other suppliers of material, and that he would also pay for the lumber still required to complete the work.

Wye admits, in effect, that Anselbrook was insistent for some assurance of payment, but states that he assumed nothing and promised nothing, neither as to past or future deliveries. He says that seeing, however, that Anselbrook was apprehensive, he suggested that he (Wye) should see Hewitt and obtain his consent that all payments be made directly to the workmen and suppliers of material.

The evidence shews that Hewitt most readily acceded the same day to all payments being made as proposed in the future, and also gave Anselbrook an order on Wye for the lumber supplied—which order was at once sent by the plaintiffs to Wye.

I find, on the whole of the evidence, that the purport of the said interview between Anselbrook and Wye is what it should most naturally be expected to have been,—which seems also supported by the parties' subsequent conduct.

I find in short that Wye did not undertake to pay for the deliveries then already made. Had he done so, I doubt whether the plaintiffs could, under the Statute of Frauds, avail themselves of the same. But I find that he did not do so. It seems plain enough that Wye, whatever he may say of his confidence, realized the inextricable difficulties under which Hewitt was labouring and that the price contracted for would not cover the full cost of the work and material which the building called for. He was quite unwilling, I am sure, to gratuitously proffer to pay more than he felt strictly bound in law to do, which would depend on the proportion of the contract executed at that time. As to the lumber which he would still require, the matter was quite different. Anselbrook made it plain that he would not supply any more, and Hewitt, who was being sued and getting in deeper water all the time, could not procure it anywhere else. And yet, Wye required the lumber. So that what I find on the evidence that Wye did, is what he would most naturally do. It was not a matter, in this case, of his guaranteeing or assuming the debt of another. Anselbrook having then declared his severance of all connection with Hewitt, it was a new contract that was then entered into whereby Wye agreed to take, on his own account and pay for, the lumber he yet required. Anselbrook's willingness to supply further lumber on those conditions could not be dependent on whether he was paid or not by Wye for the lumber already supplied. As to the latter, he had to accept the

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situation as it was, which was no reason, however, for his refusing to make a legitimate profit out of what were to be to all intents independent future sales.

A great deal of stress was laid as to whether Hewitt continued thereafter to carry out the contract or dropped out. It seems to me that in different aspects, either view is proper. Hewitt went on in a way for a time, doing less and less work every day, and then he ceased doing any at all, having given up all hope of saving a dollar for himself, and so lost all interest in the matter. He, however, continued almost to the end certifying all accounts and vouchers, mainly for the reason that he was required to do so by Wye, who apparently thought that he was thus making himself secure against any claim which Hewitt might make on the ground that the contract had been withdrawn from him.

The plaintiffs having contended, as part of their case, that Hewitt was released by themselves and Wye from all liability under the contract, did not ask for judgment against him (Hewitt). The action will then be dismissed as against Hewitt, but, for reasons which are obvious, without costs.

Neither did the plaintiffs press for judgment against the defendant company; for the reason, as I understand, that they were assured by the latter's solicitors that the company has still enough in their hands to satisfy all claims. The action will then be dismissed against them also, and also without costs, as it appears that it was owing to the fact of Wye's connection with the company which allowed him to control the information about his loan, that the plaintiffs were unable to ascertain how this loan stood.

As against Wye, the plaintiffs will be entitled to judgment for the full amount of goods supplied by them after June 2nd, and for a proportion of the goods supplied before June 2nd equal to 20 per cent. of the proportion of the total contract executed at that date, either in work performed or material on the ground, on the basis of the contract having been for $4,860.75.

The plaintiffs may either (if satisfied that the evidence bears out the following figures) take out an order to the above effect, wherein the amount of goods supplied up to June 2nd will be stated at $1,075.68, and that of the goods supplied afterwards at $1,191.16; or (if not so satisfied) an order of reference to the Master to have those two amounts determined;

With, in either case, an order of reference to determine the proportion of the contract performed at the said date as aforesaid;

Also with the proper declaration as to a lien on the land;

And for further directions;

With costs to the plaintiffs.

Judgment for plaintiffs.

GRAY v. BUCHAN.
(Decision No. 2.)

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Riddell, JJ. November 2, 1912.

BROKERS (§ I—2)—*Purchase of Shares on Marg'n — Contract—Terms—Failure to Keep up Margin—Re-sale by Brokers —Findings of Fact—Appeal.*]—Appeal by the plaintiff from the judgment of KELLY, J., 3 D.L.R. 899, 3 O.W.N. 1620, dismissing the action and allowing the defendants the amount of their counterclaim, $18.10. The judgment of the Court was delivered by RIDDELL, J., who set out the facts at length, and said that, on the findings of fact, it was plain that, as the plaintiff did not in fact comply with the demand for the margin, made through the agreed channel, he could not complain that the stock was promptly sold—it was just what any one dealing in these stocks expects and must provide against. There was no need to consider the application (if any) of the case cited, Corbett v. Underwood (1876), 83 Ill. 324. Appeal dismissed with costs. J. M. Godfrey, for the plaintiff. G. T. Ware, for the defendants.

LEAKIM v. LEAKIM.
(Decision No. 2.)

Ontario Divisional Court, Latchford, Sutherland, Middleton, JJ. April 29, 1912.

MARRIAGE (§ IV B—56)—*Action for Declaration of Invalidity—Incapacity of Wife—Jurisdiction of High Court—Motion to Strike out Statement of Claim and Dismiss Action—Con. Rules 261, 617—Judgment.*]—Appeal by the plaintiff from the judgment of RIDDELL, J., 2 D.L.R. 278, 3 O.W.N. 994. The Court dismissed the appeal with costs. L. F. Heyd, K.C., for the plaintiff. H. C. Macdonald, for the defendant.

POLLINGTON v. CHEESEMAN.
(Decision No. 2.)

Ontario High Court, Sutherland, J., in Chambers. November 4, 1912.

PARTIES (§ III—120)—*Third parties—Motion to set aside Third Party Notice—Employers' Liability Assurance—Terms of Policy—Action for Damages for Death of Employee.*]—An appeal by the Travellers Insurance Company of Hartford, Connecticut, from an order of the Master in Chambers, 5 D.L.R. 887, 4 O.W.N. 92, refusing to set aside a third party notice served upon that company by the defendant. SUTHERLAND, J., said that, having carefully read and considered the very full reasons given by the Master for making the order appealed against and the authorities referred to, he thought the order should stand; and he could add nothing of value to what had been so well stated by the learned Master. Appeal dismissed with costs. T. N. Phelan, for the company. Frank McCarthy, for the defendant.

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CARTWRIGHT v. WHARTON.
(Decision No. 2.)

Ontario High Court, Riddell, J. November 4, 1912.

DAMAGES (§ III N—298)—*Infringement of Copyright—Quantum of Damages—Appeal.*]—Appeal by the defendant from the report of the Master in Ordinary of his finding that the plaintiff was entitled to $1,400 damages for infringement of a copyright. See the judgment of the trial Judge, 1 D.L.R. 392, 25 O.L.R. 357, 3 O.W.N. 499. RIDDELL, J., said that he had read all the evidence and had the advantage of the Master's reasons for his decision; and, on the whole, while the damages might be somewhat higher than he should himself have been induced to award, he could not say that the Master was wrong. Appeal dismissed with costs. D. T. Symons, K.C., for the defendant. J. H. Moss, K.C., for the plaintiff.

NIAGARA AND ONTARIO CONSTRUCTION CO. v. WYSE AND UNITED STATES FIDELITY AND GUARANTY CO.

Ontario High Court, Cartwright, M.C. November 5, 1912.

PARTIES (§ III—120)—*Closing Pleadings against Third Party—Con. Rule 3—Particulars in Action on Guaranty.*]—Motion by the plaintiff company to have the defendant company ordered to close pleadings between it and a third party; and by the defendant company at the same time for particulars of alleged damage sought to be recovered by the plaintiff. The Master said that, although the plaintiff cannot intermeddle with the third party proceedings, yet where, as in this case, the third party has not appeared nor moved to have the notice set aside, there can be no objection to the defendant noting the third party in default and closing the pleadings as against him. This, though not expressly provided in the Rules, comes within the provisions of Con. Rule 3, which says: "As to all matters not provided for in these Rules, the practice, as far as may be, shall be regulated by analogy thereto." The defendant company, being only a guarantor for the defendant Wyse, is entitled to definite particulars of the way in which the plaintiff's claim to recover the full penalty of the bond for $10,000 is made up. The plaintiff's officer examined for discovery was not able to give any satisfactory information as to this. The plaintiff alleges that it has suffered damage by reason of some default on Wyse's part of almost $20,000, and that for this it is entitled to be indemnified by the guaranty company up to $10,000. It is apparently admitted that Wyse completed the work but did not pay for the labour and material supplied, but the officer examined could not give the items. It may be that the only issue determined at the trial will be whether the guar-

anty company is liable to indemnify the plaintiff against any default on Wyse's part, and that, if it is so decided, the damages could be assessed on a reference, as is usually done in actions on bonds; and, if that course could be arranged between the parties, there would be no necessity for particulars as yet. If, however, this question of amount is to be gone into at the trial, the plaintiff must furnish particulars as definite as would be required in an action for goods sold and delivered. The costs of the motions to be in the cause. C. F. Ritchie, for the plaintiff. W. B. Milliken, for the guaranty company.

BURROWS v. CAMPBELL.

Ontario High Court. Trial before Falconbridge, C.J.K.B. November 6, 1912.

TAXES (§ III F—148*a*)—*Action to Set aside—Irregularities in Sale—Plaintiff Tenant of Defendant.*]—Action to set aside a tax sale and tax deed. The learned Chief Justice expressed the opinion that the action was an unconscionable one; and found that, while there were gross irregularities and omissions in the proceedings prescribed by law to be taken before the sale, the plaintiff had not in fact been prejudiced by any of these, and was not, as tenant of the defendant and her predecessor in title, at liberty to deny his landlord's title: Woodfall, 18th ed., p. 243; Smith v. Modeland, 11 C.P. 387. Action dismissed with costs. L. C. Raymond, K.C., and H. W. Macoomb, for the plaintiff. W. M. German, K.C., for the defendant.

NOKES v. KENT.

Ontario Divisional Court, Clute, Sutherland, and Kelly, JJ. November 8, 1912.

NEW TRIAL (§ I—4)—*Terms.*]—Appeal by the defendants from the judgment of BOYD, C., on the 2nd October, 1912. The judgment of the Court was delivered by CLUTE, J., who stated that, in their opinion, the learned Chancellor, who tried the case, was right in his refusal to put off the trial upon the material then before him; but that it would be in the interests of justice, under all the circumstances, that a new trial should be granted, upon condition that the defendants pay the costs of the former trial and of this appeal within thirty days and pay $3,000 into Court to the credit of this cause, or give security therefor to the satisfaction of the Registrar within 30 days; otherwise this appeal should be dismissed with costs. H. H. Dewart, K.C., for the defendants. Shirley Denison, K.C., and H. W. A. Foster, for the plaintiff.

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MUNN v. KEYES.

Ontario High Court. Trial before Britton, J. November 6, 1912.

GIFT (§ I—6) — *Cheque Signed in Blank by Deceased — Alleged Gift — Trust for Creditors.*] — Action by the plaintiff, as administrator of the estate of his late brother Charles William Munn, to recover $530.95, amount put to the credit of the defendants in the Bowmanville branch of the Bank of Montreal on the 5th October, 1911, which was asserted by the plaintiff to be the property of his deceased brother. The money was prior to that date placed to the joint credit of the plaintiff and the deceased, but could be drawn by either party, and it was arranged that the deceased, who was in very poor health, was to be cared for by his sister, the defendant Mrs. Keyes, for which she was to be paid $1 per day. Evidence was given to the effect that the deceased became desirous that the money should be transferred to Mrs. Keyes on the ground that she had been looking after him and had a great deal of trouble with him, and the defendant Hillyer was called in to advise as to the manner in which this was to be done. The defendants state that the intention of the deceased was that the money was to pay debts, and after they were paid the balance of the money was to go to Mrs. Keyes. It appeared, however, that the deceased signed a cheque in blank, apparently because he did not know the exact amount to his credit, and told Hillyer to take it to the bank, get the amount filled in, and place the money to the credit of himself and Mrs. Keyes. The bank manager subsequently, at Hillyer's request, filled in the date, 3rd October, 1911, made the cheque payable to the defendants or bearer, filled in the proper amount, adding interest, and a new account was opened in the names of the defendants, starting with the credit of $530.95 as of the date 5th October, 1911. Charles Munn died on the 8th October, 1911. The learned Judge, after stating the facts, came to the conclusion, upon the evidence, that a gift to the defendant Mrs. Keyes had not been established, either inter vivos or mortis causa. He further stated that he had some difficulty in coming to a conclusion as to whether or not an irrevocable trust had been created in favour of the creditors of the deceased, and of the surplus, if any, in favour of Mrs. Keyes. His opinion was, however, that "what the deceased desired to do was not to part with the control of his money absolutely during his life, but to get it in the hands of the defendants for safe-keeping. In the event of his wanting any of the money during his life, he was to have it. In the event of his death, he desired that his funeral expenses and his debts be paid out of this money, and that his sister should get the balance, if any. This arrangement was testamentary in its character. The deceased thought it could be done, without the necessity of a will. This case cannot be put

higher . . . than the case of where a donor delivers property to a third person for the donee. The money was delivered to a third person—if to Dr. Hillyer, to him as trustee—if to both defendants, to them as trustees—for the payment of the donor's debts. Until the authority of Dr. Hillyer was exercised, he was the agent or trustee of the donor—and until the authority was exercised the donor could revoke it; and, not being exercised before the death of the donor, it was revoked by such death. Declaration that the money on deposit in the Bank of Montreal at Bowmanville to the credit of the defendants is the property of the estate of the late Charles W. Munn. Judgment for the plaintiff for $530.95 with interest at rate allowed by the Bank of Montreal on deposits at Bowmanville, from the 5th October, 1911. It was directed, however, that upon all the facts, and as the defendants had acted in good faith, although mistaken as to their rights, the judgment should be without costs. The judgment to be without prejudice to any claim the defendants or either of them may have against the estate of the late Charles W. Munn. F. L. Webb, for the plaintiff. D. B. Simpson, K.C., for the defendant Keyes. E. V. McLean, for the defendant Hillyer.

Re HEITNER AND MANUFACTURERS LIFE INSURANCE CO.

Ontario High Court, Cartwright, M.C. November 6, 1912.

INSURANCE (§ IV B—170)—*Change of Beneficiary to Pay Insurance Moneys into Court—Principle on which such Orders Made.*]—Application by the company for leave to pay into Court $1,000, amount of a policy on the life of David Heitner, deceased. The policy was made through the Winnipeg agency. It was payable to his wife, Robie Heitner, when issued, less than three years ago, but on the 7th February, 1912, the assured revoked this designation in favour of the Orthodox Jewish Home for the Aged at Chicago. Both of these parties claimed the proceeds. The Master, after referring to the Manitoba statutes on which the parties relied, expressed the opinion that any consideration of these questions is at present unnecessary, as the facts of this case do not seem distinguishable from those in Re Confederation Life Association and Cordingley, 19 P.R. 89, where an order was made such as is asked for here. He referred to the judgment of Osler, J.A., at p. 91 et seq., as containing a full discussion of the principle on which such orders are made, and of the effects of the same on the company and the respective claimants. The order to go as asked, with costs to the company fixed at $30 unless a taxation is preferred. M. R. Gooderham, for the applicants.

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COLONIAL INVESTMENT AND LOAN CO v. McKINLEY.

Ontario High Court, Riddell, J. April 2, 1912.

APPEAL (§ VII L 4—510)—*Review of findings of Master—Mortgage action—Monthly rests — Reference back.*]—Appeal by the plaintiffs from the report of James S. Cartwright, K.C., an Official Referee, in a mortgage action. The plaintiffs asked for an order setting aside or varying the report and directing a reference back to the Referee.

A. McLean Macdonell, K.C., for the plaintiffs.
H. C. Macdonald, for the defendants.

RIDDELL, J.:—A mortgage for $600 and interest, made in November, 1896, by the female defendant (the husband joining in the covenant) to the assignors of the plaintiffs, contained the following provisions:—

"Provided this mortgage to be void on payment of $600 . . . with interest at the rate of 10 per cent. per annum, as well after as before the maturity hereof, as follows:—

"The said principal sum to be paid on the 1st day of September, 1909, and interest thereon at the rate aforesaid to be paid monthly on the first day in each and every month, as well after as before the maturity hereof, until the said sum and interest as aforesaid shall have been fully paid and satisfied; the first of such payments of interest to become due and payable on the 1st day of December, 1896, and also at the rate aforesaid as well after as before maturity, upon all arrears of interest, from the date at which the same shall become due and payable, and taxes and performance of statute labour.

"And it is expressly understood and agreed by and between the said mortgagor and the said association, that, if the mortgagor pay or cause to be paid unto the association the sums following, that is to say, a monthly subscription of 30 cents in respect of each of the said shares as redemption money under the rules and by-laws of the association, together with the sum of 40 cents per month in respect of each of the said shares, being the amount of premium agreed to be paid by the mortgagor to the association for receiving the said amount in advance prior to the same being realised, together with interest at the rate of 6 per cent. per annum on the entire principal sum of $600, payable monthly as from the date of these presents until the 1st day of September, 1909, and thereafter until the full amount of such principal sum shall be fully paid and satisfied, that the same shall be accepted in full payment of the principal and interest above reserved, the said monthly subscription, premium, and interest to be payable on the first day in each and every month during the continuance hereof; and it is also expressly agreed and understood that, in case default shall be made in

the payment of any sum or sums to become due as redemption money, premium, or interest, amounting in all to the sum of $7.20 per month, at any of the times hereinbefore appointed for the payment thereof, the mortgagor shall pay to the association the sum of 60 cents as a fine or interest upon arrears of interest or principal, or both, for each month during which such interest or principal or any portion thereof shall remain due and unpaid, as well after as before the maturity hereof, until the whole amount due for interest or principal as aforesaid shall have been fully paid and satisfied, and also will observe and perform the rules and by-laws for the time being of the association in respect of the said shares."

It seems to me perfectly clear that the latter provision in case of the mortgagor can be appealed to only if the mortgagor performs the conditions named, that is, makes the payments set out. It was a privilege given to the mortgagor, of which she might take advantage by making such payments, and only upon these terms. If she omitted to make the payments, the clause did not apply at all, but the first-mentioned terms were in force.

These payments were not made. The mortgage was in arrear; and the plaintiffs, in 1903, brought their action for foreclosure; judgment was obtained in May, 1904; the plaintiffs took possession in 1904, and agreed to lease to one M. A. Johnson, and made an agreement to sell to her if the mortgage was not redeemed. She made certain payments which were credited upon the mortgage account, and, in December, 1905, assigned all her interest to one Findlay; Findlay desired to get his deed, and the plaintiffs applied for a final order of foreclosure. As they had been in possession, a new account had to be taken, which was done, and $773.79 was ordered to be paid into the bank on or before February, 1909. This was done; but the plaintiffs refused to take the money, as Johnson and Findlay had made very large improvements, for which they claimed—and for which nothing had been allowed in taking the accounts. Then plaintiffs obtained an order, on the 4th November, 1909, setting aside former proceedings, and referring it to Mr. Cartwright to make all necessary inquiries and for redemption and foreclosure.

The defendant, in January, 1911, procured a release of Findlay's claim.

The Referee, in taking the accounts, has done so with monthly rests, influenced, it would seem, somewhat if not largely, by the opinion expressed in Hunter on Foreclosure, p. 89, and a rather rhetorical obiter in *Archbold* v. *Building and Loan Association* (1888), 15 O.R. 237, at p. 250.

Neither of these, I think, is of any assistance. Mr. Hunter is speaking of a mortgage in which "the principal is received

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back on a sort of sinking fund plan"—in such cases, he thinks "the mortgagee cannot well deny that he has agreed to take his principal by driblets, and therefore is outside the rule against rests."

What may be the correct method in the case of such a mortgage, I do not think it necessary to determine (although I am not to be taken as assenting to the text-writer's opinion)—here there is a specific provision for repayment, the principal sum on the 1st September, 1909, and interest meantime monthly at 10 per cent. The mortgagees indeed agree that, if the mortgagor pay certain sums monthly, these payments will be received in lieu of the payment provided for—a privilege the mortgagor may or may not take advantage of. The mortgagor did not take advantage of this privilege by performing the conditions.

Nor is the dictum of Armour, C.J., in point. "Thou shalt love thy neighbour as thyself" is not a rule of law or one enforceable by the Courts—any more than is its congener, "If any man will sue thee at the law and take away thy coat let him have thy cloke also," or "Give to him that asketh thee, and from him that would borrow of thee turn not thou away." The rule of law is, "a bargain is a bargain;" and the Courts do not and cannot make new bargains for litigants in lieu of those they make for themselves.

I think the matter must be referred back to the Referee with a direction to take the accounts in the usual manner; and the plaintiffs must have their costs, which they may, if so advised, add to their claim.

The other matters argued before me depend, I think, upon the determination of the question upon which I have given a decision—if not, they will be left open to be disposed of after the Referee shall have made his report—or, if the parties prefer, I may be spoken to.

Reference back.

Re MATON and CLAVIR.

Ontario High Court, Riddell, J. November 9, 1912.

ENCROACHMENT (§ I—5)—*Buildings — Vendor and Purchaser.*]—Motion by the vendor for an order declaring that he can make a good title to the land in question.

A. MacGregor, for the vendor.
J. H. Cooke, for the purchaser.

RIDDELL, J.:—In this matter being an application under the Vendors and Purchasers Act (1910), 10 Edw. VII. ch. 58, one Membery owned a certain lot No. 88 on the north side of St.

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Clair Avenue. He made a contract with a firm of builders, Robinson & Burgess, to build a store on the eastern part of this lot. He told this firm to be very careful to keep within the eastern limit of the lot but that he was not particular about the west line as he owned the whole lot any way. The building was to be 25 feet wide. A mechanics' lien action was brought against him by the builders and this was settled, according to the official stenographer's note, as follows:—

This case is settled. Each party to pay their own costs. It is hereby agreed and this case is hereby settled on the above terms, each party to pay their own costs; plaintiff to take building off the defendant Membery's hands and pay the defendant $70 a foot for depth of 120 feet for the land for the 25 feet frontage, giving a deposit of cash within 30 days from date and permitting defendant Membery to occupy the premises until the 1st of August, 1912, at $40 a month rent; defendant Membery agreeing to vacate premises by 1st August, and all adjustments of taxes and rent to date from the date when the $70 per foot is paid; and all adjustments also to be made as of that date; defendant Membery to be free to take away the front platform and also sink in the front cellar when he moves.

"G. L. Crooks,"
Reporter.

The builders applying for a loan on the property, a survey was insisted upon and it turned out that the building occupied the easterly 25 ft. 0¾ inches of the lot. Membery would not convey till he was paid $10 more and his solicitor $5 for the conveyance: he then, May, 1912, conveyed "the easterly three quarters of an inch throughout from front to rear of the westerly twenty-five feet of lot number 88, etc., etc." It was not at that time noticed that while the building did project only ¾ of an inch on the west 25 ft. of the lot at the front, it ran further west at the rear.

The conveyances then to the applicants cover (1) the east 25 feet and (2) a strip of ¾ of an inch to the west of this, in all the easterly 25 ft. 0¾ inches of the lot: and the building is known as No. 1224 Bloor West.

In October, 1912, the grantees made a contract with Clavir to sell him "the premises situate on the north side of St. Clair Avenue . . . known as street number 1224 Bloor West having a frontage of ("about" is scored out here) 25 feet . . ."

Clavir finds that the rear of the building projects 2¼ inches on the west 25 feet: his solicitor delivered requisitions on title which he does not consider fully and satisfactorily answered: and this application is made accordingly. [Reference to certain matters which are considered immaterial, or have been cleared up, and to the following requisition]:

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6. "Grant of Membery of the easterly ¾ of an inch of the westerly 25 ft.: we will also require grant from him of the easterly 2¼ inches of the said westerly 25 feet as the survey shews the rear of the building to be encroaching to that extent . . . ."

The legal estate in this 2¼ inches, or so much of it as is not covered by the $10 deed from Membery, is still in Membery: it is sworn that his partner said that for $12.50 he could get the deed of this strip from Membery. But whether that is so or not, the vendors have not the title to it. It is argued that Membery would be estopped from setting up title to it—it may be so—I hope so—but that is not the great danger. A man who after agreeing to give up a building supposed to be 25 ft. frontage exacts $10 for ¾ of an inch extra which the building really measured: and then when it is found that the rear encroaches an inch or two more will not convey this trifling strip unless he is paid another sum of money, may reasonably be expected to take every advantage of his legal position. An "innocent purchaser" could no doubt be found to buy the westerly 24 ft. 0¼ inches of the lot: he could rely upon the Registry Act and might very well set up that the second deed of ¾ of an inch misled him, for ordinary prudence would have called for a perfectly correct deed at that time. When people get down to a deed for ¾ of an inch the strong presumption is that they are very accurate indeed. No doubt possession would be taken of the shop: but, as was long ago decided, possession is not in itself notice: Waters v. Shade (1851), 2 Gr. 457; Sherbonean v. Jeffs (1869), 15 Gr. 574; even if the second grantee knows it, in some instances at least: Roe v. Braden (1877), 24 Gr. 559.

At all events the "innocent purchaser" would take care not to know anything about the possession.

I do not think that the deeds are sufficient to convey all the land covered by the building, and that this requisition has not been answered.

While it is very seldom that litigation is advised by the Court, this seems to be a case for an action against Membery to carry out his agreement for settlement.

I have not omitted to notice that the contract calls for 25 ft. frontage only: both parties agree that it was the building No. 1224 Bloor West and the land it covers, which are the subject-matter of the contract.

The parties have agreed that there shall be no costs.

SMYTH v. HARRIS.
(Decision No. 3.)

Ontario High Court, Riddell, J. November 4, 1912.

COMPROMISE AND SETTLEMENT (§ I—4)—*Confirmation by court order in pending action.*]—Motion by the plaintiffs for an order in terms of a settlement made by the parties. The decisions upon a motion and an appeal in the same case are reported, 4 O.W.N. 168.

H. E. Rose, K.C., for the plaintiffs.
E. F. B. Johnston, K.C., for the defendants.

RIDDELL, J.:—In this case the parties have come to a settlement. The defendants agree to do certain things and to pay certain costs. If the acts are not done by the 1st February, the plaintiffs may "give notice of an application to" myself "to fix a day for trial." "Pleadings to be considered as now closed, and no steps except taxation of costs to be taken in action from execution of this consent until service of notice of application . . . to proceed." "(5) Application to be made by the parties to" myself "for an order confirming this settlement."

The parties now attend; and the plaintiffs submit a formal order, as of the Court, directing the defendants to do the acts, etc., which they agreed to do; the defendants say: "That is not the bargain; non hæc in fœdera veni." And I think they are right.

So far as I am concerned, all I am to do under the agreement is to make an order confirming the settlement, which I do. The parties have not agreed that I am to determine what the settlement means. Very experienced counsel have drawn up the settlement; they, no doubt, know what it means; at all events, they have not agreed that I shall tell them.

Then there is no provision (as is most usual) that an order of the Court is to be made to carry the settlement into effect. The parties are of full age; presumably they knew what they wanted, and told their counsel what it was; and presumably counsel inserted in the agreement what they intended. It seems from the document itself that the parties were content to rely each upon the promise of the other, not accompanied by an order of the Court to implement the promise. No steps are to be taken in the action from execution of the consent, it is said—that also shews that no order of the Court was in contemplation.

If it be necessary, a direction will be made to the Taxing Officer to tax the costs—but nothing else further than "an order confirming this settlement."

No costs.

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COWIE v. COWIE.

Ontario High Court, Riddell, J. November 4, 1912.

DIVORCE AND SEPARATION (§ V C—59a)—*Alimony action—Enforcement of decree.*]—Motion by the plaintiff in an alimony action, after judgment in her favour (1 O.W.N. 635), for an order for possession of the defendant's land.

J. W. McCullough, for the plaintiff.
The defendant, in person.

RIDDELL, J.:—In this case, judgment was finally given for the plaintiff by the Court of Appeal for alimony. She registered her judgment, but the defendant did not pay. On the 24th June, 1912, an application was made before me for an order that the lands of the defendant be sold to pay the alimony: he then appeared in person and stated that he could not pay the amount. He claimed also that the judgment had been obtained by perjury. I could not entertain this last plea: on the first and the representation of the plaintiff, I, following the case of Abbott v. Abbott (1912), 1 D.L.R. 697, 3 O.W.N. 683, made an order "for sale of the north half of lot No. 27 in the 7th concession of Pickering . . . or a competent part thereof . . . for the satisfaction of the arrears of alimony . . . with the approbation of the Master in Ordinary. . . ."

The Master settled the advertisement; but the defendant attended the sale, and stated that he never had a title to the said lands, and title could not be given, etc., etc. The auctioneer did not succeed in getting any reasonable bids—and the land was not sold. After the abortive sale, two prospective buyers came to the solicitor conducting the sale and said that they wished to buy, but that, under the circumstances, they were afraid of trouble in getting or retaining possession; if the defendant were dispossessed, they were prepared to offer a reasonable sum for the land, but would not buy while he was in possession. The solicitor swears that, in his opinion, it is very improbable that a fair price can be realised for the land so long as the defendant is allowed to retain possession.

The plaintiff now asks for an order "directing the defendant to deliver up possession of the land to the plaintiff or to whom she may appoint," and for an order directing him to vacate possession. The defendant attended in person on the return of the motion, and again urged that the judgment had been obtained by perjury.

I asked for authority for an order such as is asked for, but none has been furnished, and it is said by the plaintiff's counsel that none can be found.

The arm of the law will probably be found long enough to meet such a case as this by extreme measures, if necessary. At

present, however, I do not think the order asked for should be made. I shall make an order that the land be again offered for sale and that the plaintiff be at liberty to bid; the amount of past due alimony and costs to be allowed as part payment; the remainder to be paid into Court payable out to her according as the alimony becomes payable, etc.

The plaintiff is to be at liberty also to serve a notice of motion for an order to commit the defendant for contempt, in case of any further interference with the sale. The defendant must be made to understand that no interference with a sale under direction of the Court will be tolerated. His ignorance thus far may excuse him, but his misconduct must cease.

Costs of this application to be considered in all respects costs in the alimony proceedings.

RICKART v. BRITTON.

(Decision No. 2.)

Ontario High Court, Riddell, J. November 9, 1912.

STAY OF PROCEEDINGS (§ I—13)—*Non-payment of Costs of Previous Actions.*]—Motion by the defendants for an order staying the action until the costs of two former actions have been paid by the plaintiffs.

C. G. Jarvis, for the defendants.
J. G. O'Donoghue, for the plaintiffs.

RIDDELL, J.:—Rickert, President of the United Garment Workers of America, Larger their Secretary, Waxmen their Treasurer, certain other persons their "Trustees," certain others members of their executive board, on behalf of themselves and all other members of the United Garment Workers of America, sued W. A. Britton & Co. of London, Ontario, for an injunction restraining them from using the plaintiffs' trade mark and for damages, etc.

The plaintiffs all resided outside Ontario; and the defendants took out a praecipe order for security for costs; the plaintiffs moved to discharge this order; on the return of the motion they were allowed to add as a plaintiff one Carroll an organizer of the society who lived in London, Ont., as do several of its members. It then being urged that Carroll had no property in Ontario, it was urged by the defendants that the order should stand. The Master in Chambers however set it aside: 3 O.W.N. 1008, April 11th, 1912.

The plaintiffs moving for an interim injunction examined one Burgess as a witness on the motion: he declined to answer certain questions and the plaintiffs moved for an order against him. This motion was dismissed by Mr. Justice Middleton with

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costs payable to the defendants and to Burgess forthwith after taxation: 3 O.W.N. 1272. These costs were taxed at $76.40. Execution was issued but the sheriff cannot find goods of Carroli, the rest of the plaintiffs are out of the country.

Thereupon the defendants moved substantially for an order for security for costs—the Master in Chambers refused "without prejudice to a substantive application to the Court as in Stewart v. Sullivan," 11 P.R. 529; see 3 D.L.R. 890, 3 O.W.N. 1512. This was June 22nd. June 26th the motion for an interim injunction came on before Kelly, J., and he dismissed it the next day with costs. These costs were taxed at $161.25. September 6th a formal demand was made on the solicitors for the plaintiffs for this sum accompanied by a copy of the taxing officer's certificate—The solicitors replied Sept. 10th: "We have received the taxing officer's certificate and regret to report that at the present moment, we haven't quite sufficient funds in hand to pay the amount mentioned in the same." This, counsel for the plaintiffs (one of the solicitors) admits, as indeed would be fairly clear without an admission, was sarcasm—they did not intend to pay the costs or any part of the same. The letter was, and was intended to be a humorous way of saying "we do not intend to pay you; get the money if you can."

Thereupon registered letters were sent to the plaintiffs, or at least some of them, demanding payment of these costs but no answer has been received.

Carroll is clearly execution proof; it is not denied that the plaintiff organization is in receipt of large sums of money. Probably Carroll can't pay without the help of the organization—and the organization refuse to pay. I have no doubt that if Carroll desired the help of the organization he would get it without trouble.

A motion is now made for an order staying the action until these costs are paid.

In the case of In re Wickham (1887), 35 Ch.D. 272, it was pointed out that the mere non-payment of costs ordered placed a litigant in contempt—and there was jurisdiction in the Courts to stay all proceedings in the action until these costs were paid. It was said, however, that in the case of mere non-payment of costs an order would not or might not be made, but "where the party is acting vexatiously in withholding the costs of an interlocutory order" such an order would or might be made. There the costs which should have been paid were the costs of an application for a receiver—and I cannot find any circumstance of vexatious refusal, except the refusal itself.

A subsequent case of Graham v. Sutton, [1897] 2 Ch. 367, in the Court of Appeal, perhaps made the principle more clear.

Lopes, L.J., puts it thus: p. 369 "If the application rested solely on the ground of non-payment of costs, or on non-payment coupled with an inability to pay, it could not succeed. . . . If the action is vexatious, or if the plaintiff in the course of it acts vexatiously towards the defendant, the Court has jurisdiction to stay proceedings till the costs which the plaintiff has been ordered to pay are paid. Whether the jurisdiction ought to be exercised depends on the circumstances of each case."

In our own Courts the Common Law rule seems to have been adopted, but the result is much the same as in England.

Stewart v. Sullivan (1886), 11 P.R. 529; Wright v. Wright (1887), 12 P.R. 42, may be looked at. What is decided is that "while non-payment of interlocutory costs was not a ground for staying proceedings, yet if it appeared equitable to stay proceedings until they are paid, the Court in the exercise of its inherent discretion might direct a stay:" headnote to Stewart v. Sullivan, *supra*.

I think that the test expressed by Lopes, L.J., is a fair one (while of course there may be other cases). Mere non-payment is not enough even if accompanied by inability to pay—I should hesitate long before staying an action upon the ground of a plaintiff's impecuniosity. But if (1) the action is vexatious or (2) if the plaintiff in the course of it acts vexatiously towards the defendant, then an order may go, and in most, if not all cases should go.

I cannot here hold that the action in itself is vexatious but the other alternative remains to be considered. Did the plaintiffs in the course of the action act vexatiously toward the defendants? It is impossible to read the judgment of Mr. Justice Middleton as reported in 4 D.L.R. 366, 3 O.W.N. 1272, without seeing that that learned Judge thought that the proceedings for an interim injunction were vexatious—"the Canadian Union have registered a label under the Statute, and this alone would indicate that there is such an issue to be tried as to render it unreasonable to suppose that any interim injunction will be granted. Besides this, a very serious legal question arises at the threshold of the plaintiffs' case."

The learned Judge goes on to point out other difficulties: "a novel and difficult legal question ought not to be dealt with upon a motion for an interim injunction," p. 1274.

I entirely concur with my learned brother in his views: and my brother Kelly, when all the material was before him, dismissed the motion for an interim receiver. I think the motion for an interim receiver from the beginning, and especially when persisted in after the views of Mr. Justice Middleton, was vexatious.

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As regards the other costs, that is the costs of the motion to commit, the plaintiffs could not have supposed that the investigation they were desiring to make (as mentioned in 3 O.W.N. at p. 1273) would be permitted if objected to. The proceedings to commit the witness for contempt were also vexatious in my view.

The defendants in my opinion have brought themselves within the rule, even if we disregard the letter of the plaintiffs' solicitor.

The order will go as asked; costs to the defendants only in the cause.

CARTWRIGHT v. WHARTON.
(Decision No. 3.)

Ontario High Court, Middleton, J. November 2, 1912.

COPYRIGHT (§ I—8)—*Infringement — Breach of Injunction Restraining—Contempt of Court.*]—Motion by the plaintiff for an order committing the defendant for contempt in infringing the injunction granted by TEETZEL, J., at the trial: *Cartwright v. Wharton*, 1 D.L.R. 392, 3 O.W.N. 499, 25 O.L.R. 357. This injunction restrained the defendant from publication in his law list of any lists derived or copied from the plaintiff's list or from the defendant's own list published in 1911, which, according to the finding of the learned trial Judge, was improperly derived from the plaintiff's list of 1910.

J. H. Moss, K.C., for the plaintiff.
D. T. Symons, K.C., for the defendant.

MIDDLETON, J.:—The material in support of the motion is an affidavit by the plaintiff, who bases his belief that the defendant's edition of 1912 has been produced in violation of the terms of the injunction, upon the repetition in the 1912 edition of numerous misprints and errors said to exist in the 1911 edition. Fifty-four such errors or misprints are particularised.

At the time of the pronouncing of the judgment—the 4th January, 1912—the defendant had a 1912 edition well under way with his printers, Warwick Brothers and Rutter. This edition was in large measure derived from and based upon the 1911 edition. When the judgment was pronounced, and the defendant learned of his failure in the action and of the fact that all further use of the 1911 edition was prohibited, he determined to compile anew the material necessary for the publication of a new edition. The injunction in no way prevented this, so long as the compilation used in 1912 was based upon the result of original inquiry and work. He, accordingly, on the 5th January—the day after the pronouncing of the judgment—

telegraphed to his correspondents in each of the Provinces, other than Ontario, to have prepared a complete new list of barristers, also Judges, court officials, etc., for the respective Provinces. He followed these telegrams by letters advising of the holding of the trial, which necessitated the preparation of new lists without reference to the plaintiff's book or the defendant's 1911 edition. This correspondence is produced. The original lists furnished by the different correspondents are also produced; and the majority of the errors or alleged errors said to be common to both editions, and upon which the plaintiff's charge is now based, are found to exist in the material so furnished.

I am satisfied, from the material produced, that the list published in 1912 is substantially based upon the new material so obtained.

Upon the argument this was practically conceded by the plaintiff's counsel; but he still urges that on close scrutiny enough remains to indicate that some improper use must have been made of the prohibited material. This necessitates a somewhat careful scrutiny of the 54 cases alleged. Fortunately these admit of some classification.

In the first place, items 1, 2, 3, 4, 28, and 40 relate to the misspelling of the names of towns. The defendant contends, and I think rightly contends, that this is not within the scope of the injunction granted. Secondly, items numbers 32, 33, 34, 35, 36, 37, 38, 39, and 42 relate to numbers placed opposite the names of solicitors by way of reference to the Toronto agents. This, the defendant contends, is not within the scope of the injunction; and I think he is right.

A large number of other objections relate to mistakes in the initials of solicitors, the omission of the title "K.C." in a number of cases, and the fact that solicitors in partnership are reported as practising separately. The great majority of these alleged errors appear to exist in the original material derived from the sources I have indicated. This applies to items No. 5, 6, 7, 8, 9, 10, 11, 13, 15, 17, 18, 22, 23, 25, 27, 29, 30, 31, 41, 42, 43, 44, 45, 46, 47, 48, and 49.

In the preparation of the list, Mr. Wharton has had access afforded him to other lists which are probably the common source from which both lists have in some measure been derived: hence the existence of the common errors.

In reference to some individual names, further explanation has been given. In the case of objections Nos. 12 and 14, sufficient original information was acquired to make the list accurate; but the accurate information was changed to its erroneous form by the defendant, owing to his belief that correction was needed.

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Number 19, the name of the Junior Judge of the County Court of Elgin, is given as "C. O. Ermatinger," instead of "C. O. Z. Ermatinger." The name of the learned County Court Judge is given in the same way in the Canada Law Journal Almanac, which is used by Mr. Wharton by the permission of its authors; and I may say that in years gone by I have personally addressed many letters to the learned Judge, and until now did not know of his third initial.

More difficult to deal with is the case of the name of "W. T. McMullen, Local Master, Woodstock"—No. 20. This in the interdicted list is spelled "McMullin;" and in the 1912 list appears in the same incorrect form. The explanation given limps. The material said to have been given to the printer was the official list published by the Inspector of Legal Offices. This list was, no doubt, in Mr. Wharton's possession. The name is there correctly spelled; and it is said that the error was that of the printer. After giving the matter the best consideration I can, I do not think I could find against Mr. Wharton's sworn statement, by reason merely of this one coincidence. I have the less hesitation in adopting this view because manifestly much labour was gone to in order to obtain independent lists. The inspector's list of county officers for Ontario was in Mr. Wharton's hands, and was in a convenient form for use. There would be a complete absence of motive.

The only other similar case is number 16, that of "S. D. McLellan" whose name appears as "McLennan." Again the printer is blamed. The coincidence is at least singular; but, as accurate independent material was at hand, motive is again wanting.

Number 21, Mr. Ross, whose name is erroneously given as "A. W. Ross," instead of "A. G." I think the explanation is satisfactory. The initial was erroneously given in a card, and was from this carried into the list.

Number 24, W. H. Warke, erroneously spelled "Wark," the information was sought from Mr. Warke, and the original slip in his own handwriting is produced, and it is easy to see how an error might occur.

Number 26, "Cronyn & Betts & Coleridge"—the explanation given as to this is also satisfactory.

These, I think, cover all the cases except the list of Quebec bailiffs. This list, it is admitted, was copied from a list in the former book. Mr. Wharton contends that this is not one of the interdicted lists, because bailiffs are not court officials. The only evidence before me upon the point is that of a Quebec advocate, who says that they are. I can quite readily accept the statement of the defendant as indicating his bona fide belief; and I do not think that this matter is sufficiently serious to warrant any action on the part of the Court.

In the result, I do not think that any order should be made. The question of costs has given me more difficulty and anxiety than the rest of the motion. I have come to the conclusion that the motion ought to be regarded as having substantially failed; and I think that I should give to the defendant three-fourths of his costs.

Re COLLINS.

Ontario High Court, Latchford, J. November 2, 1912.

WILLS (§ III G—145)—*Conditional limitations—Devise with discretion—Death of beneficiary.*]—Motion by three of the heirs at law of Agnes Collins, deceased, for an order, under Con. Rule 938, determining a question arising upon the construction of the will.

W. M. Douglas, K.C., for the applicants.

G. B. Burson, for the executor.

T. F. Battle, for the devisees and legatees under the will of Anthony Collins.

LATCHFORD, J.:—The testatrix devised all her property to her executor upon trust to convert the same into money, and out of the proceeds to pay to her daughter "$400 absolutely" and to a son "$400 absolutely." "The balance," the will proceeds, "is to be paid to my husband Anthony Collins by my executor at such times and in such amounts as to my said executor may seem necessary for the proper maintenance of my said husband."

Anthony Collins died about two years after the testatrix. He had been paid certain small sums, which did not exhaust the residue. The applicants, who are three of the heirs at law of the testatrix, now ask for the construction of the will. The clause referring to the legacy to the husband of the testatrix is the only one open to question.

I think the husband was entitled, not to the whole balance or residue of the estate, but only to so much thereof as the executor thought proper to pay him. The general word "balance" is controlled by the explicit direction which follows, limiting the sums to be paid from time to time to so much as to the said executor should seem necessary for the proper maintenance of the legatee. To adopt the words of the learned Chancellor in Re Rispin, 2 D.L.R. 644, 25 O.L.R. 633 (affirmed by the Court of Appeal, ib. 638): "The whole benefit was contingent on the bona fide judgment and volition of the executor."

There will be a declaration that the undisposed of "balance" forms part of the residuary estate of the testatrix. Costs out of the estate—those of the executor as between solicitor and client.

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BAECHLER v. BAECHLER.

Ontario High Court, Sutherland, J. November 4, 1912.

WILLS (§ III L—193)—*Motion by Executors for Advice—Deduction of Amount Due by Legatee to Testator—Pending Action.*]—Motion by the defendants, the executors of Xavier Baechler the elder, deceased, under Con. Rule 938 and the Trustee Act, 1 Geo. V. ch. 26, sec. 75, by way of summary application to the Court, for an order authorising and permitting the applicants to deduct the sum of $754.56 from the amount of a legacy claimed by the plaintiff.

J. D. Montgomery, for the defendants.
C. Garrow, for the plaintiff.
J. R. Meredith, for the infants.

SUTHERLAND, J.:—Xavier Baechler the elder, by his last will, dated the 1st February, 1906, bequeathed to his son Xavier Baechler the younger the sum of $1,000. The latter died on the 27th September, 1906; and the plaintiff is his widow and the administratrix of his estate. The father died on the 12th March, 1907; and the defendants are the executors under his will, and letters probate have been duly issued out of the Surrogate Court of the County of Lambton, dated the 30th March, 1907.

The plaintiff on the 18th September, 1912, by writ of summons, commenced an action for the amount of the said legacy, and in her statement of claim alleges that the defendants have refused to pay it in whole or in part.

The defendants plead that the estate of Xavier Baechler the younger was insolvent at the time of his death, and that, for the purpose of protecting it, Xavier Baechler the elder advanced moneys to the First National Exchange Bank of Port Huron, Michigan, and obtained an assignment of certain notes and a chattel mortgage. They further plead that they proved the claim of the father against the estate of the son before the Probate Court of the County of St. Clair in the State of Michigan, that being the Court administering the estate of the son, and received a dividend out of the son's estate which left a balance of $754.56 unpaid.

In their statement of defence they also plead that the said balance is now owing by the son's estate with interest, and that they are entitled to apply the legacy in payment of the indebtedness of the son's estate to that of the father. They also say that they have been ready and willing to adjust the accounts between the two estates, but the plaintiff has refused to do this.

This action is coming on for trial at Goderich on the 11th inst.

The defendants are moving under Con. Rule 938 and the Trustee Act, 1 Geo. V. ch. 26, sec. 75, by way of summary application to the Court, for an order authorising and permitting them to deduct from the legacy the said sum of $754.56.

In answer to the motion an affidavit is filed by the plaintiff in which she states that she has recently learned of facts which lead her to believe that there came into the hands of the father certain assets of the son which he did not account for, and that she will be able to prove that there is no such sum as $754.56 owing by the estate of her husband to his father's estate.

I am not at all sure that a question of this kind can properly be determined on an application for advice in this way. See Re Rally, 25 O.L.R. 112; Re Turner, 5 D.L.R. 731, 3 O.W.N. 1438. Any disposition, however, which I would make of the motion would not necessarily put an end to the action.

The defendants in their statement of defence did not expressly say that they were willing to pay the balance of the legacy after giving credit for the debt. It is true that upon the motion they have now proposed to do this. The plaintiff is disputing that there is any such sum owing by the son's estate to the father as is alleged by the defendants. Under these circumstances, I think the proper course for me to take is to enlarge this motion to be disposed of by the presiding Judge at the trial of the action. He will also dispose of the costs incidental thereto.

Re LITTLE STURGEON RIVER SLIDES CO. and MACKIE ESTATE.

Ontario High Court, Riddell, J., in Chambers. November 9, 1912.

LOGS AND LOGGING (§ I—2)—*Compensation for Driving—Setting Aside Arbitrator—Timber Slide Company's Act.*]—Motion by the company for an order setting aside a notice served on them, on behalf of the Mackie Estate, of the appointment of an arbitrator.

G. F. Shepley, K.C., for the company.
R. McKay, K.C., for the estate of Thos. Mackie.

RIDDELL, J.:—In April, 1908, an agreement in writing was entered into, ostensibly between the Estate of Thos. Mackie and the Little Sturgeon River Slides Co. for the estate to do certain driving of timber over the works of the company; the company to pay for certain improvements to be made by the Estate "and in case of dispute the value thereof shall be settled by arbitration under the provisions of the Timber Slide Companies' Act." This agreement was signed by one H. T. Mackie purporting to

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act for the Mackie Estate, and "J. R. Booth per Wm. Anderson, for and on behalf of the Little Sturgeon Timber Slide Company Limited."

May 2nd, 1912, the Estate by their solicitor served notice of the appointment of V. as their arbitrator, calling upon the company to name another arbitrator.

The company repudiate the execution of the agreement, and say Anderson had no authority to sign it or to make any such agreement for the company. Booth denies all knowledge of it.

A motion is now made for an order setting aside and discharging the notice appointing an arbitrator upon the grounds (1) that there is no statutory or other authority for the serving of the notice: (2) that the alleged agreement was not made by the company, "or at all events the same is bona fide in dispute, and until the same has been admitted or duly established by process of law to be binding on the said company, the said notice and the proceedings contemplated by the said notice are premature and incompetent" (whatever that may mean): (3) that the company never went into possession.

I asked how I had any jurisdiction in the matter—and 9 Edw. VII. ch. 35, sec. 5 was referred to: "a submission unless a contrary intention is expressed . . . shall have the same effect as if it had been made an order of Court." But this applies to an actual submission, not to a document which may or may not be a submission. If upon the application of the company I were to act upon this section, the order would operate as an estoppel against their questioning the document as their submission. This the company do not want—and I accordingly do not act upon this section.

The Timber Slides Act R.S.O. 1897, ch. 194, secs. 24-35 does not advance matters.

A very simple and plain method was suggested on the argument—an action brought by the company to set aside the alleged submission and for a declaration that it is not a submission by the company, with an injunction against the Estate proceeding with the proposed arbitration, would answer all ends—an interim injunction would no doubt be granted.

If such an action be brought within 10 days, costs of this motion will be costs in that action to the Estate only; if not the costs will be paid to the estate forthwith after taxation.

SCARBOROUGH SECURITIES CO. v. LOCKE.

Ontario High Court, Riddell, J. November 4, 1912.

LANDLORD AND TENANT (§ II C—20)—*Occupation by Tenant After Expiry of Lease—Acceptance of Rent—Estoppel.*]—Action to recover possession of land.

D. L. McCarthy, K.C., for the plaintiffs.
L. F. Heyd, K.C., for the defendant.

RIDDELL, J.:—The defendant became the tenant of the Toronto Park Company of certain premises, No. 2301 Queen street east, in the city of Toronto. There was no written lease, but it was agreed that he should be tenant at $200 per annum until the property should be sold. A further term, which he asserts, viz., that he was to have the first chance to purchase, I do not find established by the evidence which I accept. The Toronto Park Company were in low water, and went into liquidation. A sale of the property of the company was made to the Scarborough Securities Company, the plaintiffs, and approved by the Court on the 11th February, 1911. The Scarborough Securities Company were acting simply as agents (and trustees) for the Toronto Railway Company in this purchase.

The sale was made effective by the order of the Court of the 11th February, 1911; and I think the tenancy of Locke then ceased, unless there was something done by the new owners of the property recognising a continuing tenancy. The defendant, on the 15th June, 1911, sent a cheque addressed to the Toronto Park Company (or successors) for $50, marked "Rent to September 15-11," payable to the Toronto Park Company (or successors); the Toronto Railway Company cashed this cheque, endorsing it in their own name.

They were the real owners of the land, though nominally it was the property of the Scarborough Securities Company; they could, therefore, estop themselves and their agents-trustees, the Scarborough Securities Company; and I think they have in fact recognised the defendant as a tenant. But, as there is nothing else alleged to bind them or their agents, I think the estoppel cannot be extended beyond the date up to which the rent was accepted, viz., 15th September, 1911.

The plaintiffs are accordingly entitled to possession, their action not being brought till May, 1912.

Judgment will go for possession with costs. If mesne profits or damages be sought, I may be spoken to again. I do not think any case is made for compensation—the defendant knew what his tenancy was.

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MacKAY v. MacKAY.

Ontario High Court. Trial before Falconbridge, C.J.K.B. November 9, 1912.

WILLS (§ III E—106)—*Taxes Accruing Prior to Testator's Death—Counterclaim.*]—Action by a beneficiary under a will for a direction that he is entitled to a conveyance of lands devised to him, free and clear of taxes and other rates which had accrued prior to the death of the testator, on which point the learned Chief Justice found against the plaintiff. He also found against the plaintiff as to the chattel mortgage and the overdraft set up in the defendants' counterclaim, the general result being stated as follows: the plaintiff is declared to be entitled to have a conveyance of the lands devised to him by testator upon terms of paying to the executors the expenses which they have incurred in and about the sale of the lands, including the moneys actually paid to the treasurer, and their own expenses of attending upon the sale, and their solicitor and client's costs incurred in connection therewith: and also the items of the defendants' counterclaim, above referred to, viz. (a) Chattel mortgage for $315.71 and interest (b) amount of the overdraft $242.60, plus $16.50 interest to the first of November, 1911, and subsequent interest; (c) the costs of this action and counterclaim. J. H. Rodd, for the plaintiff. W. E. Gundy, and R. L. Brackin, for the defendants.

CAMPBELL v. VERRAL; GIBSON v. VERRALS.

Ontario High Court, Riddell, J., in Chambers. November 9, 1912.

STAY OF PROCEEDINGS (§ II—25)—*Prior Judgment against Company without Assets—Res Judicata—Estoppel—Negligence.*]—Motion by the defendant to stay these actions, which for the purposes of the motion may be treated as one, till a former judgment recovered against "Taxicab Verrals, Limited" for the same cause of action is got rid of in some way. RIDDELL, J., said that he did not think the motion could succeed. "The cause of action against the incorporated company no doubt "transivit in rem judicatam:" but that is all. Any cause of action against Verral is still a "cause of action" only—it has not passed into a judgment. It was determined in the former action that the negligence of the chauffeur was the negligence of the company, and that judgment standing it operates as an estoppel as between the parties thereto (and their privies if any) but no further. The plaintiff could not as against the company say that the negligence was the negligence of Verral, but there is no reason why she should not as against Verral." Motion dismissed with costs to the plaintiff in any event. T. N. Phelan, for the defendant. John MacGregor, for the plaintiff.

NIEMINEN v. DOME MINES.

Ontario High Court, Cartwright, M.C. November 9, 1912.

COSTS (§ I—14)—*Extension of Time—Insufficient Affidavit—Con. Rules* 1203, 518, 524, 312.]—Motion to extend the time for giving security for costs in an action for damages for death of plaintiff's son who was killed, as admitted, while working in defendants' mine a little over a year ago. The statement of defence was delivered on 12th September. It sets up the usual defences—and also a release given on payment of 1,000 marks in gold to the plaintiff and his wife who reside in Finland—as stated on the writ. The action was begun on 7th June—for some reason no order for security for costs was issued until 17th September, the day on which issue was joined. The order for security was duly served on 18th September but was never complied with. No steps were taken by the defendants to have the action dismissed under Con. Rule 1203—and on 2nd November, this motion was made to have the time for giving security extended for two months, stating that in support of the motion an affidavit would be read. It was not said that such affidavit had been filed and none was filed until the argument. It was argued by the defendants' counsel that as no affidavit had been filed before service of the motion as required by Con. Rule 524 none could afterwards be received, and also that as the affidavit was made on information and belief, without stating the grounds of facts which admittedly were not within the knowledge of the deponent, the affidavit was insufficient and could not be received under Con. Rule 518. The Master in Chambers said that the necessity for a compliance with these rules had frequently been emphasised, referring to the headnote of the judgment in In re J. L. Young, [1900] 2 Ch. 753, which states that such an affidavit "is irregular, and therefore inadmissible as evidence whether on a interlocutory or a final application." He said, however, that following the principle of Con. Rule 312, he was unwilling to apply forthwith the rigour of the law. It seemed at least doubtful whether the plaintiff could really wish the action to proceed in view of the release above mentioned. If, however, a proper affidavit could be obtained from Mr. Findela, who is said in the affidavit filed to be "a Finnish interpreter in correspondence with the plaintiff with respect to giving security for costs," the motion might be renewed not later than 15th inst.; in default of which being done, the present motion would be dismissed with costs and the action itself dismissed with costs. Payment of costs of this motion forthwith to be a term of any enlargement of the time for giving security. H. L. O'Rourke, for the plaintiff. H. E. Rose, K.C., for the defendants.

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QUEBEC BANK v. FREELAND.

Ontario High Court, Cartwright, M.C. November 13, 1912.

JUDGMENT (§ I F—45) — *Promissory Note — Examination by Defendants of Plaintiff's Officer—Disclosure of Facts Entitling to Defend—Object of Con. Rule* 603—*Costs.*]—Action on a promissory note in which a motion for speedy judgment was made under Rule 603. For the purpose of resisting the motion Mr. Strickland, a local manager of the plaintiffs, was examined at great length and it was practically conceded by counsel for the plaintiff that his examination disclosed such a state of facts as would entitle the defendants to have leave to defend. It was also admitted by counsel for both parties that the examination was such as would probably in any case have been necessary for the defendants to make for the purpose of discovery. The costs of this examination constituted the principal part of the costs of the motion for judgment. Mr. HOLMESTED, sitting for the Master in Chambers, after stating the above facts, said: "The motion for judgment fails, and in disposing of the question of the costs I ought, I think, to arrive at a conclusion whether in the circumstances the motion was properly made. The object of Rule 603 is no doubt to furnish a summary remedy in simple cases, and to save thereby unnecessary costs; but a resort to that Rule ought not to be had, where it is known to the plaintiff that there is a bonâ fide dispute as to his right to recover. In this case a letter from the defendants' solicitors was read to me on the argument of the motion, of which, however, I do not find a copy among the papers, which very clearly intimated to the plaintiffs that the defendants disputed their right to recover on the note in question, and giving also, as I remember, an intimation of the grounds of defence. This defence I will not say is established, but is at all events shewn not to be without some appearance of substance, owing to the apparent discrepancy between the plaintiffs' books and the testimony of Mr. Strickland as to the time when the plaintiffs actually became the holders of the note in question. In these circumstances it does not appear to me that the plaintiffs were right in seeking to obtain judgment under Rule 603, and it would be wholly frustrating the object of that Rule to permit plaintiffs to litigate on a motion under that Rule a case which ought fairly and reasonably to be carried to trial in the usual way. I think, therefore, that the plaintiff should in any event pay to the defendants their costs of the motion, except the costs of the examination of Strickland, which are to be treated as costs of discovery." J. E. Jones, for the defendant Freeland. D. T. Symons, K.C., for the plaintiffs.

FULLER v. BONIS.

Ontario High Court, Cartwright, M.C. November 13, 1912.

PLEADING (§ I J—65)—*Particulars — Acts Antecedent to Writ — Inability to Give Particulars — Municipal By-law — Con. Rule* 552.]—Action for an injunction to restrain the defendants from so working their quarry as to be a nuisance to the plaintiff. The defendant moved for better particulars of the various specific wrongful acts mentioned in the statement of claim, and to confine the particulars already delivered to acts occurring antecedently to the issue of the writ, and to strike out paragraph 17, which alleges the provisions of a municipal by-law, and that part of 18 which claims that the defendants have acted in violation thereof. Judgment by Mr. HOLMESTED, sitting for the Master in Chambers: The plaintiff has delivered certain particulars prior to the motion, in answer to a demand of the defendants' solicitors; and the plaintiff has also been examined for discovery and questioned particularly as to the allegations concerning which further particulars are now sought and has, on oath, stated his inability to give them. It is not suggested that there is any other source than the plaintiff's own recollection from which more specific dates could be obtained, and I do not think on this application I should order him to do what he swears he is unable to do, at the penalty of striking out those allegations from the statement of claim. Neither do I think that the particulars of acts occurring since the issue of the writ, should be struck out, as they appear to constitute what is called in Rule 552 "a continuing cause of action," for which damages may be assessed in this action. With regard to the allegations as to the municipal by-law, I have come to the conclusion they ought not at this stage of the proceedings to be struck out. It is said that in determining whether the non-performance of a statutory duty which causes injury to an individual gives him a right of action depends on "the purview of the legislature in the particular statute and the language which they there employed:" Cowley v. Newmarket, [1892] 4 A.C. 352, and see Saunders v. Holborn Dis. Bd., [1895] 1 Q.B. 64, and Baron v. Portslade Dis. Cl., [1900] 2 Q.B. 588. The same considerations apply to by-laws which are made in pursuance of statutory powers. Whether this particular by-law gives the plaintiff a right of action I do not think can properly be determined by me on a motion of this kind. I do not think paragraph 17 is clearly irrelevant, on the contrary it appears to me to present a question proper for the decision of the Judge who may try the action. It may be remarked that the by-law does not appear to make something unlawful which before was lawful, but rather imposes a penalty for what was already an unlawful act. As plaintiff's counsel has pointed out, there is here no affidavit filed on the part of the defendants sug-

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gesting any difficulty in their pleading in the action for want of the particulars claimed, nor do I perceive any. The motion must, therefore, be refused with costs to the plaintiff in any event. E. C. Cattanach, for the defendant. S. S. Mills, for the plaintiff.

LAND OWNERS Limited v. BOLAND.
(Decision No. 1.)

Ontario High Court, Riddell, J., in Chambers. November 8, 1912.

REFERENCE (§ I—1)—*Motion for Order to Take Accounts—Ont. C.R.* 645.]—Motion by the plaintiffs "for an order that the defendants account to the plaintiffs forthwith for all moneys received by the defendants for the plaintiffs in connection with the sale of lots in Bay View Heights, Port McNicoll, subdivision." It was explained on the motion that this meant an order under Con. Rule 645.

J. J. Gray, for the plaintiffs.

Grayson Smith, for the defendants.

RIDDELL, J.:—The Court of Appeal in England have said: "Under that Rule only those accounts can be directed which are necessarily involved in the relief sought by the writ of summons:" In re Gyhon, Allen v. Taylor (1885), 29 Ch. D. 834, at p. 837,, per Cotton, L.J.

The writ of summons is not brought before me; no affidavit is filed as to the manner in which the writ was endorsed. I told counsel definitely and specially that all papers must be put in which were relied upon—it must be taken then that the plaintiffs could not shew that the writ claimed any such relief as is now sought—de non apparentibus et non existentibus eadem est ratio—and I must take it that the writ was not so endorsed. We have not here, as in some cases, an admission on the part of the defendants which could help the plaintiffs over the difficulty.

The motion must be dismissed; costs to the defendants in any event of the action.

As, notwithstanding what was said at the argument and what is said in Welsh v. Harrison (1912), 4 O.W.N. 139, at 140, as "to the necessity of filing all the papers which are to be used on motions—it is too much to expect the Court to act the solicitor's clerk and hunt up the missing documents," it may possibly be that the plaintiffs have in fact a writ endorsed as required, this dismissal will be without prejudice to any other application for an order such as is now sought or any other order.

LAND OWNERS Limited v. BOLAND.
(Decision No. 2.)

Ontario High Court, Sutherland, J., in Chambers. November 13, 1912.

DISMISSAL AND DISCONTINUANCE (§ I—5)—*Change of Solicitors—New Plaintiff.*]—Motion by the plaintiffs for an order for account. SUTHERLAND, J., said that the plaintiff company, since the launching of the motion, having obtained an order changing solicitors, and having through their new solicitors filed and served a notice of discontinuance, the action is at an end and the motion must be dismissed. The defendants will be entitled to their costs, under the circumstances, as against the plaintiffs. He did not think he could now, or should, if he had the power, in view of the facts so much in dispute, make an order as asked by Pickman on his consent filed, joining him as a plaintiff, or substituting him as such in this action as brought on his own behalf or on behalf of himself and all other shareholders of the plaintiff company. J. J. Gray, for the motion. Grayson Smith, for the company. J. H. Spence, for the defendants.

Re SEGUIN AND VILLAGE OF HAWKESBURY.

Ontario High Court, Middleton, J. November 7, 1912.

HIGHWAYS (§ III—113)—*Diversion—Municipal By-law.*]—Motion to quash by-law No. 179 of the Corporation of the Village of Hawkesbury, closing up a part of St. David street.

A. Lemieux, K.C., for the applicant.

H. W. Lawlor and A. J. Reid, for the corporation.

MIDDLETON, J.:—Under the Railway Act, sec. 238 (see amendment of 1909) the Board has authority to order that a highway may be permanently diverted. No authority is given to close a highway. In October, 1911, the Canadian Northern Railway Company, desiring to make some changes in its line through Hawkesbury, made an application to the Board which involved the closing of St. David street. Some negotiation took place looking to the closing of the street at the intersection by the municipality and the sale of this portion to the railway. With this in view, notices were given which led up to the by-law in question.

When the matter came before the Board, an order was made, quite in conformity with the statute, by which St. David street was diverted at each side of the railway allowance so as to turn at right angles and so connect with Union street; the portion of the original road allowance crossing the railway allowance being closed and an embankment constructed thereon.

Owing to the greater facility given by these diversions to

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those driving upon St. David street and desiring to reach Main street, the change may be beneficial. Those who desire to make a continuous passage along St. David street are put to some inconvenience, as they must go 178 feet from St. David street to Union street and after passing under the railway bridge must return the same distance.

With this I am in no way concerned, as the whole matter was entirely within the jurisdiction of the Board.

The municipal proceedings were initiated under some misapprehension as to the true situation; but there is no ground whatever for the suggestion that there was any abuse of the municipal power or anything other than an endeavour to come to some satisfactory arrangement with the railway.

The by-law was unnecessary, and was not acted on so far as any conveyance is concerned. It affords no answer to any claim the applicant might have. The order of the Board is a conclusive and final answer to his claims. This motion is an entirely unnecessary and useless piece of litigation, and I think I have discretion to refuse the order sought, even if there is some irregularity in the proceedings.

I do not think the by-law should be regarded as a by-law under the section of the Municipal Act relating to the closing of streets, but rather as an expression of the municipality's assent to the arrangement for the diversion of the street under the Railway Act. So regarded, it is free from all objection.

The motion must be dismissed with costs.

LONG v. SMILEY.

Ontario High Court. Trial before Riddell, J. November 4, 1912.

BROKERS (§ I—3)—*Stockbrokers — Stocks Held for Re-sale on Customer's Account.*]—Three actions, two in a County Court, and one in the High Court, brought respectively by two sisters against a firm of brokers, to recover moneys intrusted to the defendants for investment in mining stocks.

The actions were (by consent) tried together before RIDDELL, J., without a jury.

A. J. Russell Snow, K.C., for the plaintiffs.

T. N. Phelan, for the defendants.

RIDDELL, J.:—Two sisters, Georgina and Kate Long, the former a nurse and the latter a saleswoman, lived together, except when the nurse was in employment. Hearing much of money made by speculating in mining stocks, they determined to try their luck. They knew McCausland, a member of the defendants' firm of brokers, and intrusted him and his firm with their business.

Not being satisfied with the outcome, Kate brought an action in the County Court of the County of York against McCausland for $192.50, alleging that she had intrusted him with this sum for investment in mining stocks, and he had failed so to invest for her. She also brought an action in the same Court against the firm for two sums, $152.50 and $132.50, on a like claim. Georgina brought an action in the High Court on a similar claim, but claiming four sums, $192.50, $466.50, $96.25, and $180.50: $935.75 in all.

The High Court case came on for trial before me at the non-jury sitting at Toronto; at that trial it appeared that the transactions referred to in the three actions were inextricably mixed together; and, accordingly, all parties agreed—most sensibly and properly—that I should try all the actions together. At the request and with the consent of all parties, I did so.

There was much confusion in the evidence of the plaintiffs, the two sisters, and it is impossible to place full reliance on their evidence. I do not think that they wilfully misstated what they thought they recalled as facts; but, intelligent as they probably are in their businesses of nurse and saleswoman, they seem not to have applied their minds much to any other phase of their dealing in mining stock than the anticipated profits. On one matter they so far disagree as that the one contends that a considerable sum of money handed her by her sister was in repayment of a debt, while the other contends that it was a loan (or a contribution to a joint enterprise).

From a consideration of all the evidence, I have come to the conclusion that when any stock was ordered to be bought, it was intended to be left in the hands of the brokers in a convenient form for immediate sale, and that both plaintiffs quite understood this and assented to it. Stocks which were paying dividends were, of course, to be transferred into the name of the purchaser, but not others. When dividend-paying stock was bought, it was so transferred; and I shall pay no more attention to this. All the complaint is as regards the non-dividend paying stock—purely speculative stock.

When this kind of stock was bought for either plaintiff, a sufficient amount of scrip was placed, probably with other of the same mine, in an envelope; sufficient of the scrip was always held on hand to give every customer the amount held by him. When stock was bought, generally, if not always, in the books of the defendants, certificates of a particular number or particular numbers were entered with the name of a purchaser adjoining. This was mere book-keeping; the customer was not notified; and no attention was paid to keeping the particular certificate or certificates for the particular customer or any customer. When the time came, if it ever came, for the customer

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to get his stock, it would be by the merest chance that the particular certificate which had been entered near to his name in the books went out to him. It is admitted by the defendants that they did not keep any particular certificate for the plaintiffs, but sold those which had been first designated with their names in the books.

The plaintiffs contend that this dealing was a conversion; but I do not think so. They quite understood that the stock had to be in such a shape as that it could be delivered on a sale at a moment's notice; they did not know that any particular certificate had been allotted to them; they made no request for any particular certificate—and until something more was done than was done, I do not think that any particular certificate was theirs, even though they had paid out and out for some stock: Le Croy v. Eastman, 10 Mod. 499; Dos Passos, 2nd ed., pp. 255 et seq.

With some hesitation, I think I must hold, also, that the dealings of the two sisters were of such a character that transferring stock certificates to one of them, Kate, in such a form as that they could be easily divided between the two sisters, was a sufficient compliance with the duty of the brokers. The trouble has arisen from the fact that stocks bought for them went down in price. The evidence of the plaintiffs, while I do not think it perjured, is not to be relied on at any point.

Taking now the several actions:—

(1) Kate Long v. McCausland, in the County Court, for $192.50. This sum went, with a sum of $192.50 contributed by Georgina, to buy 500 Otisse and 500 Gifford, which were delivered to Kate on the 1st September, 1911. This action must be dismissed.

(2) Kate Long v. Smiley & Co., in the County Court. The sum of $152.50 went for 500 Gifford, delivered to her in August, 1911. The sum of $132.50 went, with $466.50 of Georgina's, to buy 1,000 Peterson Lake and 100 Temiskaming. The Temiskaming was delivered to Georgina and put in her name, as it was a producing and dividend-paying mine. The Peterson Lake was, with 200 ordered by Georgina in January, 1909, in all 1,200, delivered to Kate on the 15th August, 1911. Kate cannot complain—and this action must also be dismissed.

(3) The High Court action, Georgina Long v. Smiley & Co. The first item, $192.50, was for her share of the 500 Otisse and 500 Gifford delivered to Kate. The second, for the 1,000 Peterson Lake and 100 Temiskaming. The Temiskaming she got: the Peterson Lake was delivered to Kate for her. The third, $96.25, was for 500 Rochester: she says wholly her own speculation; Kate does not agree. On the whole, I think it was her own. The stock was delivered to Kate for her on the 15th Aug-

ust, 1911. The fourth and last, $180.50, was for 200 Peterson Lake and 500 Rochester, which were delivered to Kate for her on the 15th August, 1911. All this stock was delivered as soon as it was really asked for; and I think the defendants are not liable. If they did make a mistake in looking upon Kate as an agent for her sister, the sister is not damnified.

I think all the actions must be dismissed; but I shall, if so desired, make a declaration as to the ownership of the stock as between Georgina and Kate.

There will be no costs.

BLAISDELL v. RAYCROFT; RAYCROFT v. COOK.

Ontario High Court. Trial before Boyd, C. November 7, 1912.

WILLS (§ III G—145)—*Devise to Executors to Sell—Fictitious Sale at Undervalue—Attacking Parties, Joining in Conveyance—Undue Influence—Breach of Trust—Onus—Discharge of Mortgage.*]—These actions were tried together, and arose out of a will, by which the testator gave all his estate, real and personal to the defendants in the first action, his widow Jane Raycroft and his daughter (by a former marriage) Florence Cook to sell and dispose of, and to apply the proceeds thus: To the wife $2,000, to the defendant Florence Cook $1,200, to the two plaintiffs (daughters) Hattie and Laura $100 each, and also legacies of $100 each to George, Minnie and Alfred (his children), making in all $3,700 of pecuniary legacies, and from and out of the residue a good comfortable house was to be purchased for the use of his wife during her life and after her death to become the property of Florence, at a cost not exceeding $1,800. Any estate left after the expenditure of the said $1,800 and after payment of debts and expenses was to be divided equally between his two daughters, the plaintiffs. The sale of the chattels realized no more than sufficient to pay debts, and the only other asset was the land in question (a farm) the value of which at the testator's death was no more than $4,800. The land was put up for auction at a reserved bid of $5,000 and the highest bidder offered no more than $4,800. After various efforts to sell, Mrs. Falinger, another daughter offered to buy at $4,800 and the transaction was carried out by a conveyance in which the two executors and the two residuary legatees joined. These legatees lived at Springfield, Massachusetts, and the deed was taken to them for execution by the co-executrix Mrs. Cook who told them no more money was coming from the estate and that upon payment of their legacies out of the proceeds of sale nothing more would be coming to them. This transaction was attacked by the legatees on the ground that the sale was really to

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Mrs. Raycroft, who subsequently became the owner of the property, and that the putting forward of Mrs. Falinger was a mere subterfuge to disguise the real transaction. The learned Chancellor however found upon the evidence, as facts, that full value was obtained upon the sale of the land in question and that there was no scheme between the purchaser and the trustee for sale, whereby the latter should become the real owner, and that the beneficiary legatees who attack the transaction were parties to the conveyance to the purchaser, and on faith of their execution of that deed obtained the full amount of their specific legacies out of the proceeds. The view was expressed that if the plaintiffs had lodged their complaint soon after the transaction, the circumstances might have provoked some suspicion and have justified some method of investigation, but after a lapse of four years and after the sale of the property for $10,000 by Mrs. Raycroft, suspicion is transferred to the motives of this litigation, as being an attempt to secure some share of the windfall arising from this sudden rise in value, which has taken place owing to the land being required for railway purposes. [Reference to Re Postlethwaite, 59 L.T.N.S. 59 which was reversed in 60 L.T.N.S. 517 by the Lords Justices; and to Williams v. Scott, [1900] A.C. 499, the latter case being however distinguishable from this on the facts.] The action to be dismissed with costs with a declaration that the money realized from the late sale and now paid into Court is the property of the defendant Mrs. Raycroft.

RAYCROFT v. COOK was another contest between the co-executrices, which was ordered to be tried with Blaisdell v. Raycroft. The executrix Mrs. Cook joined hands with her sisters and sought to have the sale of the property treated as a nullity and to have the $10,000 which has been paid into Court as assets of the testator's estate. In that event $1,800 of it would be set apart for the purchase of a house in which she would have an estate in remainder after the widow's death, and the balance would be divisible between the two residuary legatees. In the Chancellor's opinion the same reasons which apply against relief being given to the sisters are equally and even more forcible as to the co-executrix, as she was fully informed of what the transaction was, and was satisfied, and indeed actively intervened to procure the signatures of the two sisters. After the land came into the hands of Mrs. Raycroft she dealt with her in the application of the proceeds of sale, whereby it was ascertained after all the accounts of the estate were taken that a balance of $679 was pro tanto available towards the $1,800 to be provided for the purchase of a home for the widow. The widow having come into the possession of the farm it was arranged between the co-executors that as to this $679, the widow should have only a

life estate with remainder to Mrs. Cook. To carry this out a mortgage for that sum was put upon the farm, which contained a provision for the cancelling of the security upon the deposit of a like sum of money in a bank at Prescott at any time the widow should desire. After the sale for $10,000 application was made to discharge the mortgage upon the deposit of a proper sum in the proper bank. This was refused by Mrs. Cook who then set up the larger contention which has failed. The learned Judge finds that the defendant was in the wrong: she should have relied upon the deposit in the bank as her security and have executed a discharge of the mortgage. The judgment of the Court is to this effect with costs to the plaintiff. If the parties cannot otherwise agree, the $679 may be paid into Court payable out according to the terms of the judgment. The counterclaim of Mrs. Cook is dismissed with costs, setting up as it does the contention of the residuary legatees which fails in all points. This judgment may be without prejudice to the passing of accounts of the estate before the Surrogate Judge and the raising of any contention there surcharging or falsifying accounts as between the executors, the costs of which he will dispose of. G. F. Shepley, K.C., for the plaintiffs in Blaisdell v. Rayeroft. J. A. Hutcheson, K.C., for the defendant in that action, who was plaintiff in Rayeroft v. Cook. T. D'A. McGee, for the defendant, Mrs. Cook.

ROGERS v. NATIONAL PORTLAND CEMENT CO.

Ontario High Court, Riddell, J., in Chambers. November 9, 1912.

DISCOVERY AND INSPECTION (§ IV—20)—*Default—Failure to Justify—Con. Rule* 454—*Order for Plaintiff to Attend at His Own Expense.*]—Appeal by the plaintiff from the order of the Master in Chambers of Nov. 2, whereby he directed the plaintiff to attend for examination for discovery: ante 217. RIDDELL, J., dismissed the appeal with costs to the defendants in any event, stating that he entirely agreed with the Master in Chambers, and had nothing to add to what he had said. F. R. MacKelcan for the plaintiff. Grayson Smith, for the defendants.

MASON v. GOLDFIELDS.

Ontario High Court, Riddell, J. November 9, 1912.

MANDAMUS (§ I E—41)—*To Compel Delivery of Shares.*]—Motion by plaintiff for a mandamus to defendants to deliver certificates. Judgment that as the applicant has abandoned his right if any to costs, there will be no order as to costs, and the other objects of the motion having been achieved, there will be no order. G. A. Urquhart, for the plaintiff.

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MOORE v. THRASHER.

Ontario High Court, Cartwright, M.C. November 9, 1912.

COSTS (§ I—14)—*Prior Action between Same Parties—Property in Controversy, only Relied on—Suggested Consolidation.*]—Motion by the plaintiff to set aside a præcipe order for security for costs issued under Con. Rule 1199, alleging that she has assets within this Province of a nature and amount to be ample security for the defendant's costs. The only property relied on by the plaintiff is an hotel in Amherstburgh, the ownership of which is in controversy in this action. It was the property of the mother of the plaintiff and her half-brother the defendant, who commenced an action on 29th January, 1912, alleging that their mother had made a will in his favour of this property as she had promised to do, for good consideration, that afterwards she went to reside with Mrs. Moore, who induced her to convey the hotel to her. A previous action for the same relief, namely, to have the deed to Mrs. Moore set aside and for discovery by her of the alleged will was begun by Thrasher on 14th March, 1910. This was not proceeded with as a settlement was being attempted, and the plaintiff allowed it to be dismissed for want of prosecution and at once began the pending action. This, too, was not pressed on, and statement of claim was only delivered on 26th October and statement of defence on 1st November. Meantime, on 23rd September the action of Moore v. Thrasher was begun for possession and mesne profits or rent. This proceeded much more rapidly so that statement of claim was delivered on October 18th, and on 22nd October the usual order for security was taken out. The Master in Chambers, after stating the facts as above, said that it did not appear why there are two actions, nor why the defendant did not oblige the plaintiff to proceed in due course with the action of Thrasher v. Moore, and then herself counterclaim in that action for the relief now claimed in Moore v. Thrasher, which she could probably have done without giving security.—See Odgers on Pleading, 5th ed., p. 241. Even now it would seem in the interests of both parties to have the actions consolidated, or to have one stayed until the final disposition of the other, as the issue in both is one and the same. In any case this motion cannot prevail, as the only property put forward by the plaintiff is the subject of the litigation: Walters v. Duggan, 33 C.L.J. 362. He further said that it did not appear why the action of Moore v. Thrasher was necessary, and it seemed that the proper order to make now would be to let the action of Thrasher v. Moore go to trial at Sandwich on 2nd December, as the defendant can require to be done under the practice, and in the meantime let the other action be stayed, and let the costs abide the result of that action, the costs of the present motion being in the cause, as the delay of the plaintiff in

Thrasher v. Moore was perhaps some excuse for the present action. Defendant should have leave to counterclaim now in Thrasher v. Moore, if necessary, to have the whole matter disposed of in that action formally. This can perhaps be done without her giving security. This, however, requires the consent of the parties. If this cannot be had then the present motion must be dismissed with costs to the defendant in the cause. F. Aylesworth, for the defendant. J. G. O'Donoghue, for the plaintiff.

DICKIE v. CHICHIGIAN.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Clute, JJ. November 11, 1912.

BOUNDARIES (§ II A—5)—*Fences—Evidence.*] — Appeal by the plaintiff from the judgment of the County Judge of the County of Brant. The plaintiff alleged that on the 16th November, 1911, she built a fence on the boundary line between her land and the defendant's land, and on or about that date the defendant entered upon the plaintiff's land, broke down the fence and refused to put it up again. The plaintiff claims damages, an injunction and further relief. The defendant alleged that the fence was not on the lands of the plaintiff, and that she had no right to erect a fence where she did. The County Judge found upon the evidence that the fence as erected by the plaintiff was not on her own property and dismissed the action with costs. The judgment of the Court was delivered by CLUTE, J., who said that upon a careful perusal of the evidence he found there was quite sufficient to support the finding of the learned trial Judge. This view was, he thought, supported by the evidence adduced by the plaintiff. There was not, however, sufficient evidence before the Court to enable it to define the boundary line between the properties, and this question is not affected by this judgment. The appeal should be dismissed, but under all the circumstances without costs. A. S. Baird, K.C., for the plaintiff. W. S. Brewster, K.C., for the defendant.

Re McKAY, CAMERON v. McKAY.

Ontario High Court, Kelly, J. November 11, 1912.

WILLS (§ III D—100)—*Charitable Bequest.*]—Motion by the executors of the will of Angus McKay for an order construing his will under Con. Rule 938, in respect of what amount the testator intended by the second paragraph of his will should be paid "to the missions of the Free Presbyterian Church of Ash-

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field, in the county of Huron, concession fourteen (14), Lochalsh, Canada, in connection with the Free Church of Scotland." The learned Judge was of opinion that the testator intended that two hundred dollars should be paid at the end of the tenth year after his death and a further two hundred dollars at the end of the eleventh year after his death. W. Proudfoot, K.C., for the executors. E. C. Cattanach, for the infants.

Re LAWS.

Ontario High Court, Sutherland, J., in Chambers. November 13, 1912.

INFANTS (§ II—35)—*Application to Sell Property and Divide Proceeds—Prospective Rights of Infant—Suggested Payment into Court.*]—Application on behalf of an infant, one of two joint tenants of real estate, "to sanction a sale thereof and the division of the proceeds between himself and his adult brother, the other joint tenant." SUTHERLAND, J., said that it seemed on the material a proper case for a sale of the property in the interest of both parties. If the adult joint tenant will consent to all the purchase money being paid into Court and to remain there until the infant joint tenant shall come of age, and thereafter to be dealt with by agreement between them, or further order, the order may go sanctioning the sale, and in that case the costs of this motion will be payable out of the purchase money. If not, he was unable to see how he could properly compromise the possible prospective rights of the infant in the way sought, and the motion will be dismissed without costs. H. S. Lazier, for the adult brother. F. W. Harcourt, K.C., for the infant.

Re MONTGOMERY ESTATE.

Ontario High Court, Middleton, J. November 15, 1912.

INCOMPETENT PERSONS (§ VI—31) — *Statutory Committee.*]—Application for an order sanctioning a settlement between the Minister of Justice and the Inspector of Prisons and Public Charities acting as statutory committee of Frances A. Towner, now confined in a public asylum. Judgment: This unfortunate lady has not been declared a lunatic; but I am of opinion that the statute relating to lunatics—9 Edw. VII. ch. 37, does not give the Court any authority over lunatics or their estates unless and until an order has been made by the Court declaring insanity. By the statute relating to public lunatic asylums, R.S.O. 1897 ch. 317, sec. 53, the Inspector of Prisons and Public Charities is ex officio the committee of every lunatic who has no other com-

mittee; but I do not think that this brings him under the jurisdiction of the Court over the committees of lunatics conferred by 9 Edw. VII. The committee there referred to is not the statutory committee, but the committee appointed by the Court. The Court, therefore, has no jurisdiction in the premises; but I trust it may be found that the very wide powers conferred upon the statutory committee by the Revised Statutes may be found wide enough to authorise his approval of what appears to be a very reasonable arrangement. F. Aylesworth, for the Inspector of Prisons and Public Charities.

O'HEARN v. RICHARDSON.

Ontario High Court, Sutherland, J. April 1, 1912.
Divisional Court, Meredith, C.J.C.P., Teetzel and Kelly, JJ. June 17, 1912.

CONTRACTS (§ IV F—371)—*Sale of land—Termination of contract for default.*]—This action arose out of an agreement for the sale of land, dated the 7th December, 1910. The purchaser, the plaintiff, sought as against the vendor, the defendant, specific performance, and, in the alternative, damages for breach thereof.

J. M. Ferguson, for the plaintiff.
J. W. Mitchell, for the defendant.

SUTHERLAND, J.:—The price for the property was $400, payable as follows: $200 down and $200 within five months, secured by a promissory note. The mineral rights were in the agreement reserved to one John F. Fitzmaurice, from whom the vendor had purchased the lot. He had bought it for $100, and at the time of making the agreement still owed $50 on account thereof. In the agreement he covenanted to "pay the balance of the purchase-price of the said lot to the said Fitzmaurice as and when the same shall become due and to indemnify the purchaser in case of his default in so doing."

The deed of the vendor to the vendee, or the transfer of his certificate under the Land Titles Act, of the property in question, was deposited with the manager of a bank at Porcupine, in the district of Sudbury, in escrow, to be delivered to the purchaser on payment of a note for $200 given for the balance of the purchase-money, payable five months after the date of the agreement.

The solicitor who drew the agreement was known to the vendor, but unknown to the purchaser, and the latter was taken to him by the former. The agreement contains the following clause: "The party of the first (the vendor) covenants that he will execute the proper transfer of the said lot on completion of the payment of the full purchase-price herein by the party

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of the second part (the vendee). The party of the second part covenants that he will pay the instalments of purchase-price as and when the same become due and payable. Time shall be of the essence of this agreement."

The plaintiff says that the solicitor inserted the provision about time being of the essence of the contract of his own motion; that there was no discussion about it; that he had no legal advice as to what was meant by it, and gave it no consideration; but had no idea that, if he did not pay on the exact date on which the note became due, an end would be put to his rights. He, however, also says that he thoroughly understood the agreement when he signed it; that he read it over, and it is clear. He further says that the vendor did not represent to him that he would have additional time to pay the balance of the purchase-money.

At the time the agreement was entered into, the plaintiff procured a copy of it and made a memorandum in a note-book of the date when his note became payable, viz., on the 9th May, 1911. Some days before that, thinking that the note would soon become due, he endeavoured to find his memorandum, but it had been mislaid. Thereupon, on the 5th May, 1911, he wrote from Cobalt to the manager of the Traders Bank at Porcupine, telling him that the note in question was payable at that bank, but, as he had mislaid particulars, he desired to know when it would be payable. It is said that the mail service is not very good between these two places, and that the letter was delayed in reaching the manager of the bank. At all events, he did not reply to the letter until the 12th May, when he wrote stating that the note was then several days past due, and had been protested for non-payment at maturity. It appears that Richardson had discounted it. He also intimated in the letter that the defendant had been in that morning, and intimated his intention of taking action to breach the agreement.

Before receiving this letter, the plaintiff, on the 14th May or shortly before, had found his note-book and ascertained that the note was then overdue. Thereupon, on that date, he sent two telegrams from Cobalt to Porcupine; one to the bank manager as follows: "Draw on me for protest fees and interest $200 wired by Bank of Commerce to-day. You did not notify me as to date note matured. Have you the transfer? Try and arrange matters with Richardson. Wire if necessary." And the other to the defendant as follows: "Wired funds covering note to-day. Bank did not notify me when note matured. Draw on me for any extra expense. Wire if necessary."

On the 17th, the bank manager wrote to the plaintiff that, as he had not met his obligations, and "the papers in escrow were demanded by Mr. Richardson through his attorney," the bank was obliged to surrender them. On the same day, the plain-

tiff had written to the defendant confirming the information already sent by telegram that he had arranged with the Bank of Commerce to have $200 forwarded to cover the notes, and was prepared to pay the protest fees and interest. In this letter he asked the defendant to have the transfer of the property forwarded to him.

The defendant declined to do anything. Thereupon the plaintiff commenced this action. The defendant takes his stand upon the contract, and in his defence alleges that time was of the essence of the agreement; the plaintiff made default and thereby lost his right to call upon the defendant for a conveyance of the land in question. He brings into Court the $200 paid by the plaintiff to him, and states that he is ready and willing to return it to him with the promissory note which the plaintiff had given.

The defendant was not present at the trial. An application was made on his behalf to postpone it, but I was unable, upon the facts as presented to me, to accede thereto. It is said that the land considerably increased in value between the date of the agreement and the maturity of the note. I think it is clear that the plaintiff had no intention to repudiate the agreement; that he intended to pay the note at its maturity and was able to do so, and that the reason he did not was owing to inadvertence, as stated by him.

The defendant relies upon *Labelle* v. *O'Connor*, 15 O.L.R. 528, as being conclusive in his favour in this matter. I think it is. Reference may be made to *Lovejoy* v. *Mercer*, 23 O.L.R. 29. No fraud, accident, or mistake in the drawing up of the agreement in question was alleged or proved at the trial.

The plaintiff was not let into possession, and had done nothing under the contract or in connection with the property in the meantime. The defendant in no way waived or condoned the default. See *Devlin* v. *Radkey*, 22 O.L.R. 399.

Under these circumstances, and having regard to the fact that the document was read over to the plaintiff before he signed it, and that he understood it, it would seem to me that one would have to read out of the document entirely the clause stating that time was of the essence of the contract before the plaintiff could succeed in this action.

The action will, therefore, be dismissed with costs.

The plaintiff appealed to the Divisional Court.

Toronto, June 17, 1912. The Divisional Court dismissed the appeal, holding that the case was governed by the decision in *Labelle* v. *O'Connor*, 15 O.L.R. 528.

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McDONALD v. TRUSTS AND GUARANTEE CO.

Ontario High Court, Riddell, J., in Chambers. October 30, 1912.

COSTS (§ I—10)—*Discretion—Reference.*]—Motion by the defendants for an order for payment by the plaintiffs of the costs of the action and reference.

The motion was granted.

M. L. Gordon, for the defendants.

Featherston Aylesworth, for the plaintiffs.

RIDDELL, J.:—This is the aftermath of the judgment upon the appeal reported in (1910) 1 O.W.N. 886. There a Divisional Court disposed of all the issues in favour of the defendants; but it was rather suggested than claimed in evidence that the defendants as trustees had made charges against the fund which were improper. Accordingly the Court said: "If it be desired to press such a claim, the plaintiffs may have a reference to the Master at Cornwall to take their accounts as trustees. This will be taken by the plaintiffs at their own peril as to costs; if this reference is taken, the general costs of the action and of the reference will be reserved to be disposed of by a Judge in Chambers after the report . . ."

The plaintiffs took the option given them; a reference was proceeded with, and the Master found that "the defendants being chargeable by the plaintiffs with a sum of $13.97 less than the amount the defendants are entitled to credit for, the plaintiffs are not entitled to participate further in the proceeds of the sale of the mortgaged property . . ." The report has been filed and has become absolute. The defendants ask that the costs may now be disposed of.

The Divisional Court held that there was no impropriety in the conduct of the defendants, so far as was made to appear on the evidence then before the Court; the Master has found that in the other matter the plaintiffs have nothing to complain of.

I think that the plaintiffs must pay all the costs so reserved, as well as the costs of this motion, forthwith after taxation—all the costs over which I have any control.

Order granted.

CANADIAN UNDERSKIRT CO. v. GORMAN.

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County Court for District No. 2, Nova Scotia. His Honour Judge Forbes. April 19, 1912.

EXECUTION (§ II—16)—*Supplementary proceedings—Committal of Judgment Debtor Under "The Collection Act," R.S. N.S. ch. 182—Fraudulent Disposition of Property.*]—Appeal from an order of a Commissioner under the provisions of the Collection Act, ch. 182, R.S.N.S. The Commissioner examined the judgment debtor and found that the judgment debtor had contracted the debt without having at the time any reasonable expectation of being able to pay the same, and ordered him to be imprisoned for three months in the common gaol. The defendant appealed.

Arthur Roberts, for the judgment creditor.
V. J. Paton, K.C., for the judgment debtor.

FORBES, County Judge:—The evidence taken below was used, and the defendant was recalled for additional examination. The only witness examined was defendant, and the facts brought out and sworn to by him are:—

(*a*) He formerly did business at Chester with his brother as a partner. They dissolved in 1906.

(*b*) His brother continued the business, and his name is E. C. Gorman, and the defendant is E. Gorman. The brother has good credit and considerable property.

(*c*) The defendant has no property and has been insolvent since 1908.

(*d*) The defendant is a drunkard on his own admission, and has been imprisoned in a padded cell, and was in a semi-drunken state when he ordered the goods from plaintiff.

(*e*) Defendant had no place of business, lived home with his mother and did no work and paid no board.

(*f*) He ordered goods from 13 different merchants from Toronto to Halifax, since 1st of 1911, and amounting to $2,000 or $3,000.

(*g*) He swears he sold most of them, including the plaintiffs, below cost, and he swears he will not tell to whom he sold any of them.

(*h*) He knows to whom he sold the plaintiff's goods, but will not tell.

The law, R.S.N.S. ch. 182, sec. 27, says:—

The debtor may be imprisoned if it appears:—

(*a*) That the debt was fraudulently contracted. . . ;

(*c*) That the debtor contracted the debt without having any reasonable expectation of paying the same . . .;

(*e*) That the debtor has made a fraudulent disposition of his property.

I am strongly of opinion that this debt was fraudulently contracted, and for this reason, the defendant swears he was

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insolvent in June, 1911, when he bought by letter of plaintiff. He ordered 1 dozen of silk bathing suits at $9 each.

> I do not know who I sold them to. I think I sold the lot to one man. I think I remember who the man was. He was not in that line of business. He paid me the cash. I assure you it was not over cost. There was no profit in the transaction. I did not send any money to the plaintiff. The man I sold them to did not want it known he bought the suits from me. I refuse to tell his name. I did not tell plaintiff of judgments against me in June, 1911.

This quotation from the evidence convinces me that the defendant knew he was dishonest in ordering the goods, as he failed to disclose his true and insolvent condition, and knowing his name was similar to his brother's it was his duty, if an honest man, to prevent any confusion, to have done so. And the circumstances of quick sale or transfer, low price, agreement not to disclose purchasers' names, convinces me that at the time defendant ordered the goods from the plaintiff he knew where he was going to sell them, and that the purchase from the plaintiff was a fraudulent one. And it is evident to any one that the defendant never had and has not now any reasonable expectation of paying for the plaintiff's goods, and he is, therefore, also responsible under sub.-sec. (*c*).

In *Ex parte White*, 14 Q.B.D. p. 603, Brett, M.R., says:—

> The bankrupt enters into business without any capital of his own, and in order to carry on business he borrows money and gives a bill of sale of all his property present and future, and afterwards contracts debts in the course of his business, he does so without any reasonable expectation of being able to pay for them.

Lord Cotton, L.J., agrees, and Lindley, L.J., goes farther and holds that even if there was a margin over the bill of sale, it would not affect the statute. In the case before us the defendant had no money at all and made no pretence of trying to pay. The defendant by his counsel argued that he could reasonably expect at the time of purchase to pay for the goods by selling them and remitting the money to the plaintiffs, but the English decisions are against that view, as I have shewn. We have no evidence of any kind that the mother offered to pay for the goods or that defendant expected to get money from her at the time of ordering goods or at any time since.

And lastly I hold that the defendant has made a fraudulent disposition of his property by selling them below cost and is liable under sub-sec. (*e*). A man (let alone the defendant) cannot buy goods and not pay for them and then give them away below cost without committing a fraud against his creditor, and this is called fraudulent disposition of his property.

If the debtor was an honest man he would (if unable to pay) send the goods back to the creditor. The law recognizes

this principle in allowing "stoppage in transit," and avoiding of preferences.

I disallow the defendant's appeal, and it seems just that I order the defendant to be committed to the county gaol for a period of four months, and I wish I could impose hard labour, as it would do debtor more good than the "gold cure."

Appeal disallowed.

KENWORTHY v. KENWORTHY.

British Columbia Supreme Court, Gregory, J. June 8, 1912.

CONTRACTS (§ IV—316)—*Performance, Who Must Perform —Agreement Between Shareholders—As to Contribution to Company.*]—GREGORY, J.:—The main questions herein were decided at the conclusion of the trial on the 18th December last, and the only questions remaining are those which were argued on the 10th May last.

So far as the Hatsic Prairie Company is concerned, it seems to me that the company has no standing at all, and its action will be dismissed with costs. The contract is under seal, is one between individual shareholders for the purchase and sale of shares, and the company is not a party to it, nor is it in any way a principal in the transaction; and the incidental statement of Mr. Harold Kenworthy that he acted for the company does not appear to me to in any way change the company's position.

Harold Kenworthy is, however, entitled to have specific performance of defendants' covenant to pay to the company the sum of $5,000; to direct the money to be paid to him personally would be unjust as he has not been damaged to that extent, and he would be under no legal obligation to pay it to the company, and it is clear that the agreement between the Kenworthys contemplated a voluntary contribution by them of $20,000 to the company's working capital, and Harold has already contributed his share, viz., $15,000.

Harold Kenworthy is also entitled to be repaid the sum of $5,175, which he expended for, on behalf of, and at the request of John Kenworthy. These payments were all clearly authorized and subsequently ratified.

As to the claim for a refund of the $1,500 expended by the company on the roads, etc., I am not satisfied that this money has been wasted. In any case, Harold Kenworthy has no right to have the amount paid to him as claimed, and that portion of the plaintiffs' claim will be disallowed. Ritchie, K.C., for plaintiffs. Davis, K.C., for defendants.

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