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ANNOTATED

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VOL. 56

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1921

CASES REPORTED

IN THIS VOLUME.

TABLE OF ANNOTATIONS

(Alphabetically Arranged)

APPEARING IN VOLS. 1 TO 56 INCLUSIVE.

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$25,000	1929	100 and Interest	6.00%
$25,000	1930	100 and Interest	6.00%
$25,000	1931	100 and Interest	6.00%
$25,000	1932	100 and Interest	6.00%
$25,000	1933	100 and Interest	6.00%
$25,000	1934	100 and Interest	6.00%
$25,000	1935	100 and Interest	6.00%
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REX v. YARMOUTH LIGHT and POWER Co.

(Annotated.)

N. S.

S. C.

Nova Scotia Supreme Court, Harris C.J., Longley and Drysdale, JJ., Ritchie, E.J., and Mellish, J. January 13, 1920.

CRIMINAL LAW (§ I A—3)—CAUSING GRIEVOUS BODILY INJURY BY NEGLECT OF REASONABLE PRECAUTIONS AS TO DANGEROUS THINGS—ELECTRIC WIRES—CONTRIBUTORY NEGLIGENCE NO DEFENCE TO CRIMINAL PROSECUTION.

Contributory negligence is no defence to the criminal prosecution of a light and power company for causing grievous bodily injury by omitting without lawful excuse to take reasonable precautions against endangering human life in the care of the company's electric wires. (Cr. Code secs. 247, 284.)

[See Annotation at end of this case on Contributory Negligence and Homicide by Negligent Act.]

Statement.

Crown case reserved by Chisholm, J., at the trial of the defendant company, which was indicted on a charge of having caused grievous bodily harm to one Charles Smith, to wit, causing the death of said Charles Smith at Yarmouth Bar, Yarmouth County, N.S., on October 14, 1916.

The facts appear from the report of the trial Judge as set out in the opinion of Mellish, J.

R. W. E. Landry, for defendant, appellant: There was a motion before trial to quash the indictment on the ground of irregularity. The depositions could only be sent before the grand jury by consent of the Judge and with notice to the accused. *Regina* v. *Clements* (1851), 2 Denison's Crown Cases 251; Bowen and Roland's Criminal Procedure 226; 17 Am. & Eng. Ency., p. 1284. There is no dispute that a copy of the depositions went before the grand jury. Contributory negligence is a defence in a criminal case. Archbald's Criminal Pleading, 800, 801; *Regina* v. *Kew* (1872), 12 Cox C.C. 355; *Regina* v. *Jones* (1870), 11 Cox C.C. 544. The jury must be satisfied that the negligence of the company was the cause of death. The jury should be instructed as to whether the non-repair of the line was the cause of death. The jury were instructed in effect that the company must have knowledge of a happening which they could not know of or control. There was evidence that deceased was notified that the wire was down. Shortly afterward he was found dead. This was excluded from the jury.

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R. S. McKay, K.C., *contra*: One wire had been down for 3 days before the accident. There was no evidence of contributory negligence. If there was such evidence it is no defence. *Regina* v. *Longbottom* (1849), 3 Cox C.C. 439; Russell on Crimes, 7th ed., vol. 1, p. 807; *Rex* v. *Stubbs* (1913), 8 Cr. App. Rep. 238. The burden is on the person appealing.

The whole charge must be looked at. *R.* v. *Higgins* (1902), 7 Can. Cr. Cas. 80; *Rex* v. *Michaud* (1909), 17 Can. Cr. Cas. 86 at 96, 39 N.B.R. 418.. The company were bound to insulate their wires. They had notice of the defective condition of the line and should have inspected it more frequently. The wire was only put up to accommodate summer cottages. It was no longer serving any useful purpose and it was negligence not to have cut it off, or taken it down. *Rex* v. *Michigan Central Ry.* (1907), 17 Can. Cr. Cas. 483, 492; Code, 247, 284; *Union Colliery* v. *The Queen* (1900), 31 Can. S.C.R. 81, 4 Can. Cr. Cas. 400; *Regina* v. *Salmon* (1880), 14 Cox C.C. 494.

Landry, in reply. *Regina* v. *Ross* (1884), 1 M.L.R. (Q.B.) 227.

The judgment of the Court was delivered by

Mellish, J.

MELLISH, J.: The defendant was indicted at Yarmouth and convicted on a charge of having caused grievous bodily harm to one Charles Smith on October 14th, 1916.

A motion to quash the indictment was made to the Hon. Mr. Justice Chisholm before whom the case was tried, which was refused. On this motion certain affidavits and the deposition of one John Little were used. The ground of the motion was based on the allegation that improper material was placed before the grand jury. The evidence is contradictory as to what actually took place before that body, and even if we could inquire into that, as to which I offer no opinion, I think there is no definite finding of the facts now before us. The evidence above referred to is printed in the reserved case, and the learned trial Judge reserves the following question in relation thereto, after quoting such contradictory evidence:

"Counsel for the Crown and for the defendant company have agreed upon the above statement of the facts and with considerable misgiving as to whether the point can be reserved,

I state the following question: 'Should I on the facts so agreed upon quash the indictment of the grand jury as returned and found against said Yarmouth Light and Power Company, Limited?' ''

Under the circumstances, I would answer this question in the negative.

The learned trial Judge makes the following report on the facts which I think is amply verified by the evidence which, with the charge to the jury, has been placed before us in the reserved case:

''At the September, 1917, sittings of the Supreme Court, Crown Side, at Tusket, Yarmouth County, Nova Scotia, the Yarmouth Light and Power Company, Limited, was indicted on a charge of having caused grievous bodily injury to one Charles Smith, to wit, causing his death at Yarmouth Bar, on the 14th day October, 1916, and was found guilty of the charge.

Smith was found dead on the breakwater at Yarmouth Bar, at or near a live wire under control, operation and supervision of the accused, at a distance of about six miles from the head electric station of the company. The distance from the body to the insulated wire was four or five feet. On the night previous a severe cold wind and rain storm was raging which lasted through the day of the said 14th of October, A.D. 1916. The evidence discloses that through the night of the 13th and 14th of October, 1916, by reason of the effect of the aforesaid storm, the insulated wire which had been detached for several days and hanging below the cross arm holding the non-insulated wire above, had by constant rubbing, salt of the sea, and dampness, set the post on fire and burnt the top of it off below the cross arm, carrying the bare wire down to the aforesaid distance from the breakwater, at or near where the deceased was found dead. A witness, Emma Watkins, for the defendant, gave testimony to the effect that she warned the deceased to take care of the wire and he replied, 'Emma, I eat electricity.'

Another witness, Freeman Nickerson, gave evidence to the same effect.''

The learned trial Judge reserves the following questions in addition to that above referred to:

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Mellish, J.

"1. Was I right in instructing the jury that contributory negligence is no defence to a person accused of murder—I mean contributory negligence of the deceased—because it is a public prosecution and brought for the benefit and safety of the public?"

2. Was I right in instructing the jury as follows: "I feel bound to tell you as a matter of law that the negligence of Charles Smith, who lost his life, is no defence whatever for the company," without instructing the jury that the recklessness of Smith might have been the direct cause of the accident, notwithstanding the failure of the company to repair its line?

3. Was I right in instructing the jury that "the company got leave to extend its light wires on condition that it would insulate them, and that I understood the company's Act of Incorporation states so, and that duty was imposed upon it and apparently it neglected to observe it?"

4. Was I right in instructing the jury that "in such storms as that preceding the death of the deceased it was the duty of the company to go over its line, perhaps that night or the next day and see that the public were protected when there was an unexpected storm that threw down poles and wires," without leaving to the jury the determination as to what was a reasonable time for the company to inspect its lines in this case?

5. Was I right in instructing the jury that "it was the duty of the company to take steps at once against any danger that might occur" without instructing them further than I did as to the acts of God and accidents beyond human control?

6. Was I right in instructing the jury that "assuming the company had no knowledge of the wire being down, it was its duty to have knowledge? It does not do for it not to take the precautions that bring knowledge to it; it must have knowledge of its own wires and condition of them."

7. Should I have instructed the jury, in view of the evidence, that Smith's own recklessness or foolhardiness might have been the direct cause of the accident, notwithstanding the company's breach of duty.

I make the evidence taken on the trial a part of the reserved case.

I have come to the conclusion that the questions numbered 1, 2, 3, 4, 5, and 6 respectively must be answered in the affirmative and the question numbered 7 in the negative.

In coming to this conclusion it should perhaps be stated that I think the section of the Criminal Code quoted in the charge to the jury, as to the criminal responsibility for negligence of any one having control of dangerous things, was properly dealt with by the learned trial Judge in his charge to the jury, and it follows from what has been said that I consider the learned Judge's ruling as to contributory negligence to be correct.

Defendant's appeal dismissed.

ANNOTATION

Annotation.

CONTRIBUTORY NEGLIGENCE AND HOMICIDE BY NEGLIGENT ACT.

Homicide is culpable when it consists in the killing of any person, either by an unlawful act or by an omission, without lawful excuse, to perform or observe any legal duty, or by both combined. Criminal Code R.S.C. 1906, ch. 146, sec. 252.

Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty. Cr. Code, sec. 247.

A corporation is not subject to indictment upon a charge of any crime the essence of which is either personal criminal intent or such a degree of negligence as amounts to a wilful incurring of the risk of causing injury to others. *Reg.* v. *Great West Laundry Co.* (1900), 3 Can. Cr. Cas. 514. Sections 247 and 252, as to want of care in the maintenance of dangerous things, do not extend the criminal responsibility of corporations beyond what it was at common law. *Ibid.*

Although a corporation cannot be guilty of manslaughter, it may be indicted, under Code, sec. 222 as to common nuisances, and possibly also under sec. 284 (causing bodily injury) for having caused grievous bodily injury by omitting to maintain in a safe condition a bridge or structure which it was its duty to so maintain, and this notwithstanding that death ensued at once to the person sustaining the grievous bodily injury. *Reg.* v. *Union Colliery Co.* (1900), 3 Can. Cr. Cas. 523, 7 B.C.R. 247, affirmed, 4 Can. Cr. Cas. 400, 31 Can. S.C.R. 81.

Under sec. 247 a corporation may be indicted for omitting, without lawful excuse, to perform the duty of avoiding danger to human life from anything in its charge or under its control. The fact that the consequence of the omission to perform such duty might have justified an indictment for manslaughter in the case of an individual is not a ground for quashing the indictment. *Union Colliery Co.* v. *R.* (1900), 4 Can. Cr. Cas. 400, 31 Can. S.C.R. 81.

Annotation. Some one or more officers of the corporation may also be liable upon a criminal charge arising out of the same occurrence in respect of the officer's personal misfeasance or malfeasance. In *Rex* v. *Michigan Central Ry.* (1907), 17 Can. Cr. Cas. 483, in which the railway company had been indicted for a nuisance under the Revised Cr. Code sec. 221, in carrying dynamite without proper precautions whereby fatalities resulted and for criminal neglect under sec. 247 whereby human life was endangered, Mr. Justice Riddell said in delivering judgment after a plea of guilty: "If it were the fact that the board of directors or the general manager of the defendants' company, or anyone responsible, directly or indirectly, for the system carried on in the transportation of explosives, resided within the jurisdiction of this Court, I should have recommended their being indicted as well as the company. It is right and just that employees of whatever grade shall be placed upon trial when any negligence of theirs caused wounds or death, and the higher officers through whom a defective system is put on or kept in operation should not escape."

See also *Ex parte Brydges* (1874), 18 L.C. Jur. 141.

By Code, sec. 284 it is declared an indictable offence for anyone, by any unlawful act, or by doing negligently or omitting to do any act which it is his duty to do, to cause grievous bodily injury to any other person. The effect of the interpretation clauses of the Code is to include a corporation within the term "every one" and as to a corporation to substitute the word "its" for "his" in the phrase "which it is his duty to do." Cr. Code sec. 2; *Union Colliery Co.* v. *The Queen* (1900), 4 Can. Cr. Cas. 400, 31 Can. S.C.R. 81.

The principal case of *R.* v. *Yarmouth Light & Power Co.* (1920), *ante*, p. 1, appears to be the first decision under the Canadian Criminal Code in which the question of contributory negligence has been raised as a defence to criminal negligence.

In a criminal prosecution for causing death by negligence, the general proposition seems to be established that it is no defence to prove that the deceased was guilty of such contributory negligence as would have disentitled him to claim damages in tort. *Regina* v. *Longbottom* (1849), 3 Cox C.C. 439; *Rex* v. *Walker* (1824), 1 C. & P. 320; *Regina* v. *Kew* (1872), 12 Cox C.C. 355.

But it is said that, like all legal principles, it must be applied with some discretion and the exercise of common sense; and that probably wherever there is a great disparity between the negligence of the accused and that of the deceased, and when the negligence of the former is very trivial and that of the latter very grave and obstinate, a jury would not hesitate to find a verdict of acquittal. See article on Contributory Negligence on Highways (1918), 82 J.P. 243.

In *Regina* v. *Longbottom*, 3 Cox C.C. 439, the case was that of a deaf man who persisted in walking in the middle of a busy highway at night time, manifestly a very negligent act for a deaf man. He was ridden over and killed by a cart driven by the prisoners, who were more or less intoxicated. Baron Rolfe said at p. 440:

Annotation.

"Whatever may have been the negligence of the deceased, I am clearly of opinion that the prisoners would not be thereby exonerated from the consequences of their own illegal acts, which would be traced to their negligent conduct, if any such existed. . . . There is a very wide distinction between a civil action for pecuniary compensation for . . . negligence, and a proceedings by way of indictment for manslaughter. There is no balance of blame in charges of felony, but wherever it appears that death has been occasioned by the illegal act of another, that other is guilty of manslaughter . . . though it may be that he ought not to be severely punished."

In a criminal case the question for the jury is said to be whether or not the negligence of the defendant was a *material cause* of the deceased's death; and if so, the accused person would be guilty of manslaughter, however negligent the deceased may himself have been. (82 J.P. 243). It has been suggested that the criminal law has thus adopted a rule analogous to that of the Admiralty Court in ship collision cases, which holds that where both parties are to blame each shall bear a share of the resulting damage to one or to both. (82 J.P. 243.)

But in a review of the law of Homicide on Highways (82 J.P. 133), it is affirmed that generally speaking, whether in the case of negligent driving or in the case of any other illegal act which directly causes an injury to another, the defence of contributory negligence is open to the defendant whether in civil or criminal proceedings; but that the contributory negligence on the part of the injured person, or of the deceased, must be negligence at the final moment of the accident such that but for it no injury would have resulted. See *Regina* v. *Dalloway* (1847), 2 Cox C.C. 273; *Regina* v. *Murray* (1852), 5 Cox C.C. 509; *Rex* v. *Martin* (1834), 6 C. & P. 396; *Rex* v. *Grout* (1834), 6 C. & P. 629; *Rex* v. *Timmins* (1836), 7 C. & P. 499; *Rex* v. *Walker* (1824), 1 C. & P. 320. But the qualification as so stated lacks precision on the question of proximate cause as distinguished from mere contributory negligence in its technical meaning as applied in civil actions for tort.

The trend of judicial opinion in England as indicated by the summings-up in criminal prosecutions seems now to have largely ameliorated the strictness of the rules of criminal responsibility laid down in the older cases, so that the unintentional killing of another in the course of an unlawful act will not justify a conviction for manslaughter unless the unlawful act has about it some element of grossness or perversity. (82 J.P. 133, *Regina* v. *Serné* (1887), 16 Cox C.C. 311.) If a motorist breaks a local by-law or ordinance and accidentally kills another person during the continuance of such breach of the law, two questions would have to be considered, the first, whether the death was the actual result of the breach and would not have followed but for it (see *Regina* v. *Dalloway*, 2 Cox C.C. 273); and the second, whether any element of recklessness or gross negligence is involved in such breach. Only in case of both of these questions being determined adversely to the accused, would a conviction for manslaughter be supported in present-day jurisprudence. If the breach of statutory duty be a mere technical one which no one could reasonably have foreseen as leading to an injury of the kind which in fact happened, a conviction would not be proper. (82 J.P. 133.)

Annotation. In *Regina* v. *Jones* (1870), 11 Cox C.C. 544, Lush, J., ruled that contributory negligence on the part of the deceased would not be allowed as an excuse in a criminal case, and expressed disapproval of the decision *contra* in *R.* v. *Birchall* (1866), 4 F. & F. 1087. Other cases excluding a defence of contributory negligence are: *Regina* v. *Swindall* (1846), 2 Cox C.C. 141; *Regina* v. *Dant* (1865), 10 Cox C.C. 102; *Regina* v. *Hutchinson* (1864), 9 Cox C.C. 555; *R.* v. *Bunney* (1894), 6 Queensland L.J. 80; and see Archbold Criminal Pleadings, 25th ed., 855. But the like evidence as would be relied upon in a civil action as shewing contributory negligence may still be relevant on a manslaughter charge as directed to the main question to be tried by the jury—was the death caused by the culpable negligence of the prisoner? *R.* v. *Bunney*, 6 Queensland L.J. 80, at 82, *per* Griffith, C.J.

CAN.

Ex. C.

Re the PETITION of NORTHAM WARREN CORPORATION.
Re A GENERAL TRADEMARK.

(Annotated)

Exchequer Court of Canada, Audette, J. December 16, 1920.

TRADEMARK (§ VI—30)—REGISTRATION OF GENERAL TRADEMARK WITH LIMITATION.

A general trademark may be registered with a limitation to exclude certain classes of goods for which a specific trademark not absolutely similar has been registered.

[See annotation following case.]

Statement. APPLICATION to register as a general trademark the word "Cutex."

Russel S. Smart, for petitioner.

Audette, J. AUDETTE, J.:—This is an application to register as a general trademark the word "Cutex" to be used more especially in connection with manicure and toilet preparations, such as cuticle removers, nail polish, rouge, nail white, nail bleach, cold cream, face powder, talcum powder and toilet soap which are manufactured and sold by the petitioners.

This application for registration was refused by the Minister of Trade and Commerce by reason of the existence on the register of a certain trademark consisting of the words "Randolph Cuties" registered October 29, 1914, in favour of J. W. Landenberger & Co., of Philadelphia, Pa., as a specific trademark applied to hosiery and underwear and by reason of a further registration of the words "Cute Brand" registered August 20, 1914, in favour of J. S. Todd & Son, of Victoria, B.C., as a specific trademark applied to canned salmon.

There is further record of a consent by Landenberger & Co., that if hosiery and underwear are excluded that the word "Cutex" may be registered as a general trademark in favour of the petitioners. Furthermore, there is also filed a general consent by J. S. Todd & Son to the registration of the petitioners' trademark as prayed.

In *Re Vulcan Trademark* (1914), 22 D.L.R. 214, 15 Can. Ex. 265, affirmed (1915), 24 D.L.R. 621, 51 Can. S.C.R. 411, an application was made to register the word "Vulcan" as a general trademark, but it was shewn that the word had already been used by others to apply to matches and in the conclusion of the reasons for judgment, it was held as follows, 22 D.L.R. at 221:—

On the whole, having regard to the facts of the case, I will direct that the general trademark be limited by excluding therefrom the use of the word "Vulcan" as applied to matches.

In the present application to register the word "Cutex" it may be said that the words "Randolph Cuties" and the words "Cute Brand" bear some distant resemblance to the word "Cutex;" but they are not the very same words and they are not likely to deceive uncautious purchasers because the other words resembling the word "Cutex" are in both of the other trademarks associated and accompanied by another word when used. Moreover, if the word "Vulcan" could be registered as a *specific* trademark for matches and as a *general* trademark for everything excepting matches, *a fortiori*, the word "Cutex," not absolutely similar to the other two alleged conflicting trademarks, could enjoy the same privileges.

Therefore, I have come to the conclusion to allow the petitioners to register in their name the word "Cutex" as their general trademark, limited, however, by excluding therefrom the use of the said word "Cutex" as applied to hosieries and underwear as well as applied to canned salmon.

Application granted.

ANNOTATION.

Annotation.

REGISTRATION OF GENERAL TRADEMARK WITH A LIMITATION.

Russel S. Smart, B.A., M.E., of the Ottawa Bar.

There is considerable uncertainty as to the meaning of a general trademark under the Canadian statute. Section 4 of the Trademark and Design Act, R.S.C. 1906, ch. 71, provides:—

"4. In this Part, unless the context otherwise requires—(a) 'general trademark' means a trademark used in connection with the sale of various

Annotation. articles in which a proprietor deals in his trade, business, occupation or calling generally; (b) 'specific trademark' means a trademark used in connection with the sale of a class merchandise of a particular description."

The only other reference in the Act to general trademark is in sec. 16, which reads:—

"16. A general trademark once registered and destined to be the sign in trade of the proprietor thereof shall endure without limitation."

In the above case, the Commissioner of Patents, and the Registrar of Trademarks refused to accept the application for a general trademark limited to exclude certain classes and from this ruling an appeal was taken to the Exchequer Court.

General trademarks have only come before our Courts in two cases In the first case, *Re Noelle* (1913), 14 D.L.R. 385, 14 Can. Ex. 499, the Judge of the Exchequer Court, Cassels, J., discusses the difference between general and specific trademarks in some detail. In a later case, *Re Vulcan Trademark* (1914), 22 D.L.R. 214, 15 Can. Ex. 265, affirmed (1915), 24 D.L.R. 621, 51 Can. S.C.R. 411, an order was made very similar to the order asked for in this case. The trademark had to do with the word "Vulcan" and it was shewn that the word had been used by others to apply to matches. The conclusion of the reasons for judgment read, 22 D.L.R. at 221: "On the whole, having regard to the facts of the case, I will direct that the general trademark be limited by excluding therefrom the use of the word 'Vulcan' as applied to matches."

The foregoing judgment would seem to make it clear that a general trademark may be registered with a limitation to exclude certain classes of goods.

ALTA.

S. C.

THE WESTERN CANADA MORTGAGE CO. v. O'FARRELL.

Alberta Supreme Court, Simmons, J. November 26, 1920.

1. PLEADING (§ I A—12)—STATUTORY REQUIREMENT—SPECIAL LEAVE TO COMMENCE ACTION—LEAVE NOT OBTAINED—LEAVE TO CONTINUE.

Where a plaintiff has failed to comply with statutory rules requiring him to obtain leave before commencing an action, but where the rules of Court ordinarily applicable would allow leave to commence the action the Court will give leave, on terms, continuing the action, where no injustice has been created.

2. MORTGAGE (§ VI I—135)—MORTGAGED PROPERTY SOLD FOR TAXES—CHARGE AGAINST LAND EXTINGUISHED—RIGHT OF MORTGAGEE TO SUE ON COVENANT—STATS. 10 GEO. V. 1920, CH. 3, SEC. 1.

Under sec. 63 of the Edmonton Charter, where a mortgagee allows the mortgaged property to be sold for taxes and becomes the owner at the tax sale, the mortgage so far as it is a charge against the land is extinguished, but the Court may give effect to 10 Geo. V. 1920, ch. 3, sec. 1 (16a), and allow the plaintiff to proceed upon the personal covenant in the mortgage and issue execution thereon.

Statement. CASE STATED in an action on a mortgage.

S. W. Field, for plaintiff; *W. A. Wells*, for defendant.

The facts are fully set out in the judgment.

Simmons, J. SIMMONS, J.:—The matters out of which the action arises are these: The plaintiff sues upon the covenant of the defendant in a

certain mortgage given by the defendant to the plaintiff, September 15, 1911, which was varied as to the dates of payment by an agreement between the mortgagor and the mortgagee on October 2, 1914, whereby the defendant covenants to pay the sum of $8,000, with interest from October 1, 1914.

The defendant in the mortgage covenants that he pay all taxes levied against the said lands, and in default of his doing so the mortgagee might pay all taxes and same, with interest, should become a part of the moneys secured under the mortgage. The mortgagor did not pay the taxes and the lands in question were sold by the City of Edmonton for arrears of taxes, amounting to $2,219.30. At the sale by the city of these lands for arrears of taxes the mortgagee purchased the lands for the said sum of $2,219.30 and became the registered owner thereof and has since paid the taxes assessed against the said lands.

The questions submitted on the stated case are:—

(a) Should the plaintiff have obtained leave before commencing this action? (b) Should leave now be granted to continue this action or commence another action? (c) Has the plaintiff a right to sue the defendant upon the personal covenant contained in the said mortgage and extension agreement, or is the plaintiff precluded from suing on the said covenant? (d) If the plaintiff is entitled to sue on the said personal covenant is it bound by the valuation set out in the said affidavit of H. M. E. Evans or can it by other affidavits or extrinsic evidence vary that valuation? (e) If successful in obtaining judgment on the said covenant is the plaintiff entitled to issue execution? (f) Is it necessary for the plaintiff to foreclose the said mortgage and to exhaust its remedies against the said lands before suing on the said covenant and is the defendant entitled to have the value of the said lands deducted from the amount claimed by the plaintiff herein?

Counsel for the plaintiff mortgagee claims under sub-sec. 16 (a) of sec. 1, 10 Geo. V. 1920, ch. 3, that the Court should order that the mortgagee may proceed with his action upon the covenant without his instituting or carrying on proceedings by way of foreclosure or otherwise for the sale of the lands under the directions of the Court, in view of the fact that the lands have now become vested, so far as the legal ownership is concerned, in the plaintiff mortgagee who is ready, and willing and able to transfer the same

ALTA.

S. C.

THE WESTERN CANADA MORTGAGE CO. v. O'FARRELL.

Simmons, J.

to the defendant if the debt secured by the mortgage is paid off under the plaintiff's proceedings by way of execution or otherwise. In my view sec. 63 of the Edmonton Charter must be considered, as such section provides that such a transfer under tax sale as occurred in this instance shall not only vest in the purchaser or his assigns all rights of property which the original holder had therein, but shall also purge and disencumber such land from all payments, charges, liens, mortgages and encumbrances of whatever nature and kind other than existing liens of the city or Crown. I am unable to give any other effect to that section than the declared intention thereof which seems to be this, that the mortgage, so far as it is a charge against the land, is extinguished and that any attempt to bring the land itself into the proceedings would manifestly be destroyed by the effect of said sec. 63.

I am of the opinion that sub-sec. 16 (a) of sec. 1, 10 Geo. V. 1920, ch. 3, should be given effect to in the present instance by allowing the mortgagee to proceed upon the covenant and to issue execution thereon.

This would seem to dispose of questions proposed under (c), (d), (e) and (f) with the exception of the question raised under (d) as to whether or not the mortgagee is bound by an affidavit of value in the transfer from the city to the plaintiff. In *Lebel* v. *Dobie* (1919), 15 Alta. L.R. 126, it was held, that the vendor was not estopped from pursuing his action against the purchaser under the covenant where the lands had been forfeited under tax arrears and became the property of the Crown. I am not able to distinguish that from the case where the mortgagee or vendor might purchase the lands under such a statutory proceeding for recovery of taxes. What the equitable remedies are, if any, accruing to the defendant in the event of the plaintiff recovering the debt under such a personal action, does not, in my opinion, require determination under the stated case raised by (d), and therefore I do not consider it necessary to deal with the effect, if any, of the valuation placed upon the lands by the agent of the mortgagee under the transfer from the city to the mortgagee for arrears of taxes.

As to the questions raised under (a) and (b), I am inclined to think they can be both answered together and that it is a question of terms as to whether the plaintiff should be allowed to continue the present action or commence a new action, having failed to

observe the statute requiring him to obtain leave. The Rules of Court ordinarily applicable would allow the plaintiff leave on proper terms protecting the defendant. In this case leave would have been granted if made in the first instance, and apparently no injustice has been created, and I therefore think leave should be given now continuing the present action rather than compelling the plaintiff to go to the expense of discontinuing and beginning a new action. *Judgment accordingly.*

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee, Hodgins and Ferguson, JJ.A. October 27, 1920

MUNICIPAL CORPORATIONS (§ II G—260)—INJURY CAUSED BY NON-REPAIR OF HIGHWAY—NOTICE OF INJURY—DELAY—REASONABLE EXCUSE.

Failure to give notice of injuries caused by reason of a defective highway, as required by sec. 460 (4) of the Municipal Act, R.S.O. 1914, ch. 192, within the time specified by the Act, is fatal to the plaintiff's action, unless there is reasonable cause for the delay. Where plaintiff has not shewn that her attitude of mind was that if things continued as they were at first she would never require to give notice of any claim for compensation, she has not established reasonable excuse for failure to give the notice.

[*Wallace* v. *City of Windsor* (1916), 28 D.L.R. 655, followed.]

Statement.

APPEAL by plaintiffs from the judgment at the trial in an action to recover damages arising from injury sustained by Mabel Fuller by a fall upon a sidewalk in the city of Niagara Falls. Affirmed.

The judgment appealed from is as follows:—

It will be convenient to refer to the plaintiff Mabel Fuller as "the plaintiff."

It is alleged that, owing to the neglect of the municipal council of the defendant corporation to keep its highways in repair, as required by sec. 460(1) of the Municipal Act, R.S.O. 1914, ch. 192, the plaintiff, while proceeding easterly upon a sidewalk on the north side of Morrison street, fell and severely injured her knee.

Failure to give notice, according to the provisions of sub-sec. 4 of sec. 460 of the Municipal Act, is pleaded, and the plaintiff, in reply, invokes the aid of the saving provisions of sub-sec. 5.*

*The material provisions of sec. 460 are as follows:—

(1) Every highway . . . shall be kept in repair by the corporation the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by this Act, and in case of default, the corporation shall be liable for all damages sustained by any person by reason of such default.

(2) No action shall be brought against a corporation for the recovery of

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As this is a case of extreme hardship—although very far from being an isolated case—I decided to hear all the evidence, and I think it expedient to state my conclusions of fact as well. Why, may appear later on.

The defendant does not admit that, if the plaintiff's injuries are the result of a fall, she fell at the point described; and gave evidence from which it might be inferred that the accident must have occurred nearly opposite the Mayor's residence, and just in front of a house on the north side of the street, recently built by a Mr. Bartle. Bartle's is the second house west of Clifton avenue. The plaintiff says she fell opposite the corner residence. While she was confined to the house she might not, of course, have an accurate picture of the surroundings in her mind.

Observing the plaintiff closely as she gave evidence, I am of opinion that she was honest and truthful: and she certainly is in a better position to know, and has more reason to recollect, what occurred, then and afterwards—whether as to happenings or conversations—than any one else. Without, then, in the slightest degree questioning the entire good faith of the witness who gave evidence of the telephone conversation, suggesting, as it does, that the accident occurred further west than the point described by the plaintiff, I find as a fact that the plaintiff fell where she swears she did, and that the deplorable want of repair at that point was the cause of the accident. Accompanied by counsel, and at their request, I had a look at this sidewalk. Various measurements had already been put in. I have generally found that a view minimises the seriousness of the oral description of an alleged want of repair. I take into account that the inequality

damages occasioned by such default, whether the want of repair was the result of nonfeasance or misfeasance, after the expiration of three months from the time when the damages were sustained.

. . . .

(4) No action shall be brought for the recovery of the damages mentioned in sub-section 1 unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered post to the head or the clerk of the corporation, in the case of . . . an urban municipality within seven days after the happening of the injury. . . .

(5) In case of the death of the person injured, failure to give the notice shall not be a bar to the action, and, except where the injury was caused by snow or ice upon a sidewalk, failure to give or insufficiency of the notice shall not be a bar to the action, if the Court or Judge before whom the action is tried is of the opinion that there is reasonable excuse for the want or insufficiency of the notice and that the corporation was not thereby prejudiced in its defence.

in the pavement may not have been as great in November last as it is now. These slabs are said to have a habit of moving up and down, and never continuing long in one position; and I think it is so. The principal movement, however, is in the springtime. There are two or three five-foot squares, apparently resting upon such a spongy and unstable foundation that it is quite possible their level is determined by the quantity of rainfall, as well as changes in temperature. At all events—and particularly after the evidence of so many witnesses who had not been able to detect any sign of danger, or even need of repair—I was not prepared to find dilapidation of such a decidedly serious and, to my mind, dangerous character. It is not an immaterial fact that this is a sloping sidewalk, near a street intersection, and where people going east are likely to be looking out for a street-car they intend to take. A municipal council, I think, sometimes hesitates to repair a highway pending litigation. It need not be so. Repair is not *per se* either an admission or evidence of previous negligent nonrepair, nor does it imply that the locus was previously in a dangerous condition. In this case evidence of the condition of the walk has been obtained and preserved, and the walk should be repaired at once. The next complainant may give timely notice, under the statute.

The plaintiff has sustained very serious injuries through the flagrant default of the defendant corporation. On the other hand, I am satisfied that, as alleged by the defence, the injury has been aggravated, the period of recovery prolonged, and the remedy will be more difficult and expensive than if the plaintiff had rigidly complied with the instructions of Dr. McCallum. Well, what of it? If the plaintiff had been in a position to procure the unremitting attention of trained nurses, learned specialists, and the rest of it, recovery might have been effected in 6 weeks; but she was not, and consequently, if I rightly understood counsel for the defence, in the subsequent effort to avoid the consequences of the corporation's negligence, "she failed to exercise reasonable care." In a way, I fear it is so, and that as a consequence she will have to endure a good deal of suffering, and remain helpless for a year, instead of 6 weeks; and that the cost of a cure, if she is ever cured, will be greatly increased. Who is to blame? Surely not the victim of corporate negligence, who, as it happens, was

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not in a financial position to command the attention that might have counted for recovery in 6 weeks, and, as it is argued, so "failed to exercise reasonable care." With luck, the defendant corporation may not be so grievously handicapped another time. Next time, the sufferer may be a man of many enterprises, a capitalist, or a millionaire, and the claim, although the same in principle, will be gratifyingly direct and mathematical. There will be no argument open to the defendant on the score of retarded recovery through lack of attention, he will merely be confronted by a demand for necessary outlay for a bevy of graduate nurses and their subordinates, X-ray specialists, at short intervals, with their progress records and charts, unremitting attendance of physicians and surgeons and occasional consultations with noted specialists from afar, and damages for the physical suffering and anxiety of mind of a gentleman unaccustomed to hardships, and a rather staggering claim, it may be, for interruption of enterprises, disorganisation of financial schemes, dislocation of business, and loss of time. The result, in money, is startlingly different, but the principle is the same; the wrongdoer must meet and answer for the ordinary consequences of the condition he creates.

I am not at liberty to determine one case upon the facts of another; it would be unfair to the millionaire. I take the plaintiff's case as it is, the situation forced upon her by the defendant corporation. I excuse the plaintiff from doing what it was impossible for her to do, and I assess her damages contingently at $2,000.

Although my judgment will not result in a remedy for the plaintiff, it is essential that I should deal with all the questions of fact. There was no evidence pointedly directed to shewing that the defect in the walk had existed for so long a time that notice of its condition must be imputed to the corporation. Any evidence there was as to this was seemingly incidental. The plaintiff said she had noticed the break or inequality on previous occasions, but I do not think she said when, or how long before, and on the other hand I thought some of the witnesses for the defence were peculiarly unobservant or afflicted with very bad memories. In *O'Connor* v. *City of Hamilton* (1904), 8 O.L.R. 391 (D.C.), Meredith, J. (now C.J.C.P.), at p. 414, points out

that, if the plaintiff had a right to recover on the ground of misfeasance, notice of the accident under the statute (3 Edw. VII. ch. 19, sec. 606), as the sub-sections were then grouped, was not necessary. The same cannot, I think, be said as to notice under the present section. I read sec. 460(1) as covering the whole range of corporate duty *and liability* in the matter of damages. Sub-section 2 is a specific limitation as to the duration of the right of action, "whether the want of repair was the result of nonfeasance or misfeasance." Sub-section 4 is not specifically said to apply to damages occasioned by misfeasance as well as nonfeasance, but it evidently does apply to both—to all damages occasioned by the condition of the highway, and to every liability provided by sec. 460(1)—for "no action shall be brought for the recovery of the damages mentioned in sub-section 1 unless" the notice provided for by sub-sec. 4 is given, or "reasonable excuse" under sub-sec. 5 is found to exist. Whether the condition of the walk was the result of failure to repair, or of original improper construction, or both, is, however, of some importance upon the question of actual or implied notice of the condition of the highway. As I intimated, there is not much in the way of direct evidence upon this point, but the inferential evidence as to this branch of the plaintiff's case is, I think, quite ample. Juries no longer intervene, but, as I said, I was asked to look at this sidewalk. I am satisfied that its condition on the day of the accident was substantially the same as it had been from about the time the frost left the ground in the springtime of 1919, and as it was at the time the notice was served in December. It got into that condition through misfeasance, in the sense of defective construction. The ground is low, and at that point required an extra amount of gravel or other porous foundation, and all the more so because the junction of the sidewalk near at hand, forming a right angle dam, is calculated to pen in the surface water and prevent ordinary surface drainage. The corporation was guilty of nonfeasance in neglecting to execute necessary repair. The sidewalk is not constructed of independent separate blocks. It is cross-scored, but still a connected layer of cement. It broke, through the action of the frost, and the need of repair must have been evident from April or May, 1919, and probably for a year before.

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Can the plaintiff, however, recover damages? I regret it, but I can see no possibility of her escaping the disabling effect of the Municipal Act, sec. 460 (4). The time for serving notice expired on the 14th November, 1919. I find that as a matter of fact and law nothing was done within the meaning of the statute until about the 6th December. Conditions had not changed in the meantime, and the corporation was not in fact prejudiced by the delay. The statutory "reasonable excuse," however, is wanting. If this were a case of first instance, I would certainly excuse the delay in serving notice, taking for authority sub-sec. 5 of this section. The principle upon which the statute is to be interpreted is, however, definitely settled.

This case is not different, in principle, from *Wallace* v. *City of Windsor* (1916), 36 O.L.R. 62, 28 D.L.R. 655. Many eminent Judges in this Province have referred to the hardships created by the statute: the operation of the statute may not, however, have been brought directly to the attention of the Attorney-General; and, without expressing any opinion *pro* or *con*, beyond what is purely incidental to the disposal of this action, I have considered it expedient to set out the matters involved in the dismissal of this action more fully than I otherwise might have done. The authorities are collected and commented upon and amendments suggested by the learned authors of the Canadian Municipal Manual (1917), p. 641 *et seq.*

The claim is barred. The action will be dismissed without costs.

A. C. Kingstone, for appellants.

G. Wilkie, for defendant corporation, respondent.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment, dated April 12, 1920, which was directed to be entered by Lennox, J., after the trial before him sitting without a jury at Welland on the 1st and 2nd days of that month.

The action is brought to recover damages for personal injuries sustained by the appellant owing, as she alleges, to the failure of the respondent to keep in repair a highway under the jurisdiction of its council.

The sole question for decision on the appeal is whether or not the appellant established that there was reasonable excuse for

her failure to give to the respondent notice of the injury she had received within 7 days after the happening of it, as required by sec. 460(4) of the Municipal Act, R.S.O. 1914, ch. 192.

In the cognate case of a failure to give notice of the injury as required by sec. 4 of the Employers' Liability Act, the cases under that Act have decided that if the mental attitude of the injured workman is that he says to himself, "I have had an accident the results of which are serious, but I think they will alter for the better—I shall not give to my employer notice of the accident, because, if, as I hope, the results alter for the better, I shall never give notice of a claim for compensation at all"—that is not a reasonable cause for the failure to give notice of the accident; but, if he says to himself, "If things continue as they are, I shall never require to give notice of any claim for compensation," that would be reasonable cause for not giving notice.

A majority of the Court adopted this view in *Wallace* v. *City of Windsor*, 36 O.L.R. 62, 28 D.L.R. 655 (Second Divisional Court), in which the cases under the Employers' Liability Act and under the Municipal Act were reviewed; and we are bound to follow that decision if, on the facts of the case at bar, it falls within either of these classes.

My conclusion on the evidence is that the injury which the appellant sustained was from the outset a serious one, though, owing partly, I have no doubt, to the directions of her medical adviser not having been followed, more serious consequences ensued than would have followed if she had obeyed his directions. Her testimony more than once repeated was that from the first she suffered severe pain and was incapacitated from attending to her household duties. My conclusion also is that she did not know until after the time for giving it had passed that it was necessary to give notice of the injury; and she is, in my opinion, on the horns of this dilemma: either she intended from the first to claim damages, or did not know that she could do so until after, as Mrs. Stephens testified, she told her, in answer to her inquiry why she had not taken action before, that she had not thought of it until she heard "that Mrs. Bert Carter got about $2,000 out of the city for falling on a slippery sidewalk," and the appellant herself, asked when she made up her mind to make a claim against the respondent, replied that "it was after Mr. Fuller went away on the 17th November." As the injury happened on the 7th

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November, it was then too late to give the notice. The notice given is dated the 27th November, but the postmark on the envelope shews that it was not mailed until the 5th December following.

In my view, the appellant failed to bring her case within the rule applicable where failure to give the notice is excused, because she has not shewn that her attitude of mind was that if things continued as they were at first she would never require to give notice of any claim for compensation. As I have said, having regard to the fact that the injury was from the first a serious one, causing great pain and incapacitating her from performing her household duties, it is impossible, in my judgment, to apply the rule. It is significant that nowhere did the appellant say that she refrained from giving the notice because she thought that the injury she had received was not a serious one. All that at the most the appellant proved was that she did not at first anticipate that the result of her injury would be as serious as it ultimately turned out to be; not that it was not from the outset a serious one.

An attempt was made at the trial to establish that, owing to the administration to her of morphia, her mental condition was such that she was unable to apply her mind to business, and that that afforded reasonable excuse for not giving the notice; but the learned trial Judge's conclusion was that she had failed in establishing this, and in that conclusion we agree.

The result is that the appeal fails and must be dismissed with costs if costs are asked.

I take this occasion once more to point out the hardship of the law requiring both reasonable excuse for not giving the notice and absence of prejudice to the corporation from the failure to give it to be proved. Surely it should be enough if a plaintiff were required to do one or other of these things; and it may fairly be asked why, if the corporation is not prejudiced by the failure to give the notice, it should be necessary to shew also reasonable excuse for not having given it; and it may be pointed out that, by the analogous provisions of the Workmen's Compensation Act, 1906 (Imp.), both are not required, but if either be shewn it is sufficient to prevent the want of notice operating to bar the claim for compensation.

Appeal dismissed.

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Ex. C.

Exchequer Court of Canada, Audette, J. July 6, 1920.

EXPROPRIATION (§ I B 10)—WAR MEASURES ACT—EFFECT OF ORDER IN COUNCIL AMENDING SAME—DEPRECIATION—COMPENSATION—STATUTORY DISCRETION OF MINISTER.

Where, in an Order in Council authorising the expropriation of property by the Crown, reference is made to the statute (War Measures Act) in pursuance of which the same purports to be made, and where the authority to act under said statute is questionable, but the same property could unquestionably be expropriated and taken under the general Expropriation Act, the Court may treat the proceedings as taken under the latter Act, notwithstanding the said reference in the Order in Council; especially, as in this case, the Minister had, in the exercise of his statutory discretion, decided to so expropriate, and all the requirements of the latter Act have been complied with.

In assessing the compensation for property of a commercial or industrial company, due consideration must be given to the history of the company from its origin, such as how organised, its capital, how applied and financed, the business carried on, and actual profits, and in the present case (a dock) its age and state of repairs, and, while one must also examine the component parts of the dock, the good-will of the industry as a going concern, the compensation must be arrived at upon its commercial market value as a whole at the date of the expropriation.

[*The King* v. *Kendall* (1912), 8 D.L.R. 900, 14 Can. Ex. 71; *The King* v. *The Carslake Hotel* (1915), 34 D.L.R. 273, 16 Can. Ex. 24; and *The King* v. *Manuel* (1915), 25 D.L.R. 626, 15 Can. Ex. 381, referred to.]

Statement.

INFORMATION exhibited by the Attorney-General of Canada to have property expropriated by the Crown valued and compensation fixed.

T. S. Rogers, K.C., and *W. L. Hall*, K.C., for plaintiff.

H. McInnes, K.C., *L. A. Lovett*, K.C., and *J. S. Roper*, for defendants.

Audette, J.

AUDETTE, J.:—This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands, belonging to the defendant company, were taken and expropriated by the Crown, under the provisions and authority of the Expropriation Act, R.S.C. 1906, ch. 143, for reasons declared to arise out of the *present* war, and pursuant to the powers conferred by the War Measures Act, 5 Geo. V. 1914 (Can., 2nd sess.), ch. 2, and other powers vested in the Crown,—by depositing of record, under the provisions of secs. 8 and 9 of the Expropriation Act, in the office of the Registrar of Deeds for the County or Registration Division of Halifax, N.S., a plan and description of the said lands, on June 7, 1918, together with a corrected plan and description thereof, on June 21, 1918.

The defendants, the Right Honourable Thomas Baron Denman and Samuel Mackew, by their answer to the information, declared that,

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at the time of the filing of the information herein they were trustees of certain indentures of trust whereby the lands and property of the Halifax Graving Dock Co., Ltd., described in the information, were vested in them by way of mortgage for the purpose of securing debentures by the said defendants, the Halifax Graving Dock Co., Ltd.

That the said the Halifax Graving Dock Co., Ltd., on December 31, 1918, paid, redeemed and retired the debentures issued under said mortgage, and that these defendants have executed a release of the said mortgage, and since the said December 31, 1918, they have had no property, estate or interest in the lands sought to be expropriated herein.

This indenture of release or reconveyance is also filed of record as Ex. No. 46.

These two defendants are thereby eliminated, and we have now to deal only with the Halifax Graving Dock Co., Ltd., as the defendants in the case.

The area expropriated, as mentioned in the information, is 326,200 square feet; the area claimed by the defendant is 328,294 square feet, and the area according to the Crown's evidence would be 325,100 square feet.

The defendant's title to the land above mentioned is admitted, but its claim to the land covered by water is denied. It further appears that the City of Halifax has a certain right to carry sewers across the property, at the head of the dock.

These two questions of area and title will be hereinafter mentioned and disposed of.

The Crown, by the amended information, offers the sum of $1,100,000, and the defendant company by its amended statement in defence claim the sum of $5,000,000.

The Expropriation Act above referred to, was during the war enlarged and amended under and in virtue of the provisions of the War Measures Act, 1914, and legislative effect thereto given by an Order in Council filed as Ex. B, and which may be found in 7-8 Geo. V. 1917 (Can.), p. cviii, wherein, among other enactments, the following is to be found, viz:

(1). For the purpose of the compulsory taking, during and for any reason arising out of, the present war, of any property real or personal belonging or appurtenant to, or acquired, had, used or possessed in connection with any arms or munition factory, machinery or plant, or other factory, mills, machinery or plant whatsoever which is being operated as a going concern, the Expropriation Act shall, subject to all the provisions thereof, extend and apply not only to the taking and acquisition of the land, if any intended to be taken, but also to all buildings, fixtures, machinery, plant, tools, materials, appliances, supplies, goods, chattels, contract rights, accrued or accruing,

choses in action and personal property of any description whatsoever possessed, acquired, had, owned, used, appropriated, or intended for use or consumption for, or in connection with or for any of the purposes of any such factory, mills, machinery or plant as aforesaid, or the operations or business theretofore carried on or intended to be carried on in or about or in connection with the same, and as fully and effectually to all intents and purposes as if the same were specified as included in the definition of land under the said Act.

It is also provided by the Order in Council that there shall be no allowance for compulsory taking.

The expropriation proceedings are attacked by the defendants, who contend they are null and void for want of authority to expropriate, a contention with which I am unable to agree; and the defendants on entering upon their case and adducing evidence, did so reserve all their rights in that respect to hereafter set up such contention in another Court, if they see fit.

It is abundantly clear on the face of the Order in Council, Ex. B, that there was no intention on the part of the Governor-in-Council in passing the same to do anything but exercise their right under the War Measures Act, 1914, to augment the powers of the Crown in respect of taking property for public purposes during the war. Under this Order in Council personal property became subject to the right of expropriation as well as real property. To do the other thing, *i.e.*, to abridge any of the powers of the Crown under the Expropriation Act, would not be to their purpose, even if it could be argued to be within the powers of the Governor-in-Council under the War Measures Act. So that there is no occasion here to consider any question either of ouster of jurisdiction under pre-existing legislation or the repeal by implication of any of the provisions of such legislation enabling the Crown to take property. See Maxwell on Statutes, 5th ed., ch. 7.

Coming to this particular case, it was the undoubted intention of the Dominion Government to take the absolute right and title to the whole of this Graving Dock, plant and premises, in other words, to expropriate the same. That is explicit on the face of the Order in Council of May 27, 1918, and the Attorney-General of Canada has taken the usual steps under the Expropriation Act to effectuate that intention, by filing an information for expropriation in this Court.

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Some doubt may exist under the War Measures Act, 1914, as to whether the Crown under its provisions could "expropriate" the property of the subject in the plenary sense that it can be done under the first mentioned Act, as was suggested at Bar—but, I am free to say that it is not necessary here for me to attempt to resolve that doubt. It is apparent that expropriation can be made, and has been made, under competent legislation that was in existence long before the War Measures Act referred to.

I am therefore relieved from entering upon any doubtful domain of statutory construction in order to decide that the defendant's property has been taken by due process of law.

The remarks of Lord Moulton in the appeal to the House of Lords of the case of *The Att'y-Gen'l* v. *De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508 at pp. 548-550, are instructive where complete and satisfactory statutory powers can be relied on to govern a case before the Court as against another more uncertain and unsatisfactory authority to do the act giving rise to the litigation. Lord Moulton says:

In deciding the issues raised herein between the Crown and the suppliants, the first question to be settled in the present case, might be, to my mind, treated as a question of fact, viz.: Was possession in fact taken under the Royal Prerogative or under special statutory powers giving to the Crown the requisite authority? Regarded as a question of fact, this is a matter which does not admit of doubt. Possession was expressly taken under statutory powers. The letter of May 1, 1916, from the representative of the Army Council to Mr. Whitney said:—"I am instructed by the Army Council to take possession of the above property under the Defence of the Realm Regulations." It was in response to this demand that possession was given. It was not competent to the Crown, who took and retained such possession, to deny that their representative was acting under the powers given to it by these Regulations, the validity of which rests entirely on statute.

It was not a matter of slight importance whether the demand for possession purported to be made under the statutory powers of the Crown or the Royal Prerogative. Even the most fervent believer in the scope of the Royal Prerogative must admit that the powers of the Crown were extended by the Defence of the Realm Consolidation Act, and the Regulations made thereunder. It was for that purpose that the Act was passed and the Regulations made. But even if that were not so there was a manifest advantage in proceeding under the statutory powers. It rendered it impossible for the subject to contest the right of the Crown to take the premises by the exercise of the powers given by the statute. . . . All such questions were put at rest by the Legislature giving express statutory authority by the Regulations. There could henceforward be no doubt that the Crown possessed the powers formulated by the Regulations, and this was the object of the legislation. But when the Crown elected to act under the authority of a

statute, it, like any other person, must take the powers that it thus uses *cum onere*. It cannot take the powers without fulfilling the condition that the statute imposed on the use of such powers.

The expropriation was made, as set forth in the information, for reasons declared to arise out of the "present war and pursuant to the powers conferred by the War Measures Act, 1914." The expropriation was made on account of the war when unrestricted submarine warfare was being carried on with alarming results to the commerce of the Empire, and to cope with the aftermath of the war in so far as it concerned shipping.

In expropriating this property, devoted to a certain extent to public use and to a like extent affected with a public interest, the Crown was endeavouring to meet the emergency affecting the Empire at large and to foster the building of vessels and the facilities for repairing the same. Wide powers were given the Executive under the War Measures Act, and in exercising them the Crown resorted to the machinery provided by the Expropriation Act, as enlarged by the Order in Council of March 17, 1917 (Ex. B), and deposited plans and specifications as provided by sec. 8 of the said Act.

The Minister, as provided by the said sec. 8, having deemed it advisable to expropriate, has exercised his statutory discretion and the Court has no jurisdiction to sit on appeal or in review of such decision. That it cannot go back of that decision is a legal truism. These questions are political in their nature and not judicial—Lewis on Eminent Domain, sec. 239. The Courts cannot enquire into the motives which actuate the authorities or into the propriety of their decision. *Dunham* v. *Hyde Park* (1874), 75 Ill. Rep. 371; *Gilbert* v. *New Haven* (1872), 39 Conn. 467. See *Beekman* v. *Saratoga and Schenectady Rd. Co.* (1831), 3 Paige (N.Y.) 45; *Jackson* v. *Winn's Heirs* (1823), 4 Littell (Ky.) 322; *Brimner* v. *Boston* (1869), 102 Mass. 19; *Matton* v. *The Queen* (1897), 5 Can. Ex. 401; *Vautelet* v. *The King*, Audette's Practice 115; *Wijeyesekera* v. *Festing*, [1919] A.C. 646; *Att'y-Gen'l* v. *de Keyser's Royal Hotel, Limited*, [1920] A.C. 508.

Moreover, is not the company estopped from setting up such a plea, having waived any objection to the expropriation, if any reasonable one might have been set up, by voluntarily advising the Crown through its president, in several letters, that

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it would turn over the property and assist in every way in handing over possession. Furthermore, accepting the expropriation, as a *fait accompli*, they asked and were granted delays in delivering possession until June 24, 1918, without at any time, reserving the right to attack the expropriation proceedings—a decision arrived at afterwards. When the Government was wavering as to whether or not they would expropriate, on January 23, 1918, the president of the company wrote that if the Government wished to purchase they would take the purchase money in Dominion securities. This is absolutely inconsistent with the allegation put forward on the trial that the property was taken against the will of the company. So far from taking the stand of an owner relieved of his property *in invitum*, Mr. Brookfield's attitude at this time was that of a willing vendor, in fact of a man eager to sell, and, as fully set forth in the Order in Council of January 15, 1918, the original proposal to expropriate came from the company. Mr. Brookfield was helping the Government as much as possible by making it easier in finding the moneys to pay for it. However, on May 28, 1918, when the Government had made extensive repairs at its own expense the company refused an offer of $1,100,000.

Now, the property in question, a graving dock, with all its component parts, viz., land, land under water, buildings, wharves, machinery and tools, chattels, the dock itself, etc., must be assessed at its commercial market value to the owner, in respect of the best uses to which it can be put as a going concern, with its goodwill.

A mass of evidence has been adduced on behalf of the proprietors with respect to the value of each of the component parts, therefore the Crown has followed the same course by offering statements in answer. Estimates by several of the defendant's witnesses giving opinion evidence, have been prepared in connection with the cost of reconstruction of the dock; but such estimates are all much subject to serious criticism, too long indeed to analyze here in detail on account of the view I take of the case,—and, I must say, I do not feel warranted in accepting these estimates which appear on their face to be unduly unreasonably large and which are manifestly largely speculative. At the time of the expropriation, fully 70% of the inside facing of the dock

had to be repaired and replaced at a cost estimated, by the parties actually engaged in such repairs, at $151,000. These estimates of reproduction did not allow a proper amount for depreciation, assuming that such repairs will make the dock as good as new,—an erroneous view taken by them confusing efficiency with value. Depreciation is the lessened utility value caused by physical deterioration or lack of adaptation to function under requirements. The replacement of parts, as they need replacement, will not keep the property as valuable as when new, unless the parts are all replaced at once, which is practically impossible. There is not only the physical depreciation to be taken into account, but also the "supersession," that is the functional depreciation which may result from the growth of the business which renders the structure inadequate, or to the development of the art which renders it obsolete. Supersession is the discarding of a thing before it is worn out.

As I remarked at trial, if the life of a street car be 20 years, and that it has run for 11 years, it will still answer the purpose for which it was built for another 9 years, and it is still efficient in rendering such service; but its value is not the same as new, although its efficiency for 9 more years is still good. The same principle applys to the dock, which is 29 years old. And this is said in view of the contention of some witnesses who said that the dock was as good as new for all working purposes.

This dock was built partly with subsidies amounting to $600,000, coming in severally from the Dominion Government, the City of Halifax, and the Imperial Admiralty, the latter being entitled to place any vessel in the dock, and when such vessel is above 6,000 tons, they are not to be charged for any extra tonnage beyond the 6,000 tons.

The capital of the company was $750,000, and the greater part of the stock issued was handed over to the contractor building the dock, as part payment of his contract price. There was never any dividend paid upon the stock, a matter which must not be overlooked when arriving at the value of its good-will. The stock was obviously not very attractive to the public.

The Crown in paying for the value of the dock, and its component parts, at the date of the expropriation, will pay for all the reinstatement and work done since the explosion both by itself

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and the company, and moreover will also pay full value for the property towards which it has already paid a subsidy of $200,000. Be that as it may, this is not said by way of weakening the claim of the owners, because they are justly entitled to it; but, only to shew that no extravagant price should be allowed and that only a fair and just compensation is all the owners are entitled to.

The dock is not a large one, and the company has ever and anon mooted the question of enlarging it with a view, as said by the president, *to take any vessel in the Canadian trade*, and has approached the Government for help to that effect.

In assessing the compensation for the dock due consideration must be given to the history of the company from its origin, how it was organized, what was its capital, how it was applied and financed, the business it was carrying on, its actual profits, the returns to the shareholders, the age of the dock and its state of repairs, and while one must also examine the component parts of the dock, the good-will of the industry as a going concern, the compensation must be arrived at upon its commercial market value as a whole at the date of the expropriation, without being obliged, in arriving at such value, to go into abstract calculations with respect to each component part, but taking all of them as a whole after having weighed and considered each of them. See upon this view, *The King* v. *Kendall* (1912), 8 D.L.R. 900, 14 Can. Ex. 71—confirmed on appeal to the Supreme Court of Canada, October 29. 1912. [See 32 D.L.R. at p. 668.] *The King* v. *The Carslake Hotel Co.* (1915), 34 D.L.R. 273, 16 Can. Ex. 24—confirmed on appeal to Supreme Court of Canada, June 13, 1916. [See 34 D.L.R. at p. 280.] *The King* v. *Manuel* (1915), 25 D.L.R. 626, 15 Can. Ex. 38—confirmed on appeal to Supreme Court of Canada, December 29, 1915. [See 18 Can. Ex. at p. 53.]

Now, the valuation of the property as a whole is the method that would be resorted to and adopted by a business man desiring to buy or sell. He would not make an offer for each component part of the property—and indeed, this is the method that the defendant company itself has adopted when there was any question of sale. On December 14, 1917, the Halifax Graving Dock Co. sent to the Right Honourable Sir Robert Borden the following telegram:

Hon. Mr. Carvell and Hon. Mr. Reid have approached me with a view of Government taking over our dry dock plant and all connected with it as it now stands, price to be fixed by the Exchequer Court with a maximum clause that Court will not exceed one and a quarter million dollars. On behalf of company, I agree to this proposition if Government accept.

Then, at p. 19, Ex. 58, one of the books of correspondence, is a letter of the company to Mr. Carvell, Minister of Public Works, dated June 15, 1918, where the following excerpt is found, viz.:—

After the explosion, when the buildings were knocked down and the whole place devastated, I offered you the dock, never doubting but that the management would remain in my hands. Two weeks afterwards you declined to purchase. You then agreed to reinstate buildings and plant and I told you this would probably cost $400,000, so this adds at least a value of $250,000 to the property, making $1,500,000, to which should be added an amount for good-will and a going business.

It is well to note that when the company place a price upon this property, they do so as a whole, and do not resort to the speculative statement prepared by the witnesses giving opinion evidence, and moreover, it is well to note also that their offer does not suggest any state of mind indicating an unwillingness to sell, but rather to inflate the price to $5,000,000. That was an afterthought apparently. But the fixing of price, the fixing of compensation is a matter of judgment, and one cannot do more than indicate within perhaps fairly narrow limits the figure at which the value should be placed.

To allow the claim as estimated by the defendant's witnesses would be doing a most misconceived and egregious piece of justice to which I cannot adhere.

I have had the advantage, accompanied by counsel for both parties, of viewing the premises in question, and to see with my own eyes the unsightly state of the disintegrating cement of the facing of the interior of the dock patched with brick, involving repairs to an amount of about $151,100. However, the dock in its present state of repair, 29 years old, with all its apparent defects, has a real substantial value, and if its defects have been brought out by the plaintiff, it must not be forgotten that an extravagant and inflated price of $5,000,000 has been asked by the defendant in the pleadings.

I have therefore come to the conclusion after making all allowances, and weighing all proper legal elements of compensation, to allow, for the dock property, as it stood at the date of the expropriation, with all the improvements made since the

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expropriation, both by the Crown and the defendants, covering all its component parts, and its good-will as a going concern, the sum of $1,400,000.00

from which should be deducted the sum of 8,315.20

paid to the company, as shown by Exhibit X.

$1,391,684.80

To which should be added the sum of 2,395.37

the amount the Crown collected for scrap as shewn by Exhibit 56. $1,394,080.17

To this amount should be added interest at the rate of 5% per annum from the date of delivery and taking possession, namely, on June 24, 1918, to the date hereof. I have endeavoured to avoid delaying the rendering of the judgment in view of the heavy interest accumulating upon such a large amount, which up to date would amount to a sum approximating $141,000.

Then, there will be judgment as follows:—

1st. The land and property, including all buildings, plant, machinery, tools, wharves, and chattels expropriated herein, are declared vested in the Crown from the date of the expropriation.

2nd. The compensation for the same is hereby fixed at the total sum of $1,400,000, which after making proper adjustment as above mentioned, is reduced to the sum of $1,394,080.17 with interest thereon at the rate of 5% per annum from June 24, 1918, to the date hereof.

3rd. The defendant the Halifax Graving Dock Co., Ltd., upon giving to the Crown a good and sufficient title in respect of the dry land, the buildings, the plant, the machinery, tools, wharves, and chattels, etc., free from all encumbrances, mortgages—save the right of the City of Halifax in respect of its sewer,—and further, upon giving a release of whatever title the said company has with respect to the land covered by water, irrespective of its area, are entitled to recover and be paid by the plaintiff the said sum of $1,394,080.17, with interest thereon as above mentioned, to the date hereof; the whole in full satisfaction for the land, property, and chattels taken as above mentioned, and for all damages resulting from the expropriation.

4th. The defendant company is also entitled to recover and be paid by the plaintiff the costs of the action.

Judgment accordingly.

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Quebec Court of Review, Lemieux, C.J., Dorion and Gibsone, JJ.
May 17, 1920.

MUNICIPAL CORPORATIONS (§ II C—51)—RESOLUTION OF COUNCIL—DELAY IN SENDING NOTICE OF MEETING—ABSENCE OF MAYOR FROM OTHER CAUSES—LEGALITY—PREJUDICE.

A resolution of a municipal council will not be set aside merely because the clerk delayed sending the notice to the mayor until a few hours before the meeting, the absence of the mayor not being caused by the delayed notice and no prejudice being proved.

APPEAL from the Superior Court of the District of Three Rivers annulling a resolution of the council naming the appellant as alderman. Reversed. Statement.

Tessier, Lacoursière & Fortier, for appellant.

Lajoie & Lajoie, for defendant.

LEMIEUX, C.J.:—The Court of the first instance upheld an objection to a resolution of the municipal council of the City of Three Rivers, dated August 11, 1919, appointing as alderman the appellant, Lacoursière in the place and stead of Francois Lajoie, resigned since May, 1919. Lemieux, C.J.

The sole and only reason for the judgment annulling the resolution in question is that a general meeting of the council called for August 4, had, for want of a quorum, been adjourned to August 11 and that special notice of this adjournment was not given, in accordance with the law, to Mayor Tessier, who was absent both from the meeting of the 4th and that of the 11th of August.

To avoid any misunderstanding of the import of the judgment which we are about to render, we state first, that the present decision is based, in part, upon statutory provisions different from those of the Municipal Code and the Cities and Towns Act for the Legislature has granted the City of Three Rivers a charter which included special regulations.

The facts of the case are these: Francois Lajoie having addressed his resignation as alderman to the municipal council, which accepted it, Mayor Tessier called, without delay, on May 24, a special meeting of the council for the purpose of appointing his successor, in accordance with art. 12 of the charter (R.S.Q. 1909, art. 5314), "if the office of alderman becomes vacant, the mayor shall within eight days after such vacancy call a meeting of

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the council for the purpose of choosing a named person to occupy the office during the remainder of the term of office of the alderman whom he will replace."

On May 24, the meeting of the council, although regularly called, lacked a quorum. For the same reason the meetings of the council were successively adjourned on June 2, 4, and 9 and July 16. On August 4, which was the first Monday of the month, a general meeting was adjourned to the 11th for want of quorum. Among other members absent was Mayor Tessier. This adjournment was made at the request of two members of the council, in accordance with art. 5564a, as amended by 4 Geo. V, 1914 (Que.) ch. 45.

We have said that on August 4 there was a regular meeting, seeing that this day was the first Monday in the month. The parties have admitted, in effect, that under a by-law regular meetings for the despatch of municipal business are held the first and third Mondays of each month in accordance with art. 5557.

The meeting of August 11, at which the appellant Lacoursière was appointed alderman, was as already stated, an adjourned regular meeting. It is indisputable, and the question is scarcely controverted, that at this adjourned meeting the council had the right to consider or despatch any municipal business of any kind which there might be. It is under this power that the council on August 11, appointed the appellant Lacoursière an alderman, and he took his seat at the meeting of the 13th presided over this time by Mayor Tessier, in the course of which meeting Lacoursière took the oath of office.

The applicant then contests the resolution of August 11, appointing Lacoursière alderman, for the reason adopted by the Court of first instance, that this meeting was illegal, because it was not called under art. 5564a, that is to say because no special notice of this meeting of the 4th, adjourned to August 11, was given by the clerk to the members who were absent on August 4, among them being Mayor Tessier who was absent likewise from the meeting of August 11. Article 5564a requires special notice of an adjournment to be given by the clerk to the members of the council who were absent at the time of the adjournment. It is undeniable that this requirement of the law is imperative, and that want of notice of an adjournment to members then absent would render void proceedings had at the adjourned meeting.

In the present case, the objection to the resolution does not allege that no notice was given; it maintains that a special notice was given to Mayor Tessier, but that this notice is irregular and insufficient and that it should be 24 hours clear notice, under art. 5581, which requires that "the intermediate delay after special notice shall run from the day on which such notice was served, exclusive of such day."

The special notice given by the clerk to the mayor of the holding of meeting of August 11, at 8.30 p.m., was written by the clerk on August 11 between 4 and 5 p.m. Does such notice answer the requirements of the charter of Three Rivers? If not, has such notice, assuming it to be irregular, been prejudicial to the interest of the taxpayers or of the municipality? If the mayor had been present at the meeting of August 11 would his presence have affected or altered the result of the vote upon the resolution appointing Lacoursière alderman?

Before answering these questions, we deem it our duty to re-affirm the doctrine which has been so often and so justly expressed: that a case like the present should be decided according to the law which is derived from numerous authorities, all equally emphatic, that the omission of even imperative formalities does not invalidate municipal proceedings, unless an actual injustice result from such omission, or unless the omission of such formalities nullify the proceedings which ought to be clothed with them.

Additional authorities from which this rule is drawn are the following, R.S.Q. 1909, art. 5545, which lays down that no error shall invalidate a municipal election if it appears to the Court that the election was conducted according to the principles laid down in this chapter and if the mistakes charged did not vitiate the result of the election. Article 5546 of the Act is still more explicit. It says that no municipal election "shall be declared invalid by reason of non-compliance with the provisions of this chapter as to limitations of time, unless it appears to the tribunal that such non-compliance may have affected the result of the election."

The Municipal Code contains a provision of a still more liberal nature, worded as follows: "No act, duty, writing or proceeding executed in his official capacity, by a municipal officer who holds office illegally can be set aside solely from the illegal exercise of his

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office." At a time already distant, in 1873, when we were slaves to form in all matters legal, Meredith, C.J., laid down the rule for the Courts to follow by deciding that municipal laws should be applied and interpreted with tolerance, equity and liberality. In *Parent* v. *Corporation of St. Sauveur* (1873), 2 Que. L.R 258 at 261, he said:—

> The Legislature undoubtedly foresaw that our municipal system would, in most cases, be put in operation by persons who cannot, we assume, be familiar with legal formalities. To expect in proceedings taken by such persons the regularity which is required in judicial proceedings would be to the last degree unjust.

And the Judge, after having cited the words of the Municipal Code corresponding to art. 5264, R.S.Q. 1909, added, at p. 261:—

> It is the duty of Judges to simplify, as far as lies in their power, the carrying out of the municipal system. We are convinced that the working of this system would be impracticable if full and complete effect were not given to this provision of the law to which reference has just been made.

It was because we were imbued with these opinions, which are partaken of by the very large majority of the Judges in the district, that Dorion, J., and I decided, on February 20, last, the case of *Chagnon* v. *Benoit*, now in course of publication.

Let us return to the dominant point of the action, namely, the legal value of the notice to Mayor Tessier of the meeting of August 11.

Article 5564a requires that special notice of an adjourned meeting be given to members absent at the time of the adjournment. This article does not state the length or duration of this special notice. In default of enlightenment from the wording, we must rely upon the definition of a special notice which the Act gives. We only find the one that is indicated in art. 5581, which says that the intermediate delay after special notice shall run from the day on which such notice was served, exclusive of said day. Let us suppose for a moment that the special notice mentioned in art. 5564a ought to be 24 hours, does it follow that one given on the 11th between 4 and 5 p.m., for a meeting which should take place at 8.30 p.m., would be illegal?

The Act imperatively requires a notice. The reason for notice is obvious; it is in order to notify the members absent from the preceding meeting of the day to which such meeting was adjourned without which notice the said meeting might take place without their knowledge. If no notice is given the meeting is invalid. If

a notice is given, but irregularly, without following the required formalities, even imperative, should such notice be deemed to be illegal? Ought the adjourned meeting to be likewise declared illegal if no prejudice results to the public?

The city clerk, heard as a witness, explained the circumstances under which he had given the special notice to Mayor Tessier. This is what he says: "Q. Mr. Beliveau, you gave the notices for the meeting of August 11, according to the custom followed at the City Hall? A. Yes Sir. Q. For all the adjourned meetings? A. For all the adjourned meetings."

It was therefore the custom at Three Rivers to give, on the very day on which an adjourned meeting should be held, notice to the members absent at the time of the adjournment. According to custom this notice, the length of which is not fixed, appeared, therefore, to be reasonable to the members of the council and to the mayor in particular, he who should be the faithful guardian of the rules which assure the proper working of the municipal mechanism. Should this custom prevail in the present case?

We will certainly not decide that usage, old as it may be, should be opposed to written law, either to abrogate it or alter it. The law governs customs, whose application must be limited to interpreting the law, by supplementing it or perfecting it.

The custom relied upon in the present case should have, in judicial proceedings a moral authoritative value, especially in the application of a law which should be interpreted liberally, equitably, and from a good sense point of view. This custom, alone, could not be taken advantage of, but, accompanied by other circumstances, it permits the Court to take account of it as one evidence of the desire of the parties and also as a means of solving the question whether the public or the taxpayers have suffered any prejudice or any injustice from the decision of the council in appointing Lacoursière alderman.

The custom of giving notice in the manner stated was well known, was public and amounted to a public act. It would appear to be a constant custom. It was a general common custom, to which the public had adhered all of which conditions give to usage a judicial character.

Another feature of the question; did the notice, assuming it to be irregular even insufficient from a legal point of view, attain the

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object that was intended, namely, to inform Mayor Tessier of the holding of a general meeting at which any municipal matter might be debated and adopted?

If it had been shewn that it was on account of the insufficiency of the notice that the mayor had not taken part in the meeting, or if the mayor had ever protested or recriminated against the notice, or if he had claimed that he had not taken part in the meeting by reason of the insufficiency of the length of the notice, there would then have been a reason for ascertaining whether any prejudice had been caused. But the contrary is evident and manifest; the mayor took part and presided at the meeting of August 13, in the course of which Lacoursière was sworn in as alderman in his presence. In no way did he object to the adoption of the resolution appointing Lacoursière, or blamed the council for having proceeded hurriedly, or claimed that Lacoursière was incompetent or that his appointment was detrimental to the public good. His silence, in such circumstances, must certainly be interpreted as ratifying the appointment; and we might, perhaps, add that the mayor has to such a extent ratified the appointment that he is one of the attorneys in the case, maintaining the solution which appointed Lacoursière as alderman.

Another thought, which conforms with the spirit of the Act, suggests to us arts. 5545 and 5546. These articles state that no municipal election shall be invalidated by reason of the non-compliance with the formalities prescribed for holding a municipal election, if the Judge is convinced that such non-compliance did not affect the result of the election, and that no election shall be declared invalid by reason of non-compliance with such formalities unless it should appear to the Court that such non-compliance, as to limitations of time, may have affected the result of the election.

It is true that the Act refers to popular elections, while in our case, it is a question of the appointment of a member of a council by resolution, but the cases are alike, for in either circumstance, it is a question of appointing members of a council, and the question of public interest is the same. Now, has the Court in the present case, the moral certainty that the absence of the mayor did not vitiate, effect or change the result of the resolution?

First, had he been present he would not have voted unless there was an equality of votes. Now the appointment of Lacour-

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sière was voted for by four of the members present. Laney, who had been nominated, refusing to take part in the proceedings, apparently the mayor would not have changed the result, and from his attitude at the meeting of the 13th and that which he takes as an advocate in the case before us, not only would the result of the resolution not have been affected or altered, but Lacoursière's position would have been improved, seeing the apparent sympathy which the mayor seemed to have for him.

If the mayor had not taken part in the meeting, it is not owing to want of notice or irregularity of the notice but to the fact that he did not wish, did not care, or could not take part. Assuredly it cannot be seriously maintained that the mayor did not take part because of the irregularity of the notice, since, as mayor, he conformed to the well-known common custom, which he considered reasonable, of a notice given as above shewn.

Let us suppose that it was not an election appointment of an alderman by the council—questions which so easily and so uselessly raise local prejudices and passions—but rather a by-law authorising the town to borrow $50,000 or $100,000 and that a bank or other financial institution advanced this amount to it, does anyone really think that a similar by-law adopted under the same circumstances would be declared void and that it would be held that the bank which advanced the money should lose it? We do not think that in such case there would be one dissenting voice to declare the notice illegal.

We come to the conclusion after having studied the question which presents itself in a new form, that the resolution appointing Lacoursière alderman was legal, and that the notice given to Mayor Tessier fulfilled the end and object which it had in view.

For these reasons, we affirm the judgment of first instance refusing the objections to the resolution of August 11 and maintaining, as far as Lacoursière is concerned, the said resolution with costs against the applicant, respondent, both of the objections raised on the first trial with Lacoursière and in the Court of Review.

Gibsone, J.

GIBSONE, J.:—This is a proceeding taken by a municipal elector of the city of Three Rivers to annul a resolution adopted by the municipal council of that city, at a meeting held on August 11, 1919. The petition was presented on September 30, 1919. The

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resolution in question was to appoint the *mis en cause* to the office of alderman of the city of Three Rivers in place of one Francois Lajoie who had resigned.

It is alleged that this resolution is illegal and null for the following reasons: 1. Because such a resolution could have been adopted only at a special meeting of the council called for that purpose; 2. Because the meeting of August 11 was an adjourned meeting, and the nomination of an alderman was a new piece of business which it was not within the competence of an adjourned meeting to consider, seeing that this matter had not come up at the regular meeting, and therefore could not be classed as "unfinished business" under R.S.Q. 1909, art. 5564, also, that at this meeting of August 11, not all members were present, and that an objection was made to the matter being considered at this meeting by one of the members present; 3. That the notice of the meeting in question was insufficient.

The city and also the *mis en cause* appeared and pleaded separately. Their pleadings are similar though not identical, and after denial of the allegations of the petition, they alleged objections, namely: that the petitioner suffered no prejudice; that the city was not summoned in its corporate name; that the judgment which might be rendered would not be executory against the *mis en cause;* that proceeding such as the present is not the proper one to dispossess an alderman of this office; that the security is illegal; in fact, that no security was given; that giving of security is not alleged; and that the petition is not supported by an affidavit.

I may say at the outset that I think these several objections made by respondent and *mis en cause* were, for a large part, disposed of finally in the Superior Court, and that in reality only one of them persisted in this Court, namely, the allegation that petitioner suffered no prejudice or injustice and that he had no interest. This last objection, I think, is disposed of by R.S.Q. 1909, art. 5623, which is to the effect that every municipal elector may in his own name take a proceeding such as the present to set aside any by-law, resolution, procès-verbal, etc., of the council. No special interest is required.

In the present case, it is further alleged that petitioner is a mere *prête-nom*. In his evidence, he was asked if he himself was to be responsible for the costs of the present matter. He answered

in the negative, adding that others had guaranteed him harmless in that respect. It is suggested that the fact that others are behind the petitioner, holding themselves responsible for costs and probably urging him on would make the present to be an instance of maintenance. And it is urged that, for this reason, the petitioner should not be allowed to continue his proceeding. It is quite true that the presence of the element of maintenance in a contract will vitiate it, and it would be our duty to consider the effect of its existence if such were shewn, but the question would, I think, come in for consideration only in the enforcement of the contract which was tainted with maintenance. A public action such as the present could not be refused merely because several were associated with plaintiff. The proof does not shew otherwise than that these others may have the same qualifications as the plaintiff has, namely, municipal electors, in which case, I think, the association of interest would exclude it from being maintenance when there is nothing in the record shewing that plaintiff and associates are actuated by any improper motives.

Mr. Lajoie, alderman of the City of Three Rivers, resigned, and his resignation was accepted on May 19, under the Cities and Towns' Act, art. 5314, an election should be held to fill vacancies, but there is a special provision in the charter of the City of Three Rivers to the effect that vacancies in its council are filled by the council itself and that it is the duty of its mayor, within 8 days after the vacancy occurs, to call a special meeting of the council for the purpose of appointing a successor. The mayor of Three Rivers complied with this requirement and called a special meeting for May 26. There was no quorum at this meeting, and the appointment of the alderman necessarily was left over.

As authorised by a special article in their charter, replacing R.S.Q. 1909, art. 5557, there is a by-law of the City of Three Rivers fixing the council meetings for the first and third Monday of each month. These two meetings were held in the month of June without having any quorum; the same happened in the month of July. On the first Monday of August, there was no quorum either, and it was at this meeting that an adjournment was made to the 11th.

It is contended by the petitioner that it was only at a special meeting of the council called specially for that purpose that the

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nomination of an alderman could be made. This argument is based on art. 5314, R.S.Q. 1909, as specially enacted for the City of Three Rivers. The article is to the effect that when a vacancy occurs, the mayor must, within 8 days, call a special meeting for the purpose of filling it. The special meeting affords an opportunity to make the appointment, but there is nothing either in that article or in any other statutory part of the city's charter which requires the filling of an alderman vacancy to be exercised only at a special meeting, and the conclusion must be that such power may be exercised at any subsequent regular meeting if for any reason the nomination has not been made at the special meeting called by the mayor, or if the mayor has neglected to call a special meeting, if such should have been the case.

I am of opinion that the nomination could have been made at any regular meeting subsequent to May 26.

A question which now presents itself is as to whether special notice of that item of business should have been given to the members of the council in advance of the meeting. I do not find that such was required either from anything shewn in the record or from anything in the city's charter. It is true that the council has general authority by by-law to make rules and regulations for its internal government and the council could, I have no doubt, pass an enactment to require that in all cases such as the present a notice would have to be given and failing which consideration of the question would be out of order; it is certainly the case that in many municipal councils for a motion to be in order, it is necessary that notice of it must have been given at the previous meeting of the council. That, apparently, is not the case in Three Rivers, because no mention of any such rule was made by either parties. If such rule had existed, it might be quite well that (such a nomination being made by a special motion), such motion should be preceded by a notice of the kind indicated; but in the absence of any proof or even suggestion of the existence of any municipal enactment requiring notice, we are to conclude that none was required, and this Court cannot make the legality of the council's action depend upon such a notice having been given. It is true that there are in the record the order of the day for the meeting of August 4, also that for the 11th, and that these agenda papers shew that in that for the meeting of the 4th, no mention is made

of the nomination of filling of the aldermanic vacancy, whereas in the order of the day for the 11th, there is mention of it. There being no provisions in the charter and no by-laws of the council dealing with such orders of the day, we must look upon them as matters of convenience and not as legal requirements.

The conclusion I come to is that it was within the power of the council to make this nomination at any regular meeting subsequent to May 26, without necessity of any previous notice.

I should mention that if the meeting at which the appointment was made was a special meeting, then notice would be required because, in all cases of special meeting, the business to be transacted must be stated in the summons to that meeting.

Now, it is admitted that previous to the meeting of August 11, no notice was given to the members of the council that the nomination would be made. It is necessary therefore to determine whether the meeting of August 11 was a regular meeting or a special one. It is admitted and it is clear from the record that the meeting of August 11 was called as adjournment of the regular meeting of August 4. August 4 was the first Monday of that month, and by the by-law was a date for a regular meeting. No quorum was present, but there were two members present, and by art. 5564a, two members being present, they can adjourn a regular meeting to a subsequent date. This was done.

What is the effect of such an adjournment? Is it the equivalent of calling a special meeting or does it make a continuance of the regular meeting? The question is important because if the new meeting is to be considered a special meeting, then only such business as is mentioned in the notice of it can be taken into consideration; if such meeting is a continuation of the regular meeting, then, any business which might have come before a regular meeting can come before it. In my opinion, from that fact that art. 5564a authorises an adjournment, all the effects of an adjournment must be given, and that the meeting of August 11 can be looked upon only as a continuation of the meeting of August 4, and therefore, a regular meeting at which any and all business of the council could be considered.

I come to the conclusion that the nomination of an alderman could be made by the council at any regular meeting, that no special notice that such matter would be dealt with was necessary

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in advance of such a meeting, and also that the meeting of the 11th was a regular meeting of the council.

The petitioner's complaint is thus narrowed down to the question as to whether the proceedings in the council at the meeting of August 11 were illegal by reason of irregularities or insufficiencies in the notice summoning it.

All the members of the council in office were present at the meeting of August 11, with the exception of the mayor. The notice was given to him, was left at his house between 4.30 and 5.30 in the afternoon when the meeting was called for 8.30 that evening.

It is contended that this notice is insufficient, that the law requires a longer notice than this, that the absence of the notice the law requires is sufficient to make the proceedings at the meeting illegal and annulable. This raises the question as to whether the notice to be given to members of a council under the Cities and Towns Act are peremptory requirements of law entraining nullity if not exactly complied with, or whether they are directory only and a substantial compliance with them is sufficient.

Under the Municipal Code, notices of special meetings must, under pain of the nullity of all proceedings of the meeting, be given in exact accordance with the provisions of that Code. In the Cities and Towns' Act, there is no corresponding provision. The general law provides that special notices must be given to members of the council both for the regular and for the special meetings. Article 5572 distinguishes between public notices and special notices and prescribes that special notices be served. Article 5575 declares how service is to be made, namely, when not by mail, it is by leaving a copy with the person or at his domicile or place of business. Article 5581 says that in computing the delay on special notices, the day of service is not to be counted. There can be no doubt that under the general law, these provisions as to special notices apply to the notices to be given to the mayor or aldermen of the meeting of the council.

In the case of Three Rivers, art. 5557 is replaced by an article which simply provides that the (regular) meetings of that council shall be on the days which are to be determined by by-law, without mention—and here the section of the city's charter differs from the general law—without mention of the necessity of giving special notices to the members of these regular meetings.

It is admitted that there is in the case of Three Rivers a by-law to fix the regular meetings of the council for the first and third Monday of each month. I think it is clear that there is no necessity of a notice to the members of the council of these regular meetings. But the meeting of August 11 was an adjourned meeting and R.S.Q. 1909, art. 5564a, requires that in case of an adjournment, such as the present, the clerk must give notice of the adjournment to those who were not present at the time the adjournment was made. What notice is required? The Court of first instance in this case decided that the other articles of the general law that I have just mentioned (5572, 5575 and 5581) applied as regards notices of meetings other than those had on the first and third Monday of each month, and to that extent, I agree with the conclusion of the trial Judge, but his conclusion went further than that. Having concluded as an inference from art. 5581 that the delay must in all cases be of at least one intermediate day (except of course where there is some special delay fixed as in 5561), he decided that such a delay is a matter of public policy and interest, and that the curtailment of it, as occurred in this case, operated *per se* and independently of all other circumstances to make the meeting of August 11 and all proceedings of the council then taken absolute radical nullities.

I cannot subscribe to that holding, and it is in my opinion necessary to subscribe to it, if the petitioner is to succeed.

Where a statute requires that notice must be given a specified time before the performance of an act, etc., the omission of the notice or curtailment of the specified delay may operate as a nullity of the act if so performed; but for such conclusion to be reached, it must appear quite clearly that the statute rigidly required such delay to be given under pain of nullity.

In the present case, there is no express provision in the statute, but only an inference from art. 5581. Arguments based on inference are not the most reliable; they must be adopted with caution, the other sections of the statute must be looked to, and often the special circumstances of the individual case.

In the present instance, art. 5264 lays down the rule of the whole of the Cities and Towns Act, namely, an objection founded upon informality or irregularity shall not prevail:

> Unless according to the provisions of this chapter, its omission would render null the proceedings or other municipal acts needing such formality.

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This surely means that the nullity must be pronounced by the law itself either expressly or by irresistible inference. Not only does art. 5581 not expressly pronounce a nullity, but it does not expressly exact a requirement.

In addition to that, there is no proof of prejudice, or proof that the result was that the mayor was not made aware of the date of the meeting. There is no suggestion whatsoever of trickery or misconduct or negligence. The contrary appears: the notice was the usual one at Three Rivers, and in the circumstances before us, it is not in my opinion an illegality nor an irregularity.

The judgment of first instance should, in my opinion, be set aside *quoad* the *mis en cause*, and the petition so far as the *mis en cause* is concerned dismissed with costs.

The judgment of the Court is as follows: Considering that the special written notice given by the clerk of the City of Three Rivers to Mayor Tessier of the adjournment of the general meeting from the 4th to the 11th of August, 1919, although irregular was sufficient to fulfil the purposes for which it was given; that the said notice was given in conformity with custom recognized as common and usual in such cases; that it was not on account of the irregularity of the insufficiency of the said notice that Mayor Tessier did not take part in the sitting of August 11; that, in the circumstances shewn, it is indubitable that the presence of the mayor at the sitting of August 11 would not have changed the result of the vote upon the resolution appointing the appellant, Lacoursière, alderman of the city, but that, on the contrary, the said circumstances lead to believe that, if the mayor had been present at the meeting, he would have been in favour of the said appointment; that the said notice and the absence of the mayor from the said sitting of August 11 have caused no prejudice whatever to the taxpayers of the city; that there was error in the judgment of the Court of first instance.

This Court sets aside the judgment appealed from, dismisses the action as to the appellant, with costs against the defendant, respondent, both in the Superior Court and in the Court of Review.

Judgment accordingly.

BRAULT v. THE KING.

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Ex. C.

Exchequer Court of Canada, Audette, J. September 23, 1920.

DAMAGES (§ III A—42a)—CONTRACT TO SUPPLY CRUSHED STONE—PUBLIC WORK—BREACH—COMPLETION BY ANOTHER PARTY—DAMAGES.

Where a party to a contract has by his own act or default put it out of his power to fulfil his contract, the other party may at once treat this as a breach of contract and without waiting for the time of completion to arrive may take necessary measures to ensure the completion of the contract.

PETITION OF RIGHT to recover damages alleged to have been suffered by suppliant by reason of a breach of contract by the Crown. Statement.

G. Fortin, for suppliant; *O. Gagnon*, for respondent.

The facts of the case are fully set out in the judgment.

AUDETTE, J.:—The suppliant, by his petition of right, seeks to recover the sum of $1,746.55 for damages arising out of a breach of contract with the Crown. Audette, J.

On August 22, 1911, the suppliant entered into a contract with the Crown, "for supplying crushed stone required for macadamizing a portion of the road along the west side of the Chambly Canal," —and complete such supply on or before October 15, 1911.

He had, at the time he tendered for such contract, a small plant, at his quarry, that was insufficient for the performance of this contract, and he was duly notified by Parizeau, the Government engineer, of that fact after his visit to the quarry, at the request of the Ottawa headquarters. However, the suppliant promised to purchase additional plant.

He started to make delivery under his contract, on August 10, 1911, and on September 1, he had delivered 395 tons. From the 1st to the 18th September, he delivered 743 tons.

Euclide Brault, the suppliant's son and foreman, says that at the time they took the contract they had a middling size plant, and that when they perceived that it was not sufficient, ten days or so after starting work, they purchased a larger crusher.

Parizeau, the engineer in charge of the works for the respondent, testifies that the delivery of stone made by Brault in September varied between 45, 55, and 14 tons a day; and that the average delivery between August 10 and September 1, was only an average of 27 tons.

Parizeau swears that before September 18, he has time and again told the suppliant he was not delivering enough stone to

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allow him to perform the work on time. However, at that date, he says he had realised, he was certain, that Brault was not delivering stone in sufficient quantity, and at the rate the stone was being supplied the works could not be finished in time. Parizeau further states that he repeatedly informed his superior officer that if the stone was not forthcoming the works could not be executed on time.

Under these circumstances, on September 18, 1911, he called in a Mr. Lord to supply similar stone at the contract prices, and with Lord's help and concurrence and all Brault could and did deliver, prolonging and extending the time of completion of the contract to November 15, 1911, he was only just able to complete the works.

Brault, ever since August 10 to November 15, 1911, was asked to deliver all he could, and all he has delivered or offered to deliver was duly accepted.

However, it was contended at Bar that the Crown was guilty of a breach of contract inasmuch as by calling in Lord, the latter took away from Brault a number of carters to whom he would give wages of 25 cents over and above what Brault was giving up to that date, and by Lord using some of these carters Brault was deprived of their services and could not supply all the stone he would otherwise have been able to deliver.

From perusal of the contract, it will be seen that there is no quantity of stone mentioned—that Brault is not given the exclusive supply of the stone, therefore how could he sue for a given quantity supplied by himself exclusively? By clause 5, the works have to be carried on and prosecuted to completion to the satisfaction of the engineer. Clause 16 provided what the engineer may do in case of delay, and there are other such permissive clauses in the contract; but does not the word "may," in such a document, amount to a mere intimation of what might be done and not an obligation to resort exclusively to that method? Had the word "shall" been used instead of "may," it would have tied the engineer to that method and that method only.

However, it is abundantly proven that the contractor has delivered all he could, and that the Crown readily accepted all he offered and delivered, and that but for the help of Lord, according

to the testimony of Parizeau, the works could not have been entirely executed that season. How could it be found under the circumstances that the Crown is guilty of a breach of contract?

If there is a breach of contract, it is a breach by the suppliant and of which he is alone responsible.

Indeed, where a party has by his own act or default put it out of his power to fulfil his contract, the other party may at once treat this as a breach of contract without waiting for the time of performance or completion to arrive. The apprehension of the engineer that the work was unduly delayed was in this case well founded. (*Stewart* v. *The King* (1901), 7 Can. Ex. 55, affirmed (1902), 32 Can. S.C.R. 483.)

Contractors cannot have the whole matter of the contract in their hands in respect of public works involving public interest. The Crown cannot be at the mercy of the contractor, it must protect itself, and would do no violence to the contract, when realising that the contractor was going behind in the execution of the works, to buy outside to protect itself.

Moreover, time was by clause 26 of the contract, deemed to be material and of the essence of the contract, and while the stone should have been all supplied by October 15, 1911, the Crown extended the period of the contract by a full month and accepted all the stone supplied by the contractor even during the long extension.

Out of the total quantity of 5,119 tons required for the work in question, the suppliant supplied 2,498 tons and Lord 2,621.

If as between the suppliant and the respondent either of them has been guilty of a breach of contract, it is certainly not the Crown, but the suppliant himself.

The suppliant was given every opportunity of delivering all the stone he could from August 10 to November 15, 1911, and all he was able to deliver within that period, which includes several days before and after the date of the contract, was accepted and credited to him. If there were not enough carters available in the contractor's own parish for the discharge of the duties imposed upon him by his contract, he could and should have procured that help from outside. Brault, the son, further adds—all we had of crushed stone, we delivered to the Government—and the suppliant says the Crown never prevented us from delivering stone.

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Under the circumstances, I have come to the conclusion that the suppliant is not entitled to any portion of the relief sought by his petition of right.

NOTE—Exhibit A, a statement of the quantity of stone actually supplied up to a certain date—not to the end of the contract—was filed at trial, and was to be completed to the end of the contract. The trial took place on September 10—the completion of that exhibit involved the work of at most half an hour—but it has not as yet come to hand and I am not on that account delaying judgment, because, in the view I take of the case, it is immaterial.

Judgment accordingly.

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Quebec Court of Review. Demers, Panneton and de Lorimier, JJ. June 12, 1920.

ATTACHMENT (§ I B—10)—IN REVENDICATION—GIVEN FOR IMMORAL PURPOSES—ART. 768 C.C. (QUE.)—MAINTENANCE

One who is a party to an immoral consideration in giving donations to a person with whom he is living in concubinage cannot ask for revendication of the property so given. If he could succeed at all it would be under art. 768 C.C. (Que.), for the surplus beyond what was necessary for the maintenance of the defendant but where this issue is not raised his action will be dismissed.

Statement.

The judgment of the Superior Court, which is affirmed, was given by Archibald, J., on December 6, 1919.

The plaintiff caused to be seized, by three attachments in revendication, certain goods of the value of $510, which he claimed belonged to him and which the defendant refused to give up to him.

The defendant pleads that these goods are hers, and were given to her by the defendant himself. The latter replies that such gifts had an immoral consideration, the goods having been given to the defendant to furnish the house in which they both lived in concubinage.

The Superior Court set aside the attachment in revendication by the following judgment:—

Considering that it has been established in good proof that the goods mentioned in the procès-verbal of seizure were given by the plaintiff to the defendant; that they were placed in a house in which the plaintiff and defendant were at the time living in concubinage, and that the consideration of the gift was immoral, and it is also proved that both parties were participants in said immoral consideration; that under our law where any party seeks to obtain the assistance of the Court in relation to a contract which is void in

consequence of the consideration being immoral, he will be dismissed from the Court without relief if it appears that he himself was a participant in the immorality; that the plaintiff, in addition to the present action, has introduced two other actions against the defendant in which seizures in revendication of other articles have been made, all of which form part of the furniture in the house in which the plaintiff and the defendant lived in concubinage; that these three actions ought to have been brought as one action, and in fact have been, by judgment of the Court, united for the purposes of the proof;

Considering therefore that the proof made in any one of the three causes is applicable to all; that plaintiff has failed to establish any ground of action against the defendant which the Court may allow him to maintain; also that art. 768 of our Code allows donations in such cases to the extent of maintenance, and that even if plaintiff could appear under the circumstances he should have done so under that article and demanded the reduction of the gifts in question; that the plaintiff has failed to establish a ground of action; seeing under art. 768 the donation in question was not entirely null, and the plaintiff's action ought to have been brought under that article, and there is therefore ground to condemn the plaintiff to costs; doth dismiss the plaintiff's action with costs. *Judgment affirmed.*

Archibald, A.C.J.

ARCHIBALD, ACTING C.J.:—Our art. 768 refers to art. 908 of the C.N., but this article is not at all similar to our article and refers only to children of these irregular unions. Article 768 plainly cannot be made to apply to the present case. It seems to be made applicable to donations made after the relations of concubinage have come to an end, and does not declare the said donations null, but only limits them to an amount necessary for the maintenance of the party.

The text of the present art. 908 of the C.N. reads as follows (translated): "The natural children legally recognised cannot receive by donation *entrevifs* more than what is accorded to them in the title of succession." This incapacity can only be invoked by the descendants of the donor by his ascendants by his brothers and sisters and the legitimate descendants of his brothers and sisters.

Previous to March, 1896, this latter portion of the article did not exist and a difference of opinion was raised among jurisconsults as to the effect of the first part of the article, namely, whether the incapacity of the natural children was only relative and to be considered as having been enacted in the interest of the legitimate heirs or whether it produced an absolute nullity as being a question of public order and could be invoked by any person interested, as for example, by universal legatees.

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The jurisprudence was tending in the direction of absolute nullity, and the amendments of the article was made to establish the contrary doctrine by legislation. The Code Napoleon does not seem to have included the person with whom the donor has lived in concubinage as being subject to the same rule.

In the Review Trimestrial de Droit Civil, 1913 ed., vol. 12, the question is dealt with, with some detail. In that work, at p. 553, the writer treats the question from the point of view of two well known maxims of law: *nemo auditur turpetudinem suam allegans* and, second, *nullum est, nullum producit effectum*. The author points out that notwithstanding this latter maxim, formerly a person was never permitted to come into Court alleging his own immoral or illicit actions, and that when a person coming into Court with such an allegation and seeking to re-enter into rights which he had transferred to another person, the first-cited maxim prevented him from being heard. Then the author proceeds to describe the gradual process by which the absolute nullity of illicit transactions and the supposition that the public interest ought to prevail so that illegal transactions would be allowed to exist, led to the decision, that the participant in an illegal transaction was permitted (with hesitations), to re-enter into the right which he had abandoned. On p. 554, however, the author expresses himself in this way (translated): "However, until these later times the same solutions were not adopted when there was a question of nullity for an immoral cause: the immorality of him who has paid, placing him in a too scandalous posture to invoke moral laws against his accomplice and to demand restitution."

The author cites among others S. 1898-1-309. There promissory notes had been given for an immoral obligation, and there was a suit by both parties, by the maker of the notes to declare them illegal and to have them returned and to recover back the amount of one of them which had been paid, and the other to enforce the promissory notes which were still held. The Court rejected the action to enforce the notes but maintained the action to recover back a note which had been paid, but only on the grounds that payment of the note had been forced by a seizure placed on the debtor's household goods, and against his protest. It was manifest that this action would also have been dismissed, had it not been for that consideration.

Another case cited was S. 1909-1-188. The holding in that case was that an obligation founded upon an illicit cause, according to art. 1131 C.N., can produce no effect. The parties had each taken part in the illicit and immoral contract, in the case in question. The transfer of a Maison de Tolerance in execution of which a promissory note had been subscribed and negotiated, cannot be received to demand in justice either the payment of the price stipulated or the restitution of what has been paid.

In another case cited by the same author S. 1894-1-302, the holding of the case is, when two parties have each taken part in a contract having a consideration immoral or illicit, they are both incapable of demanding by an action either the execution or the nullity of the contract. There are several other authorities cited which may be consulted.

A case has been cited in our own Courts: *Consumers Cordage Co.* v. *Connolly* (1901), 31 Can. S.C.R. 244. In this case the Consumers Cordage Co. had obtained from the Government of Ontario a contract concerning binder twine. This contract had been obtained by the Consumers Cordage Co. by the interposition of other persons, and thereupon Connolly contracted with the Consumers Cordage Co., and under this contract furnished a certain amount of capital for the execution of the contract in question. A suit was raised in the Superior Court, but no question of the illegality of the contract between Connolly and the Consumers Cordage Co. was raised in the pleadings. Connolly obtained judgment upon his action. The case went to the Court of Review where the judgment was confirmed. It was then taken to the Supreme Court from the Court of Review. In the Supreme Court the Judges noticed indications in the evidence of illegality in the contract and they ordered a re-hearing, upon that question of illegality. When the re-hearing of the case was called one of the Judges refused to sit, and the re-hearing failed and the case was set down for judgment upon facts. The judgment of the Court below in favour of plaintiff, was modified as to amount.

Girouard, J., expresses an opinion which he supported by numerous French authorities, that notwithstanding the illegality of the contract participated in by both parties, anything which had been given by one party to the other in virtue of that illegal

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contract can be recovered back by the party giving it, although he was himself a party to the illegality. That case went to the Privy Council and was judged by the Privy Council (1903) 89 L.T. 347. The Judges in the Privy Council noticed that although no reference was made to illegality of the contract in the pleadings submitted to the Courts below, yet that question of illegality had been mentioned in the Supreme Court.

The case was accordingly sent back to the Superior Court for evidence on that question. I do not find any further reports concerning that case.

In this judgment of the Privy Council there is evidently the assumption that the Court would not follow the opinion expressed by Girouard, J., that the plaintiff in that case can recover back his money, although he was a party to the illegality of the contract.

Said question has been several times before our Courts. In the case of *Lecker* v. *Balthazar* (1908), 15 Rev. de Jur. 1. The case came before Tellier, J. The holding was as follows: "By the terms of arts. 13, 989-99 of the Civil Code, obligations contrary to good morals are absolutely null; they render unworthy those who engage in them and they cannot claim the execution of them before the Courts." This case afterwards went into appeal, and the same doctrine was maintained there. It was a question of the lease of a house for the purpose of prostitution. The same doctrine was maintained by the Courts of Appeal still more recently, in another case of which I have not the name before me.

The change in opinion of law writers in French arose out of what was considered the absolute nullity of a contract founded upon an illegal or immoral consideration and upon the article of the Code which declares that such a contract can produce no effect. They held that it would be a very substantial effect if it prevented even the party who was a party to the illegality from suing for the recovery of money which had been paid by him without any legal cause.

In my opinion that is pushing logic to an unreasonable extent. The other maxim to which I have referred has been a maxim originating in the Roman law and which has penetrated into the laws of all civilised countries and has been regarded as a maxim in this country always. I cannot find any authorities in the judgments of our Courts where it has been denied. There is also a

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tendency in the French jurisprudence to moderate the universal application of the maxim that what is null can produce no effect.

Our art. 768 appears to be drawn from art. 908 of the C.N., which, however, does not speak of the concubine with whom a man has lived, but only of children, and limits donations to such children to a certain amount. Text writers and jurisprudence were engaged in a conflict as to whether one of the parties to the immoral relations could sue for the recovery of sums beyond the limit allowed, and these opinions appeared to be tending towards an affirmative answer. Thereupon the article was amended by providing that such incapacity could only be invoked by the descendant or ascendant or brothers and sisters of the donor, which would be an application of the principle, that the party cannot found an action upon his turpitude.

Our art. 768 permits donations to a concubine to a sum necessary for aliment. To that extent then the donation is valid. The present action assumed his total invalidity on the ground that the cause of the donation being immoral, no effect can be produced by it, and the donor himself, though a party to the immorality, can recover the amount. The action then ought to have been taken, if it could be taken at all, by the plaintiff under art. 768, and ought to have alleged that the donation was beyond what was necessary for aliment and ought to have been brought only for the return of that portion exceeding the amount which can be legally given. Here no such allegations have been made; no such an issue has been joined; and naturally no proof was relevant on that subject.

I am therefore of opinion then that the plaintiff as a party to the immoral foundation for the gift in question is not entitled to come into Court to ask for a revendication of the property which he gave to the defendant in virtue of or in consideration of the immoral relations existing between them; and second, that even if he could do so under art. 768 he could only do so to the extent of the surplus of the said donation beyond what was necessary for the aliment of the defendant, and that having raised no such an issue, the present action is unfounded.

L. Camirand, for plaintiff; *G. A. Marsan*, K.C., for defendant.

de Lorimier, J.

DE LORIMIER, J.:—The plaintiff claims, under three actions of attachment in revendication, taken one after the other; goods which he gave the defendant after having bought them for her

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and conveyed them to a residence rented by him in Montreal in order to furnish such residence and there live in concubinage with her. The evidence shews this.

There is no doubt that the consideration of such gift is immoral and that the gift itself is void. The question is whether, under these circumstances, the recovery of the article given, or the attachment of the goods given, as in the present case, can be granted. The Judge of the Court of first instance decided in the negative.

The authorities and the jurisprudence are unanimous in saying that if the matter is illegal the contract is void; but when it is a question of the recovery of the article given, they are not agreed. The old commentators would not allow recovery in a case of contract having as its object something contrary to public order and good morals, whilst more modern commentators are rather inclined to allow it.

Girouard, J., who gave the judgment of the majority of the Supreme Court in the case of *Consumers Cordage Co.* v. *Connolly*, 31 Can. S.C.R. 244, deals elaborately with the question, and comes to the conclusion that recovery should be granted in all cases where the matter is "prohibited by law or is contrary to good morals or to public order." This judgment was not unanimous. However, the Judge provides against cases where the Court ought not to intervene; for example, in the case of one who was paid to commit a murder. There are, therefore, exceptions to the rule which he lays down.

Pothier, also, gives instances where he shews that, when the matter offends good morals, recovery should not be had. See also *Langlais* v. *La Caisse d'Economie* (1893), 4 Que. S.C. 65, and *McKibbin* v. *McCone* (1898), 16 Que. S.C. 126.

In the case of *Lapointe* v. *Messier* (1914), 17 D.L.R. 347, 49 Can. S.C.R. 271, Fitzpatrick, C.J., seemed to make a distinction between an illegal and an immoral matter, and says, 17 D.L.R. at p. 351: "It is said in the respondent's factum that *Consumers Cordage Co.* v. *Connolly*, 31 Can. S.C.R. 244, decided in this Court, is based upon modern French jurisprudence, but that is not the case. As far back as 1839, the French Courts began to restrict the application of the Roman maxims *nemo auditur*, etc. and *quod nullum est nullum producit effectum* . . . and to-day it is universally admitted that they do not apply where the obligation is based on an illicit, as distinguished from an immoral, cause."

The result of these expositions of the law was that the majority of the decisions in France up to the year 1913, refused actions for restitution in all cases where the cause was immoral. See Mignault, vol. 5, p. 332.

Larombière, on art. 1133, No. 29, vol. 1, p. 332, and Aubry and Rau, vol. 4, p. 741, cited in *Rolland and La Caisse d'Economie*, lay down the same rule.

I think we should decide the present case in the light of these principles and declare that the recovery of the article given cannot be allowed when the subject matter is immoral and offends good morals. Arts. 768, 989, 990 and 1047 C.C. (Que.) may be read on this point.

By art. 768 gifts, like that with which we are now concerned, "are limited to maintenance"; the result is that gifts which are not for maintenance are not allowed, and they are not allowed because their consideration is immoral and void under arts. 989 and 990.

But, it is said, if such gifts are void, the parties ought to be put in the position that they were before the gift. This would be true if the donee received it "through error of fact or of law," as art. 1047 says, and if, moreover, the matter was not immoral, as I have just stated. These principles are old law as well as being ours, art. 2631 C.C. (Que.).

When matter is immoral, I would be inclined to completely ignore the parties and put them out of Court. Some authorities uphold this principle in order to discourage those who would be disposed to make similar gifts.

However this may be, the parties in the present case have acted knowingly; both knew what they were doing; the one was not giving because he was under a misapprehension; he cannot allege that the other profited at his expense, since he gave it with full knowledge of the situation.

The principle which is the basis of the doctrine of recovery is that one must not profit to the detriment of another; now, here the plaintiff cannot set it up in his own favour because he parted with it voluntarily. The plaintiff admits that the gift is void and maintains that under art. 768 C.C. the defendant could only have a right to maintenance. Now, he states, the goods seized are not for maintenance.

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It is to be noted that the plaintiff seized, by one action, a phonograph; this instrument is a luxury, and not maintenance (aliment). The defendant claims that he gave it to her for a birthday present. This does not negative it having been given for immoral purposes. It follows that, as to articles which are aliments, the defendant can keep them, because such a gift is allowed, and that as to articles which are not aliments, the plaintiff cannot require their return by reason of immorality.

The question of costs is raised, whether, if the matter is immoral, the parties should not be put out of Court without costs. The plaintiff had no right, as I have just shewn, to take these actions for recovery; it follows, therefore, that he must bear the costs. In any case, should the plaintiff not have taken one action instead of three, and should he not have brought in reduction of the donation, since certain of the movables seized might be considered as aliments? The judgment appealed from so decided. I think, moreover, that the Judge of the Court of first instance, taking all the circumstances into consideration, used his discretion as to costs, and I am not disposed to interfere.

For these reasons, I would confirm the judgment appealed from, with costs.

These notes of judgment apply to the three actions brought by the same plaintiff against the same defendant, which have been joined. *Appeal dismissed.*

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McMILLAN v. CANADIAN NORTHERN RAILWAY Co.

Saskatchewan Court of King's Bench, Bigelow, J. November 30, 1920.

DOMICIL (§ I—I)—MASTER AND SERVANT—EMPLOYEE DOMICILED IN ONTARIO—ACCIDENT IN ONTARIO—WORKMEN'S COMPENSATION ACT—JURISDICTION OF SASKATCHEWAN COURTS TO AWARD DAMAGES.

The plaintiff was in the employ of the defendant as a locomotive fireman, then domiciled and working at Rainy River, Ontario, when an accident happened, caused by the negligence of a fellow employee. The plaintiff brought an action in Saskatchewan and the jury fixed the damages at $10,700.

Held, that as the plaintiff was domiciled in Ontario at the time of the accident and the Ontario statute (the Workmen's Compensation Act, 4 Geo. V. 1914, ch. 25, and amendments) gave the Board under that Act exclusive jurisdiction, the plaintiff had no right of action in Saskatchewan.

[*Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1; *The "M. Moxham"* (1876), 1 P.D. 107; *Machado* v. *Fontes*, [1897] 2 Q.B. 231, distinguished; *C.P.R. Co.* v. *Parent*, 33 D.L.R. 12, [1917] A.C. 195, 20 Can. Ry. Cas. 141, applied].

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Bigelow, J.

ACTION for damages for injuries received in an accident by the plaintiff, a locomotive fireman, working for the defendant, the accident being caused by the negligence of a fellow employee. Action dismissed.

D. Campbell, for plaintiff.

J. N. Fish, K.C., and *O. H. Clark*, K.C., for defendant.

BIGELOW, J.:—On November 12, 1918, the plaintiff was in the employ of the defendant as a locomotive fireman, then domiciled and working at Rainy River in the Province of Ontario. On that date an accident happened at Rainy River aforesaid causing the plaintiff injury. The accident was caused by the negligence of a fellow employee. The plaintiff brings this action in Saskatchewan, and a jury has fixed his damages at $10,700. Has the plaintiff a right of action in Saskatchewan?

The plaintiff relies on the principles as stated in 6 Hals., para. 369, and such leading cases as *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1; *The "M. Moxham"* (1876), 1 P.D. 107; *Machado* v. *Fontes*, [1897] 2 Q.B. 231.

6 Halsbury, para. 369, p. 248, states:—

> Over torts committed in England the English Courts have jurisdiction whatever the nationality of the parties may be, but different considerations arise when an action is brought in England in respect of a personal tort committed abroad. In such a case the English Courts do not assume jurisdiction unless the act complained of is both actionable in England and at the same time not justifiable by the law of the place where it was done.

In *Machado* v. *Fontes*, [1897] 2 Q.B. 231 at 234-235, Rigby, L.J., states:—

> Willes, J., in *Phillips* v. *Eyre*, L.R. 6 Q.B. 1, was laying down a rule which he expressed without the slightest modification, and without the slightest doubt as to its correctness; and when you consider the care with which the learned Judge prepared the propositions that he was about to enunciate, I cannot doubt that the change from "actionable" in the first branch of the rule to "justifiable" in the second branch of it was deliberate. The first requisite is that the wrong must be of such a character that it would be actionable in England. It was long ago settled that an action will lie by a plaintiff here against a defendant here, upon a transaction in a place outside this country. But though such action may be brought here, it does not follow that it will succeed here, for, when it is committed in a foreign country, it may turn out to be a perfectly innocent act according to the law of that country; and if the act is shewn by the law of that country to be an innocent act, we pay such respect to the law of other countries that we will not allow an action to be brought upon it here. The innocency of the act in the foreign country is an answer to the action. That is what is meant when it is said that the act must be "justifiable" by the law of the place where it was done.

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In the Province of Ontario, the Workmen's Compensation Act, 4 Geo. V. 1914, ch. 25, sec. 15, as amended by 5 Geo. V. 1915, ch. 24, sec. 8, provides:

15.—(1) The provisions of this part shall be in lieu of all rights and rights of action, statutory or otherwise, to which a workman or his dependants are or may be entitled against the employer of such workman for or by reason of any accident happening to him on or after the first day of January, 1915, while in the employment of such employer, and no action in respect thereof shall lie.

(2) Any party to an action may apply to the Board for adjudication and determination of the question of the plaintiff's right to compensation under this Part, or as to whether the action is one the right to bring which is taken away by this Part, and such adjudication and determination shall be final and conclusive.

And sec. 60 of the same Act, 4 Geo. V., ch. 25, provides:

60.—(1) The Board shall have exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part and as to any matter or thing in respect to which any power, authority or discretion is conferred upon the Board, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any Court, etc.

The statutes of Ontario having provided for exclusive jurisdiction over the matter in question, the defendant contends that the Saskatchewan Courts cannot entertain this action. In 6 Hals., para. 369, the author states that "the jurisdiction of the English Court can only be ousted by proving an exclusive jurisdiction over the matter by the Courts of the foreign country," and he cites the case of *The Buenos Ayres and Ensenada Port R. Co.* v. *Northern R. Co.* (1877), 2 Q.B.D. 210, the head-note of which is as follows:—

Action for rent of premises situated abroad—Jurisdiction of the English Courts—Domicile of parties—Act of state.

Claim, stating that the plaintiffs and defendants were each of them limited companies, with registered offices in London; that the action was brought for rent of a railway station in Buenos Ayres (into possession of which the defendants were put by the plaintiffs), and for part of the cost of constructing lines of railway and approaches to the station. Defence, that the plaintiff and defendant companies were domiciled in the Argentine Republic, and carried on business there; that the premises in question were constructed on land which was the property of the Republic, and that the plaintiffs and defendants were joint concessionaries under the Republic of certain easements appurtenant thereto. That the construction of the premises was directed by the Government of the Republic, and was for the benefit and convenience of the citizens of Buenos Ayres, and that by the laws of the Republic powers of adjusting all rights arising out of the construction, and applicable to the claim of the plaintiffs were vested in the Government, and that the contract (if any) as to the cost of the construction was made at Buenos Ayres, and was subject to the law of the place of contract, and that

the Republic had assumed jurisdiction over the plaintiffs' claim:—*Held*, on demurrer, that the defence was bad, as both parties to the action were within the jurisdiction of the English Courts, and the facts alleged did not shew that the Argentine Republic had exclusive jurisdiction over the claim.

In *C.P.R. Co.* v. *Parent*, 33 D.L.R. 12, [1917] A.C. 195, 20 Can. Ry. Cas. 141, a man domiciled in Quebec was killed in an accident in Ontario. The widow sued in Quebec. It was held that upon the principles of private international law the appellants were under no common law liability in Quebec, since they were neither civilly nor criminally liable in Ontario.

Viscount Haldane, in giving the judgment of the Court, states, 33 D.L.R. at 17:—

It follows that, as the statute law of Ontario, the Province where the accident occurred which caused Chalifour's death, did not confer on any one claiming on his account a statutory right to sue, there was, so far as Ontario is concerned, no other right. For in Ontario the principle of the English common law applies, which precludes death from being complained of as an injury. If so, on the general principles which are applied in Canada and this country under the title of private international law, a common law action for damages for tort could not be successfully maintained against the appellants in Quebec. It is not necessary to consider whether all the language used by the English Court of Appeal in the judgments in *Machado* v. *Fontes* was sufficiently precise. The conclusion there reached was that it is not necessary, if the act was wrongful in the country where the action was brought, that it should be susceptible of civil proceedings in the other country, provided it is not an innocent act there. This question does not arise in the present case.

In *Phillips* v. *Eyre*, L.R. 6 Q.B., at p. 29, Willes, J., in giving judgment of the Court, said:—

As to foreign laws affecting the liability of parties in respect of bygone transactions, the law is clear that, if the foreign law touches only the remedy or procedure for enforcing the obligation, as in the case of an ordinary statute of limitations, such law is no bar to an action in this country; but if the foreign law extinguishes the right it is a bar in this country equally as if the extinguishment had been by a release of the party, or an act of our own Legislature. This distinction is well illustrated on the one hand by *Huber* v. *Steiner* (1835), 2 Bing. (N.C.) 202, 132 E.R. 80, where the French law of five years' prescription was held by the Court of Common Pleas to be no answer in this country to an action upon a French promissory note, because that law dealt only with procedure, and the time and manner of suit (*tempus et modum actionis instituendæ*), and did not affect to destroy the obligation of the contract (*valorem contractus*); and on the other hand by *Potter* v. *Brown* (1804), 5 East 124, 102 E.R. 1016, where the drawer of a bill at Baltimore upon England was held discharged from his liability for the non-acceptance of the bill here by a certificate in bankruptcy, under the law of the United States of America, the Court of Queen's Bench adopting the general rule laid down by Lord Mansfield in *Ballantine* v. *Golding* (1823), 1 Cooke's Bank-

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rupt Law 487, and ever since recognized, that "what is a discharge of a debt in the country where it is contracted is a discharge of it everywhere." So that where an obligation by contract to pay a debt or damages is discharged and avoided by the law of the place where it was made, the accessory right of action in every Court open to the creditor unquestionably falls to the ground. And by strict parity of reasoning, where an obligation, *ex delicto*, to pay damages is discharged and avoided by the law of the country where it was made, the accessory right of action is in like manner discharged and avoided.

Because the plaintiff was domiciled in Ontario at the time of the accident and the Ontario Statute gives the Board under the Workmen's Compensation Act exclusive jurisdiction in the matter in question, I am of the opinion that the defendant's contention must prevail, and therefore the plaintiff's action is dismissed with costs. *Action dismissed.*

CAN.

EX. C.

THE KING v. MIDDLETON CHURCH TRUSTEES.

Exchequer Court of Canada, Audette, J. September 23, 1920.

EXPROPRIATION (§ III C—135)—CEMETERY—SAND AND GRAVEL DEPOSITS—COMMERCIAL VALUE—VALUE TO OWNERS.

Property vested absolutely in trustees for cemetery purposes has no commercial value because of sand and gravel deposits contained on it and the value of these cannot be considered in estimating its value as a cemetery on expropriation proceedings.

Statement.

INFORMATION filed by the Attorney-General for Canada for the expropriation of a part of a cemetery for the purposes of the Intercolonial Railway, a public work of Canada.

J. L. MacKinnon, for plaintiff.

L. A. Lovett, K.C., and *J. A. Sedgwick*, for defendant.

Audette, J.

AUDETTE, J.:—This is an information exhibited by the Attorney General for Canada, whereby it appears, *inter alia*, that certain lands, belonging to the defendants, were taken and expropriated by the Crown, under the provisions of the Expropriation Act, R.S.C. 1906, ch. 143, for the purposes of the Intercolonial Railway, a public work of Canada, by depositing, on September 21, 1917, a plan and description of such land, in the office of the registrar of deeds for the county of Halifax, Province of Nova Scotia.

The area taken is 0.674 of an acre—very nearly three-quarters of an acre—for which the Crown offers the sum of $400.

The defendants, by their plea, claim:—

(a) To be reinstated. (b) In the alternative for the acquisition of new land, underdrainage of same, removing the soil therefrom

to the depth of 6 feet and replacing the same with similar gravel to that expropriated, $6,000. (c) In the alternative, for 16,000 cubic yards of gravel removed at 25 cents per yard, $4,000. (d) In the alternative for 88 burial lots, taken at $10 per lot, $880, and for direct and consequential damage to remaining part of cemetery and to cemetery as a whole, $1,000—$1,800.

This piece of land so expropriated formed part of a Presbyterian cemetery, of about three acres in size, at Middle Musquodoboit, N.S., purchased by the defendants, under statutory power hereinafter referred to, on April 8, 1908, for the sum of $150, as appears by the deed of sale filed herein as exhibit J.

When the officials of a railway take upon themselves the responsibility of interfering with a cemetery, for the sole purpose of getting gravel—not even for their right of way—should they not expect this callous step involves the payment of a very adequate compensation for this interference with the field of the dead, when gravel is available elsewhere?

The nature of the soil is gravel and sand, and it is considered as the best material for cemetery purposes.

The population of Middle Musquodoboit, under the last census, is 1,000—and under witness Bishop's estimate it is composed of about one-third of Methodists, and two-thirds of Presbyterians, although that estimate is criticised by witness Guild, who contends that the population is composed of not even a quarter of the Methodist denomination. Both denominations have a separate cemetery. There are 110 families belonging to the Presbyterian denomination, and we have it stated in evidence that the farming districts in Nova Scotia have not increased in the last 30 or 40 years.

The new Presbyterian cemetery was opened in 1912 or 1913—and there is also the old cemetery which is still open and used by a part of the population—and the lots in the new cemetery are being sold at $10 each.

The defendants were duly incorporated under the name of Trustees of Middleton Presbyterian Church of Middle Musquodoboit, by an Act of the Nova Scotia Legislature, in 1896, 59 Vict. ch. 116, and by an Act of the same Legislature, in 1908, 8 Edw. VII. ch. 198, the trustees were authorised and empowered to purchase the 3 acres in question herein for cemetery purposes. By sec. 2, thereof, these lands were:—

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absolutely vested in the said trustees and their successors in office forever, in trust nevertheless for cemetery purposes in connection with the said congregation, and the said lands and every part thereof shall be used solely for such cemetery and for no other purpose whatsoever.

It appears from the evidence of John B. Archibald that 0.30 of an acre, of this new 3 acre cemetery, was on April 1, 1915, sold by the trustees to the Crown for the sum of $100. This piece of land is said to have been so sold to give access to the Bruce property, and it is contended that it was taken from the flat below, where the land is wet and low and valueless for cemetery purposes, although, as appears by the several plans filed at trial, that part was also divided in burial lots.

The first sale decreased the area of the cemetery and the present expropriation has also had the further effect of decreasing its size; but, does it really remain so small as to be useless, as not answering the requirements of the community for a long time to come, when used conjointly with the old cemetery in existence for over 100 years, and of a much smaller size? I am unable to answer this question in the affirmative.

However, be that as it may, the defendants are entitled to a fair compensation to the extent of their loss, and that loss is to be tested by what was the value at the date of the expropriation of such piece or parcel of land to them, with the statutory title above mentioned.

The value of the land to the taker, the party expropriating, is no test or criterion for arriving at the compensation. The nature of the trustee's title takes the property out of the market for commercial purposes and it has no value as such.

The defendants own the property solely for cemetery purposes, and it could not be used for any other purpose.

The consideration of the value of the gravel and sand—the nature of the soil, is no test, as is well established by a long catena of cases. It is, I repeat, the value to them for cemetery purposes that must be considered. See *Stebbing* v. *Metropolitan Board of Works* (1870), L.R. 6 Q.B. 37; *Manmatha Nash Mitter* v. *Secretary of State for Indian Council* (1897), L.R. 24 Ind. App. 177; *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.*, [1901] A.C. 373; Browne & Allan—Law of Compensation, 97, 153; Cripps on Compensation, 102, 103; Hudson on Compensation, 301, 302, 1192; Nichols on Eminent Domain, 212.

I am unable to find, as stated in the evidence, that 88 lots were taken by the present expropriation—I cannot find that quantity on the plans filed.

It was conceded on the argument at Bar that re-instatement was impossible under the circumstances.

The whole of the cemetery is subdivided on plans, but such subdivision is not all plotted on the ground. To collect $10 a lot upon the land expropriated, the trustees would have to expend a certain amount of money.

Taking all the circumstances of the case into consideration, I will allow for the land taken, which, after proper allowance being made for roads, clearing, grubbing, seeding, etc., would sell at $10 a lot—a sale spread perhaps over a number of years—the lump sum of $600 and for the expenditure in the correction and alteration of roads, occasioned by the expropriation, together with the unsightly appearance of the land on the expropriated side, the total sum of $150, making in all the sum of $750.

There will be judgment, as follows, to wit:

1st. The lands expropriated herein are hereby declared vested in the Crown from the date of the expropriation. 2nd. The compensation for the land so taken, and for all damages resulting from the said expropriation is hereby fixed at the sum of $750, with interest thereon from September 21, 1917, to the date hereof. 3rd. The defendants are entitled to recover from the plaintiff the said sum of $750 with interest as above mentioned, in full satisfaction for the land taken, and for all damages resulting from the expropriation, upon their giving to the Crown a good and sufficient title free from all mortgages or encumbrances whatsoever upon the said property. 4th. The defendants are also entitled to the costs of the action. *Judgment accordingly.*

EMMETT v. MEIGS.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. December 8, 1920.

COPYRIGHT (§ I—8)—GUIDE BOOK—INFRINGEMENT.

It is an infringement of a copyright for a subsequent compiler of a guide book to take any information from the copyrighted book; the only use he can make of the previous publication is to verify his calculations and results after independently working out the subject matter for himself.

[*Kelly v. Morris* (1866), L.R. 1 Eq. 697, followed.]

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EMMETT v. MEIGS.

APPEAL by plaintiff from the judgment at the trial dismissing the plaintiff's action for infringement of a copyright. Reversed.

D. S. Moffatt, for appellant.

I. W. McArdle, for Meigs and Hollenbeck, respondents.

D. M. Stirton, for Western Printing & Lithographing Co., respondent.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The plaintiff has for several years been the publisher of an automobile road guide for Manitoba, Saskatchewan and Alberta. The issue for 1919 is called the 7th edition, that for 1918 the 6th. After the publication of the 1919 edition the defendants published an automobile road guide for Canada and United States and in doing so the plaintiff claims that they infringed his copyright of his 1919 edition.

The defendants' guide gives particulars of many roads not included in the plaintiff's guide but there are many common to both though in most cases the particulars of the plaintiff's guide book are much fuller but in both the chief places on the road are given with the mileage from place to place.

In *Kelly* v. *Morris* (1866), L.R. 1 Eq. 697, which was an action for infringement of copyright of a directory, Wood, V.-C., said, at pp. 701, 702:—

> In the case of a dictionary, map, guide-book or directory when there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done. In case of a road book he must count the milestones for himself . . . He is not entitled to take one word of the information previously published without independently working out the matter for himself . . . and the only use that he can legitimately make of a previous publication is to verify his own calculations and results when obtained.

The plaintiff swears that all the information in his guide book is obtained from actual observation and measurements. The defendant admits that he did not so obtain the material for his guide book but denies that he obtained any of it from the plaintiff's guide books. His explanation of the manner in which he did obtain it is by no means convincing and apparently did not convince the trial Judge, Scott, J., for he expresses the view that the material for the defendants' guide book was taken from the plaintiff's 1918 guide book and gives leave to amend. It was found, however, that at the time of trial the 1918 guide book had no copyright and the action was therefore dismissed with costs.

A comparison of the particulars in the two books of one route in respect of which the plaintiff claims an infringement that from Winnipeg to Elkhorn, shews that of 24 distances shewn, 8 differ from those shewn in the defendant's 1918 edition, and of these 7 correspond with the plaintiff's 1919 edition, 4 of which are corrections from the 1918 edition, and in addition two new places and distances are given which are in the plaintiff's 1919 edition, but not in either 1918 editions. I find myself quite unable to accept the defendants' testimony that he did not use the plaintiff's book to obtain this material and in doing so he was infringing the plaintiff's copyright.

In my opinion this establishes the plaintiff's right of action and in view of the fact that since action was begun practically the whole edition complained of has been burned by accidental fire there is little more for the plaintiff to gain. He is of course entitled to a permanent injunction restraining the publication of the book with the objectionable matter. He also asks for a reference as to damages. He is perhaps entitled to that as a matter of strict right, but as the evidence does not indicate any material damage the direction for a reference should be subject to the condition that if the reference is taken and no substantial damage shewn the costs of the reference shall be borne by the plaintiff.

One of the defendants is the publishing company, whose infringement has been an innocent one and without knowledge.

The plaintiff maintains that notwithstanding that fact it should be held liable to him for all the costs of the action and the appeal.

The defendant Meigs apparently had not sufficient means to pay for the publication and he entered into an arrangement with the company for the publication by it at its expense, its compensation being secured by an agreed division of the expected receipts. The plaintiff originally did not make the company a party but on the usual undertaking as to damages of the defendant he obtained an interim injunction restraining publication which was served on the company. The main expense had then been incurred and in view of the ephemeral nature of the book an injunction of even a few months would be of great consequence to it and in order that it might obtain some security against damage due to the

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injunction order if wrongly made as to which it was ignorant it asked to be made a party and have an order made for its protection. This was done and the action then proceeded. I cannot see that the company thereafter took any further part in the contract than was reasonably necessary to protect its own rights and I can see no good reason why it should be required to pay all the costs which have been caused, none of which are due to any wrongdoing on its part. I think the costs payable by it should be limited to the additional costs which are due to its becoming and being a party.

Subject to this, I would allow the appeal with costs and direct judgment as above indicated in favour of the plaintiff with costs. I am authorised by my brother Beck to say that he concurs in this result. *Appeal allowed.*

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EX. C.

THE KING v. MURRAY AND HATT.

Exchequer Court of Canada, Audette, J., September 23, 1920.

EXPROPRIATION (§ III C—135)—FARM PROPERTY—VALUE IF SUBDIVIDED INTO BUILDING LOTS—PRESENT VALUE OF PROSPECTIVE ADVANTAGES.

The compensation for a farm expropriated by the Crown under the Expropriation Act is to be based on the value to the owners at the date of the expropriation taking into account all the prospective potentialities but only the existing value of such advantages at the date of the expropriation.

Statement.

INFORMATION filed by the Attorney-General for Canada for the expropriation of property of the defendants for use as a seaplane station at Eastern Passage, Dartmouth, Nova Scotia.

R. H. Murray, K.C., for plaintiff.

R. T. MacIlreith, K.C., and *C. Tremaine*, for defendants.

Audette, J.

AUDETTE, J.:—This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands, belonging to the defendants, were taken and expropriated by the Crown, under the provisions of the Expropriation Act, for the use, construction and maintenance of a seaplane station at Eastern Passage, on the Dartmouth side of Halifax Harbour, N.S., by depositing, on August 19, 1918, and November 6, 1918, respectively, plans and descriptions of such lands, in the office of the registrar of deeds for the county of Halifax, N.S.

The area taken is 19.31 acres for which, it is admitted, the Crown tendered, on August 29, 1918, the sum of $13,660 for the lot first described in the information, and the sum of $2,700 for the second

lot, on January 14, 1919. Both tenders were refused. The expropriation takes the best and most valuable part of the farm upon which the buildings were erected.

The defendants by their plea, claim that the sum of $16,360 is insufficient and ask a larger and further compensation and relief.

Accompanied by counsel for both parties, I have had the advantage of viewing the *locus in quo* which is situate at about 4 miles from Dartmouth.

At the date of the expropriation the property in question was used and worked exclusively for farming purposes—it was a farm in the full acceptation of the term. True, there had been at that time some few applications for building lots to be carved therefrom, and the owners, as part of their policy, had refused to sell finding it undesirable to interfere with the property as a whole; but, at that date, no building lots therefrom had been sold. Subsequently, as appears by the evidence, a few were sold.

As a farm, it was nothing but a very ordinary farm—below the average of what may be termed good farms. The soil, upon the part fit for cultivation, is very ordinary, and a great part of the farm to the east is rocky and covered with bushes and trees.

The compensation is to be based upon the value to the owners of land at the date of the expropriation, taking into account all its prospective potentialities, but only the existing value of such advantages at the date of the expropriation, *Trudel* v. *The King* (1914), 19 D.L.R. 270, 49 Can. S.C.R. 501, and cases therein cited.

The value of the farm for subdivision purposes must be tested by the law of supply and demand. It does not appear from the evidence that if the property had been subdivided and in the market at that date, that it could have been all sold in lots within a reasonable time. The oil works at Imperoyal have developed that locality, but there is any amount of property in that neighbourhood available for subdivision, that would be taken in preference to the lands in question.

There were options of $80,000 for the whole, and $50,000 for half of the farm, given upon this property—one of them, however, was of a very uncertain character—but such options never matured, and are very much of a speculative character. Some extravagant amounts would be arrived at, if the testimony of some of the witnesses for the owners were given heed to; but they are based upon

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public talk, especially among promoters, in the locality, built upon the comparative prices which were obtained from subdivisions in other localities. That is not of much assistance when it is sought to find the market price of this property at the date of the expropriation, especially when the demand for lots there must be admitted to be very small.

As expressed by Anglin, J., in the *Trudel* case, 19 D.L.R. at p. 279:—

> Of anything which a far-seeing purchaser would take into account in estimating what he should pay for the property . . . the owners are entitled to the benefit in fixing the value of the land for purposes of expropriation.

And indeed, when we consider the amount tendered and offered by the Crown, we must come to the conclusion that such consideration and basis have been weighed and accepted before arriving at the sum of $16,360, because that amount is far beyond the value of the property as a farm.

Viewed as a farm, with the advantage of the potentiality of being turned into subdivisions within a fairly reasonable time, the buildings, with very few exceptions, can only have a demolition value and not the value established by some of the witnesses on the basis, as to what it would cost in our days to build them anew. The dwelling house appears to have been built over 60 years ago.

At the date of the expropriation, it could not fairly be expected that this property could be all sold within a reasonable time as building lots. Sales would be very slow, and spread over a very long period, if ever they were all sold. There was no market for such a large subdivision in such locality at the date of the expropriation.

The tender and offer made by the Crown, which appears to be very reasonable under the circumstances, is based, as appears from the evidence, upon the valuation of Crown witness Morrison —but as this witness has, apparently, left out some items for which the owners should receive compensation, and upon which the witness when at trial placed additional value, I have come to the conclusion that if $2,000 be added to the tender, as representing compensation for severance, the water-lot, fence, second well, etc., etc., in fact covering all other legal elements of compensation—that a very fair and just award will be arrived at.

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Eliza Murray, one of the defendants, is vested with only a life interest in the property, and it is admitted by both parties, that she was born on October 11, 1864—she being of the age of 54 at the date of the expropriation—her life-interest is assessed, according to the tables found in Cameron on Dower, at 55.89% of the award, and Agatha Hatt at 44.11% for the reversion.

Therefore, there will be judgment as follows: 1st, the lands expropriated herein, are declared vested in the Crown as of the date of the expropriation; 2nd, the compensation for the lands taken and for all damages resulting from the expropriation is hereby fixed at the total sum of $18,350, with interest on the sum of $15,660, from August 19, 1918, to the date hereof, and on $2,700 from November 6, 1918, to the same date; 3rd, the defendants are entitled to recover from the plaintiff the said sum of $18,350 in the following proportion, viz.: Eliza Murray—for her life-interest, 55.89%, equal to $10,261.40, and Agatha Hatt, the reversion representing 44.11%, equal to $8,098.60—with interest as above mentioned—upon their giving to the Crown a good and sufficient title free from all mortgages or incumbrances whatsoever upon the said expropriated property. 4th, the defendants are also entitled to the costs of the action. *Judgment accordingly.*

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British Columbia Court of Appeal, Macdonald, C.J.A., Galliher and McPhillips JJ.A. November 16, 1920.

CONSTITUTIONAL LAW (§ I A—3)—ALIENS—EXCLUSIVE JURISDICTION OF DOMINION PARLIAMENT—JAPANESE TREATY ACT, 3-4 GEO. V. 1913 ch. 27—RIGHT OF PROVINCE TO INHIBIT EMPLOYMENT OF.

In all matters which directly concern aliens and naturalised persons resident in Canada, the Dominion Parliament is invested with exclusive jurisdiction by virtue of sec. 91, sub-sec. 25, of the B.N.A. Act, 1867, and a provincial Order in Council providing "that in all contracts, leases and concessions of whatsoever kind entered into . . . by the Government . . . provision be made that no Chinese or Japanese shall be employed in connection therewith" is invalid and *ultra vires*, not because of the Japanese Treaty or the Japanese Treaty Act, 3-4 Geo. V. 1913 (Can.), ch. 27, but because power to legislate was withheld by the B.N.A. Act.

[*Union Colliery Co.* v. *Bryden*, [1899] A.C. 580; *Quong Wing* v. *The King* (1914), 18 D.L.R. 121, 49 Can. S.C.R. 440, 23 Can. Cr. Cas. 113, followed.]

Statement.

REFERENCE by the Governor-in-Council to the Court of Appeal, under R.S.B.C. 1911, ch. 45, as to the Japanese Treaty Act.

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J. W. DeB. Farris, K.C., for Provincial Government.

C. Wilson, K.C., for Shingle Agency.

A. P. Luxton, K.C., for Attorney-General of Canada.

Sir C. H. Tupper, K.C., for Japanese Government.

MACDONALD, C.J.A.:—The first and second questions submitted are as follows:—

1. Does the said Japanese Treaty Act, 3-4 Geo. V. 1913 (Can.), ch. 27, operate or apply so as to limit the effect of the legislative jurisdiction or powers of the Legislative Assembly of the Province, and, if so, in what particular or respect?

2. If the said Act does not operate or apply so as to limit or affect the legislative jurisdiction or powers of the Legislative Assembly of the Province, does the said treaty itself operate or apply so as to limit the legislative jurisdiction or powers of the said Legislative Assembly, and, if so, in what particular or in what respect?

These two questions are general and comprehensive, but the argument of counsel was confined to the concrete question of the effect of the treaty and the Treaty Act upon the powers of the Provincial Legislature in relation to the rights, duties and disabilities, in pursuit of their callings in this Province, of subjects of His Majesty the Emperor of Japan.

In my opinion, the answer to both questions is to be found in the judgment of the Privy Council delivered by Lord Watson in *Union Colliery Co. of British Columbia* v. *Bryden and The Att'y-Gen'l of British Columbia*, [1899] A.C. 580. The provincial legislation in question in that case prohibited the employment of Chinamen underground in coal mines. The decision makes it clear that in all matters, which directly concern aliens and naturalised persons resident in Canada, the Dominion Parliament is invested with exclusive jurisdiction by virtue of sec. 91, sub-sec. 25, of the B.N.A. Act, 1867.

Neither the treaty nor the Treaty Act can, in view of that decision, in strictness be said to operate or apply so as to limit or affect the legislative powers of the Province in the premises. They cannot limit or affect that which has no existence.

My answer, therefore, is that the Legislative Assembly of the Province has no jurisdiction in the premises, not because of the treaty or the Treaty Act, but because power to legislate was withheld by the B.N.A. Act.

The 3rd and 4th questions are as follows:—

3. Is it competent to the Legislature of British Columbia to authorise the Government of the Province to insert as a term of its contracts for the construction of provincial public works a provision that no Japanese shall be employed upon, about, or in connection with such works?

4. Is it competent to the Legislature of British Columbia to authorise the Government of the Province to insert as a term of its contracts and leases conferring rights and concessions in respect of the public lands belonging to the Province, including the timber and water thereon and the mineral therein, a provision that no Japanese shall be employed in or about such premises?

It follows from the answer to the 1st and 2nd questions, that it would not be competent to the Legislature to pass a law prohibiting the employment of Japanese in or about the works and premises referred to in the questions, but it was argued by the Attorney-General that the Government might, with propriety, insert in its contracts terms placing the other party under obligation to refrain from employing persons of a particular race just as the Government itself might, if it were the employer, pick and choose its employees.

The answers to the other two questions, I think, apply as well to these but, if not, then as the Treaty Act has made the treaty the law of Canada, insofar as the subjects embraced in it are within the legislative powers of Parliament, any Act or resolution of the Provincial Legislature repugnant thereto would be contrary to the Dominion statute and, therefore, beyond the competence of the Provincial Legislature to enact or pass.

It is necessary to refer to this difference between the two sets of questions: The 1st and 2nd questions affect only *Japanese subjects*. The 3rd and 4th questions refer to "*Japanese*," a description which may refer not only to a nationality but to race irrespective of nationality.

In the case to which reference has already been made, the Privy Council had to determine what was meant by the description "Chinaman" in the statute there in question and came to the conclusion, in the circumstances of that case, that the statute was aiming at both alien and naturalised Chinese and that, as to both classes, their rights and disabilities were in the hands of the Dominion Parliament. It may, therefore, be accepted that the description "Japanese," in the 3rd and 4th questions, embrace both alien and naturalised Japanese. Those of that race, who are

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natural born British subjects, may, and I think, do, in relation to their civil rights, in the pursuit of their callings, come within a class by themselves. No argument was presented by counsel upon this aspect of the matter and the questions themselves do not go the length of requiring the Court to determine the powers of the Provincial Legislature in respect of the civil rights in the Province of any race whose rights lie outside the subject of "naturalisation and aliens" assigned to the Dominion.

Galliher, J.

GALLIHER, J.A.:—I agree in answering the questions submitted to the Court in above matters with the conclusion of Macdonald, C.J.A., for the reasons given by him in his judgment just handed down.

McPhillips, J.A.

MCPHILLIPS, J.A.:—The questions submitted have been very ably presented at the Bar by the Attorney-General for British Columbia and the counsel representing interests claimed to be affected by the inhibitory clauses as contained in contracts and leases of the Crown entered into by His Majesty in the right of the Province of British Columbia. The Attorney-General contended that the Japanese Treaty Act, 1913, 3-4 Geo. V (Can.), ch. 27, was not passed in pursuance of sec. 132 of the B.N.A. Act, 1867, 30-31 Vict., ch. 3 (Imp.), but that it must be assumed to have been passed in exercise of powers under sec. 91 (2) of the B.N.A. Act, relative to "The Regulation of Trade and Commerce" and be confined to such matters. With deference, I do not so view the legislation. It would seem to be in conformity with sec. 132 of the B.N.A. Act and the ambit of the legislation is to legalise and implement the provisions of the Japanese Treaty and render it obligatory throughout Canada to the full extent of the powers delegated by the Sovereign Parliament to Canada and all the Provinces, save as in the Act is provided (see sec. 2, sub-secs. (a) and (b) of 3-4 Geo. V. 1913, ch. 27). The manner and form of the legislation is not of moment and cannot be the subject of any judicial comment or restriction. The Sovereign Parliament of Canada in the full exercise of its powers—as extensive as the Imperial Parliament in such matters—has by statutory enactment given its adhesion to and imposed upon Canada and all the Provinces the treaty obligations as contained in the Japanese Treaty. Neither do I consider that it is the province of the Court to observe upon, or attempt to hold, that the enactment was in

its nature anticipatory in respect to any provincial obligations, none being, as is contended, then existent. The legislation must, according to the true application of the canons of construction of statute law, be given effect to, wherever possible, and I see no insuperable or other barriers in the way. The Japanese Treaty, 3-4 Geo. V. 1913, ch. 27, sec. 2, "to have the force of law in Canada," must be held to be destructive of all that has gone before save as in the Act is provided, *i.e.*, it is legislation affecting all enactments *in presenti* as well as *in futuro*. Nothing may be done in derogation of this statute law to the end that the Treaty obligations may be conformed to by Canada and the Provinces. I cannot see that anything is to be gained by, nor do I—with the greatest of deference to His Honour the Lieutenant-Governor and his Executive Council—consider that it should be required of the Court of Appeal to answer in detail questions 1 and 2, wherein they are purely academic and it may possibly be that it is not so intended, as at best the views of the Court could not be said to be other than *obiter dicta*. (See Lord Loreburn, L.C., in *Dominion of Canada* v. *Province of Ontario*, [1910] A.C. 637, 80 L.J. (P.C.), 32 at 34, 2nd so last paragraph, 2nd column.) The concrete matters are set forth in questions 3 and 4, which read as follows: [See judgment of Macdonald, C.J.A., ante p. 71].

That the inhibitory provisions are not contained in any statutory enactment of the Province, in my opinion, is not an effective answer, as admittedly they have been inserted following the passage of a resolution of the Legislative Assembly of the Province of British Columbia, of date April 15, 1902, which resolution was in the following terms:—

> That in all contracts, leases and concessions of whatsoever kind entered into, issued or made by the Government, or in behalf of the Government, provision be made that no Chinese or Japanese shall be employed in connection therewith.

Following this resolution an Order in Council was passed, of date June 16, 1902, which provided "that a clause embodying the provisions of the resolution be inserted in all instruments issued by officers of the Government for the various purposes above quoted."

The application of the resolution by the Order in Council referred to, was to be held to extend to all instruments issuing under the Land Act, Coal Mines Act, Water Clauses Consolidation

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Act, Public Works contracts, the terms of which are not prescribed by statute and the Placer Mining Act. In practice the resolution was given general application and imposed in all contracts, leases and other instruments executed by and in behalf of His Majesty in the right of the Province of British Columbia. Turning to the Interpretation Act, R.S.B.C. 1911, ch. 1, sec. 26, sub-sec. 4, we see that the "Lieutenant-Governor-in-Council" means the "Lieutenant-Governor of British Columbia or person administering the Government of British Columbia for the time being, acting by and with the advice of the Executive Council of British Columbia." It follows that the Order in Council, in its terms, cannot any longer "have the force of law" (3-4 Geo. V. 1913, ch. 27), in the Province—if it at any time had the force of law—in view of the provisions of the Japanese Treaty Act, 1913, and sec. 132 of the B.N.A. Act, *i.e.*, the Lieutenant-Governor-in-Council must perform the obligations of the Province as contained in the Japanese Treaty given the force of law throughout Canada and the respective Provinces as set forth in the Japanese Treaty Act, 1913.

I do not find it necessary to enter into the detail as to what power relative to, say, "Property and Civil Rights in the Province." (sec. 92, sub-sec. 13, B.N.A. Act), may not still be exercised without thereby infringing upon the obligations imposed by the Japanese Treaty *when the legislation is general in its application to all residents of the Province.*

We have seen that "political rights" are not beyond the powers of the Provinces and, in passing, it might be said that the Japanese Treaty does not impose any obligations of this nature. The Lord Chancellor (Earl of Halsbury) in *Cunningham and Att'y-Gen'l for British Columbia* v. *Tomey Homma and Att'y-Gen'l for Canada*.

[1903] A.C. 151, at pp. 156-157:—

> A child of Japanese parentage born in Vancouver city is a natural-born subject of the King, and would be equally excluded from the possession of the franchise . . . Could it be suggested that the Province of British Columbia could not exclude an alien from the franchise in that Province? . . . The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality . . . It is obvious that such a decision (*Union Colliery*

Co. v. *Bryden*, [1899] A.C. 580) can have no relation to the question whether any naturalised person has an inherent right to the suffrage within the Province in which he resides.

It follows that wherever there is legislation, be it legislation of the Parliament of Canada or legislation of any of the Parliaments of the Provinces of Canada, in conflict, repugnant and inconsistent with any of the terms of the Japanese Treaty (save such as is preserved by the Japanese Treaty Act, 1913), all such legislation is displaced, as the Japanese Treaty Act, 1913, declares that the Japanese Treaty is "to have the force of law in Canada," 3-4 Geo. V. 1913, ch. 27, sec. 2, *lex posterior derogat priori*. *A fortiori* this same effect is applicable to all Orders in Council, which presumptively are only passed and have the effect of law if founded upon constitutional authority and statute law admitting of their passage. Lord Parker of Waddington, in *The "Zamora,"* [1916] 2 A.C. 77, at 90, said:—

> The idea that the King in Council, or indeed any branch of the Executive has power to prescribe or alter the law to be administered by Courts of law in this country is out of harmony with the principles of our constitution. It is true that under a number of modern statutes various branches of the Executive have power to make rules having the force of statutes but all such rules derive their validity from the statute which creates the power and not from the Executive body by which they are made . . .

And at p. 93:—

> It cannot of course be disputed that a Prize Court like any other Court is bound by the legislative enactments of its own sovereign state . . . The fact, however, that the Prize Courts in this country would be bound by Acts of the Imperial Legislature affords no ground for arguing that they are bound by the Executive orders of the King in Council.

Now the Order in Council here in question and which has to be considered, in answering questions 3 and 4, is in plain conflict with the Japanese Treaty, and it must be held to be displaced following the passage of the Japanese Treaty Act, 1913, and any existent legislation in conflict is displaced, and during the continuance of the Japanese Treaty no legislation would have validity, which, by its terms, or in effect, derogated from the statutorily validated Japanese Treaty, a treaty now effective throughout the whole British Empire (Hall's International Law, 7th ed., p. 356 and Clement's Canadian Constitution, 3rd ed., pp. 135 to 144). The analogy of the reasoning in the *"Zamora"* case, *supra*, is apparent if applied to the questions here to be considered. Lord Parker, continuing, [1916] 2 A.C., at 97, said:—

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There are two further points requiring notice in this part of the case. The first arises on the argument addressed to the Board by the Solicitor-General. It may be, he said, that the Court would not be bound by an Order in Council which is manifestly contrary to the established rules of international law, but there are regions in which such law is imperfectly ascertained and defined; and when this is so, it would not be unreasonable to hold that the Court should subordinate its own opinion to the directions of the Executive. This argument is open to the same objection as the argument of the Attorney-General. If the Court is to decide judicially in accordance with what it conceives to be the law of nations, it cannot, even in doubtful cases, take its directions from the Crown, which is a party to the proceedings. It must itself determine what the law is according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order. Only in this way can it fulfil its function as a Prize Court and justify the confidence which other nations have hitherto placed in its decisions . . .

Further, the Prize Court will take judicial notice of every Order in Council material to the consideration of matters with which it has to deal and will give the utmost weight and importance to every such Order short of treating it as an authoritative and binding declaration of law.

Therefore, it is for the Court to say what the state of the law is in respect to the questions propounded and the Court may reject as invalid and *ultra vires* an Order in Council which, even if valid, at the time of its passage, is now invalid by reason of subsequent legislation. In my opinion, the Order in Council never had validity wherein it was provided:—

That in all contracts, leases and concessions of whatsoever kind entered into, issued or made by the Government, or on behalf of the Government, provision be made that no Chinese or Japanese shall be employed in connection therewith,

quite apart from the Japanese Treaty and the effect of the Japanese Treaty Act, 1913. This conclusion, it seems to me, must be the only conclusion one can arrive at after careful study of *Union Colliery Co.* v. *Bryden*, [1899] A.C. 580. There it was held that:—

An enactment by a Provincial Legislature that no Chinaman shall be employed in mines is beyond its competence inasmuch as by the B.N.A. Act, 1867, sec. 91, sub-sec. 25, legislation with respect to "naturalisation" and "aliens" is reserved exclusively to the Parliament of the Dominion.

The Order in Council authorising and directing the inhibition in all contracts, leases and concessions reads: "no Chinese or Japanese"; and turning to questions 3 and 4 submitted to the Court for answer the words are "no Japanese shall be employed." It is impossible to have a decision which would be more complete than the *Bryden* case, and it being the judgment of the Privy

Council, it is absolutely binding upon this Court. The *Bryden* case was considered in *Quong Wing* v. *The King* (1914), 18 D.L.R. 121, 49 Can. S.C.R. 440, 23 Can. Cr. Cas. 113.

Referring to the *Bryden* case and subsequent cases, Clement, J., in his admirable work, Clement's Canadian Constitution, 3rd ed., at pp. 486, 487, said:—

In a Provincial Act (British Columbia) dealing with the working of coal mines a clause prohibiting the employment of Chinamen in such mines underground was considered by the Privy Council not to be aimed at the regulation of coal mines at all but to be in its pith and substance a law to prevent a certain class of aliens or naturalised persons from earning their living in the province. In other words, the enactment was not really in relation to local works or undertakings (sec. 92, No. 10) or to property and civil rights in the province (sec. 92, No. 13) or to a matter of a local or private nature in the province (sec. 92, No. 16); but was in fact an enactment in relation to aliens and naturalisation (sec. 91, No. 25), and therefore *ultra vires* of a Provincial Legislature. *Union Colliery Co.* v. *Bryden*. In a later case, on the other hand, an enactment of the same Legislature denying the franchise to Japanese was held to be legislation in relation to the provincial constitution (sec. 92, No. 1), and as having no necessary relation to alienage; and discrimination, in other words, being based upon racial, not national grounds. *Tomey Homma's* case, [1903] A.C. 151. As will appear later, it is difficult to reconcile these two decisions; and in a recent case in the Supreme Court of Canada a provision in a provincial Act (Saskatchewan) forbidding the employment of any white woman or girl in any restaurant, laundry, or other place of business or amusement owned, kept, or managed by any Chinaman, was upheld as within provincial competence as a law for the suppression or prevention of a local evil (sec. 92, No. 16), or as touching civil rights in the province (sec. 92, No. 13). It did not in the opinion of the majority of the Court present any aspect particularly affecting Chinamen as aliens; for a natural born British subject of the Chinese race (and there are many such in Canada) would be under the ban of the Act. *Quong Wing* v. *The King*, 18 D.L.R. 121, 49 Can. S.C.R. 440, 23 Can. Cr. Cas. 113. The Privy Council refused leave to appeal. In *Re Insurance Act*, 1910 (1913), 15 D.L.R. 251, 48 Can. S.C.R. 260, the question of legislative aspect and purpose also appears; see particularly *per* Brodeur, J.

It is to be observed that their Lordships of the Privy Council refused leave to appeal in the *Quong Wing* case, but it cannot be assumed that there has been any change of view of the law when, as here, we have exactly similar verbiage, *i.e.*, "no Chinese or Japanese shall be employed," "no Japanese shall be employed." In the *Quong Wing* case (18 D.L.R. at pp. 127-128), Davies, J., (now Chief Justice of Canada), said:—

The regulations impeached in the *Union Colliery* case, [1899] A.C. 580, were, as stated by the Judicial Committee, in the later case of *Tomey Homma*, [1903] A.C. 151, at p. 157, "*not really aimed at the regulation of coal mines at*

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all, but were in truth devised to deprive the Chinese, naturalised or not, of the ordinary rights of the inhabitants of British Columbia, and, in effect, to prohibit their continued residence in that Province, since it prohibited their earning their living in that Province." I think the pith and substance of the legislation now before us is entirely different. Its object and purpose is the protection of white women and girls; and the prohibition of their employment or residence, or lodging, or working, etc., in any place of business or amusement owned, kept or managed by any Chinaman is for the purpose of ensuring that protection. Such legislation does not, in my judgment, come within the class of legislation or regulation which the Judicial Committee held *ultra vires* of the Provincial Legislature in the case of *The Union Collieries* v. *Bryden*.

The Order in Council is clearly *ultra vires* and it would be *ultra vires* of the Legislative Assembly to enact or authorise the passage of any Order in Council providing for the insertion in any contracts, leases, or concessions any inhibitory provision that no Japanese shall be employed, plainly the provision would be exactly similar in effect to that declared to be *ultra vires* in the *Bryden* case, and as interpreted in the later *Tomey Homma* case by the Lord Chancellor (Earl of Halsbury), the language of the Lord Chancellor being quoted above by the Chief Justice of Canada, then Davies, J., in the *Quong Wing* case (18 D.L.R. at pp. 127, 128). Duff, J., 18 D.L.R. at 141-142, in the *Quong Wing* case, deals with the *Bryden* and *Tomey Homma* cases:—

I think, however, that in applying *Bryden's* case, we are not entitled to pass over the authoritative interpretation of that decision which was pronounced some years later by the Judicial Committee itself in *Cunningham* v. *Tomey Homma*, [1903] A.C. 151. The legislation their Lordships had to examine in the last mentioned case, it is true, related to a different subject-matter. Their Lordships, however, put their decision upon grounds that appear to be strictly appropriate to the question raised on this appeal. Starting from the point that the enactment then in controversy was *primâ facie* within the scope of the powers conferred by sec. 92, they proceeded to examine the question whether, according to the true construction of sec. 91 (25), the subject-matter of it really fell within the subject of "aliens and naturalization;" and, in order to pass upon that point, their Lordships considered and expounded the meaning of that article. At pp. 156 and 157, Lord Halsbury, delivering their Lordships' judgment, says:—"If the mere mention of alienage in the enactment could make the law *ultra vires*, such a construction of sec. 91, sub-sec. 25, would involve that absurdity. The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion—that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite

independent of nationality." It was hardly disputed that if this passage stood alone the argument of the appellant must fail. But it is said that this passage is *obiter* and is inconsistent with, and indeed, contradictory to certain passages in Lord Watson's judgment in *Bryden's* case, which passages, it is contended, give the true ground of the decision in that case, and consequently, are binding upon us. I have already said what I have to say as to the effect of Lord Watson's judgment; but I think this last mentioned argument is completely answered by reference to a subsequent passage of Lord Halsbury's judgment in *Cunningham's* case, [1903] A.C. 151, at 157. It is as follows: "That case depended upon totally different grounds. This Board, dealing with the particular facts of the case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth, devised to deprive the Chinese naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province."

That is an interpretation of *Bryden's* case, [1899] A.C. 580, which it appears to me to be our duty to accept.

It will, therefore, be seen that, according to the interpretation put upon the *Bryden* case by the Supreme Court of Canada, there can be only negative answers to questions 3 and 4. It would not be competent for the Legislature of British Columbia to authorise the Government of the Province to insert as a term of its contracts for the construction of provincial public works, a provision that no Japanese should be employed upon, about or in connection with the works, nor would it be competent to the Legislature to authorise the Government to insert, as a term of its contracts and leases, conferring rights and concessions in respect of the public lands belonging to the Province, including the timber and water thereon and the minerals therein, a provision that no Japanese should be employed in and about such premises. It would be *ultra vires* legislation—quite apart from being in conflict with the Japanese Treaty—and unquestionably now in view of the Japanese Treaty Act, 1913, any such legislation would be invalid.

With respect to questions 1 and 2, no concrete cases have been put, and, with the greatest deference and respect, as previously pointed out, there is no necessity for any specific answers to be made thereto, but without venturing to limit the horizon, or define the ambit of the Japanese Treaty, as validated by the Japanese Treaty Act, 1913, it may be said that it has the force of law in Canada and throughout the Provinces of Canada and any legislation, which, in its terms, is in conflict with, or repugnant to the Japanese Treaty, as validated by the Japanese Treaty Act, 1913,

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must be held to be repealed by necessary implication, and any future legislation limiting the privileges guaranteed by the Japanese Treaty, during the life of the Japanese Treaty, would be *ultra vires* legislation, in that the treaty, as long as it is existent, has the effect of inhibiting legislation, federal or provincial, which would be in conflict with the terms of the treaty, *i.e.*, to that extent the powers of the Parliament of Canada and the Parliaments of the Provinces of Canada, as conferred by the B.N.A. Act, 1867, are curtailed.

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C. A.

CLARKE v. GREAT WEST LIFE ASSURANCE Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. November 29, 1920.

INSURANCE (§ III G—150)—LIFE—TERMS OF CONTRACT—LAPSE OF POLICY —REINSTATEMENT.

A life insurance policy contained the following provisions: (1) If default be made in the payment of the first or any subsequent premiums or any part thereof, or of any note, cheque or other obligation given on account thereof this policy shall be void; (2) Should this policy lapse it will be reinstated at any time upon the production of evidence of insurability satisfactory to the company and the payment of all overdue premiums and any other indebtedness to the company upon the policy with interest at the rate of 6 per cent. per annum compounded annually from the date of lapse.

The Court held that the jury were justified on the evidence that the company, through its agent, was satisfied as to the health of the insured at the time of payment of overdue premiums and that it was not necessary to inform insured as to his reinstatement before it took effect.

Statement.

APPEAL by defendant from the trial judgment in an action to enforce payment of two life insurance policies. Affirmed.

P. H. Gordon, for appellant; *W. F. A. Turgeon*, K.C., and *P. M. Anderson*, K.C., for respondent.

The judgment of the Court was delivered by

Newlands, J.A.

NEWLANDS, J.A.:—This is an action to enforce payment of two life insurance policies on the life of Dr. Clarke, the husband of the plaintiff, who died on December 8, 1918. The defence is that the policies lapsed before the death of the assured, for the non-payment of a quarterly payment on one of the policies and the non-payment of instalments due under promissory notes given for past due premiums, and that no evidence of the insurability of the deceased satisfactory to the defendant was furnished by assured after the lapse of the policies and prior to his death.

The quarterly premium was due on September 24, 1918, and was for the sum of $36.85. On September 18, the company wrote the assured calling his attention to the fact that the premium would be due on the 24th of that month, and again on October 10, they wrote him that the days of grace would end on October 24, and on October 23 he sent them a cheque for that amount. The company appropriated the cheque on past due indebtedness, but the jury have found, and I am of the opinion that the evidence justified them in so finding, that the assured appropriated this payment to the premium due September 24.

The other payments, for non-payment of which it is claimed the policy lapsed, were the monthly payments on the notes for past due premiums due on the 16th days of September, October and November. The payment which fell due September 16, not having been paid, the policy lapsed. An application for re-instatement, dated October 9, was sent in, but, for some reason, was not accepted, and a new application for re-instatement was sent in on October 28, and the instalments due on the notes on September 16 and October 16 were paid. On November 22 the company accepted evidence of insurability of the assured up to October 28, and forwarded the same to Wright, their agent in Regina. The evidence of McGlynn, the head of the re-instatement department, upon this point is as follows:—

Well, on the 22nd November, 1918, I approved of the evidence of insurability then in the company's possession, which was up to the 28th October, 1918, and caused this advice to be sent to Mr. Wright for delivery to Dr. Clarke in exchange for payment of the monthly instalments which were then past due, on demand note, and while Dr. Clarke was still in good health.

The instalments due at that date was the November instalment on each note due the 16th of that month amounting together to $25.

Wright then telephoned Dr. Clarke's office, and informed Miss Williams, his book-keeper, that the amount was overdue, and on December 2, 1918, she paid it to him and took his receipt for the same. Her evidence as to what took place is as follows:—

A. I gave him $25. And he asked me if Dr. Clarke was in a perfect state of health when he left the city, and I said, yes, he was. And in casual conversation I told him the reason that he had gone to Rochester with Mrs. Clarke. I think I told Mr. Wright at the time that the doctor had gone to Rochester with Mrs. Clarke because she was undergoing an operation,

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he had gone down there with her, and that he would not be back for a couple of weeks at least, and I asked him if the $25 I was paying would hold the policies good until the doctor was back, and he said yes, although headquarters could refuse it if they wanted to, but I would know within three or four days' time; and I said, then would I get my money back, and he said yes, within three or four days I would have the money returned to me, telling me that the policies had lapsed, and that he would call me and tell me if they came back, he would let me know. But I never heard anything more of Mr. Wright from then until I left the office.

On cross-examination she also stated that Wright asked her if she could produce a medical certificate of Dr. Clarke's health, and she said: "Yes, if necessary, I could wire for one if you let me know," and that she was not asked to get a medical certificate. Wright's version of the conversation is as follows:—

Well, she tendered the $25, and I gave her the receipt for it, and she asked me if that was all that was required. I said: "Yes, that is all that is due. An instalment was past due since the 16th November, and that is all that we require for the present. The policies, however, are out of force and will require to be re-instated. I will send the $25 down to the head office and it will be a matter for the re-instatement department to deal with." Q. Did you make any inquiries as to when the doctor would return? A. Well, I inquired as to his state of health, and she said that so far as she knew he was all right; and I asked when he would be back, and she thought he would be back in a few days, that he had been away for some time already, and she thought that he would be back shortly.

Upon the question as to whether Wright was satisfied of Dr. Clarke's health at the time he received the payment of December 2, the following questions and answers from his examination for discovery are pertinent:—

Q. And did you not tell Mrs. Clarke there was no necessity to go to a solicitor, that the Great West Life was a good company and would pay the claim? A. Yes, would pay any just claims, pay any claims that were in order. Q. Well, did you say you wished you were as sure of making money as she was of getting the money? A. Yes, I made that statement. That was personal, mind you, not official at all, just a personal opinion based on the facts as I knew them at the time.

Upon this evidence the jury found that Wright was satisfied that the assured was still in good health on December 2, 1918, and I am of the opinion that they were justified in so finding.

The provisions of the policy applicable to this case are as follows:—

1. Payment of premiums . . . If default be made in the payment of the first or any subsequent premiums or any part thereof, or of any note, cheque or other obligation given on account thereof, this policy shall be void.

6. Reinstatement. Should this policy lapse, it will be reinstated at any time upon the production of evidence of insurability satisfactory to the

company and the payment of all overdue premiums and any other indebtedness to the company upon the policy with interest at the rate of 6 per cent. per annum, compounded annually from the date of lapse.

The policies became void on September 16, 1918, and, before they could be re-instated, evidence of the insurability satisfactory to the company would have to be produced and all overdue premiums and other indebtedness paid. As the head office of the company was in Winnipeg, it was not possible for them to get evidence of insurability up to the time of re-instatement. It was therefore their practice to pass upon the evidence of insurability sent in to them, and then forward the same to their agent at the place where the insured lived, for him to collect all overdue payments and satisfy himself that assured was still in good health. That was done in this case, and the jury have so found.

The company contends that it was necessary to inform the insured as to his re-instatement before it takes effect. Upon this point the jury has found that Wright on December 2, 1918, told Miss Williams (Dr. Clarke's book-keeper) that, if she did not hear from him or the defendant company within 3 or 4 days, she could rest assured the policies would be all right. As there was evidence upon which they could make this finding, it, in my opinion, satisfies the above contention.

I am therefore of the opinion that all arrears on both policies were paid on December 2, 1918, and that on that date the company had accepted evidence of the insurability of Dr. Clarke and re-instated the two policies.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed.

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Ontario Supreme Court, Appellate Division, Mulock, C.J. Ex., Riddell, Sutherland and Masten, JJ. October 22, 1920.

ARBITRATION (§ III—44)—LIABILITY OF TOWNSHIP FOR INJURY TO SHEEP BY DOG—ARBITRATOR APPOINTED BY MINISTER OF AGRICULTURE TO REVIEW—MISCONDUCT OF—FINALITY OF AWARD—ACTION TO ENFORCE.

Although an arbitrator appointed by the Minister of Agriculture under sub-sec. 2 of sec. 13 of the Dog Tax and Sheep Protection Act (1918) 8 Geo. V., ch. 46, errs in the conduct of the investigation, by reason of which the award might be set aside, such misconduct cannot be pleaded in bar to the plaintiff's action to enforce payment of the sum awarded.

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APPEAL by plaintiff from a County Court dismissing an action to recover the amount of an award under the Dog Tax and Sheep Protection Act. Reversed.

THE facts of the case as set out are taken from the judgment of MULOCK, C.J. Ex.:—

This is an action on an award, to recover the amount thereby found due to the plaintiff. The action was dismissed by the judgment of His Honour the Judge of the County Court of the County of Essex, and the appeal is by the plaintiff from that judgment. The facts are as follows:—

The plaintiff claimed damages from the defendant corporation because of the killing and injuring of certain of his sheep by dogs, the ownership of which was unknown. The council of the municipality, as required by sec. 14, sub-sec. 1, of the Dog Tax and Sheep Protection Act, 1918,* appointed sheep-valuers, who made the investigation called for by this sub-section, and found damages amounting to $225; but the plaintiff, considering that sum inadequate, appealed from such finding to the Minister of Agriculture, who, under the authority of sub-sec. 2 of sec. 14, appointed Mr. Brien arbitrator to make a further investigation. Mr. Brien, in the absence of and without notice to the defendant corporation, made an investigation, in the course of which he examined the plaintiff as to the value of the sheep in question, and fixed the plaintiff's damages at $331. The municipal council not having paid the amount awarded by Mr. Brien, the plaintiff brought this action to recover the same.

The defendant corporation admitted liability to the extent of $225, and paid that amount into Court. The learned trial

*The Act is 8 Geo. V. ch. 46, and secs. 13 and 14 are as follows:—

13. Where the owner of any dog killing, injuring, terrifying or worrying sheep is not known, the municipality in which such sheep were so killed, injured, terrified or worried shall be liable for compensation to the full amount of the damage sustained, but no municipality shall be so liable unless application has been made for damages as herein provided within three months after such sheep have been so killed, injured, terrified or worried.

14. The amount of damage sustained as aforesaid shall be determined in the following manner:

(1) The council of every local municipality shall appoint one or more competent persons to be known as sheep-valuers. Within forty-eight hours after the discovery of any damage as mentioned in the preceding section, the owner of the sheep or the clerk of the municipality shall notify a sheep-valuer, who shall immediately make full investigation and determine the extent of the damage. The sheep-valuer shall make his report in writing, giving in detail

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Judge was of opinion that, the arbitrator having conducted the investigation and examined the plaintiff in the absence of and without notice to the defendant corporation, his award was bad, and that the plaintiff was entitled to recover only the $225, and he gave him two weeks within which to elect whether he would accept judgment for that sum without costs, and failing his so electing ordered that the action be dismissed with costs. The plaintiff did not so elect, and formal judgment was entered, wherein, after a statement that the plaintiff had not so elected, it was ordered that the action be dismissed with costs, "without prejudice to the right of the plaintiff to have a new investigation in respect of damages." From this judgment the plaintiff appeals.

F. D. Davis, for appellant; *J. H. Rodd*, for defendants.

MULOCK, C.J. Ex. (after setting out the facts as above) :— In my opinion the learned Judge was right in his view that Mr. Brien, the arbitrator, having conducted his investigation without notice to and in the absence of the defendant corporation, his award was bad. Sub-section 2 of sec. 14 of the Act requires the arbitrator to conduct an investigation. It is a principle of general application in the administration of justice that both parties to a judicial inquiry shall have the opportunity of being heard; and, though the language of the sub-section does not so provide, it must be assumed that the Legislature intended that that principle should apply to the conduct of the investigation in question.

Mulock, C.J. Ex.

the extent of the injury and the amount of damage done, to the clerk of the municipality, and shall at the same time forward a copy of such report to the owner of the sheep damaged.

(2) Where the owner of such sheep considers the award inadequate to cover the loss sustained, he may appeal to the Minister of Agriculture, who may name a competent arbitrator to make a further investigation, and the award of the arbitrator so named shall be final; provided the appeal to the Minister shall be made within one week after the award of the local valuer has been received and shall be accompanied by a deposit of twenty-five dollars ($25) which shall be forfeited if the award of the local valuer is sustained.

(3) When the amount of damage has been finally determined as aforesaid, the treasurer of the municipality shall forthwith pay over to the owner of the sheep the amount so awarded.

(4) If no sheep-valuators are appointed by the municipal council, or the clerk or the sheep-valuers do not perform the duties provided for by this section or any of them within the times specified, where the time is specified for the doing thereof, or where no such time is specified, within a reasonable time, the person who has sustained the damage shall have a right of action against the municipal corporation for the amount of the damage, recoverable in any court of competent jurisdiction.

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Brien was not acting as an expert to determine the matters in difference according to his own judgment, unaided by evidence, but was to investigate, namely, ascertain the extent of the damage sustained by the plaintiff. This involved his ascertaining the facts—not from one of the parties to the difference only, but from both parties—and then determining the extent of the damage in accordance with the facts thus learned. This duty constituted him an arbitrator.

When not expressly absolved from so doing, an arbitrator is bound to observe in his proceedings the ordinary rules which are laid down for the administration of justice. No opportunity having been afforded to one of the parties to be heard, the investigation was not conducted in harmony with the general principle that both sides should be heard, and the award is therefore bad, and on a proper application might be set aside: *Cooper* v. *Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180, 143 E.R. 414; *In re Carus-Wilson and Greene* (1886), 18 Q.B.D. 7; *Harvey* v. *Shelton* (1844), 7 Beav. 455, 49 E.R. 1141; *Haigh* v. *Haigh* (1861), 3 DeG. F. & J. 157, 45 E.R. 838; *Re Gregson and Armstrong Arbitration* (1894), 70 L.T.R. 106; *Oswald* v. *Earl Grey* (1855), 24 L.J. (Q.B.) 69.

But, although the arbitrator thus erred in the conduct of the investigation, such misconduct cannot be pleaded in bar to the plaintiff's action on the award: *Braddick* v. *Thompson* (1807), 8 East 344, 103 E.R. 374; *Grazebrook* v. *Davis* (1826), 5 B. & C. 534, 108 E.R. 199; *Thorburn* v. *Barnes* (1867), L.R. 2 C.P. 384; *Bache* v. *Billingham*, [1894] 1 Q.B. 107, 112.

Though liable to be set aside, the award is not void, but, on the contrary, on its face is good.

I, therefore, with respect, think the learned Judge should not have treated such misconduct as a bar to the plaintiff's claim, and that the judgment appealed from should be set aside and judgment entered for the plaintiff for $331 with costs of action and of this appeal.

Sutherland, J.

SUTHERLAND, J., agreed with MULOCK, C.J. EX.

Riddell, J.

RIDDELL, J.:—In June, 1919, the plaintiff, who is a farmer in the township of Sandwich West, had 17 sheep killed by dogs, 12 ewes and 5 lambs; and 5 injured, 2 sheep and 3 lambs. He

notified the clerk of the township and the sheep-valuers of the township, under sec. 14 (1) of the Dog Tax and Sheep Protection Act, 1918, 8 Geo. V. ch. 46. The sheep-valuers and one of the councillors came to the plaintiff's farm and all went to the sheep-field together. The valuers determined the damage to be $225. The plaintiff, not being satisfied with the award, appealed to the Minister of Agriculture, under sec. 14 (2) of the Act; the Minister named J. B. Brien, who raises cattle and sheep, and who had been president of the Sheep Breeders' Association, as "a competent arbitrator to make a further investigation;" Brien went to the plaintiff's farm, on the 26th June, remained there 2 or 3 hours making an investigation, but confining his questions to the plaintiff himself—as he says, following the instructions of the Department in that behalf. The sheep-valuers and township had no notice or knowledge of this investigation; the sheep had been buried, and Brien's information concerning them came wholly from the plaintiff himself. Brien reported to the Minister that the damage was $331.

The plaintiff demanded the sum of $331 from the township, and upon refusal be brought this action.

The Judge of the County Court of the County of Essex, before whom, without a jury, the action was tried, held that he was not bound by Brien's award, and that the damage was only $225; and he gave judgment accordingly.

The plaintiff now appeals.

While it may be that the better course for the plaintiff to pursue was to apply for a mandamus to the treasurer of the township under sec. 14 (3), sec. 13 makes the municipality liable for the damages, and consequently this action lies.

The sole question for us to determine is, whether the "award" of Brien is final and binding upon the trial Court. There is ample evidence to support a finding that the damages were only $225, and ample to support a verdict for $331, and we could not on the conflicting evidence hold that the former estimate is wrong.

I am clearly of the opinion that the judgment is wrong.

The statute, sec. 14 (2), says, in so many words, that "the award of the arbitrator so named shall be final;" and, even

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supposing the proceeding was an arbitration properly so-called and the award was an award properly so-called, the "award" is final and binding on everybody.

It is argued, however, that the award is bad because the "arbitrator" heard only one side.

The answer to that contention is plain. "The defendant cannot in an action on an award plead collusion with a party or other misconduct of the arbitrator in avoidance of the award:" Russell on Arbitration and Award, 9th ed., p. 326, citing *Whitmore* v. *Smith* (1861), 7 H. & N. 509, 158 E.R. 574, and many other cases.

It is necessary to quote from only one case, not unlike the present case, *Thorburn* v. *Barnes*, L.R. 2 C.P. 384. There the arbitrators had refused to give one party an opportunity to be heard before them, and the Court, while holding that this was good ground for moving against the award, further held that it was no defence to an action on the award. Willes, J., at pp. 401 and 402, says: "I now come to the dry question of law, viz., whether the form in which the objection is made here is the form in which it is competent to the plaintiff to make it,—whether the not having given the party an opportunity of being heard is an objection that can be raised by plea, or only a sort of misconduct of the arbitrators to be taken advantage of by a motion to set aside the award. . . I have come to the conclusion that the latter is the only mode in which such an objection can be urged. . . It has been very forcibly urged that the whole proceeding in this case is void. . ." But the Court did not accede to the argument. Keating, J. (p. 403), considered "it . . . repugnant to one's ideas of justice that a man should be bound by the decision of a tribunal before which he has not been heard or even allowed an opportunity of being heard;" but agreed with *Braddick* v. *Thompson*, 8 East 344, 103 E.R. 374, "that advantage could only be taken of the misconduct of an arbitrator . . . by an appeal to the equitable discretion of the Court." Montague Smith, J., says (p. 405): "I should be . . . strenuous in sustaining an award where the party who complains has allowed the proper time for urging such an objection to go by, and has reserved it for a defence to an action upon the award. . . Not

having adopted the course which was open to him, the plaintiff must be taken to have acquiesced in the decision of the arbitrators."

Neither of the cases cited by Mr. Rodd, *Cooper* v. *Wandsworth Board of Works*, 14 C.B. (N.S.) 180, 143 E.R. 414, and *Smith* v. *The Queen* (1878), 3 App. Cas. 614, is the case of a statute. The law laid down by Russell and the cases I quote has never been questioned, and should not now be disturbed. As the case stands, the award is binding on the Court, and the plaintiff should have his judgment for $331, with costs of action and appeal. The most we could do would be to stay the judgment until the defendants had an opportunity to move to set aside the award; that is not asked for, and, if it were, it should not now be granted.

The defendants have allowed the time to go by to question the "award" in the technical sense, under the Arbitration Act, R.S.O. 1914, ch. 65, sec. 33 (1), (3), but the Court could extend the time under sec. 33 (2).

In my view, it would be a cruel kindness to allow such a motion to be made: the difference in the awards is only $106, and the plaintiff is undoubtedly entitled to his costs of the action and appeal because he has been right throughout, and it would be by matter subsequent if at all that he could fail.

"I am strenuous in sustaining the award" under the circumstances.

But, in my view, the so-called "award" is not an "award," technically speaking; nor is the "competent arbitrator" really an arbitrator.

The very fact that the person to be appointed by the Minister to pass finally upon the damages is to be "competent" indicates that he is to "determine the matter by using his own knowledge and skill;" he is to "use the skill of a valuer, not of a judge:" *In re Dawdy* (1885), 15 Q.B.D. 426, at p. 430.

The whole purview of the Act seems to me to require the valuers and the "arbitrator" to use their own knowledge and skill. It is unnecessary to go through the cases which are cited by Russell on the difference between valuers and arbitrators. The law is clear that a valuation is not an award.

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I am not saying that if fraud were suggested or proved an action would not lie to declare the award void. No fraud is even hinted at; and, in the absence of such an action, the award is final.

On all grounds I think the appeal should be allowed with costs and judgment directed to be entered for the plaintiff for $331, interest from the date of Brien's "award" ((1918) 8 Geo. V. ch. 46, sec. 14 (3)), and costs of suit.

MASTEN, J.:—Appeal from the judgment of His Honour J.J. Coughlin, Judge of the County Court of the County of Essex, dated the 20th January, 1920.

The leading facts are adequately detailed in the judgment of my Lord the Chief Justice and in that of my brother Riddell, and need not be repeated by me.

The statement of defence, after detailing the award of the local valuators, proceeds as follows:—

"(4) After the time for an appeal had expired, the plaintiff took an appeal in respect of such valuation and award, and procured in some way an award for the sum of $331, the principal claimed in the statement of claim.

"(5) The defendants allege that there was no jurisdiction in the provincial valuator to make such an award, but in any event say that no inspection was made under the Act, nor could any proper inspection be made of the injury at that date, and the so-called award therefore is not one in conformity with the statute and is not enforceable against the defendants.

"(6) The defendants admit owing to the plaintiff the sum of $225, which was tendered as aforesaid, and now bring the same into Court in this action."

On the argument of the appeal in this Court the only ground urged by the respondents was that they received no notice of the investigation or arbitration conducted by the provincial arbitrator, and were wholly unaware of the same until after the award had been made. The other grounds set up by the defence appear to have been dropped.

No motion to set aside the award or to refer it back to the arbitrator has ever been made by either party. The award

appears to have been published by notification to the township council in a letter of the Minister of Agriculture, dated the 7th July, 1919.

The claim asserted by the plaintiff arises under the Dog Tax and Sheep Protection Act, 8 Geo. V. ch. 46, which, under certain circumstances, gives a right of action against a municipal corporation to an owner whose sheep are killed by dogs, and establishes a method of assessing the damages recoverable. The question in dispute depends on the construction of secs. 13 and 14, sub-secs. 1 and 2, of that statute.

The first question is: Is the person appointed by the Minister of Agriculture a valuer or is he an arbitrator? The answer depends on the interpretation of the statute. The first and most outstanding consideration is that, by sub-sec. 2 of sec. 14, the appointee of the Minister of Agriculture is called an "*arbitrator*" and his decision is termed an "*award.*" A second consideration of importance is that in sub-sec. 1 the person who ascertains the damage is termed "a valuer," not an arbitrator, and the result of his investigation is termed not an award but "a report," thus indicating that the distinction was present in the mind of the Legislature when enacting the statute. And, lastly, it is to be observed that the sheep-valuers mentioned in sub-sec. 1, being local men, "shall immediately make full investigation." Presumably they would inspect the sheep, whether dead or injured, and make a full report of their observations, while the representative of the Minister of Agriculture could appear on the scene only after a considerable lapse of time, and would be obliged to inform himself by means of statements from witnesses.

For these reasons, I am of opinion that the person appointed by the Minister of Agriculture under sub-sec. 2 is an arbitrator, and not a valuer.

The sole remaining question is, whether the finding of the provincial arbitrator is a final and binding award, having regard to the fact that his investigation and award were both made without notice to the municipality who are liable to pay.

Exhibit 1 purports to be an award made by the representative of the Minister of Agriculture, acting as an arbitrator, pursuant to the statute.

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The respondent claims that the award is a nullity, basing his contention on the broad principle that no man can be condemned in damages without being heard.

In the State of New York it has been held that an award made without notice of hearing to the losing party is void, and that such a defence may be set up in an action at law upon the award: *Elmendorf* v. *Harris* (1840), 23 Wend. (N.Y.) 628.

There is much to be said for the view that in any proceeding of a judicial character which may result in a personal judgment against the defendant no cause exists and no judgment can be rendered unless there co-exist a judge properly seised of the case, a subject-matter, and a defendant as well as a plaintiff. It is contrary to natural justice that an award made without notice behind the back of the respondent should bind it. The principle has been stated and applied from the earliest times and in innumerable instances. I refer to one case only:

In *Oswald* v. *Earl Grey*, 24 L.J. (Q.B.) at p. 72, Erle, J., in setting aside the award, said: "I am of opinion that the award must be set aside, as the arbitrators have violated one of the most important principles of justice. They have held a meeting without notice, and have heard a witness on behalf of one party and have refused to hear the other side. A more glaring departure from the rules that ought to regulate the proceedings of persons sitting in the character of judges it is impossible to conceive."

In support of his contention that this principle governs in the present case, Mr. Rodd refers us to the case of *Cooper* v. *Wandsworth Board of Works*, 14 C.B. (N.S.) 180, 143 E.R. 414. That was an action of trespass for pulling down a house of the plaintiff which was in course of erection. The 76th section of the Metropolis Local Management Act, 18 & 19 Vict. ch. 120 empowered the district board to alter or demolish a house, where the builder had neglected to give notice of his intention to build seven days before proceeding to lay or dig the foundation. The Court held that the statute did not empower the district board to demolish the building, without first giving the party guilty of the omission an opportunity of being heard. The case is undoubted authority for the proposition that statutes which limit

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or extend common law rights must be expressed in clear and unambiguous language, where the effect is to prejudice a man who has had no opportunity of being heard. If the defendant had, within the time prescribed by the Arbitration Act, moved to set aside the award, that case, and the cases following it, would be strong authority in support of his right to set aside the award, notwithstanding the words of the Dog Tax and Sheep Protection Act declaring the award final (as to which see *Kennedy* v. *Burness* (1858), 15 U.C.R. 473, at p. 486).

The present action, however, falls to be determined not on the broad general principle discussed above, but on a narrower and more technical rule of the law relating to arbitrations, viz., that if there is in truth an award its validity cannot be questioned by the defence in an action brought to enforce it: *Whitmore* v. *Smith*, 7 H. & N. 509, 158 E.R. 574; *Thorburn* v. *Barnes*, L.R. 2 C.P. 384.

I think that exhibit 1 is an award. Mr. Brien, the arbitrator, was duly appointed, he acted, and he determined the question submitted to him as set forth in exhibit 1.

In the case of *Peuchen* v. *Lamb* (1876), 25 U.C.C.P. 588, the English rule as laid down in *Whitmore* v. *Smith*, 7 H. & N. 509—E.R.—and *Thorburn* v. *Barnes*, L.R. 2 C.P. 384, was adopted and applied in our own Courts. That was an action on an award. The defendant pleaded on equitable grounds that the arbitrator proceeded *ex parte* and without notice to the defendant and refused to hear the defendant and his witnesses or allow him a reasonable opportunity of proving his case. The plaintiff demurred to the plea. Wilson, J., in delivering judgment allowing the demurrer, referred to and followed the two cases above mentioned, and said (pp. 591, 592):—

"The reason why an award cannot have such matters as are contained in the plea pleaded to it, is that the award is final, so long as it stands between the parties: *Tittenson* v. *Peat* (1747), 3 Atk. 529; *Wills* v. *Maccarmick* (1762), 2 Wils. 148; *Whitehead* v. *Tattersall* (1834), 1 A. & E. 491, 110 E.R. 1295; *Dick* v. *Milligan* (1792), 2 Ves. Jr. 23, 30 E.R. 504.

"If the award be impeached for such cause, it must be by motion to avoid it.

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"There is no instance of a plea setting up such a defence which has been allowed by the Courts before or since the statute.

"If the submission be in writing or by deed, and do not exclude the Courts from interfering, it may be made a rule of Court, and relief may be given against the award.

"If the submission shew it was not the intention of the parties it should be made a rule of Court, or if the submission be verbal only, which may have been the case with this submission from anything that appears, the parties may still apply to a Court of Equity for relief in like manner as they could have done before the 9 & 10 Wm. III. ch. 15, when the submission was not by rule of Court or order of a Judge.

"The defendant prays that the award may be set aside for the reasons set forth in his plea; but that is in the nature of an original proceeding which the defendant himself must take to obtain relief. It is not, in my opinion, a subject of plea or defence to an action upon the award. It would be made in equity, not by answer but by a cross-bill: *Holderness* v. *Rankin* (1860), 6 Jur. N.S. 903; *Hannah* v. *Hodson* (1861), 7 Jur. N.S. 1092."

No motion was made by the defendants to set aside the award of Mr. Brien within 6 weeks after its publication; no motion to extend the time for so moving has ever been made; nor have the defendants counterclaimed in this action to set aside the award. They have rested their case entirely upon the ground that they are entitled by way of defence to set up the nullity of the award.

I would decide the case on the simple and narrow ground that the invalidity of the award cannot be set up by way of defence to an action to enforce the award, and it is now too late to attack the award in any other manner. As to whether, if the defendants had made a motion to set aside the award, they would have been precluded by the words of the statute, or as to whether they could within a proper time have effectively counterclaimed in this action to set aside the award (as to which compare *Bache* v. *Billingham*, [1894] 1 Q.B. at p. 112, with *Johannesson v. Galbraith* (1906), 16 Man. L.R. 138), I refrain from expressing any opinion.

It is true, as was pointed out by my brother Riddell, that under our Arbitration Act the Court has power now to extend

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the time for moving against the award. No such motion has been made, and, if it were made, I think it could not succeed. I refer in that connection to the judgment of Montague Smith, J., in the case of *Thorburn* v. *Barnes*, L.R. 2 C.P. at p. 405, where, referring to a somewhat similar situation, he said: "The Court of Chancery and the Courts of common law . . . would upon a proper application take all the circumstances into their consideration, and would probably not set the award aside, but would send it back for a re-hearing. Not having adopted the course which was open to him, the plaintiff must be taken to have acquiesced in the decision of the arbitrators."

The difference between the two awards in the present case is only $106; and, as the defendants have not moved to set aside the last award within the time prescribed by the statute, and have not moved to extend the time, they must be taken to have acquiesced in the decision of the arbitrator.

The appeal should be allowed and judgment entered for the plaintiff for $331 and interest, with costs here and below.

Some question was raised on the argument as to whether the plaintiff should not have proceeded by application for a mandamus to the treasurer to pay, pursuant to sub-sec. 3 of sec. 14.

I think that the award determines only the quantum of the damages, and not the liability of the parties. The respondents might have asserted that the sheep died of disease and not by dogs, or that the owners were not unknown. It was therefore proper to sue, and costs should follow the event.

Appeal allowed.

FRASER Cos. Ltd. v. TRUSTEES OF SCHOOL DISTRICT No. 1 PARISH OF MADAWASKA, and TOWN OF EDMUNDSTON.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Brodeur, JJ. May 4, 1920.

SCHOOLS (§ IV—75)—TAXES—ASSESSMENT—VALUATION FIXED BY TOWN AND COMPANY—SCHOOL TRUSTEES NOT PARTIES—CONTRACT NOT APPLICABLE FOR SCHOOL ASSESSMENT—SCHOOLS ACT—C.S.N.B. 1903, CH. 50, SECS 105-108.

A valuation of company property for assessment purposes, fixed by contract, between the town officials and the company, such contract being validated by Act of the Legislature, is not the valuation of the property for levying school rates, the school trustees not being parties to the contract, and the schools not having been taken over by the city or town under the provisions of secs 105 and 108 of the Schools Act, C.S.N.B., 1903, ch. 50.

[*The King* v. *School District No. 1 Parish of Madawaska* (1919), 49 D.L.R. 371, affirmed.]

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Idington, J.

APPEAL from a judgment of the Appeal Division of the Supreme Court of New Brunswick (1919), 49 D.L.R. 371, 46 N.B.R. 506, affirming the levy of school rates on appellant's property.

The only question raised on the appeal was whether or not the valuation on the appellant's property fixed by the contract at $100,000 should be the valuation for school rates. The judgment appealed against held that it should not and that the assessment was properly made on the real value.

M. G. Teed, K.C., for appellant.

E. Lafleur, K.C., for respondents.

DAVIES, C.J.:—I concur with my brother Anglin.

IDINGTON, J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of New Brunswick, 49 D.L.R. 371, 46 N.B.R. 506, whereby it was decided that the appellant was not entitled to claim, under and by virtue of legislation fixing a reduced basis of valuation of its property for the purposes of assessment "for rates and taxes within said town" of Edmundston, that such legislation extended to and necessarily determined the valuation basis for rates and taxes imposed by and through the legal machinery whereby respondent was entitled to have rates and taxes imposed for the support of the respondent's schools.

It is to be observed that there are 3 distinct corporate entities in each county entitled to levy rates and taxes within said town.

The town corporation is one; the county is another; and the Board of School Trustees of the district is a third.

The respondent in this case had jurisdiction over the town and part of the adjacent parish forming a school district known as School District Number 1.

The county corporation embraced both and much more.

And a very curious feature of the legislation now in question is that by sec. 4 of the first Act passed to carry out the purposes of the promoters thereof, it was expressly provided as follows, 2 Geo. V. 1912 (N.B.), ch. 104:—

> 4. In any valuation of the property and income of the said town of Edmundston for county purposes hereinafter to be made, during the period of twenty-five years in which this Act is made to apply, the total valuation of the real and personal property, lands, tenements and hereditaments and capital stock and income of the said Fraser, Limited, shall not exceed the

sum fixed by paragraph one of this Act until fixed by said Town Council under paragraph two of this Act, from and after which time said valuation shall be the amount so fixed by said Town Council.

Why, if the same rule was supposed to apply to every rate or tax levied in the town, no matter for what purpose, was this express provision made as against the county and not a word said as against the school rates or respondents' right to levy therefor?

I can only infer that it was because the promoters of the legislation well knew that the settled policy of the Legislature was, as Hazen, C.J., states, against such obviously unjust exemptions.

The trifling amount the county would lose, or fail to reap, by the fixing of this assessment basis would hardly be worth contesting.

The increased expenses of the administration of county affairs likely to flow from the establishment of such an industry as the appellant's would be but a drop in the bucket.

On the other hand, the probable increase of school expenses, if appellant's enterprise turned out successfully, would be sensibly felt.

And the maxim so often applied, *expressio unius est exclusio alterius*, seems to me applicable to this piece of legislation, which doubtless was a legislative expression of a contract between appellant and the town in process of formation.

It was followed by another Act validating the actual contract which resulted and that validating Act provided as follows:—

3. So much of the said Act, 2 Geo. V, 1912, ch. 104, as is inconsistent with the provisions of this Act is hereby repealed.

The suggestion made by counsel for appellant that in many similar Acts, through abundant caution, the words "saving and excepting school rates or taxes," or the like expression, was used, does not carry with me much weight when I bear in mind that, though pressed to do so, he could not point to a single instance, of the many he cited, wherein provision was made in such cases for providing the machinery for carrying out such exception but, on the contrary, the ordinary provision of the school Acts for effecting such purpose was apparently thought to be all that was necessary.

If in such cases that legal machinery given school boards for effectually levying their rates, can be carried out notwithstanding the basis of the levy being alleged to be the town assessors' valu-

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ation then surely it can be done equally well when as here we have the legal presumption held to be on the construction of the Act that school rates are in law excepted from the operation of the Act.

I think the other questions raised in argument are so effectually dealt with by the judgment of Hazen, C.J., with which I agree, that I need not repeat his reasons here.

I would therefore dismiss this appeal with costs.

DUFF, J.:—It is a settled principle that legislation intended to carry into effect contractual arrangements between local authorities and individuals shall not, unless the language is too clear to admit of a doubt, be construed as having collateral effects touching interests outside of those which, as being the interests of the parties immediately concerned, the Legislature may be supposed to have had exclusively in view. That principle applies in this case.

The appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—I am of the opinion that the appellant company is not entitled to have its assessment for purposes of school taxation limited as provided for by the New Brunswick statute, 2 Geo. V. 1912, ch. 104, and the agreement of 1917, confirmed by the Act, 8 Geo. V. 1918, ch. 65.

The Town of Edmundston has not exercised the power, conferred by sec. 108 of the Schools Act, C.S.N.B., 1903, ch. 50, to bring itself under the provisions of sec. 105 of that statute. Section 111, therefore, does not apply to School District No. 1, of which the Town of Edmundston forms a part. That is made reasonably clear by the collocation of sec. 111, and the presence in it of the words: "rates ordered to be levied by the city or town council in accordance with the requisition of the Board of School Trustees or otherwise under the provisions of this Act."

As stated by counsel for the respondents in their factum, the words of sec. 111 just quoted "distinctly refer to the provisions of sec. 105 (12) and (13), which have no counterpart in secs. 76 to 79, which alone are applicable to School District No. 1 of the Parish of Madawaska."

The valuation dealt with by the two statutes cited is of property liable "for assessment for rates and taxes within such town." No provision is made for the assessment of property of the appellant situate outside the town, but within the school district. *Primâ facie* these two statutes deal with assessment for taxes and rates

for town purposes only. The Board of School Trustees was not privy to the passing of this legislation and it is not a party to the agreement between the appellant and the Town of Edmundston confirmed by the latter Act. It is most improbable that the Legislature would pass legislation intended to affect the interests of the schools of the district adversely in a matter so important and to such an extent without at least notifying the school board and giving it an opportunity to protest against the interests committed to its charge being thus injured. At all events, an intention so to act should not be imputed to the Legislature unless the legislation in explicit and unmistakable terms puts its existence beyond question. I find no such terms in either statute. On the contrary, both Acts, as I read them, purport to deal only with the interests of the parties who were before the Legislature seeking them—Frasers, Limited and the Town of Edmundston.

I agree with Hazen, C.J., that the assessors pursued a proper and a reasonable course in first placing on the property of the appellant its actual or true valuation (in this case $1,000,000) and appending thereto the statement, "net assessment as per contract with the Town of Edmundston to be reduced to ($100,000) one hundred thousand dollars."

The appeal on this—the main subject of it—fails and should be dismissed as against the school trustees.

Two minor questions affecting the Town of Edmundston, though referred to in the appellant's factum, were not pressed at Bar. It is therefore thought better to reserve the rights of the appellant as to them in the hope that the parties may reach an agreement which will render disposition of them unnecessary.

BRODEUR, J.:—The question in this case is whether or not the limit of valuation for municipal assessment would include school taxes. Brodeur, J.

By a statute passed in 1912 the Legislature of New Brunswick declared that, in view of the contemplated establishment by the appellants of a large industrial concern within the town of Edmundston, the valuation of their real and personal property for twenty-five years should not exceed $200,000.

This legislation was to come into force when the Lieutenant-Governor-in-Council was satisfied that the sum of $250,000 on capital account had been expended.

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Nothing was done under the provisions of this Act.

In December, 1916, a contract was made between the appellants and the Town of Edmundston dealing with different objects, viz., the sale by the town to the company of electrical energy, the supply of water, the taking of some earth material required by the company for construction purposes and containing the following: "9. The valuation for assessment purposes as provided for under chapter 104 of 2 George V. of the Acts of the Legislature of the Province of New Brunswick shall be fixed at the sum of $100,000."

It was provided by this contract that the necessary legislation to confirm the agreement should be obtained by the town.

At the session of the Legislature of 1917 an Act was passed to confirm this contract between the appellants and the Town of Edmundston and to amend the Act of 1912; and sec. 2 declared: "Section 9 of the said contract shall come into force and effect and be binding upon the said Town of Edmundston and the said Fraser when a sum of $250,000 would have been expended and when a proclamation would be issued by the Lieutenant-Governor-in-Council."

The appellants made the necessary expenditure and the proclamation was issued in March, 1918.

Is this legislation binding for school purposes?

If we had to deal with the legislation of 1912, which was somewhat general in its character, the decision of this Court in *C.P.R. Co.* v. *Winnipeg* (1900), 30 Can. S.C.R. 558, could not, perhaps, be easily distinguished from it. It was held in that case that the exemption "from all municipal taxes, rates and levies and assessments of every nature and kind" would include school taxes. It should be remembered, however, that in the Province of Manitoba, where this case of *C.P.R. Co.* v. *Winnipeg*, 30 Can. S.C.R. 558, arose, the city had to levy and collect not only the municipal but likewise the school taxes. The school trustees of the city had no power to levy taxes for school purposes.

In the Province of New Brunswick the taxes are levied and collected by the school trustees; and the Legislature, in confirming a contract between the Town of Edmundston and the appellants by which the assessment for town purposes was to be limited to $100,000, would not be supposed to intend to restrict the powers of the school corporation. We might consult on this point the

case of *Osment* v. *Town of Indian Head* (1907), 7 Terr. L.R. 462, where it was held that an exemption from general municipal taxation does not include school taxes under the municipal ordinance.

Brodeur, J.

I am of opinion that the confirmation of this contract is binding, as declared by sec. 2 thereof, on the Corporation of Edmundston and the appellants only, and not on the school trustees.

The judgment *a quo* which dismissed the appellants' contention should be confirmed with costs. *Appeal dismissed.*

ROSENZWEIG v. HART; Ex parte GOLDFINE, LTD.* (Annotated).

Quebec Superior Court, Panneton, J. December 29, 1920.

BANKRUPTCY (§ II—18)—SALE OF GOODS (QUEBEC)—UNPAID VENDOR—RIGHT TO RESILIATE SALE—SECURED CREDITOR—C. C. 1543.

An unpaid vendor of goods may ask for the dissolution of the sale in case of non-payment of the price provided in the case of insolvency the right be exercised within thirty days of delivery (C.C. 1543). A vendor in such a position is a secured creditor within the meaning of secs. 2 (gg) and 6 (1) of the Bankruptcy Act and he may recover the goods from the trustee.

[See annotation, Bankruptcy Act of Canada, 1920, 53 D.L.R. 135.]

Statement.

PETITION by an unpaid vendor to have a sale of goods to an insolvent debtor set aside for non-payment of the purchase price and to have the goods returned to him. Petition granted.

B. Benoit, for petitioner; *Cohen & Bernstein*, for trustee.

Panneton, J.

PANNETON, J.:—In the present case the petitioner sold to the debtor goods to the value of $341.50, on November 12, which goods were delivered on November 15.

On November 16 the trustee took charge of the estate under a receiving order. The said goods were purchased on the following terms, half cash and half 30 days. On November 19, 1920, petitioner proceeded to re-vendicate the goods by a simple petition against the trustee as 30-day goods, which petition the trustee contests on the following grounds: (a) The said goods were purchased on credit and petitioner therefore should ask for resiliation of the sale. (b) That in any case the right to recover 30-day goods has been abolished by the Bankruptcy Act.

Proof was made of the terms of sale as alleged in petition.

After the argument of the case petitioner moved to amend the conclusions of his petition as follows: "That the pretended sale

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of the goods revendicated be dissolved and set aside on account of non-payment of the price." The motion was granted.

The amendment having been made, the case was argued again.

Petitioner rests his case upon art. 1543 C.C., which reads as follows:—

In the sale of moveable things the right of dissolution by reason of non-payment of the price can only be exercised while the thing sold remains in the possession of the buyer, without prejudice to the seller's right of revendication as provided in the title of *Privileges and Hypothecs*.

In the case of insolvency, such right can only be exercised during the thirty* days next after the delivery:—N. 1654—C 1998, 1999, 2000.

*The word "thirty" was substituted for "fifteen" by 54 Vict. ch. 39, sec. 1 (30 Dec. 1890).

The privilege thus given the vendor is now attacked by the assignee as having been wiped out by the Bankruptcy Act. In support of that pretension, the following sections of the Act are quoted: and he says:—

"It is our contention that the Act has abolished the right to revendicate goods within 30 days whether sold on cash or on credit. This clearly results from the following sections of the Act.

"A. Sec. 9, makes every voluntary assignment other than an authorised assignment under the Act, null and void, in other words, it abolishes all provincial legislation, *quoad* insolvency.

"B. Sec. 11, sub-sec. 4, expressly states that no receiving order under this Act shall be within the operation of any legislative enactment now or any time in force in any Province of Canada, regarding liens or charges, etc., to property.

"C. Sec. 25, sub-sec. ii. A converso-property exempt from seizure by provincial law is expressly excluded by the Act (598-599 C.P.). This shews that when the Act wants to preserve provincial rights they have done so expressly.

"D. Sec. 25 (a) expressly wipes out the privileges of the vendor as the section brings within its scope all such property as may belong to or be vested in the debtor, at the date of the presentation of any bankruptcy petition; as property divisible amongst the creditors in the manner laid down by the Act.

"E. Secs. 51 and 52 limit the privileges and preferences to sec. 51, sub-sec. 4, declare that all the rest of the debts shall be paid *pari passu*.

"Sec. 51, sub-sec. 6, expressly protects provincial privileges as to taxes, rates and assessments. A converso . . . It is not intended to protect other provincial privileges.

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"Sec. 52 expressly infringes on the landlord's privileges as governed by provincial law. By analogy, it is clear that it is the purpose of the Act to affect provincial privileges generally.

"Giving these sections all their effects, the Court has also to take cognizance of sec. 6, para. 1, of the Bankruptcy Act, 9-10 Geo. V. 1919, ch. 36, which reads as follows:—

"On the making of a receiving order the trustee shall be thereby constituted receiver of the property of the debtor and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose. But this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed."

The last part of this section preserves to a secured creditor the right to deal with his security in the same manner as if this section vesting all the property of the insolvent in the trustee had not been passed. By sec. 2, para. (gg), a "secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor, or any part thereof, as security for a debt due or accruing due to him from the debtor. Under art. 1543 C.C., petitioner has the privilege of obtaining the return of the goods he sold for non-payment of the price. It results from the Act that special enactments are made with regard to the rights of the landlord for his rent, with regard to marriage covenants and other rights.

If there was nothing else, it might be argued that the enumeration of special rights excludes all others, but sec. 6 reserves specially all other rights which the secured creditor has. It is argued that the right to resiliate the sale is not a privilege such as referred to in sec. 6. A secured creditor is defined by art. 2, para. (gg), above quoted. The privilege here is one which exists not only on the property, but also against the property. A privilege is certainly a right which one possesses and which no other person has. The right to demand the resiliation of the sale of movable when exercised operates as a revendication of the goods

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sold. It is a privilege against the goods as distinguished from a privilege on the goods if a privilege on the goods does not go so far enough to apply. Then the section uses the words "realise or otherwise deal with his security." These last words seem to cover any possible way which the creditor has to protect himself. Should there be any doubt left in the mind about the interpretation of the Act, it ought to be completely dispelled by sec. 25, para. (a), which enacts that the property of the debtor which is divisible amongst the creditors includes:—

(a) All such property as may belong to or to be vested in the debtor at the date of the presentation of any bankruptcy petition or at the date of the execution of an authorized assignment, and, in the case of a bankrupt, all property which may be acquired by or devolve on him before his discharge.

Then it is the property of the debtor which is available to the creditors. They have all the rights of the debtor but no more; they are in his shoes so to speak. What were the rights of the debtor with regard to the property in question? A right of ownership susceptible of being resiliated for non-payment of the price, under art. 1543 of our Code. That article made the sale a conditional one as absolutely as if an agreement had been made between the parties to the same effect. The trustee is vested with that property in the manner in which it existed in the hands of the debtor that is subject to the resiliation of the title. Petitioner demands the resiliation of the sale to have the goods restored to him; his demand is granted with costs.

Annotation.

ANNOTATION.

SECURED CREDITORS UNDER THE BANKRUPTCY ACT

BY J. A. C. CAMERON, M.A., L.L.B., K.C.

The question involved in this decision is of wide importance, as the question of provincial legislation bearing upon the Bankruptcy Act comes up for consideration. The last paragraphs of the provisions of sec. 6, sub-sec. 1, are very wide, reserving to a secured creditor untrammelled power to realise or deal with his security in the same manner as if the Bankruptcy Act had not been passed. This section, being general, must be read with the other provisions of the Act, and it would appear from the definition of a secured creditor —sec. 2, gg—that a secured creditor is one holding a security under contract or a security given to him under the provisions of the Bankruptcy Act. This view is supported by the provisions of sec. 46, which provides for proof by secured creditors. Sub-sec. 3 of sec. 46 provides for filing a statutory declaration with the trustee by a secured creditor of full particulars of the securities held by him giving the dates when each security was given. The security under review has no date as no security was given, it arising by implication

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under the provincial law. Reading the sections together it would seem to shew that the security contemplated by the Bankruptcy Act is a security arising under provincial law. Can it be said that where a provincial law implies that a person shall have certain rights under certain circumstances giving rise to security, that he "holds" a security as contemplated by the definition of secured creditor. Sec. 2, gg.

Under provincial enactments municipalities have a lien, charge or security for taxes, rates or assessments payable to them. This lien, charge or security arises not by contract but is given by provincial laws. This lien, charge or security is specially preserved by the provision of sec. 51, sub-sec. 6, of the Bankruptcy Act which is as follows:

"(6) Nothing in this section shall interfere with the collection of any taxes, rates or assessments now or at any time hereafter payable by or levied or imposed upon the debtor or upon any property of the debtor under any law of the Dominion, or of the Province wherein such property is situate, or in which the debtor resides, nor prejudice or affect any lien or charge in respect of such property created by any such laws."

If the framers of the Act had intended that the last paragraph of sub-sec. 1, sec. 6, read with the definition of preferred creditor, sec. 2, gg., was to cover such lien, charge or security for taxes it would not have been necessary to have enacted sub-sec. 6, of sec. 51. It may well be argued that the enactment of sub-sec. 6, sec. 51, shews that only such liens, charges or securities arising under provincial law, which are expressly reserved in the Act are liens, charges or securities against the estate of the bankrupt.

The judgment of Mr. Justice Panneton discusses certain sections dealing with preferred claims of landlords, etc., arising under the Act. These preferred claims were covered by provincial legislation and under these provincial laws, liens, charges or securities were given to the preferred creditors. These liens, charges or securities are retained in an altered form in the present Bankruptcy Act and it would appear that as certain provincial liens, charges or securities are dealt with, that those that are not dealt with are taken away. It cannot be said that reading the different sections bearing upon the questions that the matter is a settled one and that the last word has been said upon the subject.

STREET v. CRAIG

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Ontario Supreme Court, Middleton, J. October 26, 1920.

ANIMALS (§ IC—20)—DOMESTIC ANIMALS—ESCAPE FROM HIGHWAY—ABSENCE OF NEGLIGENCE—UNFENCED GARDEN—DAMAGE—LIABILITY—SCIENTER.

The owner of a domestic animal which is not vicious, but which, while being driven with other animals to the station, becomes excited and escapes from the highway and, running into an unfenced garden, injures the plaintiff, is not liable in damages in the absence of negligence. If the action was founded on trespass or negligence it was too remote, and if founded on the duty arising from keeping the animal there was no *scienter*.

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ACTION for damages for personal injuries sustained by the plaintiff by reason, as she alleged, of the default or negligence of the defendant. Action dismissed.

W. D. Henry, for plaintiff; *C. R. McKeown*, K.C., for defendant.

MIDDLETON, J.:—The plaintiff, a woman in humble circumstances, sues the defendant, a farmer, for damages sustained by her while in the garden of her brother, with whom she resided, by reason of an attack upon her by a cow, owned by the defendant, which entered the garden from the highway, knocking her down and inflicting most serious injury.

The defendant had sold some of his cattle to a drover, and engaged to drive them from his farm to the town-line of Orangeville, where the purchaser was to meet him and take charge of the animals. These cattle had been on the defendant's farm for a long time, and were not accustomed to being driven, and so were likely to give trouble when brought into the town. The cow in question was in no sense a vicious beast, but was undoubtedly nervous and excitable.

Two large steers were thought likely to give trouble, and the defendant tied a horn of each to its foreleg, an expedient which was shewn in the end to be unwise, for it greatly excited the animals.

Four men were employed to assist in driving these 7 beasts to the place of delivery. The defendant thought this would be ample assistance while on the country road, but admitted that he would not have been ready to undertake to take the cattle through the town and into the railway-yard without further help. The drover did not meet him as promised. The defendant had come a long way, and concluded that his better course was to take the cattle to their destination, and attempted to do so. There was no serious trouble until the cattle were upon the railway property; but, when an attempt was made to drive them through a gate into a small pen, from which they might be loaded to the railway car, they bolted. Six did not leave the railway premises and were finally driven into the pen, but the cow in question escaped from the railway-yard and had become so wild and excited as to be dangerous. She ran through the

streets, and, entering the unfenced garden where the plaintiff was, knocked her down and inflicted a severe wound upon her abdomen, and then returned to the highway. After other acts of violence, she was eventually captured.

The law relating to the liability of the owner or keeper of animals for injury done by them is in a most unsatisfactory condition. It is the result of a series of cases binding upon me, and probably binding upon all Courts, so well established has the law become, which have set up a number of artificial rules, some of which seem to have little foundation in reason. Some of these cases appear to be based upon a failure to appreciate the true significance of earlier decisions, and in many of them the reasoning of the different Judges taking part is so discordant as to make it quite impossible to say that the particular decision is based upon any clear principle. I do not propose to trace the history of the cases or discuss them in detail. Most of them are dealt with in a valuable book, Robson, Trespasses and Injuries by Animals, 1915.

In one of the later decisions, *Osborne* v. *Chocqueel*, [1896] 2 Q.B. 109, the then Chief Justice of England, Lord Russell of Killowen, thus laments (pp. 110, 111): "I do not say that the law is in a satisfactory condition; I think it is unsatisfactory. It would, in my opinion, be more in accordance with sound reason and principle to make a man responsible for what his dog did . . . that he should take the risk of keeping it. We have not, however, to decide whether the law in this respect is satisfactory or unsatisfactory, but only to say what it is as applied to the particular case before us." He then refers to the fact that an attempt had been made in the House of Commons to change the law, but that the attempt was unsuccessful.

In some of the earlier cases the view is taken that the owner of a beast is as liable for any trespass committed by it as he would be had the trespass been committed by himself. This ruling is founded on sound logic and good sense, and still remains the law, modified by certain important exceptions.

The first exception, which goes far to destroy the rule, is that the liability of the owner is limited to such damage as might reasonably be expected to result from the actions of an animal

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of the species in question or from the action of this particular animal, having regard to any mischievous propensity it had, known to its owner.

Mr. Justice Brett, in *Ellis* v. *Loftus Iron Co.* (1874), L.R. 10 C.P. 10, says (pp. 13, 14): "Having looked into the authorities, it appears to me that the result of them is that in the case of animals trespassing on land the mere act of the animal belonging to a man, which he could not foresee, or which he took all reasonable means of preventing, may be a trespass, inasmuch as the same act, if done by himself, would have been a trespass. . . . That being so, the question remains whether the damages were too remote." The Court then applied *Lee* v. *Riley* (1865), 18 C.B. (N.S.) 722, 144 E.R., as supplying the test, and held that the damages were not too remote.

The claim in the *Ellis* case was for damages by reason of the injury of the plaintiff's mare by the defendant's horse, which had reached through a fence upon the boundary and had bitten and kicked her. If the biting and kicking could have been regarded as the direct act of the defendant, as suggested, there could have been no doubt as to his liability, but the question actually considered was the probability of the horse assaulting the mare in the manner described. This seems to place the liability in the case of trespass upon precisely the same footing as in actions based on negligence, and in this indirect way the same question is raised as in cases in which it is necessary to prove *scienter*. On the facts *Lee* v. *Riley* was the converse of *Ellis* v. *Loftus Iron Co.* The defendant's mare was the trespasser and assaulted the plaintiff's horse, breaking its leg. It was argued that the action would not lie unless it could be shewn "that the animal was ferocious or of a vicious disposition and that the owner had knowledge of that vice and ferocity." The holding was that the action of the mare was not characteristic of vice and ferocity, but was the natural conduct of such an animal.

In both these cases, *Cox* v. *Burbidge* (1863), 13 C.B. (N.S.) 430, 143 E.R. 171, was recognised as the leading case and was distinguished. That was an action for negligence. The defendant's horse was allowed to graze upon a rural highway, and

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kicked the plaintiff, a young child. The law was stated by Erle, C.J., thus (p. 436): "The owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner knows it." The owner knows that a stray horse will damage corn or pasture, but "everybody knows that it is not at all the ordinary habit of a horse to kick a child on a highway" (p. 437).

Ellis v. *Loftus Iron Co.* and *Lee* v. *Riley* really turn on the finding that everybody knows that horses and mares will kick each other. Each case seems to depend upon some assumed universal knowledge of the nature of the animal in question.

Upon the same reasoning, in *Hudson* v. *Roberts* (1851), 6 Exch. 697, 155 E.R. 724 liability was found where a bull attacked a man wearing a red handkerchief, for this was "reasonable to expect;" but where a horse attacked and injured the plaintiffs, who were riding a tandem bicycle upon a highway, they failed, for this was not to be expected of the normal horse: *Jones* v. *Lee* (1911), 106 L.T.R. 123.

Quite apart from any question of trespass, the owner is liable for any injury done by a dangerous animal. This liability is not raised upon the doctrine of *Fletcher* v. *Rylands* (1866), L.R. 1 Ex. 265, concerning the liability to insure safety imposed upon one who for his own purpose brings upon his land a dangerous thing, for considerations based upon the natural and non-natural use of land have there to be regarded, but there is a certain analogy.

May v. *Burdett* (1846), 9 Q.B. 101, 115 E.R. 1213, shews that when an animal is of a kind known to be liable to attack mankind, an action will lie without proof of negligence in its keeping. The foundation of this liability is that the keeping of a dangerous animal imposes a duty to keep it safely, and the breach of that duty constitutes actionable negligence. The same rule applies in the case of any animal which would ordinarily be regarded as innocuous, which has, to the knowledge of the owner, shewn itself dangerous by doing harm to any person: *Jackson* v. *Smithson* (1846), 15 M. & W. 563, 153 E.R. 973. But such knowledge must be of a disposition to do the thing complained of. It is not to be inferred that a dog will attack mankind because it is known to have worried a goat: *Osborne* v. *Chocqueel*, *supra*.

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The keeping of a domestic animal, not known to be vicious, does not impose so onerous a duty, but merely the obligation to take reasonable care, with the consequent liability to answer for such damage as may reasonably be expected to flow from a breach of this duty. Ignorance of the true character of a domestic animal frees the owner from liability, but an honest belief in the harmless nature of an animal, not falling within this class, and the fact that it has not heretofore shewn any evil disposition, does not relieve the owner from his strict liability, as the case of *Filburn* v. *People's Palace and Aquarium Co.* (1890), 25 Q.B.D. 258, determines. This was an unsuccessful attempt to shew that an elephant had passed from the class of dangerous to that of domestic animals. "People must not be wiser than the experience of mankind," once dangerous, always dangerous, and so kept at the owner's risk.

There is another exception grafted upon the general rule as to the owner's liability in the case of trespass. Where a beast is being lawfully driven upon a highway, and escapes upon adjoining unfenced land, trespass is not actionable without proof of negligence. The origin of the exception and its reason is not clear, but the exception is now firmly established by the case of *Tillett* v. *Ward* (1882), 10 Q.B.D. 17. That case was very like the case in hand. An ox being driven down a road entered the open door of the plaintiff's shop and damaged his goods. There was nothing exceptional in the temper or character of the ox, and no negligence was proved on the part of the drovers. The plaintiff sought to establish liability by reason of the act of the ox constituting a trespass for which the owner was liable. The Court held that the trespass by an animal from a highway upon unfenced land is not actionable without negligence being shewn. The exception is one of the inevitable risks which the owner of land adjoining a highway must suffer. It is incident to the lawful use of the highway, and this exception is necessary for the conduct of the common affairs of life.

This case carries the law beyond any other reported decision, because it gives immunity for a kind of damage far beyond that suggested in the earlier cases which dealt with mere injury to crops and pasture by passing cattle. It also seems to adopt a

dictum of Blackburn, J., in *Fletcher* v. *Rylands*, suggesting that there is some obligation on the part of the owner of land adjoining a highway to fence for his protection.

It is clear that there is no obligation on the part of the owner of land adjoining a highway to fence to prevent his cattle from straying to the land of others. He must prevent his cattle straying, and he may do so by fence or by any other means he may choose: *Jones* v. *Lee*, *supra*.

In Gale on Easements, 9th ed., p. 411, are collected many cases from the Year Books down shewing that there is no obligation to fence for the purpose of avoiding trespass by the cattle of others.

Chief Justice Thayer, in *Bileu* v. *Paisley* (1889), 4 L.R.A. 840, collects the earlier English cases and American decisions based upon the common law, and concludes (p. 845): "A person owning and occupying land is not vested with the right to enjoy it upon condition that he enclose it by a palisade strong enough to keep his neighbours and their stock from breaking into and destroying the fruits of his labours. Property is not held in civilised communities by so insecure a tenure; but the law surrounds it by an ideal, invisible palladium, more potent than any mechanical paling which can be constructed."

Tillett v. *Ward* must, therefore, be taken to establish an exception to the general rule in the case of an animal trespasser from a highway.

Sir Frederick Pollock quotes with some gusto the comment of an experienced judicial officer of India upon his draft of the Civil Wrongs Bill, who referred to a section embodying this decision as "very queer law and of doubtful equity:" Torts, 10th ed., p. 620, note.

The popular idea that a man's house is his castle evidently requires some modification to bring it into harmony with this case. It is worthy of note that the Courts have declined to accord the like freedom to trespass to a traction-engine driven by steam: *Gunter* v. *James* (1908), 24 T.L.R. 868.

I was at one time inclined to think that the case in hand might be distinguished upon the ground that the animal in question was not at the time being driven upon the highway,

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that its journey had ended when it reached the railway-yard, and that when it escaped from that yard it was unlawfully upon the highway. This would, I think, be taking too narrow a view of the situation. The immunity which the case confers, based upon public necessity, if applicable at all, should cover the entire journey of the cattle until they reach their actual destination.

There was a by-law proved prohibiting animals being at large upon the highways of this municipality. This does not advance the plaintiff's case. This animal was not at large in the sense meant by the by-law. It had escaped from the custody of those in charge without negligence on their part. The by-law is aimed at preventing the turning of cattle loose on the highway without attendants. *Patterson* v. *Fanning* (1901), 2 O.L.R. 462, is a case shewing that the existence of such a by-law makes the owner of an animal at large liable, for his conduct is then unlawful.

In the result, the plaintiff fails, because: (a) if the action is founded on trespass, the damage is too remote; (b) the trespass was from a highway, and was not voluntary, nor the result of negligence, and even in this case the damage would be too remote; (c) if the action is founded on a duty arising from the keeping of the animal, the animal was a domestic animal and was not vicious and there was no *scienter*.

I greatly regret that I am driven to this conclusion by the cases, for, adapting what was said by Lord Russell, it would, in my opinion, be more in accordance with sound reason and principle to make the defendant answerable for the risks incident to taking his beasts to market, rather than to leave this unfortunate woman a cripple, without remedy for that which happened to her without the least fault on her part.

Our Legislature has had the subject before it for consideration, and has modified the law so as to afford the owners of sheep a remedy when worried by a dog, even when it is not known to be vicious; but the law has been left in the unsatisfactory condition I have indicated so far as human beings are concerned, ignoring that which is written—"How much is a man better than a sheep?"

Action dismissed.

MERCHANT BROS. v. CLOUTIER.

QUE.

C. R.

Quebec Court of Review, Pouliot, Flynn and Malouin, JJ. April 30, 1920.

MASTER AND SERVANT (§ II B—125)—WORKMAN EPILEPTIC—Failure to TELL EMPLOYER—FALL FROM ROOF OF BUILDING—COMPENSATION—INEXCUSABLE FAULT.

It is inexcusable fault on the part of a workman who is subject to epileptic fits not to tell his employer of his condition and to go onto the roof of a building and sit on the ridgeboard when he feels that he is not well. The result being that he falls from the roof and is killed. In awarding compensation the Court should take into consideration all the elements of the fault which caused the accident.

Statement.

APPEAL by defendant from the Superior Court in an action by the heirs of a workman who was killed in a fall from a high building. The Superior Court reduced the compensation from $2,040 to $1,500, the Court of Review again reduced it to $1,020, because of the inexcusable fault of the workman.

Galipeault, St. Laurent, Gagné & Metayer, for appellant.

Taschereau, Roy, Cannon, Parent & Casgrain, for defendant.

Pouliot, J.

POULIOT, J.:—Our Workmen's Compensation Act contains an express provision by which no compensation is granted if the accident was brought about intentionally by the person injured. This article is a reproduction, in almost identical words, of art. 20 of the French Act of April 9, 1898. By intention, we must understand not only the willingness to perform the act which produced the accident, but also the determination to accept the damages which result. It cannot be reasonably maintained, in the present case, that Labbé when he ascended the roof of the Methodist church to do some painting work, accepted the consequences of his act in ascending the roof. In the absence of any intentional fault on the part of the victim, the latter has, subject to the provisions of the Workmen's Compensation Act, an absolute right to compensation.

The compensation payable to the victim should be increased if there is inexcusable fault on the part of the employer. If, on the other hand, there is inexcusable fault on the part of the victim, the compensation should be diminished. But, if the fault is such that it might be excused, the compensation is wholly due to the workman.

Inexcusable fault implies essentially, says Dalloz (Code des Accidents du Travail, no. 1592), an intentional element, the willing-

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ness, at least to commit the act which brought about the accident. Inexcusable fault implies a negligence or culpable needlessness which any man thoughtful of his life ought not to be guilty of. The conscious and voluntary act of a workman subject to epileptic fits, but without intention to injure, does not, says Cabouat, constitute an inexcusable fault. As Sachet (Nos. 230, 415), teaches us, the inexcusable fault of the victim does not deprive him of the right to an indemnity but confers on the Courts the power to reduce the compensation, the measure of which is left entirely to them to estimate. Sachet (No. 416) cites the case of a workman who, taken with a fit of epilepsy beside the boiler of a factory, fell on the ground covered with fragments of hot coals which seriously burned him; he has a right, he says, to legal compensation.

The Act, in giving to the Courts the power to reduce the compensation if the accident is due to the inexcusable fault of the workman, shews thereby that, in determining the amount of the indemnity, account must be taken of the relation between cause and effect, or, in other words, of the seriousness of the consequences of the inexcusable fault rather than of the seriousness of the inexcusable fault in itself considering the damages caused. It seems to be incontrovertible that whatever may be the seriousness of the inexcusable fault committed by the employer or the workman it cannot enter into the computation for the increase or reduction of the compensation if the damage so caused is trifling. So, however gross the inexcusable fault of the employer may be, would any claim that, if the death of the victim did not result, the compensation ought to be increased just as if the victim had lost his life? The same reasoning applies in the case of inexcusable fault of the victim himself; otherwise it would be necessary to say that the increase or decrease of the compensation assumes the character of a penalty.

From the moment that there is sure proof of inexcusable fault on the part of the employer or workman, the reason for compensation disappears, and the compromise provisions of the Workmen's Compensation Act do not apply to determine the compensation which, in the case of inexcusable fault, depend on principles of the common law, which become applicable, and the compensation is left to be estimated by the Court.

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I think the inexcusable fault of Labbé does not consist in the false, lying and deceitful statement which he made to his employer that he was not subject to epileptic fits. If we attach to his statements the character of deceit and fraud, these would cause the victim to lose his right to any compensation.

The inexcusable fault of Labbé in my opinion consists in the fact that, knowing himself to be subject to fainting fits arising from epilepsy, knowing that he was ill and indisposed on the morning of the accident, notwithstanding the advice of one of his fellow workmen to return home because he felt himself to be indisposed, he persisted in going on the roof to fulfil a dangerous piece of work. Labbé further accentuated this first inexcusable fault by sitting, as he did, upon the ridgeboard of the roof. This was, under the circumstances, a risky action on his part, and a greater fault added to the first inexcusable fault.

In my opinion, Labbé, by his inexcusable fault, contributed to at least half the accident of which he was the victim, and my colleague, Flynn, J., and I consider that, in the estimate of the inexcusable fault, the Judge of the Court of first instance has not taken sufficient account of this element of inexcusable fault, and we would reduce to the same extent the amount of the compensation, which we have fixed at $1,020, instead of $1,500 which the Judge of first instance allowed.

Malouin, J.

MALOUIN, J. (dissenting):—The defendant (appellant) maintains: 1. That if Labbé's fall was the cause of his death such fall was due to his intentional fault, and therefore, his widow has no remedy; 2. That if intentional fault, which would prevent recovery, is not admitted, there must be admitted such a serious inexcusable fault that the compensation should be reduced to the lowest terms.

Article 7325, R.S.Q. 1909, lays down that no compensation shall be granted if the accident was brought about intentionally by the person injured.

By intention must be understood not only the will to do the Act which brings about the accident but also the determination to accept the consequences.

I think that there was no intentional fault on Labbé's part, and that the Superior Court was right in repeating this ground

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of defence. But, I think, with the Superior Court, that there was inexcusable fault on Labbé's part, and this brings me to the examination of the second point raised by the appellant.

In this case the maximum damages are $2,040. The Court of first instance ordered the defendant to pay $1,500 on the principle that, under the Workmen's Compensation Act, it is not the cause of the accident but its consequences which should be looked at in determining the compensation. This is indeed the principle which should govern, but this principle should not be followed in two cases which form an exception to the rule: first, when there is intentional fault, and secondly, when there is inexcusable fault.

In these two exceptions the cause of the accident should be taken particular account of. When there is intentional fault the action should be dismissed and when there is inexcusable fault it is the seriousness of the fault which should serve as a basis for reducing or determining the compensation.

Article 7325 enacts that the Court can reduce the compensation of the accident if due to the inexcusable fault of the workman. In the case of inexcusable fault, says Loubat (No. 1104), the annuities can be reduced on account of the inexcusable fault of the workman.

Judges cannot go so far as to abolish the allowance, but this is scarcely more than a theoretical point; Judges can, in fact, reduce the compensation to an insignificant and merely nominal amount (Baudry-Lacantinere, 2nd ed., vol. 19, No. 1930).

The reduction of the indemnity depends, therefore, on the seriousness of the inexcusable fault committed by Labbé. This fault is so serious that it is equivalent to deceit. Indeed, it is thanks to a lie told to the defendant and to his foreman that he was allowed to work on the roof of the Methodist church. Without such lie there would have been neither an accident nor the man's death.

For these reasons I would modify the judgment of first instance and allow only a sum of $500.

The judgment is as follows:—

Considering that, as the Court of first instance found, there was, on the part of the victim, the deceased Labbé, inexcusable fault which justifies and permits a reduction of the total amount of compensation fixed at $2,040 but that by reducing that amount

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by $540 only, the Court of first instance did not take sufficient account of the facts and circumstances which determine and characterise such inexcusable fault, and of the degree and seriousness of such fault; considering that such compensation should be reduced by half and be fixed at the sum of $1,020 of which two-thirds, namely $680, is to go to the plaintiff, and one-third, namely $340 to her minor child;

Sets aside the judgment of the Superior Court, and proceeding to render the judgment which ought to have been rendered, orders the defendant to pay to the plaintiff, as well personally as in her capacity of tutrix to her minor child, Patricia, the sum of $1,020, of which two-thirds, namely $680 for her personally and one-third, namely $340, for her minor child, with costs of an action for this amount of $1,020 in the Superior Court and with costs of review against the plaintiff (respondent).

Appeal allowed.

McGRATH v. SCRIVEN.

CAN.
S. C.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. November 23, 1920.

1. INTOXICATING LIQUORS (§ III H—90)—DESTRUCTION OF LIQUOR ORDERED BY MAGISTRATE—ORDER QUASHED ON CERTIORARI—ACTION AGAINST MAGISTRATE FOR DAMAGES—R.S.N.S. 1900, CH. 10, SEC. 6.

Section 6 of the R.S.N.S. 1900, ch. 10, is a complete answer to an action brought against a stipendiary magistrate for damages for destruction of liquor ordered by him in proceedings under the N.S. Temperance Act, the action having been brought before the order for the destruction of such liquor had been quashed on *certiorari*.

2. OFFICERS (§ II C—88)—WARRANT—ISSUED BY COMPETENT AUTHORITY—VALID ON FACE—LIABILITY FOR EXECUTING.

If an order for destruction of intoxicating liquor is valid on its face, and has been issued by competent authority, it is absolute justification to the ministerial officer who executes it, although it is afterwards quashed on the ground that the original seizure had been illegally made while the liquor was under the control of the Canadian Government Railways.

[See *Ex parte McGrath* (1919), 31 Can. Cr. Cas. 10, and *Martinello* v. *McCormick* (1919), 50 D.L.R. 799; *McGrath* v. *Scriven* (1920), 52 D.L.R. 342, affirmed.]

Statement.

APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc* (1920), 52 D.L.R. 342, allowing defendant's appeal and reversing the judgment on the trial before Drysdale, J., with a jury, in favour of the plaintiff for $375, Ritchie, E.J., dissenting as to respondent Scriven, and dismissing the plaintiff's cross-appeal to increase the damages to $1,290.

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MCGRATH v. SCRIVEN.

Davies, C.J.

J. J. Power, K.C., for appellant; *S. Jenks, K.C.*, for defendant.

DAVIES, C.J.:—This action was one brought by the plaintiff appellant against the stipendiary magistrate of Halifax, McLeod, and the constable Scriven, for the alleged illegal seizure and subsequent destruction of a quantity of spirituous liquor belonging to the plaintiff.

Harris, C.J., of the Supreme Court of Nova Scotia, on the hearing of an appeal by the magistrate and the constable from a judgment of the trial Judge, maintaining the action against them for the sum of $375, being the damages assessed by the jury, went into a full and exhaustive statement of the provisions relating to the times within which such an action as this must be brought, and held that under these provisions it was brought too late, and that both the magistrate and the constable were protected by the lapse of the statutory time for bringing the action. He further held that as to the destruction of the liquor by the constable Scriven, he was protected, because the order for destruction was made by a magistrate having general jurisdiction over the subject matter, and was valid on its face, with which holdings Longley, J., concurred (1920), 52 D.L.R. 342.

I am of opinion that the judgment of Harris, C.J., was correct, and feel that I cannot usefully add anything to his reasons with which I am fully satisfied.

I would dismiss the appeal with costs.

Idington, J.

IDINGTON, J.:—The appellant brought an action on July 31, 1918, against the respondent McLeod, who was a stipendiary magistrate, and Scriven, a constable, for acts done in the course of a proceeding under the Nova Scotia Temperance Act, 8-9 Geo. V., 1918, ch. 8, and result of an order to destroy liquor under said Act by said magistrate belonging to the appellant thereunder.

The order for destruction was afterwards quashed. The R.S.N.S., 1900, ch. 40, for the protection of Justices of the Peace and others, which includes said stipendiary magistrate, by sec. 6, enacted as follows:—

> 6. No action as mentioned in this chapter shall be brought for any thing done under a conviction or order until such conviction or order is quashed, nor shall any such action be brought for anything done under

any warrant issued by such Justice to procure the appearance of a party and which has been followed by a conviction or order in the same matter, until such conviction or order is quashed.

It seems to me that this enactment is framed in such clear English that we must apply it as it reads, and when so applied it is a complete bar to this action so far as the respondent McLeod is concerned, and of course to this appeal so far as it regards him.

The respondent Scriven is not protected by the said Act, but might have been entitled to protection under R.S.N.S. 1900, ch. 42, for the protection of constables and other officers; and it would have simplified matters very much, if he had, as his duty bound him to do, responded to the demand made upon him by appellant for a perusal and copy of his warrant.

Not having observed that clear line of duty, he is driven to rely upon another statute of limitation which has been repealed, and in substitution thereof another is enacted limiting the time for bringing an action to 3 months after the cause of action arose, instead of 6 as had been provided by the prior enactment.

This new Act, 8-9 Geo. V., 1918 (N.S.) ch. 8, was passed by the Legislature on April 26, 1918, nearly a month after the respondent Scriven had made the seizure of liquor in question.

This action was not brought until after that period of 3 months from the date of the passing of said enactment and of 4 months from the said seizure which in one view is the only cause of action, if any, which appellant can rely upon.

I attach no importance to the said lapse of 4 months, save this, that an appellant asking us to strain things to reach an equitable result had not so much reason to complain as others may have had by reason of a sudden change in the period of limitation.

If the conclusion reached by Harris, C.J., in the Court below, relying upon the decision in the cases of *The King* v. *Chandra Dharma*, [1905] 2 K.B. 335, and The *"Ydun,"* [1899] P. 236, is correct there is an end of the matter.

I have examined the cases cited by the appellant of *Deschène* v. *Montreal*, [1894] A.C. 644, and *Bradford Corporation* v. *Myers*, [1916] 1 A.C. 242, and find nothing in them to help the appellant. Indeed as the latter turns upon the express point of

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whether Public Authorities Protection Act, 1893, was at all applicable or not, and the Court held it was not, I am surprised to find it cited as having any bearing upon what is involved herein.

As apparently industrious research has found nothing better to overcome the decisions relied upon by the Court below I must conclude that the appellant is defeated by the application of the principle involved by said decisions.

Moreover, the verdict of the jury upon the questions submitted to test a finding of what were the actual facts seems rather a formidable obstacle in the appellant's way.

The truth would seem to be that what the respondent Scriven in his information alleged to be the fact, was not the fact which he should have alleged, and which if truly stated would have given no chance for this litigation.

The suggestion, in argument for appellant, of *res judicata* seems rather far fetched when the proceeding in question put forward as such, was between His Majesty and appellant, and not between the latter and Scriven.

In conclusion, I feel, after much labouring with appellant's argument that if the respondent Scriven is to be held responsible, by reason of his negligence when laying his information, in failing to distinguish between the Government Railway and the Express Co., as the actual possessor of the goods in question, for the stream of litigation that has ensued, I should, if in the Court below, have left him to pay his own costs.

But we do not meddle with costs in Courts appealed from unless incidental to substantial relief of another kind.

I think the appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—I am by no means certain that the right construction of sec. 6 of ch. 40 of R.S.N.S., 1900, is not contended for by Mr. Power, namely that the condition imposed is that the conviction or order should be quashed before the trial of the action.

I think, however, that the appeal fails on the ground that the plaintiff has failed to make out the allegation upon which his case rests, namely that the magistrate, McLeod, exceeded his jurisdiction in making the order which led to the acts of which the plaintiff complains. I see no reason for holding that

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the Nova Scotia Temperance Act, 8-9 Geo. V., 1918, ch. 8, does not authorise the seizure of liquor upon the premises of an express company, and certainly nothing in Martinello's case involves such a conclusion. With respect, I am unable to concur in the view of Ritchie, E.J., 52 D.L.R. at 352, that the judgment in *Ex parte McGrath* precludes the magistrate from relying upon the true facts. The argument of Mr. Jenks is, I think, well founded that the magistrate was not a party in the sense required in order to make a judgment in those proceedings binding upon him in any controversy with the appellant. On the other hand, as respects the constable, he is, I think, protected by the principle referred to by Harris, C.J., namely that having acted under an order made by a magistrate having general jurisdiction and valid on its face, the order affords a justification for anything done before it is quashed. Scriven's act in seizing the liquor may not fall under the protection of this principle, but in respect of that the appellant could at most recover nominal damages and as *res judicata* was not adequately pleaded, he should not, I think, be permitted to amend for the purpose of maintaining the action on this ground.

I express no opinion upon the question whether or not the Act of 1918 applies to this action.

Anglin, J.

ANGLIN, J.:—Harris, Chief Justice of Nova Scotia, has, I think, conclusively shewn that the defendant magistrate is fully protected by sec. 6 of the Act for the Protection of Justices, R.S.N.S., 1900, ch. 40, and that the constable, Scriven, is likewise protected as to the claim in respect of the seizure of the appellant's liquor by sub-sec. 3 of sec. 70 of the Nova Scotia Temperance Act, as enacted by 8-9 Geo. V., 1918, ch. 8, and as to its destruction by the fact that the order for it was apparently valid on its face. I feel that I cannot usefully add to the reasons assigned by Harris, C.J., for these conclusions.

Mignault, J.

MIGNAULT, J.:—In this case I feel that I cannot add anything to the able and exhaustive judgment of Harris, C.J., and for the reasons stated by him, my opinion is that the appeal fails and should be dismissed with costs.

Appeal dismissed.

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Re GRENVILLE PROVINCIAL ELECTION.

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Ontario Supreme Court, Magee, J.A., and Sutherland, J. October 12, 1920.

ELECTIONS—(§ II—D—75)—CORRUPT PRACTICES IN CONNECTION WITH—ESTABLISHING—INTENTION—BRIBERY.

Money paid to a local band by a supporter of a candidate on visiting his home town where the band played in front of the residence where the candidate and supporter were stopping, with the intention of paying a compliment to the supporter is not given with corrupt intent in connection with an election.

The words, "You do what is right and I will do what is right," in connection with a promise given by a candidate at an election to procure a position as teacher for a voter's daughter, is too vague from which to draw any inference of corrupt intent.

A candidate having been chosen by a convention of delegates from all parts of the constituency, after the close of the convention the delegates had dinner at a hotel, the candidate paying for the dinners. Held under the circumstances that no corrupt intent had been established so as to bring the case under sec. 169 of the Ontario Election Act, R.S.O. 1914, ch. 8; and, there being no evidence that any invitation had been given at or during the meeting or at the place of meeting, and the business having been concluded and the delegates dispersed, and, so far as shewn, the arrangements to pay having been made after they had so dispersed, it was not a case of furnishing refreshment at a meeting of voters assembled for the purpose of promoting the election, within the meaning of sec. 168; and the charge in that respect against the respondent failed.

[*Prescott Case* (1884), 1 Ont. Elec. Cas. 88, and *Muskoka and Parry Sound Case* (1884), 1 Ont. Elec. Cas. 197, distinguished. *East Middlesex Case* (1903), 5 O.L.R. 644, followed.]

The fact that a candidate owned all the shares except a few held by persons to qualify as directors in an incorporated company by which a newspaper was published and job printing done, and which printed proclamations, ballot-papers, etc., in connection with an election, and for which the candidate pays out of money received from the Provincial Government, does not bring such candidate within the provisions of sec. 11 of the Act respecting the Legislative Assembly, R.S.O. 1914, ch. 11, so as to make him ineligible for membership in the Assembly.

Statement.

PETITION by George Arthur Payne for a declaration that the election of George Howard Ferguson, respondent, as member of the Legislative Assembly of Ontario for the electoral district of Grenville, was void, that the respondent was disqualified, and that the petitioner, who was the defeated candidate at the election, was duly elected.

Gordon Waldron, for petitioner; *H. A. Stewart*, K.C., and *W. H. Price*, for respondent.

THE COURT:—The petitioner, who was the defeated candidate at the provincial election in October, 1919, filed his petition to have the respondent's election as member for Grenville electoral district declared void, the respondent declared disqualified, and he, the petitioner, declared elected.

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The grounds set forth in the petition and particulars were various alleged corrupt practices or illegal acts by the respondent or his agents, an alleged majority of legal votes for the petitioner, and the ineligibility of the respondent by reason of his having a contract with the Government or a public officer, contrary to sec. 11 of the Legislative Assembly Act, R.S.O. 1914, ch. 11.

Particulars of the charges of alleged illegalities were delivered by the petitioner, numbered 1 to 54 (including 41 (a)) and numbered 1 and 2 under para. 15 of the petition, 1 and 2 under para. 26, 1 under para. 9, and 1 to 13 inclusive under para. 17. At the trial six additional particulars, lettered (a) to (f), were added, making 78 in all.

The respondent, in turn, filed a cross-petition to have it declared that the petitioner, Mr. Payne, was not elected, and alleged various corrupt practices and illegalities of votes—and also delivered particulars.

At the trial no evidence was offered on behalf of the petitioner as to some of his particulars, and as to others it was conceded that the evidence failed to disclose irregularity or corrupt practice. In all, counsel for the petitioner had admitted at the close of his case that the charges in particulars numbered 4, 5 (in part), 6, 7, 9, 12, 15 (in part), 16 to 23, 26 to 32, 34 to 40, 41 (a) to 45, 47 to 52, 54, 1 under para. 15, had failed to be substantiated, and also all the added particulars lettered (a) to (f).

The claim to the seat was also abandoned by the petitioner's counsel, which renders it unnecessary to consider the particulars under paras. 15, 17, and 26, and in consequence of that abandonment the respondent abandoned any attempt to prove his cross-petition.

This left only the following charges by the petitioner, Mr. Payne, to be disposed of, namely:—

1. Alleged promise and payment by one Stanley Lampkin to one Alexander Matt of money to vote for the respondent.

2 and 3. Alleged payments by one John Boyd to one Levius Matt of $5, (2) to induce Levius Matt to vote for the respondent and (3) to procure Mrs. Alexander Matt so to vote.

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5. Alleged offer and payment by John Boyd and Samuel Lampkin of money to Alexander Landrie and Alexander Lee to vote for the respondent.

8. Alleged offer by Albert Roach junior to one James Kelly and his wife of money to vote for the respondent.

10 and 53 (duplicate charges). Alleged offer and payment by Albert Roach junior to one James E. McIntyre of money to vote for the respondent.

11. Alleged payment by John Boyd to James E. Begley of money to vote for the respondent.

13. Alleged payment by William Kidd of $5 to William J. Greer to vote for the respondent.

14. Alleged offer and payment by Albert Roach junior to William P. Fleming junior of $25 to vote for the respondent.

15. (Included in No. 5).

24. Alleged payment by Lampkin, Boyd, and Roach to Lorne Burchill of $2 to vote for the respondent.

25. Alleged payment by W. Burchill to Arthur Rylands, bandmaster, of $30 to influence Rylands and the members of the band to vote for the respondent.

33. Alleged payment of $2 by Almon Cook to Mrs. Thomas Bellinger to vote for the respondent.

41. Alleged order by the respondent to Almon Cook, hotelkeeper, to furnish meat, drink, and refreshments at the respondent's expense, at a meeting of voters assembled for the purpose of promoting the election, and payment therefor by the respondent to Cook.

46. Alleged promise by the respondent to one Patrick O'Brien to procure for his daughter a position as teacher in a city school to induce him to vote for the respondent.

1 under para. 9. That the respondent, being owner of a newspaper in the electoral district, called the Kemptville Advance, contracted as such owner with the Government and did printing for the Government under the Election Act for the said election, and was paid therefor.

As to charges 1, 15, and 24 it was proved that one Sidney Lampkin, a moulder in a plough factory, solicited Alexander Matt, Lorne Burchill, and Alexander Landrie to vote for the

respondent, telling Matt and Landrie each that there was something in it for them. Next day or so he put $2 into the pocket of each of the two first named, and handed $2 to Landrie, who gave it back to him, with the remark that Lampkin needed it as much as he, and Lampkin thanked him. Lampkin left the neighbourhood after the filing of the petition. The evidence would lead to the conclusion that he was supplied with funds from some source. He was an active supporter of the respondent, but there was no proof to establish any agency for the latter, and this was conceded by counsel for the petitioner.

As to charges 2 and 3, the evidence shewed that John Boyd, near the close of the poll, went to the home of Alexander Matt, referred to in charge 1. The husband had already voted, and Boyd urged the wife to go also before the poll closed. Her brother-in-law, Levius Matt, was present, and to him, according to her, Boyd handed $5 without saying what it was for. Boyd drove her to the poll, and she voted. After her return, Levius Matt handed her the $5, also without remark. She said in evidence that she supposed he paid it on account of his board. Boyd stated in evidence that he was fish and game inspector, and that he owed Matt the money for services as boatman during fishery inspection some years previously, but had not since seen him till election day. Matt does not appear ever to have asked for any money, and Boyd admits that he had not included it in his accounts to the Government. Levius Matt was not called as a witness. The transaction is, to say the least, a very suspicious one, but it is unnecessary to make a direct finding as to whether there was a corrupt payment. Boyd admitted having worked in the election for the respondent, of whom he was an old friend, but there is not sufficient evidence to make him an agent of the respondent.

As to charges 5 and 15, there is no proof of any promise or payment to Alexander Lee to vote for the respondent nor of any payment to Landrie other than that already referred to.

As to charges 8, 10, 14, and 53, there is evidence that the same John Boyd sent a youth, Albert Roach, to drive to the farms of James Kelly, James E. McIntyre, and William Fleming, who were understood to be Liberals, and ask them to vote for

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the respondent. Roach said to each of them that Boyd told him to say, "There will be something in it for him to vote for the respondent if he would do so," and to Fleming he named the sum of $5. Roach professed inability to remember whether Boyd had told him to say there was something in it for them, but he said Boyd may have hinted at it. He was paid $6 and $1 by Boyd for his journey. Boyd denied that he had directed Roach to pay them any money or that he himself had handled any money not his own. His disclaimer is not convincing. The conclusion we would draw is that there was a corrupt offer by Boyd through Roach, but here again there is a failure of evidence to shew that either of them was in the position of agent for the respondent.

As to charge 11, the same John Boyd, in the spring of 1920, received 7 bushels of seed barley and 3 bushels of peas from James E. Begley and paid him $25. This, they say, was in pursuance of an arrangement made shortly before election day; but, though the price is said to be high, it is not shewn to have had any relation to Begley's vote, and the charge is not proved.

As to charge 13, William J. Greer was called and stated that on election day William Kidd, at the polling place, asked him to help him out, meaning, vote for the respondent. Greer replied that he did not think he could, whereupon Kidd asked him if $5 would not tempt him, and if he wanted to take it he would see that he got it. Greer said he did not want it, and Kidd said that lots were taking it, and he might as well take it. No money was in fact paid to Greer. William Kidd was called and would not contradict Greer's evidence, but did not think he used the word "tempt." There was no doubt of the corrupt offer, but again there is failure of proof of agency of Kidd for the respondent, as was conceded for the petitioner.

As to charge 33, the evidence of the two persons concerned shews that Almon Cook, hotel-keeper, a supporter of the respondent, called for Mrs. Kathleen Bellinger and drove her to the polling place, where, as she volunteered to say, she voted for the petitioner, and on the way back to her house, when she told Cook she had voted for Payne, he said, "You done pretty well,"

and, arriving at her house, he laughed and said, "This is for Payne," and paid her $2. Both say there was no previous request to vote for the respondent, nor promise of payment. The fact of payment to a voter and professedly for voting is established; that it was paid by Cook for voting against the respondent whom he was supporting may well be questioned, but there is no evidence to establish Cook's agency for the respondent.

As to charge 25, the facts appear to be that a public meeting of electors had been called in the respondent's interest not far from the village of Cardinal, at which the respondent was to speak. He had asked the Hon. Dr. Reid, Minister of Railways in the Dominion cabinet and federal member for the county, also to come and address the electors. Dr. Reid had formerly lived in Cardinal, and his mother lived there, and he and the respondent were dining with her at her house before the meeting. While they were there, the local band, a voluntary organisation of musicians, came to the front of the house and played there. Dr. Reid handed $30 to Burchill, who was at the house, to be given to the band. Mr. Burchill went out and paid it to the bandmaster, Arthur Rylands, who subsequently distributed it among the members of the band—10 in all. No previous arrangement for the visit of the band to the house is shewn to have been made, and no request made on their behalf for money. It would seem that their demonstration must have been intended to honour their distinguished former townsman, as it does not appear that the presence of the respondent was known.

Dr. Reid, in former years, had taken part in the formation of the band in the village, so much so as to have been a member, and had always taken an active interest in it. It was shewn that it was usual, during many years, for the band to turn out on occasions of public interest or to pay such compliments to individuals and especially to Dr. Reid. The respondent himself had known many such. It was also shewn that it was usual to give some gratuity to the bandsmen, at such time. In the present instance the respondent was not aware of the payment at the time. It is not shewn to have been in excess of what was usual. One cannot doubt that, quite apart from the fact of the intended political meeting of that evening and the impending election, the

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occasion was such as to stimulate a liberal recognition by Dr. Reid of the honour done him by his local friends. It is true that he knew that among the bandsmen were men who were not likely to vote for the respondent, but that the election influenced his action cannot fairly be inferred. It would, perhaps, have been better to have shewn his appreciation of the compliment at a later date, when his purpose could not be misunderstood, and it may have been indiscreet to have made the payment at the time, but we cannot say that it is a fair deduction from the evidence that it was made with a view to influencing the men's votes, or of seeking favour for the respondent, or that it was really made at all in relation to the election, or was other than evidence of the spontaneous goodwill of a prominent fellow-townsman towards his former organisation and his fellow-townsmen doing him local honour.

Slight circumstances might differentiate other cases from this one, but we have to deal only with the evidence before us. With the question whether Dr. Reid can be said to be an agent of the respondent, at whose request he made several speeches in his behalf during the election, it is unnecessary to deal. The payment in question should rather be attributed to Dr. Reid's sense of his personal position in his former village.

As to charge 46, one Patrick O'Brien says that he spoke to the respondent with a view to getting a position for his daughter as teacher in some city school, or other position for which she was qualified by her certificate, as she had only been able to get employment in rural schools. In effect, according to Mr. O'Brien, who had not been of the same shade of politics as the respondent, the respondent told him to have his daughter make application to the Department of Education in Toronto, and he would render assistance, and wound up with the words, "You do what is right and I will do what is right." After the election application was made in Toronto for a position, but, according to O'Brien, received little or no attention. Even if Mr. O'Brien's evidence alone were accepted, the words used, under the circumstances, uncoupled as they are with any consequent acts, would be entirely too vague to draw from them any reasonable inference of corrupt intent, but the respondent denies having used

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the only words to which any sinister meaning could be given, and in effect says that he merely expressed his readiness and desire to assist in such circumstances any resident of his district to attain a proper object. His denial must be accepted.

There remain two other charges against the respondent himself.

As to No. 41, of furnishng food and refreshment to electors, the facts appear to be these.

There is or was, in the county, a Conservative association, which had or was supposed to have a chairman, executive committee, and a secretary, and a local committee in each polling subdivision, each local committee to have a chairman and secretary. According to the respondent and Dr. Reid, practically the only use ever made of the association was to call conventions for the selection of candidates for the House of Commons or the Legislative Assembly. In 1919 it had been inactive for several years. On the approach of the provincial election, the officials and executive committee of the county association were, at the respondent's instance, asked to meet at Spencerville with a view of having a Conservative candidate selected. The meeting was held, and it was decided to hold a convention on Monday the 6th October, at the same place, and the notices were sent to the local chairmen or secretaries to have delegates appointed to attend it. It does not appear that there was ever any probability of the suggestion of any other name as candidate than that of the respondent himself. The convention was held on Monday, delegates from almost all the subdivisions attending, about 80 or 90 persons in all. There were some speeches by various persons, including the Hon. Dr. Reid and the respondent, and the latter was unanimously selected as candidate, and the meeting was enthusiastic. It does not appear that any other name was in fact submitted to the meeting, though the respondent says there may have been some formal or complimentary nominations. After his nomination, he again spoke, thanking the meeting. Others than the delegates were present, as there was no exclusion of the public. After the close of the meeting, which took place in the forenoon, most but not all of those attending the convention went for dinner to the local hotel kept by Almon

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Cook. About this time, the respondent told Cook or his clerk that he would pay for the dinners. No announcement of this fact was made, and no previous intimation given nor invitation to go to the hotel to any one, so far as appears; but, when some at least of the delegates went to pay the hotel clerk, they were told that the dinner had been paid for. It does not appear that any one was told the name of any person as bearing the expense. It is perhaps probable that it became well-known to be the respondent. The amount paid by him was about $70, in the recollection of the hotel-keeper and his clerk. The respondent did not say this was incorrect, but had thought it was about $50 or $60. The charge was 75 cents each, and if about $70 it would indicate about 90 persons paid for. Precisely what was the arrangement with Cook was not disclosed, but we assume that it was only as to refreshments for those properly attending the convention as speakers or members. As the result of the convention was looked upon as a foregone conclusion, we would infer from the fact that the hotel clerk had accepted payment from some of the delegates that the arrangement with Cook was made after the meeting had adjourned. It seems not to have been made till that day, but the respondent had previously informed Cook that the convention was to be held in the village and told him he should be ready for the influx of guests, as the preliminary meeting of the executive committee appears to have strained the hotel's resources for the day. There is no indication of the probability of any one having been at the convention who was not already a warm supporter of the respondent.

Under these circumstances, was there an illegal act by the respondent? The Ontario Election Act, R.S.O. 1914, ch. 8, sec. 168, prohibits a candidate or any one else from providing or furnishing, at his own expense, meat, drink, refreshment, or provision at a meeting of voters assembled for the purpose of promoting the election, previous to or during the election, or from paying or promising or engaging to pay therefor—but this is not to extend to meat, drink, or refreshment furnished to any such meeting of voters by or at the expense of a person at his usual place of residence, where such residence is a private house; and a breach of the enactment is made a corrupt practice and subject to a penalty of $100.

By sec. 169, a candidate who corruptly provides or is accessory to providing any meat, drink, refreshment, or provision to or for any person, in order to be elected or for being elected, or for the purpose of corruptly influencing such person or any other person to vote or refrain from voting at an election, shall be guilty of a corrupt practice and incur a penalty; and, by sub-sec. 2, the giving of meat, drink, refreshment, or provision to voters extensively or generally, by a candidate or his agent, or the taking part therein or giving the same wholly or partly at the expense of the candidate or agent, shall *primâ facie* be a corrupt practice, within the meaning of the section; and, by sub-sec. 3, it is not a sufficient answer that the person charged had been in the habit of treating: *North Ontario Case* (1884), 1 Ont. Elec. Cas. 1.

The above section 168 was originally sec. 161 of R.S.O. 1897, ch. 9, as amended in 1899 (62 Vict. (2) ch. 5, sec. 6), by the addition of the words "where such residence is a private house," and consolidated in 1908 (8 Edw. VII. ch. 3), when sec. 161 was re-enacted as sec. 168, with the words "at a meeting" instead of the original words "to a meeting." Section 169 was orignally sec. 162, as amended in 1908 by the addition of sub-sec. 2, and the transfer to it on consolidation in 1908 of sub-sec. 3 from sec. 163 of the 1897 Act, now sec. 172 of R.S.O. 1914, ch. 8, which relates to furnishing food or refreshments to a voter on nomination or polling day on account of his being about to vote or having voted.

It is to be noted that sec. 169 requires the furnishing of refreshments to a person to be corruptly done, whereas sec. 168 prohibits furnishing the refreshment at a meeting, and declares that to do what is prohibited shall be a corrupt act. As said by Patterson, J.A., in the *Prescott Case* (1884), 1 Ont. Elec. Cas. 88, 93, speaking of another provision of the Act: "The Legislature seems to have removed from the Courts the duty of inquiring what was the intention with which the act was done, having attached to it the character of a corrupt practice."

The circumstances, so far as brought out, seem to preclude the idea that there was a corrupt intention so as to bring the case under sec. 169. The parties were, so far as appears, all the friends and supporters of the respondent, and we would

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attribute his act rather to the desire to shew appreciation of the continued confidence of his friends than to any attempt to gain strength in the polling.

As to sec. 168, there being no evidence that any invitation had been given at or during the meeting or at the place of meeting, and the business having concluded and the delegates dispersed, and, so far as shewn, the arrangement to pay having been made after they had so dispersed, the case we think is to be distinguished from the *Prescott Case*, 1 Ont. Elec. Cas. 88, and the *Muskoka and Parry Sound Case* (1884), 1 Ont. Elec. Cas. 197, the latter of which cases went, as said by Osler, J.A., in the *North Waterloo Case* (1899), 2 Ont. Elec. Cas. 76, at p. 88, "to the very verge of the law." In the *East Middlesex Case* (1903), 5 O.L.R. 644, the facts seem more nearly to resemble in essence those of the present case than either of the former, and it was there held that there was not a breach of the section in question.

Since these cases the wording of the Act has been changed by the substitution of the words "at a meeting" for "to a meeting," and it is pressed upon us that this change was intended to require that the refreshments must be furnished during and at the place of meeting. By the use of the word "at," it would at least seem that the word "meeting" cannot be construed as meaning the persons constituting the meeting, and if any effect is to be given to the change it would seem to limit rather than extend the scope of the prohibition. Considering that the section is aimed at acts which are not corrupt in themselves, nor done with corrupt intent, but which might entail such serious consequences to the candidate, while it should receive a reasonable construction, as was said by Osler, J.A., in the *North Waterloo Case*, 2 Ont. Elec. Cas. at p. 88, "We are not to strain the words of the statute."

In our opinion, this charge fails.

The only remaining charge is No. 1 under para. 9. The work of printing the proclamations for the nomination and polls and those for the voting on the prohibition referendum, and also of the ballots for each and cards for the polling booths, was given by Mr. Johnston, the returning officer for the electoral district of the county of Grenville, to the Advance Printing Company Limited, of Kemptville, in the county. The company did

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the work and rendered to Mr. Johnston an account therefor, amounting to $190.54. The charge for the work was on the proclamations $52, dated the 30th September; that for the referendum ballots $66 on the 7th October; and that for the election ballots and cards $72.54 on the 14th October; the total being $190.54.

The returning officer, after the election, included this amount in his statement to the Government of his disbursements, and received a cheque covering his disbursements and fees, out of which he paid the company the amount.

The company was incorporated about 10 years ago. There had been two newspapers published in Kemptville, one owned by the respondent and the other a rival paper. The owners decided to unite them, and the company was formed to acquire them, shares being issued to the owners in payment. Both continued in the management of the company for about 5 years, and then the respondent bought the other shares and has since remained practically sole owner, all the shares being held by him, except, as he says, a few qualification shares for directors. The respondent in his examination says, "It is an incorporated company," and again, "I control it absolutely, except the nominal shares." He also states that ordinarily he is not in the office more than once a month. The business is conducted by a manager, and it was with the manager that the returning officer made arrangements for the printing, and to him that the money was paid. The respondent had no personal knowledge of the transaction. The reason given by the returning officer for getting this work done there was the limited time and the necessity for despatch, the company having better facilities than other offices.

The Act respecting the Legislative Assembly, R.S.O. 1914, ch. 11, by sec. 11 makes ineligible to the Assembly any one holding or enjoying, undertaking or executing, directly or indirectly, alone or with any other, by himself or by the interposition of a trustee or third party, any contract or agreement with His Majesty, or with any public officer or department, with respect to the public service of Ontario, or under which any public money of Ontario is to be paid for any service, work, matter or thing. It is contended that under this section the respondent is rendered ineligible by reason of this printing transaction. Section 12, para. (*b*), declares that no one is ineligible by reason of

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being a shareholder in an incorporated company having any such contract or agreement, unless the contract or agreement is for the building of a public work. This section would almost seem to imply that in some cases a person might be ineligible under sec. 11 by merely being a shareholder in a contracting company.

The Advance Printing Company might at present be termed a "one-man company," and its contracts do in fact redound to the profit or loss of the respondent, in effect as if they were contracts by him and in his own name, but yet the company is a legal entity separate from its shareholders. It was formed to give effect to an ordinary business transaction and in good faith, and was not in its inception open to the objections sought to be made to the company, formed by one man to take over his own business and absolve him from personal liability, which was in question in *Salomon* v. *Salomon & Co.*, [1897] A.C. 22. The validity of such a company was there established, and unless it could be said that the Advance Printing Company became merely an alias for the respondent or merely his agent, the company alone and not he would be responsible on its contracts, and he could neither sue nor be sued thereon. In *Blair* v. *Haycock Cadle Co.* (1917), 34 T.L.R. 39, where goods had been sold to a company and a shareholder was sued for the price, on the allegation that the company was only his agent, the House of Lords decided that questions as to the number of shares held by the defendant were proper as relevant to the issue and that the *Salomon* case did not decide such a question. But there is here no evidence, beyond the ownership of the shares and the respondent's statement that he controls the company, to warrant any finding that it is only another name for himself, or only his agent, and certainly not to warrant a finding that he could have sued for the price of the printing or been sued for any failure in performing the contract. He is not within the exception in sec. 12 (*b*), and is expressly relieved by that section, in the absence of any evidence of identity or agency.

The petition will therefore be dismissed; but we think, under all the circumstances, that the dismissal should be without costs. The cross-petition will also be dismissed without costs.

Judgment accordingly.

Annotation.

ANNOTATION.

TITLE BY POSSESSION.

By E. Douglas Armour, K.C., of the Toronto Bar.

The law respecting title by possession, where a trespasser encloses a piece of the adjoining land overhung by the projecting eaves of his neighbour's house seems to be assuming a novel shape. We are not without instances of cases where prior decisions have been accepted without criticism, until at last the law becomes settled beyond hope of reclamation; and the same fate may attend the question which was involved to some extent in the cases of *Rooney* v. *Petry* (1910), 22 O.L.R. 101, and *DeVault* v. *Robinson* (1920), 54 D.L.R. 591, 48 O.L.R. 34. *DeVault* v. *Robinson* followed the other case without criticism, the reasoning being adopted and accepted as correct. It will therefore be convenient to examine the earlier case.

In *Rooney* v. *Petry*, the plaintiff's north wall was situated about a foot from the northerly boundary of his lot, and the eaves of his house projected over this one foot space. The defendant for "many years" treated the one-foot strip as part of his lawn and sometimes planted flowers in it. The plaintiff was in the habit of using the land to the north of his house for the purpose of painting it. The Court held that the defendant had extinguished the plaintiff's title to the strip but that his title was "subject to the easements, (1) the maintenance of the roof, and (2) the right of entry and support, etc., for painting, etc., the north side of the house and front fence." It is unfortunate that the number of the "many years" was not stated, as the question of the acquisition of an easement is involved therein.

In giving judgment Riddell, J., said, 22 O.L.R., at 107:—"That the right of a person to have his eaves or roof project over another's land is an easement is, of course, elementary, and the power of acquiring such an easement by the statute has been admitted since *Thomas* v. *Thomas* (1835), 2 Cr. M. & R. 34, 150 E.R. 15; *Harvey* v. *Walters* (1873), L.R. 8 C.P. 162; *Lemmon* v. *Webb*, [1894] 3 Ch. 1, at 18."

Let us now examine these three cases, in order to ascertain whether they decide that a projecting eave constitutes an easement.

In *Thomas* v. *Thomas*, 2 Cr. M. & R. 34, at 36, 150 E.R. 15, the plaintiff complained that the defendant by building had obstructed a drain which discharged through the defendant's premises (which need not be further remarked upon) and that the building was "so near to the said wall and to the thatch thereof, that by reason thereof . . . the rain which from time to time descended to and fell upon the thatch of the said wall was wholly prevented from dripping and falling from the thatch thereof in manner aforesaid." The issues in the case were two, viz.: (1) whether unity of possession had extinguished the easement of dripping or shedding water, and (2) whether the plaintiff by having raised the height of his wall had lost his easement. The effect of the judgment on the latter point is shortly and correctly expressed in the head-note:—"Where a party has a right to have the droppings of rain fall from his wall upon the premises of another, the right is not destroyed by raising the height of the wall."

In *Harvey* v. *Walters*, L.R. 8 C.P. 162, precisely the same point arose, namely, whether increasing the height of the wall from the eaves of which

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rain dripped upon the defendant's land destroyed the easement; and it was held, following *Thomas* v. *Thomas*, that in the absence of evidence that any greater burden was thrown on the servient tenement, the easement was not destroyed.

It will be noticed that in each case there was an easement to shed water on another's land acquired by user before the action was brought, and as far as the writer can ascertain, nothing is said in either of the two cases about the maintenance of a projecting eave being an easement.

In *Lemmon* v. *Webb*, [1894] 3 Ch. 1, the plaintiff's trees grew so that the boughs overhung the defendant's land, and the defendant cut them off up to the boundary line without giving previous notice to the plaintiff; and it was held that the overhang of the trees constituted a nuisance and not a trespass, and that the defendant had a right to abate the nuisance by cutting the boughs, and was not obliged to give notice of his intention to do so. This decision was affirmed in the House of Lords, [1895] A.C. 1, where the sole question was, as it was largely in the Court below, whether previous notice was necessary. The overhanging boughs had been in that position for more than 20 years, so that if the fact had constituted a trespass the plaintiff would have acquired an easement, whereas the Courts held that the overhang in the case of trees was merely a nuisance. It cannot be inferred from this case that the right to maintain a projecting eave is an easement.

Assuming then that those cases do not support the proposition in the text, it must be examined on principle to ascertain whether it is accurate. If a man in building his house build on a foot of his neighbour's land, there is no doubt that the encroachment would be an occupation which would develop into ownership in 10 years, and not the exercise of a right which would ripen into an easement in 20 years. Similarly, if he excavated his neighbour's land and constructed a cellar and used it in connection with his own house which, except the cellar, was built on his own land he would in 10 years gain title by possession and not an easement: *Rains* v. *Buxton* (1880), 14 Ch.D. 537. In each case there is permanent occupation to the exclusion of the owner; whereas an easement is the result of the exercise of a right which does not exclude the owner of the servient tenement from the occupation of his land. If then, a man should build the upper portion of his house so as to overhang his neighbour's land, does he not exclude the neighbour from the occupation of that portion, and is he not in exclusive possession himself? A passage from the judgment of Kay, L.J., in *Lemmon* v. *Webb*, [1894] 3 Ch. 1, at 18, shews the difference between that case and the case of a projecting house. Where boughs of trees overhang, the wrong is a nuisance, the remedy is by action on the case, and damage must be shewn as the cause of action; but where a house projects over adjoining land, it is a case of trespass and the remedy is for trespass to land. Now a trespass to land constituting occupation by a mere continuance ripens into a title by possession, whereas the overhang of the boughs for more than 20 years gave no right of any kind.

The preceding discussion is academic in so far as the principal cases are concerned, for the projections of the buildings in both cases were over the plaintiff's own lands; but it arises naturally out of the Judge's dictum; and if the arguments are sound and the cases cited properly interpreted it appears that there is no ground for the proposition that the right to maintain a permanent portion of a building projecting into a neighbour's property is an easement.

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Another, and the true point to be determined is, upon what grounds such a projection is to be maintained as of right when the owner loses part of his land underneath the projection by the occupation of a trespasser. In this phase, if the right claimed is an easement, the number of years of occupation is an important factor, for title by possession can be acquired in 10 years, while the acquisition of the right to an easement takes 20 years.

Assume, for the sake of the argument, that in either case the defendant had been in occupation of the plaintiff's strip of land for exactly 11 years, during which time the plaintiff had regularly, at intervals, gone on the strip for the purpose of painting his house, taking in supplies or the like, so that if the strip had belonged to the defendant, he would have been in the way of acquiring an easement. Now, it is plain that a man cannot have an easement over his own land; and the land belongs to the plaintiff, notwithstanding the occupation of the defendant, up to the close of the last day of the 10 years. Therefore, during the 10 years the user by the plaintiff of his own land cannot be considered in computing the 20 years necessary to acquire an easement. It is not until his title to the strip has been extinguished by the occupation of the defendant that he is in a position to begin that user which may in time ripen into an easement. On the above hypothesis of occupation for 11 years, then, the plaintiff would have had only one year's user to his credit. It is submitted, therefore, that in order to justify awarding an easement to a plaintiff whose title has been defeated by possession, there should be a lapse of at least 30 years before (occupation and user continuing) the plaintiff could claim an easement.

But there seems to be another and a better ground for the plaintiff's relief. It has been determined that a man may gain title by possession to a cellar, *Rains* v. *Buxton*, 14 Ch.D. 537; and that title can be similarly gained to a tunnel, *Bevan* v. *London Portland Cement Co.* (1892), 3 R. 47, 67 L.T. 615, without interfering with the ownership of the soil lying above. And, where a trespasser has been in occupation of land, lying under an overhanging projection, it is sufficient, and seems on the authority of the above cases, proper, to hold that all that the owner loses is that which the trespasser occupied, namely, the land under the projection, and that the overhanging portion of the owner's building remains his own property unaffected by the trespass.

THE AMERICAN DRUGGISTS SYNDICATE Ltd. v. THE CENTAUR Co. (Annotated.)

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Quebec King's Bench, Appeal Side, Lamothe, C.J., Carroll, Martin and Greenshields, JJ. October 18, 1920.

TRADEMARK (§ II—9a)—"CASTORIA"—ARBITRARY WORD — LONG USAGE —REGISTRATION—EXPIRATION OF FOREIGN PATENT—PROTECTION OF.

The word "Castoria" in connection with the manufacture and sale of a senna laxative for infants and children is not the generic name of a medicinal preparation, but an arbitrary designation and as such may be the subject of a valid trademark which, being registered in Canada, protects the right to the sole use of the word in Canada during the life of the trademark, although the patent rights to the preparation and sole right to the use of the word in the United States have expired, and the product has not been protected by a patent in Canada.

[Review of authorities; see annotation following case.]

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Lamothe, C.J.

APPEAL from a judgment maintaining an interlocutory injunction and ordering the appellant company to refrain from using the word "Castoria" in the sale of a certain pharmaceutical preparation intended for infant use and bearing the label "A.D.S. Castoria." Affirmed.

Warwick F. Chipman, K.C. and *Russel S. Smart* for appellant.

H. N. Chauvin, K.C. for respondent.

LAMOTHE, C.J.:—An interlocutory injunction was granted by the Superior Court (Duclos, J.) ordering the appellant to cease manufacturing and offering for sale a certain medicinal preparation designated by the name "Castoria." The Court of Appeal has been asked to quash this injunction. The case was argued at length and many decisions were cited. After studying the record, I agree with the opinion expressed by Duclos, J. A certain medicinal preparation prepared in the United States in 1865, by a Doctor Pitcher, was patented at Washington and sold to the public as a substitute for castor oil. The patent did not contain the word "Castoria." During the life of the patent the inventor of the mixture invented the name "Castoria" which he applied to the product. On the expiration of the patent the word "Castoria" was made the object of a trademark obtained at Ottawa and effective throughout Canada. The respondent company is in the rights of the inventor of the word. The appellant company pretends that the trademark was obtained irregularly because at the time the word "Castoria" had become public property and because this word had become an ordinary and common name for a special thing.

It is not shewn that prior to the registration of the trademark at Ottawa any person other than the predecessor of the respondent had made use of the name "Castoria." The facts do not establish that the name was delivered and given to the public. The word did not become a common and ordinary name for a special thing. In fact, there are on the market several preparations called "Castoria" which differ in various respects. There is no certain article of commerce which can be designated under the name "Castoria." The preparations sold under this name are simply mixtures without any chemical reaction. No new substance was created. The word "Castoria" is not found in dictionaries of the English language.

I consider that the trademark was obtained regularly and the Courts should enforce it.

I have expressed my opinion briefly as I agree entirely with the study of the case made by Carroll, J.

CARROLL, J.:—In the month of December, 1919, the appellant company began to sell that medicine known as "Castoria," the letters "A.D.S." being placed above the word "Castoria."

The appellant company was incorporated by Dominion letters patent in January, 1919, but did not sell the preparation known under the name of "Castoria" before December, 1919.

That respondent company contends that it has the exclusive right in Canada to use the word "Castoria" and bases its contention on a certain trademark registered at the Department of Agriculture, November 27, 1879, as well as on a second trademark entered in the same Department in 1898.

Respondent company further urges that it has, by virtue of common law and also by long usage extending some 40 years, the exclusive right to use that trademark.

It has been established in this cause that the respondent company has, for years, spent large sums of money in advertising its products. A few attempts were made by certain parties of companies to employ the word "Castoria" but were not persisted in and it is as late as 1919 that appellant company ventured to make use of that word in the sale of its goods.

The first trademark was registered in 1879, in the name of Dr. Pitcher, and the second bears the signature of Chas. H. Fletcher, but, clearly, the word "Castoria" is the essential feature in the trademark.

In 1861 Dr. Pitcher invented, in the United States, a certain drug compound for which he obtained a patent. Such preparation is called "Castoria." The American patent lapsed in 1885 and none was ever recorded in Canada.

Appellant company's contention is that the appellation "Castoria" is an ordinary word of the English language, designating the drug or medicinal product originally invented by Dr. Pitcher.

Before proceeding further, let us find out what is meant by the expression "trademark."

Among industrial products, there are a great number the value of quality of which the consumer cannot know at the time

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he buys them. Two products apparently identical may sometimes widely differ. Such particularly is the case as regards goods contained in wrappers, parcels or receptacles which the purchaser does not see nor taste at the time of buying. Who is the maker thereof? From what manufacturer are the goods coming? The answers to such queries will oftentimes afford the only clue to go by. It is his only means to judge of the value of what he buys. Hence the custom of affixing special drawing or signs on the manufactured products in order to trace or identify their source or origin. Pouillet, Des Marques de Fabrique, p. 33.

Nobody will contest to the manufacturer the right to put his own name on his products; neither will any one deny that no other person may usurp such name. No definite legal enactment is required to permit a manufacturer to place his own name on the products of his industry, but for diverse reasons and in his own interests, instead of placing his name on his products so as to certify their origin, he will sometimes use some sign or mark. Such will consist either in several letters of the alphabet, in a word or in certain signs which belong to nobody in particular and are public property, but which, by thus being applied on the manufactured article, will allow it to be distinguished or differentiated from other similar products.

The particular manner in which a trader will inscribe his name on goods of his personal make may, to all intents and purposes, confer to that name the character of a mark.

Considered in its object, the trademark, to be considered such, requires no particular labour or pains. It has of itself no literary, artistic or industrial worth and gives none to the object to which it is affixed. In that respect, it in no way compares with patents which properly cover creations of the intelligence, and by virtue of which the law grants to the patentees exclusive rights for a given period of time.

The trademark, as I have already stated, derives no value from the article to which it is applied. It is a mere sign which identifies the product to which it is affixed. It is a certificate on the goods. It is equivalent to the name of which it takes the place. It really constitutes a property which belongs to the first occupant.

No one is injured if he is not allowed to use a trademark appropriated by another, since the number of signs by which a product may be distinguished from another similar product is fairly infinite. Anybody may pick from the public domain a sign unappropriated as yet and acquire its exclusive use to designate his products. That sign, which thus becomes personal, must, however, be made known to the public, so as to avoid confusion among those who might claim a prior use of same.

The mark, as has been said, is, so to speak, the name of the manufacturer who makes use of it. It is intended to ensure fairness and honesty in commercial and industrial transactions.

It is impossible, as I said a moment ago, to assimilate a trademark and a patent. The object covered by the patent, whether it be a literary or artistic work or an industrial device, has a great value. The mark, in itself, has no value, its only utility is that of a certificate as to the origin or source of the product to which it is affixed. Employed by another, it ceases to be the expression of truth or genuineness.

The patent differs from the trademark in that a new substance results from the invention. The State, to encourage the patentee and reward his industry, grants him the privilege, during a given period, to manufacture the article invented. That privilege is not, however, conferred for an indefinite time as it would then become a monopoly. Such is not the case as regards the general trademark which, once it is registered, endures indefinitely, R.S.C. 1906, ch. 71, sec. 16, or as regards a specific trademark which endures for a period of 25 years and may be renewed by the proprietor thereof or his legal representative for an additional period of 25 years and so on without limitation. (Sec. 17).

Respondent company in this cause asserts that the mark or sign covering its products has been infringed, that it has suffered a wrongful act which it has a right to ask that a stop be put to.

On the other hand, appellant company deny any infringement on their part but contend that the trademark registered by the respondent company does not consist in the designation "Castoria," but in a particular drawing to which is added a signature, and that the word "Castoria" itself is but a generical name under which the pharmaceutical formula thus called, not having been patented in Canada, became public property.

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We are asked, in the present matter, to decide a question concerning which jurisprudence is obviously rather indefinite, as the judicial opinions to which we were referred arise from facts which are never similar. However that may be, jurists have laid down certain rules for guidance and it is for the discernment of the Judges to apply such rules to the facts in each case.

One of those rules is to the effect that a distinction must be made in a trademark as between the arbitrary designation and the necessary designation. In the first case, the word of the label is created by the manufacturer and has no relation whatever with the nature of the product so designated or its component elements. On the other hand, the necessary designation is that which relates to the very nature of the article or commonly designates that commercial product.

The arbitrary designation may therefore well be the object of personal exclusive ownership, whereas the necessary designation cannot.

The ingredients which enter into the composition of "Castoria" shew that that word is, of its nature, in no way descriptive. The word clearly is imagined or fabricated and may not be infringed by other competitors.

The principles which govern the matter are identical in the French or English law and when the point to elucidate is, as in the present cause, whether an interlocutory injunction must issue, there arises the following question summarised by Bedarride (No. 918:—)

> The imitation [says he] incurs the penalty enacted when it is of a nature to deceive the purchaser, that is to say, as soon as it creates the possibility of this mark being mistaken for that one. It is self-evident that if no confusion be possible, nobody can complain . . . the possibility of such confusion is therefore the essential test. It is that possibility which the law solely and exclusively considers. Due stress must be laid on the words "of a nature to deceive the purchaser." Consequently, the law does not require that the purchaser be misled, it is sufficient that he might be.

The foregoing abstract from Bedarride refers to penal law, but the principle involved applies as well in civil matters. As a matter of fact, it is not necessary, in civil law, to prove that the counterfeit or imitation has had the effect of actually deceiving one or more persons. It is sufficient that the brand or label be, as a

whole, of a nature to mislead the public. In that, the law intends guarding from fraud the consumer who, in the end, buys the product bearing the forged trademark.

Therefore, when a manufacturer sells products bearing a label imitating that of another manufacturer, he is liable to the penalties provided by law, although the jobbers or traders to whom directly he sells his wares may not have been deceived as to the nature or source thereof, if those who shall ultimately buy the goods, *i.e.*, the consumers, may be misled. Pouillet, Des Marques de Fabrique at 250.

The English legal doctrine is very much the same and is ably summed up in the case of *Cellular Clothing Co., Ltd.* v. *Maxton & Murray*, [1899] A.C. 326, where the most important cases are cited. At p. 336, the Earl of Halsbury, L.C., says:—

There has not been any question, nor can there be any question as to what the state of the law is. It is laid down in *Burgess's* case (1853), 3 DeG. M. & G. 896, 43 E.R. 351, the *Anchovy Sauce* case, with great precision. The simple proposition is this: that one man is not entitled to sell his goods under such circumstances, by the name or the packet, or the mode of making up the article, or in such a way as to induce the public to believe that they are the manufacture of someone else. The proposition that has to be made out is that something amounting to this has been done by the defendant, and if that proposition is made out the right to relief exists.

Lord Shand, at p. 339, continues:

The word used and attached to the manufacture, being an invented or fancy name and not descriptive, it follows that, if any other person proceeds to use that name in the sale of his goods, it is almost if not altogether impossible to avoid the inference that he is seeking to pass his goods off as the goods of the other manufacturer. A person invents or applies the term "Eureka" as the name of a shirt in his sales. If you buy a "Eureka" shirt, that seems at once to mean that you are buying a shirt made by the particular maker who is selling shirts under that fancy name. The public come to adopt the word "Eureka" as applicable to the manufacture of the particular person who began to use it and as denoting the article he is selling, and if another person employs the word in the sale of the same or a similar article, it seems to follow that he is acting in direct violation of the law that no one, in selling his goods, shall make such representations as will enable him to pass them off as the goods of another, so as to get the benefit of that other's reputation.

And further on, at p. 340, Lord Shand squarely puts the question as follows:

It is true the question in issue in cases of this class may generally be broadly stated as: Did the defendants by their representations seek to induce purchasers to acquire their goods under the false belief that these goods were of the plaintiffs' manufacture?

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The essential word in the trademark is "Castoria" and the appellant company, in using that word, certainly induced the purchasers to believe that the article they were buying was the one which originally had been compounded by Dr. Pitcher. It is not required, to constitute an infringement of a trademark, that the second competitor be in bad faith. It follows that it is not necessary that there should be fraud. I refer to the remarks of Lord Shand in the above case.

The conclusion we come to is that the use of the word "Castoria" constituted an infringement of the trademark registered at Ottawa.

But we are told that the name designating a product follows the fate of the product and that no patent having been registered in Canada covering the manufacture of Castoria, the formula becomes *ipso facto* public property and the appellation itself falls within the scope of *public juris*.

I think that the appellant company is mistaken. The designation not being generical and necessary but arbitrary and having been registered, it remains the exclusive property of respondent company which has, through registration, protected its privilege from all infringements.

Appellant company may well manufacture a product similar in its constituting elements to that which respondent company offers for sale, but it is precluded by law from giving it a name the exclusive use of which belongs to said respondent company.

It cannot either be said that the product manufactured by the respondent company, under the name of "Fletcher's Castoria," and that compounded by appellant company as "A.D.S. Castoria," differ materially in their respective designations and that the public are quite able to distinguish between the two without any possible confusion.

In order that there be no illegal competition between two commercial products of the same nature, their respective names or designations must be sufficiently distinct that the purchaser may not, as I have already said, be led to mistake one for the other.

The fact that in the United States, the people can use the word "Castoria," by reason of the patent having lapsed con-

stitutes no ground why the public could do as much in Canada. The legislations of all countries concerning trademarks or patents have no application beyond their respective territories.

It has not been shewn either that when a patent lapses or outlaws in the United States, the inventor is not entitled to protect his work in Canada by means of a trademark.

Another objection proffered by appellant company is that respondent company has made over its rights to another party, who subsequently re-transferred them to respondent company and that such transactions would have deprived the latter of its rights in the trademark.

In certain countries, such transfer of rights is prohibited, but I cannot find anything in the Trade Mark and Design Act, R.S.C., 1906, ch. 71, which suggests that such a prohibition exists in our country. On the contrary, any trademark registered at the Department of Agriculture is assignable in law (sec. 15) which goes to shew that the industrial rights may also be transferred.

As a conclusion, I am of opinion that the judgment rendered must be confirmed with costs.

Martin, J.

Martin, J.:—This is an appeal from a judgment of the Superior Court for the District of Montreal rendered on June 29, 1920, granting the respondent's application for an interlocutory injunction to enjoin appellant from using the word "Castoria" in connection with the manufacture and sale of a senna laxative for infants and children.

In December, 1919, the defendant began selling in Montreal a senna laxative for infants and children under the name of "Castoria" using the letters "A.D.S." above the word "Castoria."

Respondent, petitioner in the Court below, claimed the exclusive right in Canada to the word "Castoria" basing its claim on two trademarks registered in the Department of Agriculture at Ottawa, one on November 27, 1879, and one on November 25, 1898, and a common law right in the word as a result of continuous and exclusive use thereof in Canada for 40 years and upwards.

The appellant denies that the word "Castoria" could be a valid trademark and affirmed that it was the generic name of a medicinal preparation and that in any event under a United States patent granted on May 12, 1868, this medicine had become known as "Castoria" and that upon the expiration of that patent

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the word became public property not only in the United States but in Canada and elsewhere as the generic name of the medicinal preparation.

The order of the Superior Court enjoined appellant as follows:—

(a) From infringing the petitioner's trademarks, to wit.: 1. A certain trademark registered in the Department of Agriculture, in the Dominion of Canada, on the 27th day of November, 1879, being a general trademark consisting of a label upon which is printed the following words: "Pitcher's Castoria," a substitute for castor oil, and the facsimile signature of D. B. Dewey. 2. Another certain trademark registered in the said Department of Agriculture, at Ottawa, on the 25th day of November, 1898, being a specific trademark consisting of the word, "Castoria," and a facsimile signature of Charles H. Fletcher.

(b) From selling or offering for sale a medical laxative preparation as Castoria or marked with the word "Castoria" or using the name "Castoria" in connection with the sale or offering for sale of any such medical laxative preparation not manufactured by the plaintiff.

(c) From selling or offering for sale under the name "Castoria" the preparation now made, sold and offered for sale by the said defendant under such name and from selling or offering for sale a medical laxative preparation in such a manner as to represent or lead to the belief that the preparation manufactured, sold or offered for sale by the said defendant is the manufacture of the said plaintiff.

In 1868 one Dr. Pitcher invented a medicine compounded of various ingredients according to formula, for which he obtained a patent in the United States which expired in the year 1885. This medicine in the United States was commonly called "Castoria," though it was not so christened by the inventor in his patent.

It is the right of every one of His Majesty's subjects to decorate his goods with any symbol he pleases so long as that symbol has not become, by use or by virtue of registration, the individual property of another.

I take it, as established in this case, that the word "Castoria" was an invented, coined or fancy word and at the time of its first registration in Canada, in 1879, was not in use by anyone else anywhere and it was adopted for the purpose of distinguishing respondent's product from that of other manufacturers.

It was, I think, a good trademark when first adopted and registered and it was adopted and used by respondent and its auteurs *bonâ fide* for the purpose of distinguishing their goods from those of other manufacturers. No action has even been taken to annul such trademark or its registration in Canada and even

if the article manufactured, advertised for sale and sold by respondent subsequently came to be known colloquially by the name of their trademark, I should hesitate to declare that respondent had thereby lost all property rights in their trademark.

I think the situation might be put this way: respondent adopted a coined or fancy word as a symbol to distinguish its product. It trademarked the same in Canada as its property and has ever since used such symbol to distinguish its product, and appellant's proposition is that because "mothers ask for Castoria" and "babies cry for Castoria," that that word has now become the generic name of the thing and that any persons making or compounding a like senna laxative can and must call its product by that name. The result of such a use would be to give appellant and the public a right to appropriate respondent's trademark and tradename and make use of it for their advantage, to respondent's corresponding detriment.

If the fact that a trademark becomes the name of the thing to which it is applied is to invalidate such trademark, the less successful a trademark is the better. I imagine that if such a theory were advanced respecting many valuable trademarks in England, the United States and Canada, such as "Bovril," "Fruitatives," "Vaseline," "Lactovaciline," "Japalac," and the like, it would meet with very strong opposition and protest from the owners of such trademarks which have become valuable by judicious and extensive advertising.

The fact that the public has been educated up to the point of asking for the product under respondent's tradename proves the value of the trademark, but does not give the appellant and others the right to adopt and use this trademark under which the goods are known and put on the market by respondent.

But it is urged that under the monopoly granted to Dr. Pitcher by the United States patent, the medicine had come to be known as "Castoria" and that when the monopoly created by that patent ceased to exist by the expiry of the patent and the appellant and others became entitled to adopt the formula of the patent and make and market a senna laxative, that they were entitled to call it "Castoria" and the *Linoleum* case (1878), 7 Ch.D. 834, was cited as an authority in support of this proposition. The *Linoleum* case decided that where an inventor of a new substance

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gives it a name and has taken out a patent for the invention and has during the life of the patent had his invention protected and sold the substance under the selected name, he is not entitled to the exclusive right to such name after the expiration of the patent. Although the *Linoleum* case was decided nearly fifty years ago, I never understood that it decided anything else, and the case of *Centaur Co.* v. *Heinsfurter* (1898), 84 Fed. Rep. 955, merely decided that a patent confers no right to any particular name after the expiration of the patent but only the exclusive right to make and sell during the life of the patent the article to which name is applied.

If a man takes out a patent for a new and useful substance or compound he must describe the substance or disclose the compound and he has a monopoly during the life of the patent to make the thing which he has patented, and after the patent has expired, the public is entitled to take the benefit of the invention; but if I trademark a fancy name and advertise and sell my product as identified by that mark, I cannot prevent the public from selling a similar compound under another name, but I can prevent it from selling the compound under the trade symbol I have adopted.

I think the proposition might be put this way: "the name of a patented article by which it has become known to the trade, whether derived from the personal name of the inventor or whether purely arbitrary, is the generic description and designation of that article and is not the subject of exclusive appropriation as a trademark."

This is the rule laid down in *Singer Mfg. Co.* v. *June Mfg. Co.* (1896), 163 U.S. 169. The result then of the American, the English and the French doctrine universally upheld, is this, that where, during the life of a monopoly created by a patent, a name, whether it be arbitrary or be that of the inventor, has become by his consent, either express or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created.

Of course, this rule must be subject always to the qualification in the matter of user that no unfair competition is created by the manner of user. I do not think the fact that the product or medicinal compound was patented in the United States and

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that such patent has now expired, alters or affects respondent's right to its trademark in Canada. The United States patent, of course, had no extra-territorial effect. During the life of such patent no one could make the patented article in the United States but when that patent expired there, anyone was at liberty to manufacture this article and call it by the name by which it had become known.

In Canada, however, the respondent's auteurs did not protect their product by way of a patent but by means of a trademark and any one in Canada was at liberty to manufacture this compound and call it anything except "Castoria." The fact that the United States patent had expired cannot affect or impair respondent's right under their trademark. The United States patent is dead, but the Canadian trademark still lives.

It is unnecessary to point out that the rights and privileges under a patent are different from those under a trademark and where a coined or fancy word is registered as a trademark or trade symbol, rights thereto do not lapse by the expiry of a foreign patent, and I know of no rule of law which gives a trader the right to use his rival's symbol.

The cases cited and relied on by appellant are all or nearly all patent cases. Possibly his reasoning would be good if the trademark had not been registered in Canada until after the expiration of the United States patent. In such case and at such time the common generic name of a thing could not be the subject of a valid trademark but the word was registered in Canada in 1879, 6 years before the expiry of the United States patent and at a time the public had not acquired any right to the word there or here.

In the United States "Castoria" may mean the patented article which anyone can now make or vend. In Canada it means the article put on the market by respondent and its predecessors and was not at the date of the registration in Canada in name of an article; no one was using the word and no one could use it when it was registered as a trademark in Canada and when registered it was a valid trademark here and continued to be so notwithstanding the expiry of the United States patent in 1885.

I am not going to digest all the cases cited at Bar, nearly one hundred in number. The general principles governing cases

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of this character are well known and well established. The vocabulary of the English language is common property and no one ought to be permitted to prevent other members of the community from using the word which has reference to the character or quality of the goods, but the fact that a name has come in a secondary sense to indicate the article as well as the goods of a particular manufacturer does not prevent it from being a good trademark.

Appellant's argument rests almost wholly on the fact that "Castoria" is the name of the thing and not a symbol to denote respondent's product. I have reached the conclusion that when registered it was a coined or fancy word intended to denote respondent's product and that the public had not then acquired any rights to use the word either here or in the United States, and the intense anxiety of the appellant to adopt this word in the sale of its product results and proceeds not because the word has become the generic name of all senna laxatives, but because they hope to profit by respondent's effort and expenditure in creating a demand for this product.

The appellant could open Webster's unabridged dictionary and select any one of several thousand English words with which to christen their new-born child, and if no English word could be found suitable to their liking they could do as respondent's auteurs did, coin one.

When the word was coined, adopted and registered, it was clearly a good trademark. We must consider its validity by conditions existing at the time it was adopted, and we must not criticise the word by what has happened since, and the subsequent use of it by the public as a common appellative of the substance manufactured cannot take away respondent's rights.

In the view that I take of this case, it is not necessary to enquire or decide whether or not the word "Castoria" has acquired a secondary meaning as applied to respondent's product, though much foundation for such an argument can be found to result in continuous user for 40 years and upwards, nor is it necessary to discuss the doctrine of passing-off.

The appellant in his factum suggests that a case of passing-off cannot be made out without proving that the use of the name by others has resulted in deception. I would rather say that it is

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not necessary for the plaintiff to shew that confusion has actually occurred in order to obtain injunction if the Court is of opinion that there is a strong probability of confusion occurring in the normal course of trade, and it is sufficient to shew that such deception will be the natural and probable results of defendant's act.

See: Fuzier-Herman, Verbo Concurrence Deloyale, No. 5; 38 Cyc., Trade-Marks, Trade Names and Unfair Competition, at pp. 747, 756, and 773; 27 Hals., tit. Names and Designs, p. 776.

I would confirm the judgment of the Superior Court and dismiss the present appeal with costs.

Martin, J.

GREENSHIELDS, J. (dissenting):—By the interlocutory judgment, the reversal of which is sought by the present appeal, the respondent obtained an interlocutory injunction against the appellant restraining the appellant from selling and offering for sale a substance under the name of "Castoria."

Greenshields, J.

It would appear from the record that some 30 or more years ago, in the United States, someone, respondent's auteur, invented what he considered a new and useful product. It was produced by compounding a number of more or less harmless drugs or substances. The inventor desired to protect the product of his intellect, and he secured from the United States a patent.

It would be useless to dwell at any length upon what the patent secured to the inventor. During its life it protected him against the whole world, or, at least, the whole world as represented by the United States. No one could compound and offer for sale his patented article.

It will be noticed that in the patent he gave his substance no name, much less a generic name.

Having created the thing, he did desire to give it a name, and he baptised it "Castoria." There is no doubt that the word was coined. As a part of the English language or any other language, so far as the record shews, the combination of the letters spelling the word, did not exist. The word did not exist.

Although it was argued that the word itself had some relation to the substance—in other words, that it indicated to some extent the property of the substance—I should say it can be safely said, that at its origin the word was a fancy word, which had no meaning whatever except as applied to the thing or substance sold by the inventor.

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The inventor did not apply for or obtain in the United States any trademark. He proceeded to sell his goods as "Pitcher's Castoria."

When a person obtains a patent he gives a *quid pro quo*, that is, he yields his consent that after the life of his patent has expired, the whole world is free to manufacture and sell the thing covered by his patent.

At the expiration of the life of the patent of the thing "Castoria," the public were at perfect liberty to compound the substance and sell it under that name in the United States. During all the life of the patent there is one thing certain, that substance was sold under no other name than "Castoria," and the substance was known to the public as "Castoria."

When the patent expired, the record shews that manufacturers or dealers to the number of 15 or 18, in the United States, commenced the manufacture and sale of the substance. There was on the market (and I paraphrase the testimony) "Smith's Castoria" and there was "Brown's Castoria" and there were many others. The proof would shew that possibly in the composition or compounding by these different manufacturers, there was a slight difference, but in all cases the substance was sold as "Castoria."

So much for the United States.

In Canada the substance was never patented. At one time the rights of the original inventor passed to one Fletcher, and eventually it reached the respondent.

On November 27, 1875, a general trademark was registered in the Department of Agriculture of the Dominion of Canada. It consisted of a label on which we find the following words: "Pitcher's Castoria, a substitute for Castor Oil," and a *facsimile* reproduction of the signature of one D. B. Dewey.

Subsequently, on November 25, 1898, a specific trademark was registered in the Department of Agriculture at Ottawa, consisting of the word "Castoria" and the *facsimile* signature of Charles H. Fletcher.

From and after the registration of these trademarks "Castoria" was extensively advertised and extensively sold, either as "Pitcher's Castoria" or "Fletcher's Castoria."

The appeal was ably and exhaustively argued at Bar. Almost a whole library of authorities were handed to this Court for its

assistance and guidance. Many of the reported cases are of little, if any, assistance, and none of them can finally and definitely be accepted as authority which should be followed. Every case of this kind must in its final determination depend upon the particular facts proven.

I am unable to agree with the majority of my brother Judges, but it is a matter of some satisfaction that that difference does not arise on a question of law, but rather on a question of fact. I am in entire accord with the view of my brother Judges as to the legal rights of the holder of a valid trademark. I am also, I believe, in complete agreement with them as to the obligations due by the public to the holder of that trademark.

I am of opinion that the word "Castoria," although in its origin a coined, selected fancy word, has by long usage become the generic name of a substance, and as such is not the subject of the trademark. "Pitcher's Castoria" or "Fletcher's Castoria," in my opinion, designates or indicates the origin of the substance just as much as "Brown's Tobacco" and "Smith's Tobacco" would indicate the origin of the substance known under the generic name "Tobacco."

There is a well known substance which received at its baptism a fancy or coined name, "Postum." When selected to denote a substance, it had no meaning. Now it describes or indicates a definite substance just as much as "Coffee" means coffee or "Tea" means tea. There may be a hundred dealers in "Postum," and each may indicate its origin as being in "Pitcher" or "Fletcher." It is still "Postum."

So, in my opinion, Castoria may have its origin in a dozen different manufactures, but it is still Castoria, and nothing else. Without limitation, in my opinion, any one may put on the market the substance "Castoria." It may be that the product of one manufacturer may differ from the product of another, just as one grade of coffee may differ from another, or one pound of tobacco from another pound of tobacco. The public may be deceived, as I fancy the public usually are, in patent medicines. A's Castoria may be different slightly from B's Castoria, either in strength or colour; nevertheless the thing is Castoria.

It will be at once seen that I place the decision of this case squarely with *Linoleum Mfg. Co.* v. *Nairn* (1878), 7 Ch.D. 834.

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There the word "Linoleum" was a pure invention. It is said to be solidified oil, and unless one may find an indication of oil in the word "Linoleum" as it was said one may find an indication of castor oil in "Castoria," then the word in no way indicates origin, but is the name of the substance. Walton was the inventor of a new and useful substance. He took out a patent and he looked for a name, and he called it "Linoleum." He did not trademark. He sold the substance so invented by him during the lifetime of the patent under the name of "Linoleum." At the expiration of his patent another person started to manufacture a substance and put it on the market as "Linoleum." An order restraining him from selling linoleum was sought. It was refused by a well-reasoned judgment.

I am of opinion from the facts disclosed in the present case, that the same reasoning may and should be followed, and the same result arrived at. Said Fry, J., 7 Ch.D. at p. 836:—

> In the first place the plaintiffs have alleged, and Mr. Walton has sworn, that having invented a new substance, viz: the solidified or oxidised oil, he gave to it the name of "Linoleum," and it does not appear that any other name has ever been given to this substance. It appears that the defendants are now minded to make, as it is admitted they may make, that substance. I want to know what they are to call it? That is a question I have asked, but I have received no answer; and for this simple reason, that no answer could be given, except that they must invent a new name. I do not take that to be the law. I think that if "Linoleum" means a substance which may be made by the defendants, the defendants may sell it by the name which that substance bears.

I have no doubt whatever that any one may make Castoria in Canada, and I believe with Fry, J., 7 Ch.D. 834 *et seq.*, that they cannot be forced to call it by any other name but may call the substance by the name it bears.

I should reverse the judgment.

Appeal dismissed.

Annotation.

ANNOTATION.

ARBITRARY WORD AS TRADEMARK.

By Russel S. Smart, B.A., M.E., of the Ottawa Bar.

The questions already raised by this case were the subject of annotation in the case of *Rubberset Co.* v. *Boeckh Bros. Co. Ltd.* (1919), 49 D.L.R. 13.

The most complete statement of the law with respect to the possibility of sustaining a trademark for the name of a new article is given by Fry, J., in *Linoleum Mfg. Co.* v. *Nairn* (1873), 7 Ch.D. 834, where he said, at p. 836:

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"In the first place, the plaintiffs have alleged, and Mr. Walton has sworn, that having invented a new substance, namely the solidified or oxidised oil, he gave to it the name of 'Linoleum,' and it does not appear that any other name has ever been given to this substance. It appears that the defendants are now minded to make, as it is admitted they may make that substance. I want to know what they are to call it? This is a question I have asked but I have received no answer; and for this simple reason that no answer could be given, except that they must invent a new name. I do not take that to be the law. I think that if 'Linoleum' means a substance which may be made by the defendants, the defendants may sell it by the name which that substance bears. But then it is said that although the substance bears this name, the name has always meant the manufacture of the plaintiffs. In a certain sense that is true. Anybody who knew the substance, and knew that the plaintiffs were the only makers of this substance, in using the word, knew he was speaking of a substance made by the plaintiffs, but, nevertheless, the word directly or primarily means solidified oil. It only secondarily means the manufacture of the plaintiffs, and has that meaning only so long as the plaintiffs are the sole manufacturers. In my opinion, it would be extremely difficult for a person who has been by right of some monopoly the sole manufacturer of a new article, and has given a new name to the new article, meaning that new article and nothing more, to claim that the name is to be attributed to his manufacture alone after his competitors are at liberty to make the same article. It is admitted that no such case has occurred, and I believe it could not occur; because until some other person is making the same article, and is at liberty to call it by the same name, there can be no right acquired by the exclusive use of a name as shewing that the manufacture of one person is indicated by it and not the manufacture of another."

Following this statement of the law, Fry, J., referred to the case of *Braham* v. *Bustard* (1863), 1 H. & M. 447, 71 E.R. 195, where the words "Excelsior White Soap" were in question as applied to a new white soft soap, which had been invented by the plaintiffs, and held to be a good trademark. He discusses this case in the following terms, 7 Ch.D., at p. 838: "Now here, as I pointed out, the plaintiffs having invented, or their predecessors in title having invented, a new subject-matter, use merely the name distinguishing that subject-matter, but do not use a name distinguishing that subject-matter as made by them from the same subject-matter as made by other persons. The two cases are essentially different."

A number of names for drugs and medicines in the French Courts have been held not to be good trademarks. (See Allart, Des Marques de Fabrique, 1914, at 68, where the following, among many, were held not to be good trademarks: "Chloralose," "Antipyrene," "Lactopepine," "Vaseline," "Glycero-Kola," "Sirop Pegliano," "Glycerophosphine," "Phenosalyl," "Adrenaline," "Pyramidon," "Peptofor Perles d'ether.")

The *Linoleum* case, 7 Ch.D. 834, above quoted, has been followed in nearly all succeeding English cases on the same subject-matter, and has never been overruled or in any way limited. The other judgment of Fry, J., to the same effect in *Siegert* v. *Findlater* (1878), 7 Ch.D. 801, was followed by Lord Davey in *Cellular Clothing Co.* v. *Maxton and Murray*, [1899] A.C. 326, which was quoted at length in the judgment of the Appellate Division of the Ontario Supreme Court, in *Rubberset Co.* v. *Boeckh Bros. Co., Ltd.*, 49 D.L.R. 13. 46 O.L.R. 11.

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The doctrine laid down in the *Linoleum* case was adopted and approved by the United States Court, in *Singer Mfg. Co.* v. *June Mfg. Co.* (1894), 163 U.S. 169, in which the American, English and French authorities were all discussed.

Similar facts to those that issue in the foregoing case were in question in a corresponding United States case, the situation differing, however, in that in the United States, a patent had been taken out on the medicine "Castoria," whereas in Canada no patent had been taken out. The case reached the Court of Appeal, in the United States, under the title of *Centaur Co.* v. *Heinsfurter* (1898), 84 Fed. Rep. 955, at 957, in which part of the judgment read: "It matters not that the inventor coined the word by which the thing has become known. It is enough that the public has accepted that word as a name of the thing for thereby the word has become incorporated as a noun into the English language, and the common property of all. (*Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U.S. 169.)" And at page 959: "That the word 'Castoria' has become the one name by which this medicine is generally known, does not admit of doubt. The testimony make this perfectly clear. No other name is suggested by which the article is called. It is universally bought and sold as 'Castoria' and not by any other name. Indeed, the Court might almost take judicial notice of this fact."

The doctrine of the *Linoleum* case has been quite recently explained in the *Chocaroons* case, which is perhaps the most recent case in Great Britain dealing with this class of trademark, viz: *Re Williams Ltd.* (1917), 34 R.P.C. 197, 33 T.L.R. 199, in which Warrington, L.J., said, at p. 204: "The danger of allowing the name given to a new article to be registered as a trademark is that the article may become known and popular under that name, and other persons, though they have a right to make and sell the article, are practically debarred from doing so, because the public would refuse to buy it unless sold under the name by which they know it. The owner of the trademark may thus obtain a monopoly in the goods by having the exclusive right to use the name. (See *per* Parker, J., in the case of *Philippart* v. *William Whitely Ltd.*, [1908] 2 Ch. 274, 25 R.P.C. 572.) In my opinion on the evidence it is clear that the word has been used, and is proposed to be used, as the name of the article put upon the market by the applicants under that name, and not *bonâ fide* for the purpose of distinguishing the applicant's goods from those of other makers."

The United States Supreme Court discussed this in the case of *Holzapfels Co.* v. *Rahtjen's Co.* (1901), 183 U.S. 1, where there was a British, but no United States, patent on paint for ship's bottoms. Part of the judgment read, *per* Peckham, J., at p. 9: "This way of designating the composition was employed by Rahtjen, in Germany, for his own sales and Suter, Hartmann & Co. simply copied his method of describing the same. How else could this article thereafter be described? When the right to make it became public, how else could it be sold than by the name used to describe it? And when a person having the right to make it described the composition by its name and said it was manufactured by him, and said it so plainly that no one seeing the label could fail to see that the package on which it was placed was Rahtjen's composition, manufactured by Holzapfel & Co., or Holzapfels' Composition Company (Limited), how can it be held that there was any infringement of a trademark by employing the only terms possible to describe the article, the manufacture of which was open to all? Of necessity when

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the right to manufacture became public the right to use the only word descriptive of the article manufactured became public too."

(See, also, "Valvoline" for oil, in *Re Leonard & Ellis's Trade Mark* (1884), 26 Ch.D. 288. "Haematogen" for a chemical product, in *Re Hommel* v. *Bauer & Co.* (1904), 22 R.P.C. 43, 21 T.L.R. 80. *In re Magnolia Metal Co.*, [1897] 2 Ch. 371, 391.)

On the other hand, the following words have been supported as trademarks, some of them as being fancy words: "Bovril," [1896] 2 Ch. 600, 13 R.P.C. 382; "Solio," [1898] A.C. 571, 15 R.P.C. 476; "Vaseline," [1902] 2 Ch. 1, 19 R.P.C. 342; "Chartreuse," [1910] A.C. 262, 27 R.P.C. 268; "Alundum" (1919), 36 R.P.C. 153; "Lactobaciline" (1912), 29 R.P.C. 497; "Microbe Killer" (1897), 28 O.R. 612; "Tabloid," [1904] 1 Ch. 736, 21 R.P.C. 217; "Painkiller" (1867), 13 Gr. 523; "C.A.P." (1902), 4 O.L.R. 545; "Gripe Water" (1915), 32 R.P.C. 173, 85 L.J. (Ch.) 27; "Fruitatives" (1912), 8 D.L.R. 917, 14 Can. Ex. 30; "Tachytype," [1900] 2 Ch. 238, 17 R.P.C. 380.

In the matter of the *Farbenfabriken Trade Mark, Somatose* (1893), 11 R.P.C. 84, the majority of the Court held that the word "Somatose," used as the name of a pharmaceutical product, was descriptive and therefore not a good trademark; Lindley, L.J., dissented and in his opinion said: "If a person selects as a trademark for his goods a word which no one has ever heard of before, no injury is done to any one simply because he is prevented from taking the same word to designate his goods. The inconvenience, moreover, is not so great as represented. No one would care to register as a trademark a new word, which would not be likely to attract customers, and be remembered. A good catch word is what is wanted, and this practically limits the choice of new words."

In the *Solio* case, *Eastman etc., Co.* v. *Comptroller-General of Patents, etc.*, [1898] A.C. 571, 15 R.P.C. 476, Lord Herschell, referring to, and disapproving the *Somatose* case, said, [1898] A.C., at 580-581: "The vocabulary of the English language is common property; it belongs alike to all; and no one ought to be permitted to prevent the other members of the community from using, for purposes of description, a word which has reference to the character or quality of the goods . . . But with regard to words which are truly invented words—words newly coined—which have never theretofore been used, the case is, as it seems to me, altogether different; and the reasons which required the insertion of the condition are altogether wanting. If a man has really invented a word to serve as his trademark, what harm is done, what wrong is inflicted if others be prevented from employing it, and its use is limited in relation to any class or classes of goods to the inventor? . . . An invented word is allowed to be registered as a trademark, not as a reward of merit, but because its registration deprives no member of the community of the rights which he possesses to use the existing vocabulary as he pleases."

In *Celluloid Mfg. Co.* v. *Cellonite Mfg. Co.* (1887), 32 Fed. 94, at 98, Bradley, J., of the Supreme Court of the United States, said: "As to the complainant's alleged right to the exclusive use of the word 'celluloid' as a trademark, and the defendant's alleged imitation thereof. On this branch of the case, the defendant strenuously contends that the word 'celluloid' is a word of common use as an appellative, to designate the substance celluloid, and cannot, therefore, be a trademark; and, secondly, if it is a trademark the defendant does not infringe it by the use of the word 'cellonite.' As to the

Annotation. first point, it is undoubtedly true, as a general rule, that a word merely descriptive of the article to which it is applied cannot be used as a trademark. Everybody has a right to use the common appellatives of the language, and to apply them to the things denoted by them. A dealer in flour cannot adopt the word 'flour' as his trademark, and prevent others from applying it to their packages of flour. I am satisfied from the evidence adduced before me that the word 'celluloid' has become the most commonly used name of the substance which both parties manufacture, and, if the rule referred to were of universal application, the position of the defendant would be unassailable. But the special case before me is this: The complainant's assignors, the Hyatts, coined and adopted the word when it was unknown, and made it their trademark, and the complainant is assignee of all the rights of the Hyatts. When the word was coined and adopted, it was clearly a good trademark. The question is whether the subsequent use of it by the public, as a common appellative of the substance manufactured, can take away the complainant's right. It seems to me that it cannot."

The word "Fruitatives" was held to be a valid trademark, *Fruitatives Ltd.* v. *La Compagnie, etc.*, 8 D.L.R. 917, 14 Can. Ex. 30.

In *Linotype Co.'s Trade Mark* case, [1900] 2 Ch. 238, 17 R.P.C. 380, the Linotype company of England was permitted to register the word "Tachytype" although it was a name invented by an American company which permitted the Linotype company to use it in England, apparently retaining the right to use the name in the United States.

In some instances a secondary meaning has been held to have been established for words which, in their primary sense, would be descriptive, or not supportable as a trademark.

In *Reddaway* v. *Banham*, [1896] A.C. 199, at 212, 13 R.P.C. 218, Lord Herschell said: "Lord Westbury pointed out that the term 'Glenfield' had acquired in the trade a secondary signification different from its primary one; that in connection with the word starch it had come to mean starch which was the manufacture of the plaintiff," and also [1896] A.C. at p. 210: "The names of a person, or words forming part of the common stock of language may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves without explanation or qualification by another manufacturer would deceive a purchaser into the belief that he was getting the goods of A. when he was really getting the goods of B."

In *Rey* v. *Lecouturier*, [1908] 2 Ch. 715, 25 R.P.C. 265, Lord Alverstone, C.J., said (25 R.P.C., at 284): "Had Chartreuse, in the year 1903, acquired, in England, in the liqueur market, a secondary meaning? And if it had acquired a secondary meaning who is entitled to the benefit of the liqueur protected by that secondary meaning?" And continuing, the Lord Chief Justice said: "I have not the slightest doubt that for a great many years before 1901 the word 'Chartreuse' or 'Grande Chartreuse' had acquired in the English liqueur market the secondary meaning that it was a liqueur manufactured by the monks of the monastery."

See also *Provident Chemical Works* v. *Canada Chemical Co.* (1902), 4 O.L.R. 545 (1902), 3 Com. L.R. 414 as to "C.A.P."; *Bucyrus Co.* v. *Canada Foundry Co.* (1912), 8 D.L.R. 920, 14 Can. Ex. 35; *Boston Rubber Shoe Co.* v. *Boston Rubber Co.* (1902), 32 Can. S.C.R. 315; *Montgomery* v. *Thompson*, [1891] A.C. 217, 8 R.P.C. 361.

Annotation.

As stated above, whether or not a word has acquired a secondary meaning is a question of fact, as in the *Cellular* case, [1899] A.C. 326, at 336, where Halsbury, L.C., said: "It cannot be denied, therefore, under those circumstances, that it was for the appellants to establish if they could, that an ordinary word in the English language, properly applicable to the subject-matter of the sale, was one which had so acquired a technical and secondary meaning differing from its natural meaning, that it could be excluded from the use of everything else. That is the proposition the pursuers had to make out."

It is easier to prove a secondary meaning where the word is a fancy or invented word; see *per* Lord Davey, in the *Cellular* case, [1899] A.C. 326, at p. 343: "But there are two observations which must be made; one is that a man takes upon himself to prove that words, which are merely descriptive or expressive of quality of the goods, have acquired the secondary sense to which I have referred, assumes a much greater burden—and indeed a burden which is not impossible, but at the same time extremely difficult to discharge—a much greater burden than that of a man who undertakes to prove the same thing of a word not significant and not descriptive but what has been compendiously called a 'fancy' word."

A class of cases which differs somewhat in type from those discussed above, is the so-called *Yorkshire Relish* case in which the trademark was supported largely on the grounds that the infringer did not possess the secret of its manufacture, and, therefore, could not make the same article. *Birmingham Vinegar Brewery Co.*, v. *Powell* [1897] A.C. 710, 14 R.P.C. 720. There Lord Shand said, at pp. 730-731: "When a purchaser came into the market and asked for 'Yorkshire Relish' . . . the result of the purchase was that the plaintiff got the benefit of it and it appears to me under those circumstances the defendants were not entitled, by using the same name for the article, to appropriate those profits . . . I think it has not been made out that there was a direct representation, or that there was such representation by means of the labels, because I have rather felt that the argument . . . that the labels were of the kind sufficiently to distinguish the article was a sound argument. But there remains the fact that this article was called by the name 'Yorkshire Relish,' and in this particular case, whatever may be said of others, it occurs to me that the mere use of the words 'Yorkshire Relish' was a representation that those were the goods manufactured by the plaintiff, for this reason: that the plaintiff had given that name to his goods, he exclusively had made goods of that class; and the public had bought those goods to an extent which had given the plaintiff very large profits . . . It is what may be called a fancy name in its outset and it appears to me to remain the same still. It is not such a case as was put in the course of the argument of a person giving a mere description of the article he makes by describing the materials from which it is made, such as 'whole meal bread,' or the like. A trader who sells whole meal bread could never complain of another coming forward and using the same term. But when 'Yorkshire Relish' is given—not as a description of the article, but as something that would enable persons to identify the article as of the same manufacture as they had before—the very use of the term 'Yorkshire Relish' appears to me to be a representation that the article sold is the article which the plaintiff makes. Therefore, on that ground, as well as upon the ground that this is really not 'Yorkshire Relish' at all, as it was made by the plaintiff, I am of opinion that the judgment of the Court below is sound."

See, also, the remarks by Alverstone, C.J., in *Rey* v. *Lecouturier*, [1908] 2 Ch. 715, 25 R.P.C. 265, at 284.

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BLACK v. McKEAN.

Nova Scotia Supreme Court, Harris, C.J., Russell and Longley, JJ., Ritchie, E.J., and Chisholm, J. January 11, 1921.

ESTOPPEL (§ III G—87a)—WRITTEN AGREEMENT—VERBAL REPRESENTATIONS AS TO MEANING—INTERPRETATION.

When a representation is made by one party to another, with the intention that the latter should act upon it, and he does so, the former is precluded or estopped from maintaining anything contradictory to the representation as between himself and the latter.

Statement.

APPEAL by defendant from the judgment of Mellish, J., in an action claiming a declaration that plaintiff had performed all the conditions and stipulations of a certain agreement, entitling him to the reconveyance of a lumber property conveyed as security for advances made for the purpose of enabling him to complete the purchase of the property and to carry on lumbering operations on the property. Before action plaintiff had fully paid all advances made and had relieved defendants from all liability under the agreement. Defendants claimed, nevertheless, that they were entitled to hold the property until plaintiff had fully lumbered it and disposed of the lumber as provided in the agreement. Affirmed.

S. Jenks, K.C., for appellant.

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

Harris, C.J.

HARRIS, C.J.:—I have reached the conclusion, though not without some doubt, that the judgment of the trial Judge ought to be upheld and that clause 1 of the agreement ought to be interpreted as having reference to the period when the security was in force and that it ceased to have any effect when the loan and all advances were repaid.

If the parties contemplated what defendants now claim it is impossible to understand the recital or the concluding paragraph of the agreement. They are both inconsistent with the claim now set up. The recital refers to the agreement to guarantee the advance to be made by the Bank of Montreal to complete the purchase of the property and the agreement to arrange for advances by the bank for the operations of the year 1914, and the agreement to purchase the cut of lumber for the year 1914, and then proceeds:

> and as security therefor the said party of the first part has agreed to assign etc. . . . and has also agreed that the title to the said property shall be conveyed to the said party of the second part to be held by him as security for the performance of this and said other agreement etc.

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The said other agreement means the agreement for the sale of the cut of lumber on the property for the year 1914.

It will be noted that there is no reference whatever to the lumber to be cut on the lot after the year 1914.

The concluding paragraph of the agreement deals with the case of default in payment; provides for a sale and the application of the proceeds as follows:

in the first place to the expenses of such sale or sales and necessary conveyances and secondly so far as they will go to or towards the repayment . . . of any sums that he may have paid or be liable for under said guarantee or may have advanced hereunder together with interest, expenses, costs, charges, rates, assessments, moneys paid on account of rates taxes and impositions or such portion thereof as may remain unpaid, and thirdly to or towards any sums otherwise accruing due by the said party of the first part his heirs etc.

There is in this clause no provision for any payment of anything to McKean in respect to the uncut portion of the lumber on the land in question and that, together with the omission in the recital is, I think, a clear indication against the contention now set up on behalf of the defendants. Clause 1 can only be read consistently with these two clauses if it is understood as having application so long only as there is anything due to McKean in respect to the sums guaranteed or advanced.

It is important also to remember that there was no provision for advances except for the one year, *i.e.*, 1914; that there was a special agreement for the sale of the cut for 1914, and no such agreement with regard to the cut of succeeding years; and it is clear from the evidence that neither of the parties expected a cut of more than three million feet in a year, so that it would take ten years to cut off the whole thirty million feet.

All these things indicate that the agreement was intended to mean what the plaintiff swears George McKean said it did mean. The trial Judge believed the plaintiff's evidence as to the statement made by George McKean at the time of the execution of the agreement and it would seem that a statement made under such circumstances would estop George McKean—and equally so those claiming under him—from setting up a contention that the agreement meant anything different from what he then said it meant.

The plaintiff had a limited education and no legal adviser, and McKean had the agreement drawn up by his own lawyer and

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plaintiff relied upon McKean's statement as to the meaning of the document.

In Moncrieff on Fraud and Misrepresentation, 1891, at p. 235, a familiar principle is stated thus:

> Where one person makes a representation to another knowing that he is about to act upon it and intending that he should act upon it, and the other does act upon it, the former is thereafter precluded or estopped from maintaining what is contradictory to his representation as between himself and the person to whom he makes the representation. It is not necessary that the party representing should know that his representation is false.

This is but another way of expressing what Lord Blackburn said in *Burkinshaw* v. *Nicolls* (1878), 3 App. Cas. 1004, at 1026, that:

> When one says to another, "I take upon myself to say such and such things do exist and you may act upon the basis that they do exist," and the other man does really act upon that basis, it seems to me it is of the very essence of justice that between those two parties their rights should be regulated, not by the real state of the facts, but by that conventional state of facts upon which the two parties agree to make the basis of their action and that is what I apprehend is meant by estoppel in pais or homologation.

I have no doubt Mr. George McKean was quite honest in saying what he did as to the meaning of the agreement and it is only because of his death that the question arises; but it does not make any difference whether or not George McKean believed the meaning of the contract to be as he stated it to the plaintiff. The principle governing it is thus stated in Kerr on Fraud and Mistake, 5th ed., 1920, at pp. 519 and 520:

> Where a person obtains a contract by mistake or mis-statements innocently made, he cannot retain the advantages he has gained when he discovers his mistake. If he does so his innocent mis-statement becomes from that moment a deliberate mis-statement, or, in other words, fraud.

And see Jessel, M.R., in *Redgrave* v. *Hurd* (1881), 20 Ch.D. 1 at 12 *et seq.*

There may be a difficulty about the plaintiff succeeding upon his own evidence alone as to this statement of George McKean by reason of the lack of sufficient corroboration, but the case does not depend upon that alone, and there is some corroboration.

I would dismiss the appeal with costs.

Russell, J.

RUSSELL, J.:—I have not been able to discover any ambiguity in the agreement between the parties for the lumbering of the property therein referred to. It recites the arrangement for advances to the plaintiff by the late George McKean and the

agreement made between them for the lumber to be sold to McKean, being the product of the lumbering season of 1914. It then provides for the conveyance to McKean of the property which was under an agreement of purchase by plaintiff from the Nova Scotia Lumber Company, to be held by McKean as security for the performance of the agreement of which the recital is part, and also of the agreement intended to bear the same date, but which is in fact dated a day earlier, for the sale of the 1914 lumber. The agreement of which the recital is part contains a clause providing that the plaintiff shall, with reasonable promptness and diligence, completely lumber the property, and will cut, saw and deliver to McKean all the lumber on said property, and also that no other lumber shall be cut on said property, nor shall any lumber cut from the property be sold to any other person or persons than the said McKean.

The plaintiff reserves to himself a right to sell the property free of the agreement, and, consistently with the intention that McKean should have the profits on handling all the lumber on the property; it provides that should the plaintiff exercise this right of sale he will pay fifty cents per thousand on the estimated quantity of lumber on the property, less such portion thereof as should have been already handled by McKean.

A contention adverse to this construction is based on the provision that if the plaintiff should fail to repay the advances made by McKean, or the loss by fire or otherwise, or breach by the plaintiff of his agreement with McKean, the latter should have the right to sell the property after certain notice to the plaintiff and that there is no provision in this event for any compensation to McKean for his loss on the unexecuted part of the plaintiff's covenant to sell and deliver to him all the lumber on the land. I do not see why we should change the reading of the unambiguous covenant of the plaintiff to manufacture and deliver to McKean all the lumber on the land merely because the agreement does not in its terms provide an adequate remedy for the breach of the covenant.

It is suggested that McKean was under no obligation to make any advances to plaintiff for any lumbering operations after the year 1914. There may be more than one good reason for that. As a matter of fact, I understand from the evidence that further

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advances were made for two seasons after 1914, but I attach no importance to that fact. Quite possibly the plaintiff was sanguine enough to believe that no further advances would be necessary, or quite as possibly he relied upon the desire of the lumber merchant to secure the trade as a sufficient guarantee that the necessary advances would be forthcoming. But even if there were no explanation whatever for the omission to provide for further advances the fact would not, under any principle of construction of which I am aware, enable the Court to alter the explicit agreement between the parties, or to hold that the defendants who now stand in McKean's shoes are not entitled to retain the property as security for the performance of the agreement.

It is sought to vary the writing to make it consistent with a conversation as to its meaning that is said to have taken place between the parties before the execution of the document and the trial Judge has found as a fact that such a conversation took place, although one of the parties to the conversation is dead and the plaintiff's statement is directly contradicted by a witness who swears that he was present throughout the whole conversation. I think the authorities are very strong and clear against the reformation of an instrument in writing on such evidence. I am under the impression that before such a writing can be reformed there must be proof almost as full as that required in a criminal case. However that may be, I am quite certain that the evidence in the present case falls short of the requirement for a reformation of the agreement.

In my opinion the appeal should be allowed with costs and the plaintiff's claim dismissed.

Since the foregoing was written, I have had an opportunity to read the opinion of my brother Ritchie in which relief is proposed to be given as in a case of fraud. I do not understand that fraud was charged or that the trial Judge found fraud. The case for fraud should, I assume, be as fully proved as a case for rectification, as to which the authorities, English and American, chiefly American, will be found collected in the American case of *Southard* v. *Curley* (1892), 134 N.Y. Rep. 148; 3 Keeners Cases on Equity Jurisdiction 460.

Longley, J.

LONGLEY, J., concurred with Harris, C.J.

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Ritchie, E. J.

RITCHIE, E.J.:—I base my judgment on the fraud which I think the evidence discloses. After the bargain was made between the plaintiff and George McKean, W. K. McKean went out and had the agreement drawn up by a lawyer. The plaintiff, who is since deceased, was a man of limited education, but the clause as to all the lumber drew from him an objection, whereupon he was told by George McKean, who is also since deceased:

> The meaning and intention of this agreement is that we hold all the lumber on this property until we are paid off all our advances with interest; that means to say, you can't sell any lumber off this property until you cut enough to pay us all off, because if you did we would not have security, and that is what the agreement means.

The plaintiff said, "If that is what that means, all right," and he signed on that understanding. The Judge has made a distinct finding as to this conversation.

The evidence was contradictory as to whether the statement was made or not; the Judge had to decide as to whether Black or W. K. McKean was telling the truth. He saw and heard them both and I have no hesitation in accepting his finding as conclusive of the fact that the conversation did take place. The defendants are in exactly the same position as George McKean would be if he was alive and making the contention which the defendants are now making. Once we get the fact that George McKean made the statement attributed to him, then it follows that if the defendants' present contention is correct, the statement was a false one. It was that statement which induced the contract; the plaintiff signed on that understanding. In my opinion a man who obtains a contract by a false statement ought not to be permitted to benefit thereby. In *Redgrave* v. *Hurd*, 20 Ch.D. 1, at 12, Jessel, M.R., laid down a rule which I think is applicable to this case:

> According to the decisions of Courts of Equity, it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. It was put in two ways, either of which was sufficient. One way of putting the case was: "A man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false; he ought to have found that out before he made it." The other way of putting it was this: "Even assuming that moral fraud must be shewn in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency; no man

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ought to seek to take advantage of his own false statements." The rule in equity was settled, and it does not matter on which of the two grounds it was rested.

It cannot be successfully urged as an answer that the plaintiff might have found out for himself what was the fact as to the intention of the agreement. I quote again from the same judgment of Jessel, M.R., 20 Ch.D. at 14:

> Another instance with which we are familiar is where a vendor makes a false statement as to the contents of a lease, as, for instance, that it contains no covenant preventing the carrying on of the trade which the purchaser is known by the vendor to be desirous of carrying on upon the property. Although the lease itself might be produced at the sale, or might have been open to the inspection of the purchaser long previously to the sale, it has been repeatedly held that the vendor cannot be allowed to say, "You were not entitled to give credit to my statement." It is not sufficient, therefore, to say that the purchaser had the opportunity of investigating the real state of the case, but did not avail himself of that opportunity.

The fact that the representation to which I have referred was made is referred to in the statement of claim and denied in the defence. Fraud is not specifically charged in the statement of claim, but under our system of pleading any necessary amendment ought to be made as a matter of course.

No question of surprise can arise as the representation is set out in the statement of claim.

In regard to the question of corroboration, all that I think is necessary is that there should be some corroborative evidence of the fact that the agreement was held as security only, and as to this I adopt the opinion of the trial Judge.

I would dismiss the appeal with costs.

Chisholm, J.

CHISHOLM, J.:—I have come to the conclusion, but not without considerable doubt, that the defendants' appeal should be dismissed. Our Evidence Act, R.S.N.S. 1900, ch. 163, sec. 35 (1), provides that:

> in any action or proceeding in any Court by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment, award or decision therein on his own testimony or that of his wife, or of both of them, in respect to any dealing, transaction, or agreement with the deceased or in respect to any act, statement, acknowledgment, or admission of the deceased unless such testimony is corroborated by other material evidence.

The plaintiff's success in this action turns upon his own evidence of the conversation carried on between himself and the late George W. McKean at the time the documents were prepared and exe-

cuted. Plaintiff's version of the conversation must have the statutory corroboration in order to enable him to obtain a judgment in his favour, and the trial Judge finds the necessary corroboration in some of the terms of the agreement which he holds to be ambiguous. Whether such corroboration as the statute requires can be furnished by recourse to some of the clauses of an ambiguous document is the point as to which I have doubt. I shall, however, agree that the appeal should be dismissed.

Appeal dismissed with costs.

ATTORNEY-GENERAL for MANITOBA v. KELLY.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. December 1, 1920.

ARBITRATION (§ III—17)—AWARD—JURISDICTION OF UMPIRE—JURISDICTION EXCEEDED—RIGHTS OF COURT ON APPEAL—AWARD BAD IN PART—REMAINDER TO STAND.

On a motion to set aside an award on the ground that the arbitrator has exceeded his jurisdiction, the Court is not confined to the award but may look at all material used on the motion and receive parol evidence. When an award is bad in part, and the bad part may be severed from the rest, the award will stand in so far as it is good, and the other part will be treated as null.

[See annotation, 39 D.L.R. 218.]

Statement.

APPEAL by defendants from a judgment of Curran, J. (1919), 48 D.L.R. 536, on a motion to set aside or vary an award made by an umpire. Reversed in part.

A. J. Andrews, K.C., for appellants.

J. B. Coyne, K.C., for respondent.

Perdue, C.J.M.

PERDUE, C.J.M.:—The statement of claim in this action sets forth that a contract in writing, dated July 16, 1913, was entered into between His Majesty represented by the Minister of Public Works of the Province of Manitoba and the defendants, therein called the contractor, for the erection and completion of the buildings known as the "New Parliament Buildings" in the city of Winnipeg. The works to be done were to be in accordance with the specifications and drawings accompanying the contract and with such other working and detailed drawings as should be furnished to the contractor from time to time by the architect from time to time specially employed by the Minister of Public Works. The contract-price for the completion of the works was $2,859,750.

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It is a matter of history that at the session of the Manitoba Legislature in the early part of the year 1915, it was charged by the Opposition in the Legislative Assembly that by collusion between certain officers and employees of His Majesty and the defendants large sums of public money had been by various methods improperly paid to the defendants, that inferior work and materials had been furnished and excessive prices had been paid to the defendants. A royal commission was issued to make enquiry into the truth of these charges. The report made by this commission is referred to in para. 5 of the judgment of Mathers, C.J.K.B. (see 48 D.L.R. 536), which contains the submission in the present case.

In the early half of the year 1915 a change of Government took place. On July 21, 1915, an action was commenced by the Attorney-General for the Province of Manitoba for and on behalf of His Majesty, The King, in the right of the Province of Manitoba, against the defendants in respect of the matters arising out of the claims above mentioned. The statement of claim is of great length and makes many charges of fraud against the defendants, of collusion and conspiracy between them and various officers and employees of His Majesty in connection with the erection of the parliament buildings, causing great loss and damage to the Province. The plaintiff made claim for the following relief:

(1) A declaration that all the said contracts are null, void and of no effect; (2) In the alternative, a declaration that all the said contracts were obtained by fraud and should be set aside, that all the said contracts were collusive and fraudulent and were obtained by conspiracy, fraud and collusion with officers and employees of His Majesty and that the same should be set aside; (3) Damages, or in the alternative repayment of all moneys hereinbefore referred to as paid to the defendants; (4) Repayment of all moneys improperly or wrongfully obtained or paid to the defendants, including all repayments or overpayments; (5) Such further and other relief as to this Honourable Court may seem meet; (6) Costs.

By their statement of defence the defendants claim that all the contracts were duly and regularly entered into by the defendants, were in fact executed and delivered "and were and still are in full force, virtue and effect." They admitted the payments made and claimed that such payments had been authorized by statutes passed in the years 1912-1915. They denied the charges of fraud, collusion and conspiracy. They denied the charges

made in the statement of claim and aver that departures from the original contract and additional works undertaken were authorised by His Majesty's Ministers, the Minister of Public Works and the architect in charge. They also set up ratification by the select standing committee on public accounts to whom the matters in question were referred by the Legislative Assembly. These are the main defences. The defendants also put in a set-off and counterclaim in which they claimed on various grounds the sum of $2,379,137.

The action came on for trial before Mathers, C.J.K.B., on March 22, 1917, and a judgment was then pronounced with the consent of all parties. This judgment is set out in full by Curran, J., in the judgment which is the subject of this appeal, 48 D.L.R. 536. Pursuant to the above consent judgment, the appraisers having failed to agree, the umpire named therein made an appraisal or award in the form of a report dated May 25, 1917, which is also set out in full in Curran, J.'s, judgment, 48 D.L.R. 536. It shews a balance of $1,207,351.65 due from the defendants to the plaintiff. A motion was made to a Judge of the Court of King's Bench by way of appeal from and to vary, set aside or amend the award of the umpire. The motion was made both in Court and in Chambers. Many grounds were taken on the motion. These are also set out by Curran, J., in the above judgment.

The material used upon this appeal is so vast that I shall not attempt to give a summary of it. Discussion may be almost wholly confined to the consent judgment pronounced at the trial, which forms the submission in the case, and to the award of the umpire.

Paras. (1), (2) and (3) of the judgment are of such importance that I shall quote them in full. They are as follows:

It is ordered and adjudged: (1) That all the contracts referred to in the statement of claim herein be and the same are hereby set aside. (2) That the plaintiff do recover from the defendants: (a) The sum of $1,680,956.84, in which amount is included the sum of $500,000, the amount of a certain bond dated July 31, 1913. (b) All loss to the plaintiff by reason of defective workmanship and materials including the reasonable costs of ascertaining and remedying such defects. Provided that in ascertaining such amount the appraisers, or in case of disagreement, the umpire, shall be the judges as to whether or not the work was defective and to what extent, and shall also be the judges as to what extent the investigations carried on for the purpose of ascertaining and remedying such defects were necessary, and what amount of money, if any, paid for that purpose shall be charged to the defendants.

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(3) The defendants shall be entitled to set off against the amount provided for in para. 2 hereof: (a) The fair value of the work done, and materials provided by the defendants on the new parliament buildings in the city of Winnipeg so far as erected on May 19, A.D. 1915, on the basis of a fair contractors' price (including reasonable contractors' profit) for the work done and materials furnished, having due regard to the character of the same and the purposes for which same was intended; in regard to the value of the work and material consideration shall be had of prevailing prices at Winnipeg at the time the work was done, and in estimating the rates for men employed the fair wage schedule of the Government as it stood in July, 1913, shall be followed. (b) The value of the plant and materials taken over by the Government as at the time they were placed on the ground. (c) The fair value of any work which had been done which was afterwards torn down and replaced by the defendants by order of the provincial architect on account of and made necessary by change or changes in plan.

By para. (11) of the judgment it is declared that the appraisal made thereunder shall not be subject to the provisions of the Manitoba Arbitration Act, R.S.M. 1913, ch. 9. The Court must, therefore, in dealing with this matter resort to its inherent jurisdiction over awards: That the duty imposed on the "appraisers" and on the umpire by the judgment was a submission to arbitration is, I think, clear beyond doubt. They had to do more than make a mere valuation. Their duty involved a judicial enquiry. They are to be the "judges" whether the work was defective and to what extent, and also be the "judges" as to what extent the investigations carried on were necessary: para. (2), sub-sec. (*b*). As authority for the view I take, I need only refer to the judgments of Cockburn, C.J., and Blackburn, J., in *In re Hopper* (1867), L.R. 2 Q.B. 367, 8 B. & S. 100.

Under para. (2), sub-sec. (*b*), of the umpire's report he awards as loss to the plaintiff "by reason of defective workmanship and materials, including the reasonable costs of ascertaining and remedying such defects," the following items:

One-half cost of Royal Commission appointed to investigate all matters in connection with the New Parliament Buildings, known as the "Mathers Commission." Cost item, $68,968.07	$ 34,484.03
One-half cost of physical investigation made on the New Parliament Buildings, which investigation disclosed the fact that caisson foundations were defective. Cost item, $10,675.03	5,337.51
Portion of cost in repairing caissons up to February 28th, 1917	160,306.63
Loss by reason of defective and improperly cut stone work	12,531.57
Loss by reason of sundry items of improper work	3,247.05
Estimate of expenditure necessary to complete the repair of caisson foundations	615,213.00
(Total) Under para. 2, sub-sec. (*b*)	$831,119.78

Only two of the above items, the first and the last, were contested.

I do not think that the Court can interfere with the award upon the first item. It is authorised under the words "including the reasonable costs of ascertaining . . . such defects" in sub-sec. (*b*), and amplified by the further words in that sub-section

and shall also be the judges as to what extent the investigations carried on for the purpose of ascertaining . . . such defects were necessary, and what amount of money, if any, paid for that purpose shall be charged to the defendants.

I think these words fairly cover the item. As to the quantum the decision of the umpire under para. (6) is final.

The main question in this appeal arises in connection with the above item of $615,213. This stands by itself separate and distinct from the others and it clearly shews on the face of the award what the item was intended to cover. It is the umpire's "estimate of expenditure necessary to complete the repair of caisson foundations." The sum in question was awarded under para. (2), sub-sec. (*b*), of the judgment which contains the submission. If it is not chargeable against defendants under that sub-section there is no other part of the judgment which will authorise it.

By sub-sec. (*b*) the plaintiff is to recover from the defendants

all loss to the plaintiff by reason of defective workmanship and materials, including the reasonable costs of ascertaining and remedying such defects; and the appraisers or the umpire are to be the judges whether the work was defective and to what extent, and also

to what extent the investigations carried on for the purpose of ascertaining and remedying such defects were necessary, and what amount of money, if any, *paid for that purpose* shall be charged to the defendants.

Now when we examine the other items awarded by the umpire against defendants under sub-sec. (*b*) we find the first item of $34,484.03, already discussed, which covered part of the investigations of "all matters in connection with the new Parliament Buildings." The second item is one-half the cost of the physical investigation of the buildings which disclosed that caissons were defective, the sum of $5,337.51 being awarded in respect of this item. The third item awards against defendants $160,306.63 as portion of costs in repairing caissons up to February 28, 1917. Then come two items: one, "loss by reason of defective and impro-

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perly cut stonework;" the other, "loss by reason of sundry items of improper work." These five items are each figured down to a cent and shew actual expenditure by the plaintiff which the umpire finds is chargeable against the defendants under the terms of sub-sec. (*b*).

The item of $615,213 shews on its face that it has never been expended. It is merely an estimate of expenditure that may be made in the future, but may never be made. The word "loss" in para. (2), sub-sec. (*b*), taken in the connection in which it is found means money loss—money out of pocket. This appears clearly when we turn to para. (12) of the judgment. That paragraph directs that if upon striking the balance between the parties a balance is found in favour of the plaintiff, the defendants shall pay to the plaintiff the balance so found with interest at 5% per annum from July 1, 1914, to date of payment. The Government is deemed to be out of pocket that much since that date. But, as the item of $615,213 forms part of the balance found by the umpire in favour of plaintiff, the defendants are charged interest at the rate of 5% per annum on that item from July 1, 1914, although the amount has never been expended. The judgment is dated March 22, 1917, and the award, May 25, 1917. The item of $160,306.63, found by the umpire, covered the cost of repairing caisson foundations to February 28, 1917.

I think that on the face of the award and the judgment containing the submission the umpire exceeded his powers in respect of the item of $615,213 and took upon himself to decide something which is not within the submission.

If it be open to the Court to look at the affidavits and other evidence filed on the motion, the above conclusion will appear still more clearly. It was objected by counsel for the plaintiff that evidence outside the submission and award could not be used on this motion. That, no doubt, is the general rule where one of the parties seeks to appeal from or review the finding of an arbitrator upon the merits. But where the award is attacked on the ground that the arbitrator has exceeded his authority and awarded on a matter or matters not submitted to him, evidence may be given to establish the fact. There is ample authority for this.

In *In re Green and Balfour Arbitration* (1890), 63 L.T. 325, at 327, a case in the Court of Appeal, Fry, L.J., said:

The first and most important question in this case is: What was the subject in dispute between the parties when the arbitration was had recourse to? That is a subject upon which, according to all the authorities, parol testimony may be received, and of course must be received, because otherwise arbitrators might be taking upon themselves to determine matters which had never been in any way submitted to them.

It follows that if an arbitrator has taken upon himself to decide some matter not referred to him by the submission, evidence may be given of the fact that he so exceeded his authority. Such evidence was received in the following amongst many other cases: *Ross* v. *Boards* (1838), 8 Ad. & El. 291, 112 E.R. 847; *Price* v. *Popkin* (1839), 10 Ad. & El. 139, 113 E.R. 53; *In re Morphett* (1845), 2 Dow. & L. 967. Even the arbitrator himself may be examined upon this point. In *In re Dare Valley Ry.* (1868), L.R. 6 Eq. 429, at p. 435, Giffard, V.-C., said:

> I can see no reason why the arbitrator should not be just as well called as a witness as anybody else, provided the points as to which he is called as a witness are proper points upon which to examine him. If there is a mistake in point of subject-matter—that is, if a particular thing is referred to an arbitrator, and he has mistaken the subject-matter on which he ought to make his award, or if there is a mistake in point of legal principle going directly to the basis on which the award is founded—these are subjects on which he ought to be examined, and also grounds for setting aside his award.

It is for the Court, and not for the arbitrator to decide whether the matter in question is one which was agreed to be referred to arbitration: *Piercy* v. *Young* (1879), 14 Ch.D. 200. In *Produce Brokers Co.* v. *Olympia Oil and Cake Co.*, [1916] 1 A.C. 314, at p. 327, Lord Parker of Waddington said:

> The binding force of an award must depend in every case on the submission. If the question which the arbitrator takes upon himself to decide is not in fact within the submission the award is a nullity. The arbitrator cannot make his award binding by holding contrary to the true facts that the question which he affects to determine is within the submission.

See also Lord Sumner's statement to a similar effect at p. 329.

I think the evidence adduced to shew that the umpire exceeded his authority in respect of the item of $615,213 was receivable. Burt, the appraiser appointed by the defendants, made an affidavit relating to the proceedings before the arbitrators. He verified the discussions that took place between the appraisers and the umpire which had been taken down in shorthand by a Court stenographer and extended into an ordinary typed report. Burt was cross-examined on this affidavit. He also gave evidence before Curran, J., on the application to set aside the award. An

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affidavit made by John Woodman, an engineer employed by the Government, whose report is referred to in para. (5) of the judgment of Mathers, C.J.K.B., was filed in support of the motion, and also an affidavit of Paul C. B. Schioler, an engineer employed by the Government to design a caisson foundation for the new Parliament Buildings.

Burt's evidence shews that no extensive examination of the caissons was made by the appraisers or umpire and that they were subjected to no tests to ascertain their bearing capacity, although para. (7) of the judgment authorised the appraisers and the umpire to "cause any work to be uncovered or any investigations to be made which the appraisers agree upon or the umpire desires." A discussion that took place between Burt and the umpire as to how the latter arrived at the amount of the item of $615,213 is found at p. 672 of the report of the arbitration proceedings. It is as follows, the umpire being called the "Chairman."

> Mr. Burt: . . . In effect it holds him (Kelly) responsible for landing the piers on hardpan? The Chairman: Yes, and especially in the other parts of the building where the rock was so close. Mr. Burt: Is that the same basis for the making of the charge against him, or is it also based on a conclusion that the piers, as they stand, are not capable of carrying the load? The Chairman: *It is not based on any knowledge that they are incapable, but based on the uncertainty respecting their condition* and that what has been disclosed is sufficient reason for holding him responsible for the replacement.

This shews that the umpire had not taken steps to ascertain the condition of the caissons in question and had no real knowledge whether they were sufficient for their purpose or not. He based his finding "on the uncertainty respecting their condition." It is shewn that this uncertainty might have been removed by a thorough examination and test of the caissons which did not take place. The above reply of the umpire to Burt's question shews that the umpire contemplated replacement of the caissons and not mere repairs.

The Government after obtaining the advice and assistance of eminent engineers repaired, and, as it is claimed by them, strengthened and added to the foundations put in by the defendants. They then proceeded with and completed the buildings on these foundations. The cost of the repairs and additions has been charged against the defendants and is covered by the item of $160,306.53. Adding to this the item of $615,213 the defendants are charged in respect of the foundations with a total amount of $775,519.

As against this the umpire allowed them $340,000 for constructing the foundations in the first place. This leaves them indebted to the Government in respect of this part of the work to the amount of over $435,000, with interest at 5% since July, 1914. The result of the award is that the Government received a free gift of the foundations and also the sum of $435,000 to secure it against any "uncertainty respecting their condition." On the proceedings before the umpire Oxton, the Government appraiser, objected to the sum of $340,000, claiming that a foundation of the best materials and of sufficient strength to carry the building could have been put in for less than $200,000. If the umpire had allowed Oxton's contention the above sum of $435,000 would have been largely increased and the discrepancy between the cost of the caissons as allowed and the cost of merely repairing them would be still more remarkable.

A perusal of the evidence confirms me in the conclusion that the umpire took an erroneous view of his duties under the submission and exceeded the powers conferred upon him in so far as the item of $615,213 is concerned. It is urged that this vitiates the whole award. I do not take that view. The item is separate and distinct from the rest of the award and can be struck out and deducted from the balance found against the defendants without interfering with the validity of the award in other respects.

Johnston v. *Cheape* (1817), 5 Dow. 247, 3 E.R. 1318, was an appeal from an award made by an arbitrator. The submission authorised him to cause a river to be deepened and widened and to proportion the expense of the improvements amongst the parties to the arbitration according to the benefit received by each. He made his award, but directed each of the parties to keep the river banks opposite his land in good repair, a matter that had not been authorised by the submission. The House of Lords held on appeal that the direction as to repair of the river banks was in excess of the powers of the arbitrator but should be considered as an excess not vitiating the other parts of the award. The authorities are clear that where an award is bad in part, but the bad portion is clearly severable from the rest, the award may stand in so far as it is good, the faulty portion being treated as null. I would refer to Russell on Arbitration and Award, 9th ed., at pp. 214-216, and the cases there cited.

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Another ground for setting aside the award was strongly urged before this Court. It is claimed by the defendants that Oxton, one of the appraisers, with the purpose of prejudicially affecting the mind of the umpire, sent to him prior to his (the umpire's) entering upon his duties a copy of the evidence taken before the Public Accounts Committee, the Mathers Commission and the evidence taken thereunder, all of which contained serious charges against the defendants connected with matters to be dealt with by the arbitrators. The umpire states that he did not read the documents above mentioned. Para. (7) of the judgment containing the submission declares that the appraisers and the umpire are to be entitled to form their own opinion as to the fair value and proper charge to be made in respect of all matters referred "from their own knowledge, inspection or examination, or from other source as they may deem proper." The judgment refers to the report of John Woodman, and appendix thereto, made to the Mathers Commission which are to be taken as correct insofar as certain quantities and measurements were concerned. I cannot say that the umpire would be acting improperly if with this reference he read the rest of the evidence before the commission. He might, under the authority given him by the submission, regard it as a source from which he could derive information. The same may be said of the evidence before the Public Accounts Committee, which probably related to the same matters.

There is also a charge that Oxton when furnishing a copy of the report of Svenn Bylander, an engineer employed by the plaintiff to investigate and report on the sufficiency of the caissons, handed to Burt, the other appraiser, a copy of the same document, but from which the last page had been removed, Oxton stating at the time that the part omitted had no bearing upon the matters under consideration. The part suppressed was important and may have influenced the umpire in awarding to the Government the item of $615,213. But as this item should, in my opinion, be struck out on the grounds I have already mentioned, I do not think that the defendants' case suffered by Oxton's action.

I would allow the appeal to the extent of striking out of the award the item of $615,213 and reducing the amount found in favour of the plaintiff to the sum of $592,138.65. The costs of

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and incidental to the motion to the Court of King's Bench and the costs of the appeal to this Court should be paid by the plaintiff, to be set off, *pro tanto*, against the amount due to the plaintiff.

CAMERON, J.A. (dissenting):—This matter comes before this Court by way of appeal from the judgment of Curran, J., 48 D.L.R. 536, who refused to give effect to the defendants' motion to set aside, vary or amend the award made by Robert Macdonald, the umpire named in the judgment herein, which was pronounced March 22, 1917, by Mathers, C.J.K.B. (see 48 D.L.R. 536), with the consent of all parties and duly entered. By its terms two appraisers were appointed who were to agree so far as they could upon matters of difference and in the event of the appraisers being unable to agree "such matters shall be referred by either appraiser to Robert Macdonald, of the City of Montreal, Architect and Engineer, who is hereby by both parties agreed to as Umpire and whose decision shall be final." The umpire's "report shall be final and conclusive between the parties and may be made a rule of Court; and this judgment shall be a final judgment for the amount shewn in said report except as hereinafter provided."

Nothing in the subsequent part of the judgment affects the considerations raised before the Court. It is further declared that the provisions of the Manitoba Arbitration Act, R.S.M. 1913, ch. 9, shall not apply.

The umpire accordingly made his report, which was filed in the Court and without anything further a certificate of judgment for the amount of the balances found by the umpire was filed in the land titles office as a judgment against the defendants for $1,207,351.65.

The judgment and the report of the umpire are both set out in the judgment of Curran, J., 48 D.L.R. 536, as also are the grounds on which the motions before him were based. It is to be noted that an independent motion is made directly to this Court as well as that by way of appeal.

It is to be borne in mind that Macdonald was the nominee of the defendants as much as he was that of the plaintiff and his name appears in the judgment. By its terms "the judgment shall be a final judgment for the amount shewn in said report," and when the report is filed "the defendants shall pay the amount so found with interest." Such amount thus becomes inserted

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in the judgment and an integral part of it and of the certificate issued thereunder. The judgment, a judgment by consent, has not been set aside. It certainly cannot be set aside in proceedings such as these, but would need to be impeached by separate action or petition. To set aside or amend the report cannot affect the judgment, in which it is, in effect, inscribed and which remains in full force. In this view of the facts the conclusion seems to me to follow that these motions are misconceived and futile and on this ground alone should be dismissed.

I shall, however, refer to other matters which were discussed on the argument.

A great deal of material was presented to Curran, J., on the motion before him, to all of which objection was taken (48 D.L.R. 536). A stenographic report of the proceedings before Macdonald was put in. I am at a loss to know on what ground this report can be considered as evidence for any purpose whatever. The only argument that was put forward to support it was the assertion that the appraisal proceedings were taken down in shorthand by the direction of Macdonald, which cannot affect the question of admissibility in the slightest.

Apart from that consideration, it was argued that all the evidence presented by the defendants on the motion before Curran, J., is inadmissible. This contention is well supported by the authorities, several of which are referred to by Curran, J., in his judgment. Even in the case of an ordinary award it is well settled that the Court, on reviewing an award, is confined to the evidence contained in the award itself or in some contemporaneous document connected therewith. These exceptions have been, in recent years, further enlarged to include the case where the arbitrator admits a mistake as will be seen later.

In *Fuller* v. *Fenwick* (1846), 3 C.B. 705, 136 E.R. 282, it was held that the Courts cannot inquire whether the conclusion of the arbitrator was right or not

> unless they could, upon the face of the award, distinctly see that the arbitrator, professing and intending to decide in accordance with law, had unintentionally and mistakenly decided contrary to law. [*Per* Wilde, C.J., at p. 712.] There is nothing upon the face of this award to shew that the conclusion the arbitrator has come to is not a perfectly just and right one. [*Per* Maule, J., at p. 713.]

In *Holgate* v. *Killick* (1861), 7 H. & N. 418, at 422, 158 E.R. 536, Wilde, B., says:

The principle to be collected from the later cases is plain, viz., that the Courts will not look at anything for the purpose of reviewing the decision of an arbitrator upon the matter referred to him, except what appears on the face of the award, or some paper so connected with the award as to form part of it.

On the argument Bramwell, B., referred to *Leggo* v. *Young* (1855), 16 C.B. 626, 139 E.R. 904, where the umpire had written a note to a party to the award, on a separate paper, expressing an opinion as to costs. It was held that the parties were bound by the award and the accompanying note could not be looked at.

In *Hodgkinson* v. *Fernie* (1857), 3 C.B. (N.S.) 189, at 200, 140 E.R. 712, Lord Cockburn held the effect of the authorities to be that "unless there be something upon the face of an award to shew that the arbitrator has proceeded upon grounds which are not sustainable in point of law, the Court will not entertain an objection to it."

Williams, J., says at p. 202 that there are only two grounds upon which an award can be set aside, corruption or fraud, and "where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award."

This case was referred to and followed in *Latta* v. *Wallbridge* (1861), 3 P.R. (Ont.) 157.

In *Hogge* v. *Burgess* (1858), 3 H. & N. 293, at 298, 157 E.R. 482, Watson, B., says: "Where an arbitrator professes to decide according to law, but does not do so, if the mistake appears on the face of the award, or is disclosed by some contemporaneous writing, the Court will set aside the award."

In *Dinn* v. *Blake* (1875), L.R. 10 C.P. 388, an award under the Common Law Procedure Act was involved. After the Master had made his award against the plaintiff he had stated in conversation with the plaintiff the grounds on which he had decided. The plaintiff sought to shew that the grounds so stated shewed that the Master had erred in law. It was held by the Court, composed of Brett, Denman and Archibald, JJ., that an award will not be sent back to an arbitrator on the grounds that he has made a mistake in law, except where the arbitrator admits his mistake.

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In [illegible] v. *Lemay* (1890), 18 Can. S.C.R. 280, it was held that:

An award will not be set aside on the ground that a memo., furnished by the arbitrator to the losing party after its publication, shewed that the accounts between the parties were adjusted upon a wrong principle, the defect, if any, not being a mistake on the face of the award or in some paper forming part of, and incorporated with, the award, and there being no admission by the arbitrator himself that he had made a mistake.

Strong, J., says, at p. 284:

Nothing in the law relating to arbitrations and awards is better established than the rule that the Court will not set aside or otherwise interfere with an award on the ground of mistake in the arbitrator either as regards the law or the facts, except in certain well defined cases.

These exceptions are, first, where the mistake appears on the face of the award, or in some paper which forms part of the award and is by reference incorporated with it. Secondly, in cases where the arbitrator himself states: "That in his opinion he has made a mistake of law or fact and was desirous of the assistance of the Court, and willing to reserve his decision on the point on which he believed himself to have gone wrong."

In *Doe dem Stimpson* v. *Emmerson* (1847), 9 L.T. (O.S.) 199, objection was taken to an award of an arbitrator to whom all matters in difference were referred on the ground that it was clearly erroneous in point of law. It was held by Wilde, C.J., that:

The Court has no more authority to review the arbitrator's decision upon a point of law referred to him than upon a point of fact. Whatever may have been formerly the understanding, it is enough to say that in modern times the decisions are distinct and uniform, that if parties choose to refer a matter of law to an arbitrator his decision upon the matter is final.

This decision is thus referred to by Lord Halsbury, L.C., in *Adams* v. *Great North of Scotland Ry. Co.*, [1891] A.C. 31 at 39-40.

And in the Court of Common Pleas, 40 years ago, in a case in which the arbitrator had a question of law submitted to him according to the ordinary forms of pleading, the Court, having come to the conclusion that the decision of the arbitrator was, in the sense in which they understood the words, erroneous in deciding upon a question of law on demurrer, nevertheless held that the parties having submitted that question to the arbitrator, it was for the arbitrator to determine it; in their own language, the parties had agreed to accept the arbitrator's decision upon the question of law, as well as his decision upon the facts. In the Court of Queen's Bench, 30 years ago, that decision was adopted as being the law which would guide the Court in the decision of such questions.

I refer also to *Lemay* v. *McRae* (1889), 16 A.R. (Ont.) 348, and *In re Hohenzollern Actien Gesellschaft and the City of London Contract Corp.* (1886), 54 L.T. 596.

In *Shortridge* v. *Young* (1843), 12 M. & W. 5, at p. 6, 152 E.R. 1087, Lord Abinger says:

If the parties consent to the Judge's disposing of the matter himself in a summary manner, the effect of the statute is to constitute him an arbitrator for that purpose, and his decision cannot be reviewed.

Subject to these exceptions and to the exception of fraud or misconduct on the part of the arbitrator, the validity of awards is now upheld by the Courts whether the findings have to do with the law or the facts.

The rule is founded on sound policy as is stated by Parke, B., in *Phillips* v. *Evans* (1843), 12 M. & W. 309, at p. 312, 152 E.R. 1216, cited by Martin, B., in *Hogge* v. *Burgess*, 3 H. & N., at p. 297.

"Although we may possibly do some injustice in particular cases, I think it better to adhere to the principle of not allowing awards to be set aside for mistakes, and not to open a door to inquire into the merits, or we shall have to do so in almost every case." That [Martin, B., says] was clearly the old rule.

It is most applicable in a case such as this, where the umpire is named by both parties and given by consent embodied in a judgment of the Court the most extensive powers. The umpire is not bound by the rules of evidence but can form his own opinion in respect of all matters submitted from his own knowledge, inspection, examination or from any other source he may deem proper. Thereon he is to make his findings which it is agreed shall be final and conclusive between the parties as the judgment declares.

Taking the exceptions to the general rule that the Courts will not interfere with an award on the ground of mistake as they are stated by Strong, J. (18 Can. S.C.R., at 284), there is here clearly no mistake which appears on the face of the award or in any paper that forms part of it and is incorporated in it. Nothing of the kind appears. The notes of the proceedings before the board are not evidence for any purpose. They certainly do not form part of the report or award and are not incorporated in it. Nor have we before us any admission or statement by the umpire that he has made a mistake either of law or fact which he wishes reviewed. There is no ground whatever asserted to lead us to suppose that the arbitrator is satisfied that there has been a mistake.

This conclusion obviates the necessity of going into the items mentioned in the report which were discussed before us at great length. It was sought to give a narrow and strained construction

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to the judgment, but its terms are amply wide to include the umpire's findings as those are stated in the report and beyond these we cannot go. On the face of the report there is nothing to shew that the umpire dealt with any subject outside the terms of the judgment.

There remain the questions involved in the alleged fraudulent conduct or misconduct of Oxton and of Macdonald.

It must be remarked that one item of these charges, that involved in the alleged suppression of a part of Bylander's report, was not made part of the defendants' case until added by amendment at the trial, though the facts were known long previously.

The charges made against Oxton are that he forwarded to the umpire in Montreal the evidence before the Public Accounts Committee, the Mathers Commission and the evidence taken therein and the report thereupon; and that he shewed the report of Svenn Bylander, an engineer employed by the plaintiffs to report on the sufficiency of the caissons, to the umpire but part of it only to Burt, the appraiser for the defendants.

As against Macdonald it is charged that he concealed from Burt the fact that he had the various documents sent him by Oxton and that he imposed on Burt by falsely and dishonestly stating to him that the part omitted from the Bylander report had no bearing on the matters under consideration.

There are other charges specified in the notice of motion but these were not dwelt on in the argument.

An elaborate argument on this branch of the case was addressed to the Court and numerous cases bearing on the independence and impartiality required of arbitrators were cited: *Race* v. *Anderson* (1886), 14 A.R. (Ont.) 213; *Conmee* v. *C.P.R. Co.*, (1889), 16 O.R. 639, and *Harvey* v. *Shelton* (1844), 7 Beav. 455, 49 E.R. 1141, and others. These cases were all decided on the particular circumstances involved and are not applicable to the facts here. The impression left on my mind on the argument was that a manifest attempt was being made to exaggerate the importance of incidents that were of little substance and, on reflection, I see no reason to alter my opinion. I agree with the views expressed on the subject by Curran, J., 48 D.L.R. 536.

Macdonald was selected as umpire because of his high character and professional standing. The questions presented him for

solution and settlement were such as he was familiar with in his professional capacity. He has not made known on what evidence he proceeded, or on what grounds, or by what reasoning or calculations he arrived at his findings. It was and was by the parties intended to be, a matter for his sole judgment. The presumption is that he has carried out the terms of his appointment to the best of his ability and judgment and with a just regard for the interests of all parties. It accomplishes nothing whatever to rebut this presumption, when the defendants on unwarranted and flimsy grounds seek to repudiate the decision of a tribunal of their own selection.

I would uphold the judgment appealed from 48 D.L.R. 536, and dismiss the appeal and the motion made directly to this Court.

Fullerton, J.A.

FULLERTON, J.A.:—This is an application to set aside an award made by Robert Macdonald, the umpire named in the judgment entered in this action on March 22, 1917. Under that judgment certain matters in difference between the plaintiff and the defendants arising out of the construction of the new Parliament Buildings in Winnipeg were referred to two appraisers, being Stephen Clifford Oxton appointed by the plaintiff and H. I. Burt appointed by the defendants. The judgment provided that in the event of the appraisers not being able to agree on any of the matters referred the same should be referred to Robert Macdonald as an umpire.

Sixteen grounds of objection to the award are set out in the notice of motion but only three were seriously pressed in the argument.

They were:

(1) Misconduct on the part of Oxton, prior to the commencement of the hearing; (2) Misconduct on the part of both Macdonald and Oxton in the course of the hearing; (3) That the sum of $615,213, charged against the defendants in connection with caisson work, should not have been so charged because it was not a loss to the plaintiff by reason of defective workmanship and materials within the meaning of para. (2), sub-sec. (*b*), of the said judgment.

I shall deal with these grounds in their order.

The defendants complain that on April 17, 1917, Oxton sent to Macdonald, who was then at his home in Montreal, certain documents which had a tendency and were intended to prejudice the latter against the defendants.

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These documents were: (1) The evidence given before the Public Accounts Committee of the Legislature at the session of 1915; (2) Public Works Department Report for 1914; (3) Public Works Department Report for 1915; (4) Report of Royal Commission appointed to enquire into certain matters relating to the new Parliament Buildings. At the same time Oxton wrote to Macdonald a letter in which he said:

> In order that you may have some knowledge of the matter under discussion and at the same time provide you with some literature which may be interesting reading on your journey West, I am forwarding to you, under separate cover, four pamphlets as follows:

mentioning the names of the pamphlets enumerated above. He concludes: "Perusal of these will make you somewhat acquainted with the conditions which have led up to the present situation."

He signed his letter "S. C. Oxton, Deputy Minister," he being at the time Deputy Minister of Public Works.

Now para. (10) of the judgment in this action under which the arbitration was held provides that:

> If the umpire dies or refuses or is unable to act, another umpire who shall be an architect or engineer and a British subject *resident within the Dominion of Canada, but not within the Province of Manitoba*, shall be appointed by a Judge of said Court.

The selection of Macdonald, who lives in Montreal and the provision for the appointment of an umpire from outside the Province in the event of his being unable to act shew very clearly that what the defendants desired and what the plaintiff agreed to was that the umpire should be a man who could approach his duties with an entirely unprejudiced mind and without any knowledge of the many scandals in connection with the Parliament Buildings which had been so much discussed throughout the Province and with which the defendants had been so prominently identified.

Notwithstanding this provision of the judgment, Oxton, the representative of the plaintiff, in direct violation of the spirit of the agreement, sent to Macdonald the documents above referred to which contain a complete history of the defendants' connection with the Parliament Buildings. Had no such clause as I have referred to been contained in the judgment Oxton had no right whatever to send these documents to Macdonald. His conduct in doing so cannot be too strongly condemned. His object in sending them could only have been to prejudice Macdonald against the defendants.

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Until the umpire had formally begun his investigations neither side had any right to furnish him with material bearing on the matters into which he was to inquire. Macdonald, although he probably knew nothing of the terms of the judgment, appears to have had quite a different conception from Oxton of the conduct and duties of an umpire in his position for he says in his affidavit filed in answer to this application:

I have never read the evidence before the Public Accounts Committee. I did not read the report of the Mathers Commission, nor the reports of the Public Works Department, prior to my arrival in Winnipeg, *as I preferred to keep an open mind until both sides could be heard.*

In view, however, of the fact that Macdonald did not read the documents sent him by Oxton I think the first ground taken by the defendant fails.

Coming now to the second ground taken by defendants, namely, misconduct on the part of both Macdonald and Oxton during the course of the hearing, this is based on the following facts:

During the course of the proceedings Oxton handed to Macdonald a report made by S. Bylander to the Minister of Public Works, dated December 7, 1916. He also gave a copy of this report with the last page detached to Burt.

According to the reported minutes of the proceedings a discussion then took place as follows:

The Chairman: You are referring to the two reports? Mr. Burt: Yes, the second one particularly. The Chairman: I have them both in my possession. Mr. Burt: I have the first in full, but I have not the last page of the second. Mr. Oxton: I shewed it to you, Mr. Umpire, but I didn't give Mr. Burt access to it because it concerned a question of policy that I didn't consider he would be interested in. Mr. Burt: If it is a question of policy that affects this appraisal I might be quite interested in it. The Chairman: It does not.

The page of the report that was detached contained matter which, it seems to me, might have very considerable influence on the mind of an arbitrator. Among other things it contained the following:

There would be no object in selecting some of the caissons for examination, for in doing so there is an equal chance that the most inferior might be left unexamined and the same uncertainty and risk would still remain. The cost of the work already done has been very great. Mr. Simon advised me that the Government was most reluctant to incur any expenditure that could possibly be obviated, and I find that at least $1,000,000 expenditure would still be required to secure the foundations. In view of this I therefore recommend that

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the Government should take some risk and leave the remainder of the caissons, though unsatisfactory, as they are at present. Further cracks in the wall and settlement may be anticipated and will no doubt occur for some years to come. Such settlements, however, are not likely, in my opinion, to cause any serious menace to the safety of the building and the risk the Government will be required to take is not excessive considering the cost entailed in making the work good. While therefore I recommend that no further expenditure shall be incurred, it would appear that the Government is entitled to compensation for taking over the faulty work and the accompanying risk.

Bylander, I understand, is one of the great authorities on building foundations and made a very thorough examination of the caissons supporting the Parliament Buildings. His opinion would naturally have great weight.

Burt was clearly entitled to see any document placed in the hands of Macdonald by Oxton.

The statement made by Oxton that the page of the report concerned a question of policy only and that of Macdonald that it did not affect the appraisement were both, to say the least, inaccurate. It may be said that as Macdonald was at the time considering items upon which Oxton and Burt had failed to agree the latter's functions had ceased and for that reason Burt had no right to see the document. The fact is that both Oxton and Burt were at the time acting as the advocates and using their best endeavours to forward the interests of the parties by whom they were respectively appointed.

In my view it matters not whether at the time they were acting in the capacity of advocates or as arbitrators, neither had any right to submit a document for the consideration of Macdonald without permitting the other to see it. I think the effect of what happened is to render the award void.

In case I may be wrong in so holding, I will proceed to consider the third objection to the award, namely, the allowance by the umpire of the sum of $615,213 in connection with the caissons.

By his award the umpire charges the defendants with the sum of $160,302.62 for repairs to caissons and with the further sum of $615,213 which is stated in the report to be: "Estimate of expenditure necessary to complete the repair of caisson foundation." To the allowance of the latter item the defendants take strong objection: They contend that it does not represent a loss to the plaintiff by reason of defective workmanship and materials within the meaning of the judgment and that the umpire in allowing this item exceeded his jurisdiction.

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Mr. Coyne, on behalf of the plaintiff, contends that the Court on this motion cannot look at the affidavits and exhibits filed in support but are confined strictly to the judgment and award. He says that the award is regular on its face and in the absence of fraud is conclusive and binding on all parties.

It will be necessary first to determine the jurisdiction of this Court over the award.

The judgment itself contains the following provision: "The appraisal hereunder shall not be subject to the provisions of the Manitoba Arbitration Act." It is clear, therefore that the matter cannot come before us by way of appeal and that we have therefore no right to consider the merits or review the findings of the umpire.

A review of the authorities makes it clear that an award regular on its face can only be attacked on three grounds: (1) Corruption on the part of the arbitrator; or (2) Excess of jurisdiction; or (3) Where the arbitrator himself states that he has made a mistake.

There is no question here either of corruption or mistake admitted by the arbitrator. There is, however, a very serious question as to whether or not the umpire has exceeded his jurisdiction.

Sir G. M. Giffard, V.C., in the case of *In re Dare Valley Ry.*, L.R. 6 Eq. 429, at p. 435, said: (see judgment of Perdue, C.J.M., ante, p. 173).

I think there can be no doubt whatever that in considering whether or not the umpire has exceeded his jurisdiction we are entitled to look at the material filed. If this were not so there might be many cases where arbitrators have plainly exceeded their jurisdiction yet the Court would be helpless to interfere. Take for example an arbitration as to the value of lot A. The arbitrators in fact value lots A and B and the award on its face fails to indicate this. On an application to set aside the award the Court could only be apprised of the true facts by evidence. My view is that we are entitled to look at all the material filed for the purpose of ascertaining if the umpire has exceeded his jurisdiction. See *In re Green and Balfour Arbitration* (1890), 63 L.T. 325.

Para. (2) (*b*) of the judgment which confers the jurisdiction of the appraisers and umpire to deal with and ascertain the loss

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suffered by the plaintiff reads as follows: [See *ante* p. 169.] Purporting to act under the authority of the above paragraph of the judgment, the umpire charges Kelly with the following: [Items of charges, see *ante* p. 170.]

The last item is the one in question.

Now in order to interpret the meaning of the clause in the judgment above quoted it is important and justifiable to look at the surrounding circumstances at the date of the judgment.

The plaintiff had prior to February 28, 1917, expended $237,099.54 in repairing certain of the old and putting down certain new caissons. They had also expended certain moneys in investigations made with a view to learning the condition of the caissons. The award charges the defendants with a portion of the above amount of $237,099.54, *i.e.*, $160,302.62.

When these repairs were completed about the last of February, 1917, the construction of the building was proceeded with and although the building is now completed and occupied the plaintiff has not since expended a single dollar on caissons.

The situation at the date of the judgment was that the plaintiff had spent $237,099.54 in repairing the old and constructing certain new caissons. The plaintiff had also expended certain moneys on repairs to cut stone work and incuring certain other defects in the work. The superstructure had been erected on the caissons and the work was proceeding.

The parties then agreed on the judgment containing the above-quoted para. (2) (*b*) (see *ante* p. 169).

The important question to be determined is the meaning of this paragraph—what jurisdiction did it confer upon the arbitrators?

Reading the first paragraph of (2) (*b*) by itself it might at first appear that it covered some loss beyond the costs of "ascertaining and remedying such defects." The word "such," however, clearly refers to the "loss to the plaintiff by reason of defective workmanship and materials" and makes it clear that what was intended by this paragraph was the reasonable costs of ascertaining and remedying defects.

Going now to the second clause:

Provided that in ascertaining *such* amount (that is, the costs of ascertaining and remedying defects) the arbitrators shall be the judges as to whether

or not the work was defective, and to what extent and shall be also judges as to the extent of *the investigations carried on* for the purpose of ascertaining and *remedying such defects*.

This shews clearly that the parties had in mind that investigations had been carried on and defects had been remedied and were providing that the defendants should pay the costs which the plaintiff had incurred in ascertaining and remedying these defects.

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The sentence which follows makes this doubly clear "and what amount, if any, *paid for that purpose*, shall be charged to the defendants." Now the words "that purpose" can only refer to the previous words "ascertaining and remedying such defects."

In the light of the surrounding circumstances, the only construction I can place on para. (2) (*b*) is that it authorised the arbitrators to charge the defendants the portion of the moneys already expended by the plaintiff in making repairs which they should think properly chargeable to him.

If I am right in this construction then clearly the umpire in charging the defendants with the sum of $615,000 for some possible expenditure the plaintiff some time in the future might make in repairing caissons clearly went beyond his jurisdiction and dealt with a subject-matter which was not referred to him.

The authorities shew that an award may be bad in part and good for the rest provided that the bad portion be clearly separable. Russell on Arbitration and Award, 9th ed., p. 214; *Johnston* v. *Cheape* (1817), 5 Dow. 248, 3 E.R. 1318.

As the other members of the Court take the view that the suppression of the Bylander report is not a valid ground for setting aside the judgment, I will concur with Perdue, C.J.M., and my brother Dennistoun in a judgment striking out of the award the item of $615,213.

The plaintiff should pay the costs of the motion to the Court of the King's Bench and the costs of this appeal.

Dennistoun, J.A.

DENNISTOUN, J.A.:—The parties to this action on March 22, 1917, having agreed upon terms, a consent judgment was entered by Mathers, C.J.K.B., as set forth in full in the reasons for the judgment of Curran, J., from whom this appeal is taken, 48 D.L.R. 536.

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The defendants had undertaken by written contracts to erect Parliament Buildings at Winnipeg. The buildings were partially completed when the judgment referred to was settled. By it the parties agreed in effect that all previous contracts should be set aside and that the defendants should be paid the value of the work done and materials provided by them for such Parliament Buildings so far as erected on May 19, 1915, on the basis of a fair contractor's price, including reasonable contractor's profit for work done and materials furnished having due regard to the character of the same and the purposes for which same were intended, together with the value of plant taken over by the Provincial Government.

In order to ascertain how accounts stood between the Government and the contractor it was further agreed that there should be set off against the contractor in favour of the Government the sum of $1,680,956.84 cash previously paid the contractor under the contracts abrogated by the judgment; and in addition all loss to the Government by reason of defective workmanship and materials, including the reasonable cost of ascertaining such defects.

Two appraisers and an umpire were appointed. The decision of the umpire in the event of the appraisers failing to agree was declared final and the judgment indicates the method of conducting the appraisal in these words:

(7) The appraisers and the umpire are to be entitled to form their own opinion as to the fair value and proper charge or allowance hereunder to be made in respect of all matters submitted hereunder from their own knowledge, inspection, or examination, or from other sources, as they may deem proper, and for that purpose may cause any work to be uncovered or any investigation to be made which the appraisers agree upon or the umpire desires.

Para. (11) of the judgment provides that the provisions of the Manitoba Arbitration Act, R.S.M. 1913, ch. 9, shall not apply and para. (12) deals with the balance to be ascertained as follows:

(12) If on striking the balance hereunder it is found that the balance is in favour of the plaintiff, and upon the said report being filed in Court in this action, then the defendants shall pay to the plaintiff the balance so found with interest at the rate of 5% per annum from July 1, 1914, to date of payment.

The appraisers and the umpire had many meetings extending over the greater part of the month of May, 1917, and on May 25 their report was delivered. It found a balance of $1,202,351.65 in favour of the plaintiff.

This sum by virtue of the provisions of sec. (8) of the judgment became the final judgment of the Court and by para. (12) interest is payable thereon from July 1, 1914.

The judgment clearly shews that the intention of the parties was to make it unappealable; it was to terminate the litigation. The purpose was to obviate the necessity of going to trial, with the possibility of numerous appeals on the merits.

The field to be covered by evidence was so vast and the opinions and deductions of the most eminent engineers so conflicting, that the parties determined by a solemn agreement to be bound by the decision of the umpire and to leave him free to use his own knowledge based on personal observation or other evidence upon which he saw fit to rely. The umpire was the judge of both fact and law. The taking of legal evidence in the form generally demanded by the terms of submissions to arbitration was by the terms of the judgment in question expressly waived and by agreement of the parties the award might be based upon the professional opinion of the umpire after drawing upon reasonably available sources of information and his own observation and experience. He was carefully selected as an able and well-qualified engineer and architect, and unprejudiced resident of another Province and he brought to the work a keen professional mind unbiased by any previous connection with the work or the parties.

The defendants have moved against the report of the umpire or his award as it is differently styled by a consolidation of motions launched in Court and Chambers. These motions were heard by Curran, J., sitting as a Judge in Court and in Chambers, and dismissed by him, 48 D.L.R. 536. The defendants appeal to this Court.

The grounds of appeal, 16 in number, may for the sake of convenience in discussing them be reduced to three:

(1) That the report or award is against law, evidence, and the weight of evidence; (2) Misconduct on the part of appraiser Oxton and on the part of the umpire, Macdonald; (3) Lack of jurisdiction in respect to items allowed.

There was submitted on the argument a voluminous book of notes taken apparently during the meetings of the umpire with the appraisers and purporting to record their remarks. It does not appear that evidence was taken by calling witnesses to speak

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viva voce, but statements were taken, reports looked at, and personal inspection and examination of the work made. We are in ignorance as to what evidence was before the umpire and have no means of knowing upon what he based his findings of fact.

The umpire admits no mistake on his part and should this Court set aside his award and refer the matter back to him for re-consideration, there is nothing to indicate that he would bring in a different finding from the one now before us.

Affidavits were filed on the motions before Curran, J., 48 D.L.R. 536 *et seq.*, to shew that the award was contrary to evidence and the weight of evidence. In my judgment upon the terms of the submission this should not have been done, as the opinions of engineers which are contrary to those of the umpire have no bearing whatever upon the questions which this Court may properly consider, and should be rejected as irrelevant and immaterial.

Macdonald, the umpire, says it will cost the Government of Manitoba $615,213 to repair the caissons which the defendants have placed under these buildings; it is quite immaterial that Bylander is of opinion it will cost $1,000,000 to make these repairs, and Schioler is of opinion that he could put new foundations under the whole building for $222,750.

The parties agreed in the most solemn manner to abide by the finding of Macdonald and unless it appears clearly that his mind did not go with his award, that he was guilty of misconduct, or was corrupt, or that he clearly acted beyond the scope of the reference and dealt with matters which were beyond the scope of the reference, this Court has no jurisdiction to set it aside.

In references by consent the general rule is that, the parties having chosen their own arbitrator to be the judge in the disputes between them, they cannot, when the award is good upon its face, object to his decision, either upon the law or the facts. In this respect the Courts do not recognise any distinction between the awards of legal and of lay arbitrators. Russell on Arbitration and Awards, 9th ed., p. 210. And at p. 211, the same author says:

> There are many old cases in which the question as to how far an alleged erroneous decision of an arbitrator would induce the Courts to set aside

or remit an award was discussed, but the modern cases clearly establish that the Courts will not send back an award to the arbitrator on the mere ground of mistake. But where there has been corruption or fraud, where there is a mistake of law or fact apparent on the face of the award, or where the arbitrator himself admits that he has made a mistake, the award will be set aside or remitted to the arbitrator.

In support of this statement of the law many cases may be quoted. I content myself by referring to a few of them.

In *Hodgkinson* v. *Fernie* (1857), 3 C.B. (N.S.) 189, at 200, 140 E.R. 712, still quoted with approval, Cockburn, C.J., said:

It is not easy to reconcile all the decisions as to how far the Court will interfere with the determination of an arbitrator whether upon the law or upon the facts. But the modern cases which have been cited certainly go the length of deciding, that, unless there be something upon the face of award to shew that the arbitrator has proceeded upon grounds which are not sustainable in point of law, the Court will not entertain any objection to it.

In 1861, Wilde, B., said in *Holgate* v. *Killick*, 7 H. & N. 418, 158 E.R. 536:

The Courts will not look at anything for the purpose of reviewing the decision of an arbitrator upon the matter referred to him, except what appears on the face of the award or some paper so connected with the award as to form part of it.

Adams v. *Great North of Scotland Ry.*, [1891] A.C. 31, sets forth the view of the House of Lords upon the practice which at one time prevailed of reviewing awards upon the merits, and states that such practice is now obsolete. Lord Halsbury, L.C., says at p. 39:

There is no doubt that at one time the Courts in both countries (England and Scotland) treated themselves rather as being in the position of Courts of Appeal, and examined whether or not the conclusion at which an arbitrator had arrived was sound, both in point of law and in point of fact. . . . In the Court of Common Pleas, 40 years ago, in a case in which the arbitrator had a question of law submitted to him according to the ordinary forms of pleading, the Court, having come to the conclusion that the decision of the arbitrator was, in the sense in which they understood the words, erroneous in deciding upon a question of law on demurrer, nevertheless held that the parties having submitted that question to the arbitrator, it was for the arbitrator to determine it; in their own language, the parties had agreed to accept the arbitrator's decision upon the question of law, as well as his decision upon the facts (*Doe dem. Stimpson* v. *Emmerson*, (1847) 9 L.T. (O.S.) 199). In the Court of Queen's Bench, 30 years ago, that decision was adopted as being the law which would guide the Court in the decision of such questions.

And at p. 41:

In order to make the argument intelligible and sensible . . . I must know what the facts were. I do not know what the facts were; but the arbitrator did. . . . Until I am compelled to come to the opposite

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conclusion upon the face of the award, or upon some evidence which is legitimately to be brought into the consideration of the matter, so that I can form a judgment upon it, I shall assume that the arbitrator performed his duty.

In *McRae* v. *Lemay*, 18 Can. S.C.R. 280, the decision of the Supreme Court of Canada is reported in the headnote in these words: [See *ante*, p. 180.]

I refer also to *C.P.R.* v. *Fleming* (1893), 22 Can. S.C.R. 33.

Mr. Andrews argues for the appellant that what was said by the umpire to the appraisers during the progress of their discussions and particularly what was said in reference to the preparations of the award some 5 hours before it was delivered may be evidence to shew that the umpire approached his conclusions upon insufficient foundations and without sufficient evidence to sustain them. In my judgment what was said by the umpire at the time referred to was not evidence which should have been admitted by affidavit or otherwise. It had no legal relation to the award which was subsequently given and should be viewed only as a statement made while the subject-matter of the award was under advisement. The umpire was free to change his mind, to alter his opinion, to take new evidence and to reject as untrustworthy evidence previously relied upon, and he was in no way bound or estopped by any views which he expressed at any time before reading his conclusion.

So soon as the award was published it became part of the judgment of the Court by consent of parties, and what went before it or led up to it should be rejected except in so far as it may have a bearing upon the questions of misconduct and want of jurisdiction which remain to be dealt with.

I would, therefore, reject all the evidence of values and costs which was admitted in support of these motions and decide this branch of the case upon the clearly established principles enunciated in the cases quoted above.

This is an award under the inherent jurisdiction of the Court. It is not governed by statute. The umpire is not an officer of the Court. He derives his powers by consent of the parties, and directs how judgment shall be entered. His finding becomes part of the final judgment and is incorporated with it.

The judgment itself is not appealed against. How could it be? It was made by consent. To give effect to the argument of

the defendants and to set aside the award because the amount awarded is too great or too small is, in my judgment, not permissible in the present proceedings. 1 Hals. 483; *Meunier* v. *C.N.R.* (1912), 4 D.L.R. 376, 4 Alta. L.R. 245.

Having come to the conclusion that the award cannot be reformed or referred back for the purpose of increasing or decreasing the sums awarded, I state briefly in respect to the charges of misconduct against Oxton and Macdonald, that I agree with the view taken by Curran, J., 48 D.L.R. 536, and for the same reasons hold that there was no misconduct sufficient to invalidate the award.

There now remains the third ground for consideration, that the umpire allowed claims which were outside the scope of the reference and I proceed to an examination of the judgment and the award, in order to determine if any defect appears upon the face of the award which may invalidate the umpire's finding. In my judgment there is such a defect. He had no authority to award $615,213 as "Estimate of expenditure necessary to complete the repair of caisson foundations."

The umpire was authorised to credit the Kellys with the fair cost of the work which they had done, having regard to the character of the same and the purpose for which same was intended. He has fixed this amount at $1,059,252.31. This includes, it must include, the fair cost of the caissons which the Kellys built. They were entitled to be paid their fair value, notwithstanding their defects, leaving it to the Government hereafter to strengthen, enlarge or increase their dimensions or numbers if it thinks well to do so. The Kellys are entitled to be paid what these caissons were worth when they left them and the umpire was in error, and misconceived the meaning of the judgment, when he came to the conclusion that he was justified in charging the Kellys with the costs of bringing the caissons up to a higher standard of strength or durability than they then possessed.

The judgment authorises the umpire to ascertain: "(2) (*b*) All loss to the plaintiff by reason of defective workmanship and materials including the reasonable costs of ascertaining and remedying such defects."

In accordance with this direction he charges the Kellys with $160,306.63 being portion of cost in repairing caissons up to

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February 28, 1917. He also charged various other items for repairs and defects which had been made good by the plaintiff, and had been definitely ascertained. These items covered loss to the Government down to the date of the award, May 25, 1917, and, in my opinion, that was all the judgment authorised him to do.

When he left the domain of what had been done and paid for and entered the field of speculation and opinion he clearly had no jurisdiction to make an "estimate" of what ought to be done in the future.

Para. 12 of the judgment provides for the payment of interest on the balance ascertained at the rate of 5% per annum from July 1, 1914, to date of payment. This is an illuminating paragraph. It shews clearly what was in the minds of the parties. The loss which the plaintiff had sustained up to the judgment was to be ascertained and would properly bear interest. That the plaintiff should receive interest from July, 1914, on sums of money which might be expended in the future or which might never be expended at all was never contemplated.

This in itself is sufficient to demonstrate that the award of $615,213 is unauthorised and should be set aside.

It may be argued that the umpire's intention was to credit the Kellys with $1,059,252.31 less $615,213 required to repair the work done; and that he should have credited them with the difference between these sums $444,039.31 as the fair value of the work done, and said nothing about repairs. If he had done so, there would be difficulty in interfering with his award for the reason given above, that the evidence upon which he arrived at such a conclusion would not be open to review. But he has not done so. In language and figures of the plainest significance he says that the work which has been done is of the fair value of $1,059,252.31 having regard to the character of the same and the purpose for which it was to be used. He must have taken into consideration all deductions for bad work and faulty materials before arriving at the fair value of the work on the ground, and his estimate of $615,213 must be for additional work and other materials necessary to bring the work, as the Kellys left it, up to the standard which the umpire thinks it ought to attain.

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The judgment intends that the Kellys shall be paid a fair price for what they did, and that the Government shall pay for everything else except the items specifically mentioned and as to which there is no serious dispute.

In my humble opinion the item of $615,213 charged against the defendants as an "Estimate of expenditure necessary to complete the repair of caisson foundations" should be stricken out of the award and the balance recoverable from the defendants reduced from $1,207,351.65 to $592,138.65 and the judgment of the Court of King's Bench (see 48 D.L.R. 536 *et seq.*) amended accordingly.

In Russell on Arbitration and Award, 9th ed., p. 214, ch. 5, sec. 8, the author discusses "The award though bad in part, when good for the rest," and quotes the authorities. When the bad portion of the award is clearly separable from the residue it may be excised and the residue will stand good.

In the case at Bar the item found to be outside the scope of the reference and beyond the jurisdiction of the umpire is in no way connected with the rest of the award except by inclusion in the total sum awarded. It appears as an item separate and distinct and may be struck out without in any way interfering with the residue.

I would allow the appeal as indicated. The appellants should have the costs of the appeal, and of the motion to set aside the award in the Court below. *Appeal allowed in part.*

Re DUFFERIN PROVINCIAL ELECTION.

JOHNSON v. SLACK.

ONT.

S. C.

Ontario Supreme Court, Mulock, C.J.Ex., and Rose, J. October 12, 1920.

ELECTIONS (§ II C—73)—PROVINCIAL ELECTIONS—ELECTION EXPENSES—PROMISE TO PAY SCRUTINEERS—ONTARIO ELECTION ACT, R.S.O. 1914, CH. 8, SECS. 111 AND 167.—PETITION TO VOID ELECTION.

A promise on the part of a candidate for the Legislature to pay his own expenses if elected, (which involved the repayment of certain sums collected) is not a promise to pay each contributor in order to induce the latter to vote. And a promise to pay certain of the electors who acted as scrutineers, there being no corrupt intention in the employment of the same, cannot be said to be a mere promise to pay the electors for voting, and such payments duly made can rightly be called *bonâ fide* payments for lawful and reasonable expenses in connection with the election.

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RE DUFFERIN PROVINCIAL ELECTION.

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PETITION by plaintiff to have declared void the election of defendant as member of the Legislative Assembly of Ontario for the electoral district of Dufferin. Refused.

W. H. Price and *Gordon N. Shaver*, for petitioners.

Gordon Waldron, for respondent.

THE COURT:—The charges which are pressed are two in number. The first is based upon the raising of money by the farmers' clubs in the constituency, or certain of them, for the purpose of defraying the election expenses of Mr. Slack, who was nominated by a convention of the United Farmers of Ontario and their sympathisers.

At or immediately after the convention, there having been some suggestion by some of those present that the clubs might well pay half the expenses of the candidate, Mr. Slack stated that he did not desire that that course should be followed. He said that in the event of his success he would prefer to pay his own expenses, but that if he was defeated he thought there would be nothing unfair in the clubs paying the expenses, or he would be glad if the clubs did pay the expenses—it is difficult to find, upon the evidence, the exact expression used.

After the convention, some of the clubs took up subscriptions and raised very small amounts, and two of them sent these amounts to the treasurer of the farmers' organisation in the county—the others kept them in their own hands.

After the election, the funds which had been sent to the county treasurer were returned to the clubs, and these moneys, as well as the moneys which the clubs had kept in their own possession, were repaid to the original subscribers. The amounts of the individual subscriptions were very small, some of them as small as 50 cents, and, so far as appears, none of them larger than about $2.

It is argued that Mr. Slack's promise or statement, at or after the convention, however it was worded, amounted to a promise to the subscribers that in the event of his success he would repay any moneys which they put up for the purpose of meeting the expenses of the election, and that by such promise he gave each subscriber a direct financial interest in the result of the election, and thus made a promise which, to use the

words of sec. 167 of the Ontario Election Act, R.S.O. 1914, ch. 8, was a promise of a payment to the subscriber in order to induce the subscriber to vote at the election. It seems to us that this argument is not well-founded. Mr. Slack does not seem to have sought nomination or to have known before he went to the convention that there was a probability of his being nominated. He was the candidate of an organisation many of whose members were very ready to subscribe money to help defray the expenses of his election. Being ready to subscribe money for such purpose, it is inconceivable to us that their zeal on behalf of the candidate could have been increased by a promise that the trifling sums which they subscribed would be repaid in the event of their candidate being successful, or that Mr. Slack, in making his promise to pay his own expenses if he was elected, could have had in his mind any intention of inducing any of the subscribers, or any other person, to vote or refrain from voting at the election or to assist in electing him.

This charge fails.

The second charge is that a number of scrutineers were promised payment for acting as scrutineers, and, after the election, were paid. It has long been the practice in Dufferin to pay scrutineers, and, although the evidence indicates that no person who was asked to act as a scrutineer was told that he would be paid for acting, it is shewn that some of those who consented to act expected that they would be paid; and perhaps it is not unfair to assume that, in many cases, the agent of the candidate and the person whom the said agent asked to act both knowing of the custom, there was an implied bargain that, after the election, the scrutineers would be paid.

After the election was over, Mr. Slack asked the agents throughout the riding to pay the scrutineers who acted in their respective districts, and many of such scrutineers were paid. There was no concealment of this fact; the payments to scrutineers were shewn as part of the election expenses in the return which was made by Mr. Slack's financial agent to the returning officer.

Cases from the English reports were cited to us in which payments to what are, in England, called "watchers" were

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discussed. None of these, however, seems to us to advance the inquiry as to the legality of the payments in question here. They do, of course, shew what it does not need cases to shew, that payment to a scrutineer which is only colourably a payment for his service as scrutineer, and is in reality a payment to him for voting, is a corrupt payment, but beyond that we think the cases have no bearing.

In this particular case, it is shewn that Mr. Slack and his executive committee, or members of it, discussed the question of having scrutineers, and that it was decided that it would be wise to have two scrutineers at each polling subdivision, one of them a man, and, if possible, the other a woman, the latter apparently being intended to keep her eye more particularly upon the regularity of the polling of the votes of such women as presented themselves at the poll. The plan agreed upon was, as far as practicable, carried out. In most instances the scrutineers were selected by local officers of the farmers' organisation. Those of them who were called as witnesses said that they voted.

As has been stated, what is charged is that the employment of and payments to these scrutineers were corrupt—the employment with the implied promise of payment being a mere cloak for a promise to pay for voting, and the payment being, in fact, a payment for voting. We, however, find no evidence whatever of any corrupt intention in the employment or in the payment of these scrutineers.

As has been pointed out in some of the English cases dealing with "watchers," payments to scrutineers might be made a cloak for payments for voting, and now that the matter has been brought prominently forward for discussion in this case, it may be that the Legislature will think it wise to discuss the question whether such payments ought to be prohibited, and ought to be declared to be corrupt practices. That, however, is entirely a matter of policy for the Legislature. What we are concerned with is the law as it stands, and we do not find anything in the law which indicates that payments honestly promised or made to these scrutineers, who are persons whom the candidate is entitled to employ (see sec. 111 of the Ontario

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Election Act), are anything other than those *bonâ fide* payments for lawful and reasonable expenses in connection with the election, which, by sub-sec. 2 of sec. 167, are expressly declared not to be bribery. Those of the scrutineers who expected to be paid for their services had no right to vote: Ontario Election Act, sec. 13 (2); and, if any had been shewn to have voted knowing that they had no right to do so, it would have been shewn that they had been guilty of corrupt practices: sec. 177; *Easton* v. *Brower* (1899), 2 Ont. Elec. Cas. 100. But the number of votes lawfully cast is not here in question; and there was no attempt to shew that any one who voted knew that he had no right to do so—indeed, the inference from the antiquity and generality, in the county of Dufferin, of the practice of paying scrutineers, as well as from the openness of the whole proceeding in this case, is, rather, that the persons whose acts are in question did not know that it was against the law for one to vote who expected to be paid for services rendered in the election.

The petition fails.

The costs of the respondent ought to be paid by the petitioners, and the money deposited as security ought to be applied accordingly, after payment of those charges which, by sec. 21 of the Controverted Elections Act, R.S.O. 1914, ch. 10, are given priority over them. *Petition refused.*

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Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. May 4, 1920.

RAILWAYS (§ III B—50)—ACCIDENT AT CROSSING—BREACH OF STATUTORY PRECAUTION—NEGLIGENCE—FINDINGS OF JURY.

The jury having found no contributory negligence on the part of the plaintiff, and want of conformity with the provisions of the Railway Act on the part of the defendant, the latter must be held liable for damages when plaintiff is injured at level crossing.

[See Annotation, Negligence within the Meaning of the Railway Act, 35 D.L.R. 481.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1919), 48 D.L.R. 526, 25 Can. Ry. Cas. 245, 45 O.L.R. 528, reversing the judgment at the trial by which the action was dismissed (see 48 D.L.R. 526). Affirmed.

R. S. Robertson, for appellant.

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Davies, C.J.

DAVIES, C.J.:—This action is one to recover damages for injuries received by respondent Follick when struck by an engine of the appellant railway company as he was crossing the track in front of the appellant's approaching train at a railway crossing called Niagara Junction.

The facts are fairly stated in the appellant's factum as follows:—

At the place in question the line of the Grand Trunk Railway, running west from Niagara Falls, intersects a branch line of the Michigan Central Railway, running south to Fort Erie. The appellant's trains run on the Grand Trunk tracks, and the train in question was a regular west-bound passenger train.

The respondent was a section foreman of the M.C.R., and at the time of the accident, about 5.15 a.m., on December 21, 1916, was engaged in helping to clear up a wreck that had occurred upon its branch line at a point a little south of the G.T. line.

There are two signals or semaphores to protect the railway crossing against trains coming from the east. One is about 700 ft. east of the crossing and is called the distant signal; the other is close to the crossing, and is called the home signal. Both signals are under the control of a signalman stationed at the crossing in a small building called the "H" office.

A little while before the arrival of the train on the morning in question the signalman notified the conductor of the wrecking train that the appellant's train would soon pass and the wrecking operations were suspended and the wrecking train taken off the crossing, its engine going to the north side and the cars standing on the south side of the track on which the appellant's train was travelling. The signalman on the approach of the appellant's train gave it both signals clear so that the train could come through.

The respondent had shortly before this sent his men home to breakfast and he himself was preparing to go and went into the "H" office for his lantern. Coming out of the door of that office he was facing directly towards the approaching train, but it is said that it was hidden from him at the moment by a car of the wrecking train which stood about 7 ft. south of the G.T. tracks. The respondent walked from the door of the "H" office in a northerly direction towards the G.T. tracks, having the above-mentioned car on his right hand. He says that when he reached the north end of the car he looked easterly, and although the

country is level and free of obstructions for at least one-third of a mile to the east he says he did not notice the appellant's approaching train, although its headlight was burning and bell ringing and the engine was almost upon him.

The respondent continued on his course to and across the G.T. tracks, and had just passed the north rail of the track when the appellant's engine struck him and severely injured him.

The respondent is quite unable to explain why he did not notice the approaching train. Various explanations were suggested to him. He had been at work constantly for a period of twenty-two hours at the time of the accident and the appellant suggested that that fact may have been the effective cause of the accident. His counsel and some of his witnesses suggested that he may have been blinded by the headlight of the M.C. wrecking engine which stood at the north side of the G.T. track. The respondent frankly confessed that he could not explain it.

On behalf of the respondent, it was contended that the appellant was responsible for the accident because in the first place it is alleged its train did not come to a stop before proceeding over the railway crossing, as it was required to do. The evidence, as to the stopping of the train, was conflicting. Some witnesses said the train did not stop at all after it had come in sight of the crossing. Other witnesses said that it did stop at a point about 500 ft. east of the distant signal, and then came on, the signals shewing a clear track. The jury contented themselves with finding on this point merely that the train did not stop at a reasonable distance east of the distant signal.

The respondent also complained that the train was run at an excessive speed. The evidence as to the speed of the train was also conflicting. The estimates of speed given by different witnesses varied from ten to twenty-five miles an hour. The jury did not make a finding as to the speed of the train. They found the appellant chargeable with negligence in not proceeding with sufficient caution approaching a wreck zone which was observed.

I frankly confess that at the close of the argument at Bar, Mr. Robertson had by his able argument and clear presentation of the case for the railway company almost, if not quite, convinced me that the appeal should be allowed and the action dismissed. After, however, reading the evidence and the judgments, and

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most carefully considering them in connection with the findings of the jury, I entertained great doubts that my first impressions of the case after the argument were correct.

In the result, I find myself in the position of being unable to decide that the judgment appealed from is so clearly wrong that I would be justified in reversing it.

Under these circumstances I will not, though still doubting, dissent from the judgment proposed dismissing the appeal.

Idington, J.

IDINGTON, J.:—The question raised by this appeal must turn upon the question of whether or not there was sufficient evidence to warrant the jury in finding that the injuries which respondent suffered on the occasion in question were caused by the failure of appellant "in not stopping its train at a reasonable distance east of the distant signal and proceeding with sufficient caution approaching wreck zone, which was observed."

The appellant, in my opinion, absolutely discarded the statutory provisions contained in secs. 277 and 278 of the Railway Act, R.S.C. 1906, ch. 37, which are as follows:—

277. No train or engine or electric car shall pass over any crossing where two main lines of railway, or the main tracks of any branch lines, cross each other at rail level whether they are owned by different companies or the same company, until a proper signal has been received by the conductor or engineer in charge of such train or engine from a competent person or watchman in charge of such crossing that the way is clear. (2) . . .

278. Every engine, train or electric car shall, before it passes over any such crossing as in the last preceding section mentioned, be brought to a full stop; Provided that whenever there is in use, at any such crossing, an interlocking switch and signal system, or other device which, in the opinion of the Board, renders it safe to permit engines and trains or electric cars to pass over such crossing without being brought to a stop, the Board may, by order, permit such engines and trains and cars to pass over such crossing without stopping under such regulations as to speed and other matters as the Board deems proper.

The statute does not in express terms define the exact distance from the crossing at which the "full stop" is to be made, but uses very imperative terms when it says "the engine, train or electric car shall, before it passes over any such crossing . . . be brought to a full stop."

I should say that the stopping 1,700 ft. away, alleged in this case by the appellant, was a mere mocking of the Act.

Some electric cars do stop several times in that distance. If one happened to have stopped that far back from a crossing,

would it be justified in rushing ahead when it came to the railway crossing, even if, as urged herein, the signal to pass was up?

I submit decidedly not and hold that such a car must, before crossing, come "to a full stop" immediately next the crossing place.

I say this to illustrate how variable the conditions may be for the respective moving things specified in the statute.

Obviously what would be the exact stopping place for an electric car might, for many reasons, be impossible for a train, or even an engine alone, upon a steam railway.

Hence Parliament, finding it impossible by the ordinary use of language accurately to define a common distance serviceable for each and all of these different kinds of traffic appliances, left that to the reasonable allowance necessary to be made in each respective case by those concerned, impliedly requiring, however, the exercise of a reasonable judgment.

The verdict in terms finds this was not exercised and the evidence supports that finding.

In the case presented herein reasonable judgment seems to have been entirely absent. I can find no excuse for such a disregard of its use. I am quite sure that the signal being up permitting the crossing was no excuse for disregarding this statutory obligation, otherwise there would have been no occasion or need for enacting sec. 278, R.S.C. 1906, ch. 37.

The latter was an added independent and imperative safeguard which experience, no doubt, had dictated was necessary; and it is to the observance, or non-observance, of that alone, and the possible relation of that non-observance to the accident in question that we should direct our attention in this case.

The primary object of this statutory safeguard probably was to avert the possible collision of crossing trains, whilst at the same time protecting those employed in the complicated situation often found co-existent with such crossings.

But its existence and observance was something which all those working at the point of crossing, or immediately thereabout, had a right to rely upon for their protection.

And all the more so when working under the peculiar conditions in question of removing a wrecked train, as respondent had been doing for twenty-two hours on a stretch up to the very

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moment of the crossing, and (after putting away his tools) he had picked up his lantern and was necessarily crossing the track on his way home.

Had the statute been duly observed on that occasion, it seems quite clear he would not have been touched by the appellant's train.

Had he been a mere casual trespasser he might have had no ground in law to complain.

But as a man lawfully engaged in his employment at the place in question, he was entitled to that measure of protection which a due observance of the statute would have produced.

The circumstances in which he was placed, by reason of the appellant's non-observance of the statute, rendered the conditions for his discharge of duty far more hazardous than need have been.

There is thus to my mind evidence of the natural sequence connecting the illegal act of appellant with the injuries suffered by respondent which, of necessity, had to be submitted to the jury.

I find no difficulty in understanding the verdict of the jury in light of the evidence and the Judge's charge.

I fail to understand the relevancy of the case of the *G.T.R. Co.* v. *McKay* (1903), 34 Can. S.C.R. 81, relied upon by counsel for appellant.

According to the construction put therein, by the majority of this Court, upon the statute there in question, the railway company had duly observed the terms thereof.

I think the appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—I was much impressed during the argument by Mr. Robertson's ingenious and forceful contention that the failure of the employees of the defendant company to stop its train at a reasonable distance east of the distant signal could not have been the proximate cause—*causa causans*—of the injury to the plaintiff, but was at most a remote cause or cause *sine quâ non*. If all that the jury were entitled to infer from this omission of duty was that if it had been fulfilled the train would not have reached the crossing until the plaintiff had passed over it, I incline to think Mr. Robertson would be right. But it seems to me that the jury was entitled to infer more, and to find that, had the stop been made as required by the statute, the plaintiff would have had a much better oppor-

tunity by reason of a reduced speed of the train to escape being run down. Of course nobody can positively affirm that he would have escaped; but as, in the familiar cases of a failure to sound the whistle or ring the bell as prescribed by the statute, the jury is allowed to infer that the omission to do so is the cause of injuries sustained at a highway crossing, although nobody can assert that had the bell been rung or the whistle blown the injured person's attention would have been thereby attracted to the approaching train and the accident averted, and the company cannot successfully appeal in such cases from a finding that its negligence was the cause of the plaintiff's injury, so here it seems to be impossible to hold that the jury was not warranted in inferring that the failure to discharge the statutory duty of stopping within a reasonable distance of the diamond crossing was truly a *causa causans* of the plaintiff being run down.

While the additional finding, that the defendant was negligent "in not . . . proceeding with sufficient caution approaching a wreck zone, which was observed," seems a little vague and indefinite, on turning to the statement of claim I find that, in addition to failing to stop as prescribed by the statute, the only other negligence charged against the defendant is "running at an excessive speed" and "not giving the proper statutory warning on approaching the level crossing." There is no evidence of the latter omission and it is not mentioned in the charge of the trial Judge. But he does direct the jury's attention specifically to the allegation of excessive speed—"that the train was going at too great a speed" and he tells them that they should, "eliminate from (their) consideration anything except such negligence as caused injuries to the plaintiff."

Although it is not so clear as in the recent case of *B.C. Electric Ry. Co.* v. *Dunphy* (1919), 50 D.L.R. 264, 59 Can. S.C.R. 263, that the jury's finding of lack of precautions was directed to the specific neglect charged, I incline to think we should not ascribe to them an intention to travel outside the record or to find negligence of which there was no evidence and that we should assume that failure to moderate the speed of the train in approaching the wreck zone was the lack of due caution for which they meant to find the company to blame.

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No objection to the findings seems to have been made when they were brought in. If counsel were not satisfied that they were sufficient and responsive to the questions submitted they might have called the attention of the trial Judge to the matter and he might have directed the jury to bring in a more specific finding.

On the whole, while the case is undoubtedly close to the line, interference with the judgment appealed from seems to me not to be warranted.

Brodeur, J.

BRODEUR, J.:—This is a railway accident. The action instituted by the respondent claims that as a result of the appellant's negligence he suffered damages. The negligence that is complained of is want of conformity to the statutory provisions of the Railway Act, R.S.C. 1906, ch. 37, in reference to level railway crossings.

Section 278 of the Railway Act enacts that a train, before it passes over a level railway crossing, must be brought to a full stop.

The question of fact is whether the appellant's railway train did or did not come to a full stop at the place where the law requires it so to do. The evidence is conflicting on that point. The jury was fully charged as to that and they found that the company was at fault. It was also for the jury to determine in those circumstances if there was contributory negligence and their findings are not such that we could consider them as perverse.

The appeal should be dismissed with costs.

Mignault, J.

MIGNAULT, J.:—I concur with my brother Anglin.

Appeal dismissed.

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New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. November 19, 1920.

LIBEL AND SLANDER (§ II E—75)—LETTER TO SOLICITOR OF PLAINTIFF—PRIVILEGED COMMUNICATION—EVIDENCE OF COUNSEL AT TRIAL.

A communication by a party to a legal proceeding directly to the solicitor of the other party, being reasonably necessary for the purpose of settling a claim must be regarded as privileged; as if the communication had been made direct to the other party it would have been privileged.

Statement.

MOTION by defendant to set aside verdict entered for plaintiff, and to enter a verdict for defendant, or for a new trial. Rule absolute to set aside verdict for plaintiff and to enter a verdict for defendant, with costs of appeal and costs in the Court below.

W. H. Harrison and *J. B. M. Baxter*, K.C., for appellant.

H. A. Powell, K.C., and *D. Mullin*, K.C., *contra*.

The judgment of the Court was delivered by

HAZEN, C.J.:—This is an appeal from a case which was tried before Chandler, J., and a jury at the St. John circuit in April last, when a verdict was entered against both defendants, the damages being assessed at $500. A question was raised at the trial as to the competency of Mr. Mullin, who was the solicitor and also one of the counsel on the trial, to give evidence, his evidence being of very great importance to the plaintiff. This question has been raised before on a number of occasions in this Court. In *Shields* v. *McGrath* (1847), 3 Kerr (N.B.) 398, it was held that examining a party's counsel as witness for him was an improper practice, and the rule for a new trial was made absolute. In the *Bank of British North America* v. *McElroy* (1875), 15 N.B.R. 462, this case was overruled on the authority of *Cobbett* v. *Hudson* (1852), 1 El. & Bl. 11, 118 E.R. 341, it being held that though the practice of counsel in a cause giving evidence is most objectionable, a Judge at *nisi prius* has no authority to refuse it if offered; Ritchie, C.J., saying, at p. 463:—

> It is the privilege of the party to offer the counsel as a witness: but that it is an indecent proceeding, and should be discouraged, no one can deny. I have always discountenanced the practice, and think the circumstances must be very exceptional to warrant counsel in offering their evidence.

This case, so far as I can ascertain from a perusal of the authorities, has never been overruled in this Province. The English decisions on this point date back for many years. In *Waldon* v. *Ward*, an old case decided in 1654, counsel was allowed to be examined; in *Rex* v. *Milne* (1810), 2 B. & Ald. 606 note (a), 106 E.R. 487, the prosecutor was obliged to waive giving evidence before Lord Ellenborough, C.J., would allow him to address the jury; in *Rex* v. *Brice* (1819), 2 B. & Ald. 606, 106 E.R. 487, the prosecutor was not allowed to address the jury. *Per curiam*:—

> Besides the prosecutor may be, and generally is, a witness; and it is very unfit that he should be permitted to state, not upon oath, facts to the jury which he is afterwards to state to them on his oath.

In *Stones* v. *Byron* (1846), 4 D. & L. 393, the plaintiff's attorney acted as advocate and also testified to and contradicted the defence, and Patterson, J., held his testimony inadmissible as inconsistent with the due administration of justice; and *Dean* v. *Packwood*

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(1847), 4 Dow. & L. 395 (see footnote), followed Patterson's judgment in this case. In *Cobbett* v. *Hudson*, 1 El. & Bl. 11, 118 E.R. 341, the plaintiff conducted his own case and was held entitled as a right to address the jury as well as to testify, although the practice was reproved as being contrary to good taste and good feeling and revolting to the minds of the jury. In *Benedict* v. *Boulton* (1846), 4 U.C.Q.B. 96, counsel was not allowed to be a witness for his party, but in *Davis* v. *Canada Farmers Ins. Co.* (1876), 39 U.C.Q.B. 452, it was decided that it was a misdirection for a jury to reject the testimony of counsel when offered as a witness on behalf of his client. I think the law on the subject is properly summed up in Wigmore on Evidence, vol. 3, at p. 2538, sec. 1911. He says: "There is, then, in general, no rule, but only an urgent judicial reprobation forbidding counsel or attorney to testify in favour of his client."

My conclusion therefore is that on this ground a new trial should not be granted, but I cannot help expressing the opinion that having regard to the circumstances of the case as they will subsequently appear, the proceeding was not a proper one, and in the language of Ritchie, C.J. (15 N.B.R. at 463), "should be discouraged."

It was contended at the trial and argued before the Judge below that there was no evidence to support a verdict against the defendant Peter McIntyre, and that the Judge should have directed the jury to enter a verdict for him. This ground, however, was abandoned on the argument before this Court.

The action was for libel. The alleged libel was contained in a letter written by one of the defendants to counsel for the plaintiff, Mr. Mullin. The plaintiff is a schooner captain, and was employed by the defendants as master of the schooner "Harold B. Cousins," an American registered vessel, for a period of 4 months, in the year 1918, during which time he sailed the schooner from St. John to New York. After its arrival in New York the schooner was sold to David W. Simpson, a ship-broker, of Boston. The crew were paid off and the plaintiff returned to St. John and called upon the defendant Peter McIntyre to settle his accounts, Allan McIntyre being present. At that time a liability of $4.93 was admitted as a balance due on account of wages, but the plaintiff claimed an additional $24—$17.50 of which was his

passage money from New York to St. John, and $6.50 exchange paid by Peter McIntyre on moneys drawn by plaintiff in New York, as defendants claimed, contrary to instructions. In consequence of the dispute over this balance of $24 the plaintiff placed his claim in the hands of Mr. Mullin who wrote the defendant Peter McIntyre requesting payment. In the meantime a letter had been received from Mr. Simpson, who was a ship-broker and commission merchant in Boston, and a man with whom Peter McIntyre had done business for many years, which letter was opened by Allan McIntyre, and the portion of it allowed in evidence was as follows:—

Boston, Mass., May 13, 1918.

Captain Peter McIntyre,
St. John, N.B.

Dear Sir: I have a letter from the purchasers of the "Cousins" saying your captain took the main sheets and a lot of other stuff out of the vessel, also breaking the windlass, causing the new owner $400 to repair.

Yours very truly,
(Signed) David W. Simpson.

On the 16th May following the defendant Allan McIntyre wrote the following letter to Mr. Mullin, which letter contains the alleged libel:—

May 16, '18.

Mr. Daniel Mullin.
Dear Sir:

Replying to your communication of the 15th, let me say that I herein send you cheque in full settlement of amount due Captain Ward for wages. I might say that Captain Ward would have had this amount earlier had it not been for the fact that his accounts were not satisfactory, and I was obliged to await vouchers from New York. Further, I have since received a letter from the owner of the "Cousins" that this Captain Ward had removed several articles from the schooner which were not his property. This is a very serious matter, and while I prefer not to investigate these charges, I may say that should he find it necessary to enter any further claim I will be obliged to make further investigation.

Yours truly,
(Signed) Peter McIntyre.

This was typewritten personally by Allan McIntyre, who signed his father's name to it.

The letter was received by Mr. Mullin and shewn by him to the plaintiff, and there was no publication except to the plaintiff and his solicitor.

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The questions which arise are as to first of all whether the letter constituted a libel or not; secondly whether there was any publication of the same; and thirdly whether it was not a privileged communication as contended by the defendants.

As to the paragraph:—

Further, I have since received a letter from the owner of the "Cousins" that this Captain Ward had removed several articles from the schooner which were not his property. This is a very serious matter, and while I prefer not to investigate these charges, I may say that should he find it necessary to enter any further claim I will be obliged to make further investigation.

The learned Judge directed the jury that while the occasion was privileged the communication was not so, and that it was for the jury to decide whether the words just quoted constituted a libel or not. He also said to the jury:—

The words must be both defamatory and false to be libellous. False and defamatory words if written and published constitute a libel. The words written must be false and defamatory if written and published. There is no doubt about the writing, because we have it before us. There is equally no doubt of publication, because the letter was sent to Mr. Mullin, and while he was solicitor for the plaintiff in this case, still that constitutes a publication. So the words were written and published, and question is whether the words are false and defamatory.

In directing the jury that the occasion was privileged but that the communication was not privileged, the trial Judge no doubt had in mind the law as laid down in Odger on Libel and Slander, 5th edition, at p. 304. Whenever the money is demanded from the defendant by the plaintiff or his solicitor the defendant is entitled to reply, and in his reply to state his reasons for refusing to pay the sum demanded. Such reply is privileged so long as it is confined to the matter in hand, although it may contain charges of fraud or misconduct against the plaintiff. Such charges are at most but evidence of malice, which may take the case out of the privilege. The trial Judge said:—

The general rule is this, that when a money demand is made, that a man has the right to answer the letter and under certain circumstances he may go beyond a mere refusal of payment, and if the language which he uses is abusive or imputes misconduct or fraud, it may be excusable on account of the occasion. So far as this particular question of privilege is concerned, you will follow my ruling on this matter, because it is entirely a question of law. So far as this question goes, my ruling is this: that the occasion on which this letter was written by Allan A. McIntyre was privileged; that is, that he had a right to reply to this letter and that certain protection was extended to him by the law as to the letter which he might write in reply, but the law has gone farther than this. Even though the occasion be privileged, the question is whether

the letter itself was privileged, whether the defendant was protected by the law in writing what he did. [In Odger on Libel and Slander, 5th ed., at p. 304.] "Not every communication made on a privileged occasion is privileged. The defendant may in answer to an inquiry launch out into matters which have no bearing on the question, or in writing to a person who has a joint interest with himself in one undertaking he may wander off into other matters with which his correspondent is not concerned. . . . But there appear to be some cases where the communication is so wholly irrelevant and improper, that the Judge, while ruling that the occasion was one which would have afforded protection to the proper letter, may yet declare that no privilege at all can attach to the letter which the defendant in fact wrote on that occasion."

I have ruled that the occasion on which this letter was written was privileged, but I go further and I rule that this letter itself is not privileged. I think it comes within this rule that the communication is so wholly irrelevant and improper, these particular words in it which I have read to you several times, that while the occasion was one which would have afforded protection to a proper letter, I do declare that no privilege at all could attach to this particular part of the letter which the defendant wrote. That is my ruling.

It seems to me from a perusal of the paragraph in the letter which is said to have been libellous, that it contains no statements that can fairly be construed as false or defamatory, and that the statement made is not wholly separate and apart from the question that was under consideration and not irrelevant to the matter that was being discussed between the parties, and that, in Chandler, J.'s, language, there was no launching out into matters that had no bearing on the question. The statement made by McIntyre was to the effect that he had received a letter from the owner of the "Cousins" that Captain Ward had removed several articles from the schooner which were not his property. That statement is true, and the letter which McIntyre received from Simpson to that effect was put in evidence. Neither do I think that the language can be said to be defamatory. It makes no criminal charge against the plaintiff. It simply says that Captain Ward had removed several articles from the schooner which were not his property. Surely this is not a charge of theft or defamatory in the legal meaning of that term. It is perfectly consistent with the idea that they had been properly and legally removed, and I do not think that the subsequent statement that this was a very serious matter which the defendant would prefer not to investigate carries the matter any further, nor can it be successfully argued that his letter was in the nature of a threat to Captain Ward.

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The matter arises out of the transaction that was being considered, viz., the wages and disbursements which were due Captain Ward for his services in connection with his position as captain of the "Cousins," and while I fully concur in the Judge's charge that even though an occasion may be privileged, a communication written in connection with that occasion may be of so outrageous a character and so irrelevant to the subject under dispute that it will not come within the privilege, I entirely though respectfully disagree with his ruling in regard to the present letter, and I think apart from the question of privilege altogether that the Judge would have been justified in doing as he did in the case of *Lupee* v. *Hogan* (not yet reported), which was decided in this Court a few months ago, by withdrawing the case from the jury.

In Fox's Libel Act, 32 Geo. III. 1792, ch. 60, it was expressly provided that in all criminal proceedings for libel the jury were to decide the question of libel or no libel subject to the direction of the Judge. In civil proceedings the practice always was the same with this exception, if the Judge thinks that the words cannot possibly bear a defamatory meaning he might shorten the proceedings by stopping the case. But it is only in cases where he is satisfied that the publication cannot be a libel, and that if it is found by the jury to be such their verdict will be set aside, that he is justified in withdrawing the question from their cognizance. Had I been trying the case I am of opinion that I would on the evidence submitted have decided that the words could not possibly bear a defamatory meaning and have shortened the proceedings by stopping the case. Courts of justice will not put a forced construction upon words which may fairly be deemed harmless as to my mind is the case with those contained in the defendant's letter which is the subject of the suit.

The trial Judge however evidently took a different view, and must have thought that the words could bear a defamatory meaning and therefore left the question of libel or no libel to the consideration of the jury, and the jury having found the defendants guilty of libel I would not feel justified in setting aside the verdict on that ground alone, but the Judge having directed the jury that the letter was not privileged is to my mind a reason why the verdict should be set aside and a verdict entered for the defendant. It is true that not every communication made on a privileged

occasion is privileged (Odger, at p. 304), and the defendant may in answer to an inquiry launch out into matters which have no bearing on the question, or in writing to a person who has a joint interest with himself in one undertaking he may wander off into other matters with which his correspondent is not concerned. The presence of such irrelevant matter, it is stated by Odger, does not of course affect the Judge's ruling that the occasion was privileged. As a rule it will be merely evidence of malice to take the case out of the privilege, but there appear to be some cases where the communication is so wholly irrelevant and improper that the Judge by ruling that the occasion was one which would have afforded protection to a proper letter may well declare that no privilege at all can attach to the letter which the defendant wrote on that occasion, but in this case I fail to see how the language quoted can be said to be wholly irrelevant and improper, so as to justify the Judge in declaring that no privilege can attach to it. It has been decided in certain cases that if the matter impugned as irrelevant, can possibly have any bearing on the question or throw any light on the matter, or become of any assistance to the person to whom it is sent, the Judge should not rule that there is no privilege but submit the whole communication to the jury on the issue of malice, if there be evidence to go to them on that issue, and in the present case it seems to me there was no evidence of that sort beyond the letter itself. *Huntley* v. *Ward* (1859), 6 C.B. (N.S.) 514, 141 E.R. 557, was very strongly relied on, with other cases, by the respondent. In that case the plaintiff and defendant were jointly interested in property in Scotland, to the manager of which the defendant wrote a letter principally about the property and the condition of the plaintiff with reference thereto, but also containing a charge against the plaintiff with reference to his conduct to his mother and aunt, which is entirely different from the facts in the case under consideration, because that charge had no relevancy to the subject under consideration and was entirely irrelevant and improper.

Another point of importance is the question of publication. As already stated, the only publication set up is that the letter was sent to Mr. Mullin, the defendant's solicitor, and it is claimed that that constitutes publication to a third party, and the jury was

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so informed by the Judge. On the other hand, the appellant contends that a communication by the defendants to the plaintiff's counsel is not a communication to a third party, as he was acting in a confidential capacity and could not legally or properly communicate its contents to anybody except his own client, and that communication to him in a matter in which he was acting for the plaintiff professionally was equivalent to a communication to the plaintiff himself, and could possibly cause no injury whatever to the plaintiff. I may say here that there is no evidence of special damage beyond the evidence by Mr. Mullin, who stated that the letter lowered his estimate of Captain Ward's character. It did not however apparently lower it very greatly in his opinion, as he continued to act as his solicitor, and brought this action for him, and when he was asked "What sort of opinion have you got of him now?" he states: "Until the matter is cleared up I do not know just exactly how he stands." I do not think that Mr. Mullin can be regarded as a disinterested witness, as he was undoubtedly very much interested in the result of the suit, being solicitor and counsel therein, or that his evidence as to the lowering of his client in his estimation by the receipt of the letter in question should be taken too seriously. It is claimed, however, that the receipt of the letter by Mr. Mullin was a publication, and the case of *Moran* v. *O'Regan* (1907), 38 N.B.R. 189, is relied upon in this connection. In this case, as in other cases that have been decided on practically similar points to *Moran* v. *O'Regan*, the Court relied upon the case of *Pullman* v. *Hill & Co.*, [1891] 1 Q.B. 524, which case was decided by a Court whose decisions in the opinion of Hanington, J., do not bind this Court. However, this Court is bound by the judgment in *Moran* v. *O'Regan*, which was founded upon *Pullman* v. *Hill & Co.*, which was regarded as an authority absolutely conclusive by a majority of the members of the New Brunswick Court, and until that case of *Moran* v. *O'Regan* is overruled or limited we will be bound by it. It is therefore necessary to consider that case and the cases on which it was founded, and in doing so to decide if they are conclusively in favour of the contention of publication in this case.

The case of *Pullman* v. *Hill & Co.* came before Lord Esher, M.R., Lopes and Kay, L.JJ. It was an action for libel where it appeared that the alleged libel was contained in a letter respecting

the plaintiffs, two of the members of a partnership, written on behalf of the defendant, a limited company, and sent by post in an envelope addressed to the firm. The writer did not know that there were other partners in the firm. The letter was dictated by the managing director of the defendant company to a clerk who took down the words in shorthand and then wrote them out in full by means of a typewriting machine. The letter thus written was copied by an office-boy in a copying press. When it reached its destination it was in the ordinary course of business opened by a clerk of the firm and was read by two other clerks. It was held that the letter must be taken to have been published to the plaintiff's clerks and the defendant's clerks, and that neither occasion was privileged. It seems to me that this is very different from the case that we are now considering. In that case the letter was read by a clerk of the firm and by two other clerks, and in addition to that had been dictated by the managing director of the defendant company to a clerk who took the words down in shorthand and wrote them out by himself on a typewriting machine. It is not at all analagous to the receipt of a letter by an attorney who is an officer of the Court and who could not, if he respected his position, and who as a matter of fact did not, shew the letter to anyone except the plaintiff himself. *Puterbaugh* v. *Gold Medal Furniture Mfg. Co.* (1904), 7 O.L.R. 582, was a case where the manager of the defendant company handed to a stenographer to be typewritten a draft letter written in the interest of the company but not connected with its ordinary business, which contained defamatory statements. It was held on the authority of *Pullman* v. *Hill* that the privilege was taken away by the publication to the stenographer and the defendant company was liable. In giving judgment Moss, C.J., said:—

> I confess that but for that case [referring to *Pullman* v. *Hill*] and some of the expressions regarding it made by members of the Court in the subsequent case of *Boxsius* v. *Goblet Frères*, [1894] 1 Q.B. 842, I would have hesitated long before pronouncing against the judgment appealed from.

The case of *Boxsius* v. *Goblet Frères* referred to by Moss, C.J., was decided by Lord Esher, M.R., Lopes and Davey, L.JJ., and was a case where a solicitor acting on behalf of his client wrote and sent to the plaintiff a defamatory statement regarding her. This letter was dictated to a clerk in the office and was copied into the letter book by another clerk. It was held in that case that the

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occasion was privileged, since the communication if made by the solicitor direct to the plaintiff would have been privileged and the publication to his clerk was necessary and was in the discharge of his duty to his client, and was made in the interests of the client, and *Pullman* v. *Hill* was distinguished. In delivering judgment Lord Esher, M.R., said, at p. 844:—

> In the case of *Pullman* v. *Hill & Co.*, this Court held that if a merchant dictates to a clerk a libellous statement about a customer, which that clerk takes down and gives to another clerk in the office to copy, that is a publication to the clerks, and the occasion of such publication is not privileged. We so held on the ground that it does not fall within the ordinary business of a merchant to write such defamatory statements, and that if he does so it is not reasonably necessary, as he is doing a thing not in the ordinary course of his business, that he should cause the statement to be copied by a clerk in his office.

The case of *Pullman* v. *Hill* is distinguished again in that of *Edmondson* v. *Birch & Co.*, [1907] 1 K.B. 371. That was a case where a business communication containing defamatory statements concerning the plaintiff was made by the defendant, a company, to another company, on a privileged occasion and for the purpose of and incidentally to the making of the communication the defamatory statements were in the reasonable and ordinary course of business published to clerks of the defendant company. It was held that the privileged occasion covered such a publication of those statements which was therefore not actionable. *Moran* v. *O'Regan*, 38 N.B.R. 189, to which reference has been already made, was an action for libel, the declaration alleging that the defendant falsely and maliciously published a letter containing defamatory matter and addressed and sent it to the plaintiff, and that this letter was dictated by the defendant to a stenographer who extended the same by a typewriter, which transcribed copy was signed by the defendant and sent to the plaintiff. In that case Hanington, J., who dissented, was of the opinion that a stenographer ought not to be treated as a third person, and that the communication to him ought to be treated as privileged. This case was decided distinctly on the authority of *Pullman* v. *Hill*, and I do not think that that case or any of the others which I have cited or which have been referred to on argument are authorities that can be regarded as on all fours with or that cannot be distinguished from the present. No authority has been cited to shew that a communication to a solicitor on behalf of his client

in a proceeding between parties is not a privileged communication, and *Pullman* v. *Hill* has been distinguished in many cases as I have pointed out where the distinction is not so marked as it is between that decision and the present case.

In *Boxsius* v. *Goblet Frères*, [1894] 1 Q.B. at 846, Lopes, J., says:—

> It appears to me that the rule may be thus stated: If a communication, made by a solicitor to a third party, is reasonably necessary and usual in the discharge of his duty to his client, and in the interest of the client, the occasion is privileged. In the present case, if the communication had been made direct to the plaintiff it would have been made on a privileged occasion; and though not so made, but made to a clerk in the office, the occasion was also, in my opinion, privileged. It was reasonably necessary that the solicitor should make such a communication; it was usual to do so in the course of business.

Surely then a communication made by a party to a legal proceeding, directly to a solicitor of the other party, that communication being reasonably necessary as in this case, as it was made for the purpose of enclosing money and settling a claim that had been outstanding, must be regarded as a privileged one.

Slightly altering the language of the distinguished Judge whose opinion I have just cited, if the communication had been made direct to the plaintiff it would have been made on a privileged occasion, and though not so made but made to his solicitor, the occasion was also in my opinion privileged.

There was also objection by the appellant to the admission in evidence of a letter written by Mr. Mullin, the plaintiff's solicitor, to the defendant on June 10, 1918, after he had received the letter of May 16, which was the *raison d'être* of this action. In his letter Mr. Mullin said:—

> On reading your letter Captain Ward was very much incensed because of the reflections therein contained on his character and reputation. He asked me whether he had any redress for the statements made in your letter attributing to him theft of certain articles from the schooner, and the intimation that you preferred not to investigate the alleged charges of theft, and your threat that if Captain Ward should find it necessary to enter any further claim you would be obliged to make further investigation. I have advised Captain Ward that your letter is libellous, having imputed to him a crime.

Neither a party to a suit nor his solicitor can make evidence by writing letters to which the other party makes no reply and upon which he takes no action, and the admission of this letter in evidence and the reading of it to the jury, containing as it did the assertion of Mr. Mullin to the effect that it imputed a crime to

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Captain Ward and attributed theft to him, was calculated to improperly influence the jury. The only reason urged for its admission is that while no answer was made to this letter, in consequence of it, the defendant Allan McIntyre went to Mr. Mullin's office. What occurred there is told by Mr. Mullin and also by McIntyre. The former says that he told McIntyre that the usual thing, the writ having been issued, was for the defendant to put in an appearance and engage a solicitor. McIntyre told him that it was not the defendant's wish to engage a solicitor but they wanted to settle the matter out of Court, and there was no suggestion that this was without prejudice. Mr. Mullin then referred to the case of *Moran* v. *O'Regan*, and says he took down the book, evidently the report of the case, and read an extract in connection with it and told Allan McIntyre that the circumstances of that case were very much less aggravated than this, and pointed out to him wherein he thought this was the case, and states that after some talk it was agreed that McIntyre should pay $700 or $750, and he was absolutely sure that it was not less than $700. After this an appearance was put in to the action.

McIntyre absolutely denies having made any offer or agreed to any amount in settlement or having talked a settlement of the case. McIntyre's account of what took place is that he asked Mr. Mullin what the trouble was and was informed that Captain Ward had taken action for libel. He said he thought he had not done anything wrong, but that however Mr. Mullin got down a book and cited a case to convince him that the case was libel. To use his own words:—

> The case he quoted to me was where a man had written another man a letter calling him a thief and a liar, and he said the Judge had given a verdict and that was all that was said. I left the office.

He positively denies that he agreed to pay $700 or $750, or any other amount, and that these sums were never mentioned between them, and that he never offered anything, and that he only went and got Mr. Mullin's version of the case and left the office without making any offer. He is most positive in his statement, asserting that he never agreed at any time to pay anything in connection with the libel claimed.

It seems to me doubtful if this evidence, which was objected to at the time, should have been received. The statement is that a

conversation took place between the plaintiff's counsel and the defendant, the latter, if he is to be believed, thinking that he had done no wrong and having gone to Mr. Mullin's office after receiving a letter, to see what the trouble was about. It was calculated to influence the jury not only in regard to the libel itself, but with respect to the amount of damages they should award, if they decided there was a libel. No claim was made by the plaintiff on an account stated, no reference to the subject of the conversation was referred to in the pleadings, and it was mentioned for the first time when Mr. Mullin went on the stand. Even if the evidence of this conversation was properly admitted, I am satisfied that the letter written by Mr. Mullin to the defendant was not.

For the reasons I have stated I am of opinion that the verdict in favour of the plaintiff should be set aside and a verdict entered for the defendant with the costs of this appeal and the costs of Court below. *Judgment accordingly.*

PAISLEY v. LOCAL IMPROVEMENT DISTRICT, No. 399.

Alberta Supreme Court, Walsh, J. December 11, 1920.

MUNICIPAL CORPORATIONS (§ I A—6)—LOCAL DISTRICT—ESTABLISHED BY LIEUTENANT-GOVERNOR-IN-COUNCIL—PERFORMED FUNCTIONS FOR EIGHT YEARS—LIABILITY—LOCAL IMPROVEMENT ACT, 2-3 GEO. V. 1911-1912 (ALTA.), CH. 4, SEC. 23.

When the Lieutenant-Governor-in-Council has assumed to establish a local district, and it has not been shewn that the Minister authorised by statute to establish the same has not given his consent, and the local district carries on and performs the function of such a district for eight years, unless there is proof to the contrary, it must be presumed that the district is legally and properly constituted.

Statement.

ACTION for damages for injuries to property caused by a faulty drain and to compel defendants to carry water to a proper outlet. Judgment for plaintiff.

N. D. Maclean, and *J. B. McBride*, for plaintiff.

A. A. McGillivray, K.C., for defendant.

Walsh, J.

WALSH, J.:—At the opening of the trial Mr. McGillivray, on the consent of plaintiff's counsel, was allowed to amend his defence in several particulars. The only amendment with which I am now concerned is that in which the defendant says "that it had no existence as a legal entity or at all at the time of the making of the said agreement or at the time of any of the acts or omissions in the statement of claim mentioned." Mr. McGillivray then put in the

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evidence upon which this defence is based and proceeded to develop his argument with respect to it in the hope that the taking of a lot of evidence might be thereby avoided. I was unable to dispose on the spot of the novel contention thus put forward for the defendant and so I had to take the evidence and reserve my judgment.

The contention in brief is that though the defendant has been functioning as a local improvement district since the year 1912, it has not been since the second Monday in December, 1912, and is not now properly constituted as such a district, and as the agreement sued upon was entered into and the acts complained of were done since the last mentioned date this action cannot be maintained. There was in existence until the 2nd Monday in December, 1912, a local improvement district embracing exactly the same territory as that which is comprised within what has until this contention was raised been supposed to be Local Improvement District, No. 399, the defendant, the only change between the two being in name. By amendment made to the Local Improvement Act (1907, Alta. stats., ch. 11), by 2-3 Geo. V. 1911-12 (Alta.), ch. 4, sec. 23, secs. 3-8 of the Act were repealed and new sections substituted for them. By the new sec. 3, every district then existing under the provisions of that Act on and from and after the second Monday in December, 1912, became and was disorganized, and ceased to exist as a district and so this old district was dissolved. By the new sec. 8, it is provided that the Minister, meaning the Minister of Municipal Affairs, may by order constitute any territorial unit a district and assign a name and number thereto.* Mr. McGillivray put in the Alberta *Gazette* of January 15, 1913, which contains an order in council passed on December 23, 1912, stating that under the provisions of sec. 8 of the Local Improvement Act, His Honour the Lieutenant-Governor by and with the advice of the executive council has been pleased to order the establishment of certain local improvement districts of which No. 399 is one. The argument is that under sec. 8 the Minister and the Minister alone has the power to create districts and that this order in council was therefore ineffectual to establish this district, and so this district which is put forward as a defendant is not a district at all and this action must for that reason fail.

* [See amendment 4 Geo. V., 1913 (2nd sess., Alta.) ch. 2, sec. 14.]

I have not considered at all the broad question as to whether or not the power conferred upon the Minister by the statute can be effectively exercised by the executive council of which he is a member, for I think that the defendant has not shewn that the Minister did not by order constitute this district and for this reason this objection must fail. All that I know from the proof that the defendant has laid before me is that the Lieutenant-Governor-in-Council has assumed to establish it, but it by no means follows from that, that the Minister has not as well by his own independent order exercised the power given to him by the statute. It must be presumed that this *de facto* district which has been carrying on for 8 years performing all of the functions of a legally constituted district, levying taxes, borrowing and spending money, building roads and doing all of the other acts which a duly established district has the power to do is one that has been legally and properly constituted until the contrary thereof has been definitely and conclusively established and in that I think the plaintiff has failed.

Since the argument, Mr. Maclean has asked leave to put in evidence certain material which he has found in the offices of the department. Although I have not considered this new material at all in reaching the conclusion to which I have come, I think I should give leave to file it and I therefore do so. It is quite true that notice of the amendment setting up this defence was given some days before the trial and that the defendant's solicitors in their covering letter offered to consent to a postponement of the trial if the plaintiff's solicitors were taken by surprise by the proposed amendment. The part of it with which I am dealing is contained in one paragraph of 4 lines in 2 pages containing in all 7 paragraphs of amendments, the rest of them being devoted to questions of *ultra vires*, absence of seal, etc. There is nothing in the covering letter suggesting even vaguely the question of the improper constitution of the district, the question of law being simply referred to in it as being whether or not the agreement is binding. I do not think that plaintiff's counsel could have been expected simply from the information contained in the amendment and the accompanying letter to meet with these proposed documents the case made by the defendant on this count and so I think it only fair that he should have that chance now.

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The defendant, by the construction of its ditch along the north and south road from the point B on Ex. 2 to the point D and by the construction of the culvert at point D and of the ditch westerly to point E and of the culvert at point E, brought to and discharged upon the plaintiff's land a large body of water which would not otherwise have found its way to the same. The plaintiff brought action against the defendant because of this in November, 1915, which was settled by the payment to him of $422.24, being the amount of his damages suffered to that date through this cause and by the agreement of the defendant the exact terms of which are in dispute but the object and intent of which was to remove the cause of the plaintiff's complaint and to prevent a recurrence of the same. There is no doubt that the defendant's agreement was to remove the cause of this damage as early as possible in the spring of 1916. This could only be done by the closing of the culvert at E and carrying the ditch which ended there further westerly to a proper outlet. The plaintiff's contention is that the ditch was to be extended westerly along the highway to and under the railway crossing and thence to a natural outlet. The evidence fails to satisfy me that this was agreed to. My conclusion is that the details of the plan for the relief of the plaintiff's land from this flooding were not then worked out. He was content to have it ended by such means as would relieve him from it, but not particular as to the method by which that end should be attained. In the spring of 1916, the culvert was closed and something was done in the way of ditch extension to implement the defendant's promise to remove the cause of his damage. The work thus done quite failed to produce the promised result. I think that the extension westerly of the ditch was quite insufficient to carry off the water brought to E partly because of its lack of capacity and partly because of its method of construction. The defendant's agreement has for this reason never been performed.

The question of the power of the defendant to make such an agreement at all or, if it had the power, whether it could be done except under its corporate seal is raised by the pleadings though I do not remember that it was touched upon in the argument. I do not think that the plaintiff's rights rest alone in this agreement. If it is binding the defendant can be held to it by a judgment for the specific performance of it and damages for the breaches already committed. If it is not binding the defendant can be treated as

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a wrongdoer in having brought the water to the plaintiff's land and can by a mandatory injunction be ordered to carry it away and to pay the plaintiff the damages which he has suffered from it over and above those for which it has already settled. The consequence of the defendant's failure to take this water to a proper outlet is the annual flooding of his land. Although the culvert originally complained of was closed in 1916 it has since been replaced and is now in position and additional ditches leading to it have been made along the highways. The defendant has no right to so construct and maintain ditches along its highways as to bring to and leave upon the plaintiff's lands the large body of water which they carry to it. The defendant sought to establish by its evidence the fact that these ditches were a benefit rather than an injury to the plaintiff's lands because they intercept and carry away from them a considerable volume of water which would otherwise in the natural course spread over the same. Even if that is so and I express no opinion as to it, it by no means justifies the bringing to this particular spot on the plaintiff's land and leaving it there of this water which would not otherwise be discharged upon it and which unquestionably is a source of damage to him. It no doubt gathers into its ditches water which but for them would flow and spread according to the natural contour of the land, but that does not give it the right to dump at a given spot on the plaintiff's land the water thus intercepted with all the other waters which it catches in them. Its plain duty is to carry to a proper outlet all the water which by its system of ditches it diverts from its natural course and this it has not done.

The plaintiff is entitled to a judgment directing the defendant to carry to a proper outlet the water that it carries through the ditches in question so that the same shall no longer flood or do damage to his lands. I do not attempt to give any directions as to how this is to be accomplished. That is for the defendant and so long as it produces the required result the plaintiff cannot complain. He is also entitled to recover his damages which I fix at $439.60. The larger sum which he set up in his own evidence is an anticipated damage if the water is not taken away from his land. I have no doubt that if this judgment stands the defendant will obey it and therefore this anticipated damage will never arise. The plaintiff is entitled to his costs under column 2.

Judgment for plaintiff.

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Re SUCCESSION DUTY ACT.

ROYAL TRUST Co. v. MINISTER OF FINANCE FOR BRITISH COLUMBIA.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 21, 1920.

TAXES (§ V C—198)—SUCCESSION DUTIES ACT (R.S.B.C. 1911, CH. 217)—RATE OF DUTY—SCHEDULE AS LAID DOWN IN PROVINCIAL STATUTE—INTERPRETATION.

Succession duties, so called, requiring a part of the estate situated in any Province at the time of death to be handed over to the Provincial Treasurer (or other authority entitled to demand or receive the same), and the scale by which such duties are to be measured, and the conditions upon and by which it is to be applied, are clearly within the power of the Legislature to enact.

Statement. APPEAL from the judgment of the British Columbia Court of Appeal (1919), 47 D.L.R. 529, 27 B.C.R. 269, in an action to determine the duties to be levied under the Succession Duties Act. Reversed.

J. A. Ritchie, for appellant; *C. Wilson*, K.C., for respondent.

Idington, J. IDINGTON, J.:—The late Sir William Van Horne was domiciled in Quebec when he made his last will and testament and died on September 11, 1915, possessed of an estate of the aggregate value $6,371,374.73, of which $300,000 worth was situated in the Province of British Columbia. The questions raised herein relative to the amount of the succession duties collectable upon or out of that part of the estate so situated, must be determined by the true interpretation and construction of the Succession Duty Act, R.S.B.C. 1911, ch. 217, as amended, of said Province; if and so far as *intra vires* the Legislature thereof.

The judgment of the Court of Appeal for British Columbia ((1919), 47 D.L.R. 529, 27 B.C.R. 269), holds that the scale applied by the appellant in estimating the duties payable in question would be *ultra vires* the power of the said Legislature to enact, and hence the Succession Duty Act so construed would be *ultra vires*.

It should tend to clarity of thought upon the subject to bear in mind that the right of anyone to claim any part of the estate of a deceased rests entirely upon the legislative enactments in force where the property so left may chance to have provided.

The succession duties, so called, requiring a part of the estate situated in any Province at the time of death to be handed over to the Minister of Finance or other authority declared by the Legislature entitled to demand and receive same, is clearly within the power of the Legislature to enact.

The scale by which such duties are to be measured and the conditions upon and by which it is to be applied also fall within the said power.

There is no attempt made by the enactment here in question to tax, directly or indirectly, any part of the estate lying beyond the Province.

All that is attempted is to apply a scale of assessment to that now in question presumed to be fitting the case of a wealthy man's estate.

Similar distinctions are, rightly or wrongly, made in an infinite variety of ways in that kind of legislation in the cases of those domiciled within a Province.

Two of the most prevalent of those distinctions are the cases of men of wealth, as distinguished from their poorer neighbours, or of men with a family, or next of kin, as distinguished from those who have none.

No one has ever, so far as I know, tried to maintain that such distinctive conditions are beyond the power of the Legislature having absolute authority, over property and civil rights, to impose as a term of the necessary recognition by local authority, in order to entitle anyone to claim the succession of any part of the property of a deceased person.

For aught I can see, as matter of law, the like distinction might be so made in favour of or against the sex or colour of him or her who has died, or him or her who is to become entitled to receive by virtue of legislative authority what has been left if the Legislature saw fit to do so.

It seems to me necessary, from experience, of the mode of thought with which enactments such as that in question are sometimes approached, in trying to interpret and construe them, that a full realisation of the foregoing elementary principles is necessary.

The amended statute now in question if viewed in light of such conceptions is to my mind very clear and simple.

I agree it might have been expressed in some way that would have rendered the construction put upon it below impossible.

Yet if we pay heed to the interpretation of the definitions of the phrases "aggregate value" and "net value" when used in

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the enactment, how, I submit with great respect, can the clauses wherein they occur be construed otherwise than as embracing both property within and without the Province?

The phrases are defined respectively as follows, R.S.B.C. 1911, ch. 217, sec. 2:

"Aggregate value" means the value of the property before the debts, incumbrances, or other allowances authorized by this Act are deducted therefrom, and shall include property situate without the Province as well as property situate within the Province.

"Net value" means the value of the property, both within and without the Province, after the debts, incumbrances, or other allowances or exemptions authorized by this Act are deducted therefrom.

What right have we to read them in any sense which will discard this statutory meaning? And what right have we to read into the enactments in which they appear another meaning than that would give?

And when we look at the whole purview of the statute is it not clear that there is no pretence of intention to tax anything situated beyond the Province but merely to apply by means of the ascertainment thereof a scale of tax applicable to that within the Province according to certain conditions?

These conditions I think were properly appreciated by the appellant and duly applied by the rules of proportion he has adopted.

And, curiously enough, as illustrative of how the prepossessions and self-interest of men will tend to mislead them, we have the respondent quite content to adopt the rule of proportion so invoked when it is applied to the deduction of the testator's debts of which none existed in the Province.

And that is accepted by the Court as quite right.

It would have been quite competent, but for the testamentary disposition, for the respondent to have paid all the debts out of British Columbia assets.

The necessary relevant authorities are cited in the dissenting judgments below and need not be repeated here.

I think the appeal should be allowed with costs.

Duff, J.

DUFF, J.:—The decision of this appeal turns upon the proper construction of sec. 7 of the Succession Duty Act, R.S.B.C. 1911, ch. 217, as amended by 5 Geo. V. 1915, ch. 58. The section so amended provides that where the net value of the property of the

deceased exceeds $25,000 and passes through a certain course of succession prescribed by the statute, then "all property situated within the Province . . . shall be subject to duty as follows:"

Then follow three sub-paras. (*a*), (*b*) and (*c*), of which para. (*c*) only has relevancy to the present appeal. That paragraph is in these words:

(c) Where the net value exceeds two hundred thousand dollars, at the rate of one dollar and fifty cents for every one hundred dollars of the first one hundred thousand dollars, two dollars and fifty cents for every one hundred dollars of the second one hundred thousand dollars, and five dollars for every one hundred dollars above the two hundred thousand dollars.

Net value as defined in the interpretation section means a net value ascertained by taking into account the value of all property both within and without the Province. It seems reasonably clear that the scheme contemplated by the Legislature as brought into force by para. (*c*), is that for the purpose of ascertaining the rate in the case of estates falling within that paragraph, the net value of the estate is to be divided into three parts: the first being the sum of $100,000, the second also being the sum of $100,000, the third being the difference between the sum of $200,000 and the sum representing the aggregate net value; the net value in every case as already mentioned being ascertained by reference to the whole of the property both within and without the Province. This division having been made, the rate prescribed by para. (*c*) is the rate of $1.50 notionally applied to the whole of the first $100,000 of the net value; the sum of $2.50 for every $100 on the second $100,000 notionally applied to the whole of that sum, and $5 for every $100 above the $200,000 notionally applied to the whole estate both within and without the Province. In this manner the rate of taxation is ascertained. The property taxed, however, is only the property situated within the Province, and in the case of each of the parts only that part of the first $100,000, the second $100,000 or the excess over $200,000 as the case may be which is so situate is subject to taxation according to the several rates prescribed by sub-sec. (*c*) for the parts mentioned. This appears to be a simple and perfectly intelligible scheme applicable alike to estates partly situated within and partly situated without the Province, and to estates wholly situated within the Province and the attention of the Legislature seems to be expressed with reasonable clearness. The alternative interpretation pro-

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posed by Mr. Wilson in his able argument, I think, cannot be maintained on any construction of "net value" in sub-sec. (c) which is not inconsistent with the definition of that phrase given in the interpretation section.

ANGLIN, J. (dissenting):—Although it would appear that in the opinion of the majority of the Judges who have dealt with this case its determination should turn on whether sec. 7 of the British Columbia Succession Duty Act, R.S.B.C. 1911, ch. 217, as amended by sec. 4 of 5 Geo. V. 1915, ch. 58, is or is not *intra vires* of the Provincial Legislature, I am, with profound respect, unable to discern in it any arguable question of constitutional validity. The subject-matter of the taxation being admittedly within the Province, I fail to appreciate how it can transcend its legislative jurisdiction to prescribe that the rate of the tax which it is to bear shall depend upon the amount of the decedent's entire estate, whether situate wholly within, or partly without and partly within, the Province, or how it could be said, if the rate of taxation on the domestic assets were made to increase the amount of the "net value" of an entire estate comprising foreign assets, that the greater tax consequently levied on the domestic assets in that case would involve an indirect tax on the foreign assets. I agree with Martin, J. (27 B.C.R. at 274), that: "It is not a matter of indirect taxation at all, but simply the fixing of a basis of domestic assessment in varying circumstances, domestic and foreign."

The respondent's petition does not claim freedom from succession duties. It does not challenge the constitutionality of sec. 7 of the statute. It asks merely a declaration that the amount of the duty payable under it in respect of the $290,463.25, net value of the estate of the late Sir Wm. Van Horne, K.C.M.G., situate in British Columbia, is $8,523.16 and not $14,242.10 as claimed by the Province. Both parties are agreed that the amount of the taxable property in British Columbia is the "net value" of the decedent's assets in the Province and that this "net value" is to be ascertained by deducting from the gross or aggregate value of such assets a part of the debts of the decedent which bears to his whole indebtedness the same proportion as the aggregate value of his British Columbia assets bears to that of his entire estate. Whether this practice is correct or is sanctioned by the statute is therefore a question not presented for our consideration.

The difference between the parties arises from a divergence of views as to the mode of computation directed by R.S.B.C. 1911, ch. 217, sec. 7, the material parts of which, as amended, 5 Geo. V. 1915, ch. 58, read as follows:

When the net value of the property of the deceased exceeds twenty-five thousand dollars, and passes under a will, intestacy, or otherwise, either in whole or in part, to or for the use of the father, mother, husband, wife, child, daughter-in-law, or son-in-law of the deceased, all property situate within the Province, or so much thereof as so passes (as the case may be), shall be subject to duty as follows:

(a) . . . . . .

(b) . . . . . .

(c) Where the net value exceeds two hundred thousand dollars, at the rate of one dollar and fifty cents for every one hundred dollars of the first one hundred thousand dollars, two dollars and fifty cents for every one hundred dollars of the second one hundred thousand dollars, and five dollars for every one hundred dollars above the two hundred thousand dollars.

Counsel representing the Minister of Finance contends that it is not on the entire "first one hundred thousand dollars" worth of property situate in British Columbia that duty at the rate of 1½% is to be levied, but on the proportion thereof which would be subject to that rate if the entire estate had been situate within the Province—and in like manner as to the "second hundred thousand dollars" worth of assets situate in British Columbia. He would read the words "every one hundred dollars of the first one hundred thousand dollars" and "every one hundred dollars of the second one hundred thousand dollars" as meaning in each case, "that portion of every one hundred dollars which bears to it the same proportion as the amount of the net value of the estate within British Columbia bears to the net value of the whole estate wherever situate."

The respondent executor, on the other hand, maintains that this construction involves interpolating an idea which is not only not expressed in the statute but is excluded by its terms. One hundred dollars, he says, means that sum and not some part or proportion of it varying as the relative amount of foreign assets comprised in the estate is greater or less.

With Galliher, J.A., 47 D.L.R. 529, 27 B.C.R. 269, I view this as the real, if not the sole, question for decision—and with that Judge I would determine it in the respondent's favour. While unable to read the words "net value" in clause (c) as Macdonald,

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C.J.A., does (*i.e.*, as having a meaning different from that which the same words bear in the first line of sec. 7, viz., the meaning given to it by the definition found in sec. 2), I agree with what I understand to be that Judge's view and also that of Galliher, J.A., that it is the entire first $100,000 worth of "all property situate within the Province" that is declared by clause (*c*) of sec. 7 to be liable to a duty of 1½% and the entire second $100,000 worth of the same property that is declared to be liable to a duty of 2½%, and that the 5% rate of duty applies only to the excess over $200,000 of assets situate within the Province. The statute, in my opinion, plainly says so.

Omitting the introductory 46 words of sec. 7, which serve to define the cases that fall within the operation of the section as a whole, and also the introductory words of clause (*c*) "where the net value exceeds two hundred thousand dollars," which in like manner serve to define the cases that fall within the purview of that particular clause, the operative part of the section, as applicable to the case before us, reads as follows, 5 Geo. V. 1915, ch. 58:

> All property situate within the Province . . . shall be subject to duty as follows:
>
> At the rate of one dollar and fifty cents for every one hundred dollars of the first one hundred thousand dollars, two dollars and fifty cents for every one hundred dollars of the second one hundred thousand dollars, and five dollars for every one hundred dollars above the two hundred thousand dollars.

That this provision was intended to apply to estates consisting of property wholly within the Province as well as to those comprising property partly within and partly without the Province is conceded. While in the former case the appellant takes the statute just as it is and says that it fully expresses the intention of the Legislature, in the latter, he would apply clause (*c*) as if it read as follows, the words in brackets being interpolated, except the concluding words, which are substituted:

> (*c*) Where the net value exceeds two hundred thousand dollars, [and part of the estate consists of property not within the Province] at the rate of one dollar and fifty cents for [a part of] every one hundred dollars of the first one hundred thousand dollars, [which bears to the sum of one hundred dollars the same proportion as the net value of the estate within British Columbia bears to the net value of the entire estate of the decedent] two dollars and fifty cents for [a like part of] every hundred dollars of the second one hundred thousand dollars, and five dollars for every one hundred dollars [worth of the rest of the estate within the Province].

In the case at Bar the appellant would apply the 1½% rate to $4,683.84, and the 2½% rate to $4,683.84 and the 5% rate, not as the statute says to "every one hundred dollars above the two hundred thousand dollars," but to "every one hundred dollars above $9,366.48."

Not only does clause (c) of sec. 7 appear to say in such plain language that the lower rates of 1½% and 2½% are the rates of duty to be taken in respect of the first $100,000 worth and the second $100,000 worth of property situate within the Province respectively that no excuse is afforded for any departure from Lord Wensleydale's well-known "golden rule of construction," but as part of a taxing Act it does not admit of "an equitable construction" in favour of the Crown in order to carry out some presumed intention of the Legislature in the direction of equality which has not been expressed. *Lumsden* v. *Commissioners of Inland Revenue*, [1914] A.C. 877, at 897. The subject of taxation must come within the letter of the law. We cannot justify reading into this taxing statute any words such as counsel for the Minister argues the Legislature must have meant it to contain in order to increase the burden of the tax, whether on a plea of equalisation or any other. It may be that if the Act be read literally, as I think it must be, the taxation on the $300,000 of British Columbia assets owned by the decedent will be less than it would have been had all the rest of his estate of $6,371,374.73 been likewise situate within the Province. But, if that be a result which the Legislature did not intend, it is reached merely because it has expressed an intention to that effect and has failed to express any other intention. The remedy is in its hands and must be sought from it and not from the Courts. *Att'y-Gen'l* v. *Milne*, [1914] A.C. 765, at pp. 771, 774, 780-1.

I would dismiss the appeal with costs.

Brodeur, J.

BRODEUR, J.:—The question in this case is whether the British Columbia Government should levy a succession duty, on Sir Wm. Van Horne's estate, of $14,242.10, as claimed by the appellant, or of only $8,523.16, as contended by the respondent and as decided by the Court below, 47 D.L.R. 529, 27 B.C.R. 269.

All the difficulty is as to the construction of sec. 7 of the Succession Duty Act of British Columbia, R.S.B.C. 1911, ch. 217, and as to the way of computing the rate of duty. There

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was a suggestion by one of the Judges below that the Province had no right to take into account the extra-provincial assets to determine the net value of the estate. But this constitutional aspect was not, and, with reason, accepted by the other Judges. It seem to me that a Province acts within its powers in enacting that the property of a deceased person situate outside the Province should be considered in arriving at the aggregate value. *Re Renfrew* (1898), 29 O.R. 565. There is no attempt in the present statute to tax property outside the Province; but it simply declares that the property situate within the Province will bear a heavier duty so long as the whole estate will be larger.

The provincial authorities in determining the rate of duty in this case have taken into account all the property of the deceased both within and without the Province and have subjected the proportionate part of such property within the Province to the duty which would have been payable if the whole estate had been within the Province. This mode of calculation is not only a fair and equitable one, but is the one authorised by the statute.

The respondent contends that the rate of succession duty should be determined with reference only to the net value of the property of the deceased within the Province.

Sec. 2 of the Succession Duty Act enacts that the net value mentioned in the duty rate (sec. 7) means the value of the property both within and without the Province.

It is common ground that the liabilities of the estate should be charged proportionately on the property in the Province and it seems to me that the same rule should be observed as to the payment of the rates of succession duty.

The appeal should be allowed with costs throughout and the claim as made by the British Columbia Minister of Finance be declared valid.

Mignault, J.

MIGNAULT, J. (dissenting):—As I view this case, it involves merely the construction of the British Columbia Succession Duty Act, ch. 217 of the Revised Statutes of 1911, as amended by sec. 4 of ch. 58 of the statutes of 1915. No constitutional problems arise and the right of the British Columbia Legislature to levy a succession duty of any amount on property within the Province passing by the death of a person domiciled within or without the Province, has not been disputed.

The late Sir William Van Horne left an estate of the aggregate value of $6,371,374.73 with liabilities of $169,989.56, so that the net value of the estate was $6,201,385.17. Out of the aggregate value, 2,000 shares in the B.C. Sugar Refinery, Ltd., were in British Columbia and their agreed value was $300,000. The appellant demanded $14,242.10, as succession duty, and the respondent, managing executor of the estate, petitioned the Court to have it declared that the claim of the appellant proceeded upon an erroneous basis, and that the sum payable for succession duty was $8,523.16, and no more.

By the statute "aggregate value" means [see judgment of Idington, J., *ante*, p. 228].

While "net value" is defined as [see *ante*, p. 228].

Sec. 7 of the statute is as follows (R.S.B.C. 1911, ch. 217, as amended by 5 Geo. V. 1915, ch. 58):

When the net value of the property of the deceased exceeds twenty-five thousand dollars and passes under a will, intestacy, or otherwise, either in whole or in part, to or for the use of the father, mother, husband, wife, child, daughter-in-law, or son-in-law of the deceased, all property situate within the Province, or so much thereof as so passes (as the case may be), shall be subject to duty as follows:

(*a*) Where the net value exceeds twenty-five thousand dollars, but does not exceed one hundred thousand dollars, at the rate of one dollar and fifty cents for every one hundred dollars;

(*b*) Where the net value exceeds one hundred thousand dollars, but does not exceed two hundred thousand dollars, at the rate of one dollar and fifty cents for every one hundred dollars of the first one hundred thousand dollars and two dollars and fifty cents for every one hundred dollars above the one hundred thousand dollars;

(*c*) Where the net value exceeds two hundred thousand dollars, at the rate of one dollar and fifty cents for every one hundred dollars of the first one hundred thousand dollars, two dollars and fifty cents for every one hundred dollars of the second one hundred thousand dollars, and five dollar for every one hundred dollars above the two hundred thousand dollars.

I am of the opinion, on the construction of this section, that the property subject to succession duty is "all property situate within the Province," and inasmuch as the property in British Columbia of this estate exceeded in value $200,000, the succession duty must be calculated according to para. (*c*) of sec. 7.

The property in British Columbia belonging to the estate amounted, I have said, to $300,000. It appears to have been common ground between the parties that from this $300,000 should be deducted the sum of $9,536.75, being a share of the total

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liabilities of the same proportion as the sum of $300,000 when compared with the aggregate value of the whole estate, thus leaving a net value in British Columbia of $290,463.25. It is on the basis of this reduction of the assets in British Columbia that both parties have proceeded, and I express no opinion whether the reduction should have been made.

The appellant's mode of calculation, which I copy, correcting some misprints in figures, from the respondent's factum, no objection having been taken to the accuracy of the statement by the appellant's counsel, is as follows:

Total amount of estate, less debts	$6,201,385.17
Agreed value of property in B.C. after deducting proportion of debts	290,463.25

The appellant then divided $6,207,385.07, the whole estate, by $290,463.25, the agreed net value of the British Columbia property, the quotient being 21.3496. Then to ascertain the duty payable he divides the first $100,000.00 by 21.3496, which is $4,683.84, and 1½% on this sum is $70.24.

The same process for the next $100,000.00 at 2½% produces $117.09.

Then the Appellant deducts twice $4,683.84, *i.e.*, $9,367.68, from the value of the property in British Columbia after deducting the proportion of the debts, viz.: $290,463.25, leaving $281,095.57, and upon this sum charges 5%, *i.e.*, $14,054.77; the result being:

First $100,000 at 1½%	$ 70.24
Second $100,000.00 at 2½%	117.09
The remainder, viz.: $281,095.57, at 5%	14,054.77
	$14,242.10

The appellant strongly relies on the statutory definitions of "aggregate value," and "net value" given above, and contends that when para. (*c*) of sec. 7 speaks of the "net value" exceeding $200,000, the "net value" referred to is the net value of the property both within and without the Province. Even supposing this construction to be sound, the rule of para. (*c*) must nevertheless be followed, and the rate of taxation is 1½% on the first $100,000, 2½% on the second $100,000, and 5% above the $200,000. The intention of the Legislature is clearly shewn by the amendment made in 1915 to sec. 7, which section, before this amendment, in the case of a succession of more than $200,000, required the payment of $5 on every $100 of the net value of the estate. The effect of the amendment was to charge, even in the

case of a net value of more than $200,000, 1½% on the first $100,000, 2½% on the next $100,000 and 5% on the excess over $200,000. Moreover, as stated, the subject of this taxation is "all property situate within the Province" (see also sub-sec. [a] of sec. 5) and unless the Legislature be held to have intended to impose a tax on property outside the Province, which it could not do, the property only which was situate within the Province is taxed according to the scale indicated.

Calculating therefore in conformity with this scale the succession duty on the sum of $290,463.25, agreed upon as the net value of the assets in British Columbia, the amount due is $8,523.16, as found by the Courts below, 47 D.L.R. 529, 27 B.C.R. 269.

I am, therefore, of the opinion that the appeal should be dismissed with costs. *Appeal allowed.*

HEBERT v. FAUCHER.

Quebec King's Bench, Lamothe, C.J., Lavergne, Carroll, Pelletier and Martin, JJ. March 8, 1919.

ADVERSE POSSESSION (§ I H—38)—DISPUTE—STRIP OF LAND SHEWN TO BE PART OF HIGHWAY BY SURVEY—ACTS OF POSSESSION—POSSESSORY ACTION.

Alleged acts of possession performed by an individual on a strip of land shewn by survey to be a portion of the highway, will not, even if true, be sufficient to allow the individual to maintain an action of possession.

[*Drew* v. *Désaulniers* (1895), 1 Rev. de Jur. 381, not accepted; *Roberval* v. *Tremblay* (1914), 23 Que. K.B. 509, distinguished.]

Statement.

THE judgments of the Court of Review of the District of Quebec pronounced on June 22, 1918, by Sir Francois Lemieux, C.J., and Pouliot and Dorion, JJ., are confirmed in their results. The decision of the Court of Review which contains a complete statement of the facts is reported in (1918), 54 Que. S.C. 316. It should be stated that the Court of King's Bench does not agree in the reason drawn from the non-liability to prescription of public roads which served as the basis of the second holding in the report.

J. H. Fortier, K.C., for appellant.

Pacaud and *Morin*, for defendant.

Pelletier, J.

PELLETIER, J.:—These are two possessory actions respecting a small piece of land of little value. The actions were maintained in the Superior Court but the Court of Review, 54 Que. S.C. 316, reversed both judgments which are now before us.

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Pelletier, J.

It is clear that the piece of land to which the two possessory actions relate form part of the public road. The parties by their pleadings admit this sufficiently to shew that there is no possible doubt about it. Each of the appellants has signed a *proces verbal* of the area of the bornage in which they formally recognised that their property does not extend to the place where the encroachments of the defendant have been made. The possession of the plaintiff will then be of land forming part of the public way.

The defendant has cut wood on this land because he is charged with the maintenance of the road at this place, that the trees prevent the sun from drying up the road and that it was necessary to remedy this to keep the road in good order. Without accepting the theory of the Court of Review on the subject of susceptibility to prescription which, in my opinion, is not a feature of this case, I have come to the conclusion that the plaintiff has not made proof of an exclusive possession sufficient to maintain a possessory action. His possession would, in any case, be uncertain and the only remedy that is open to him—if he has one—would be an *action au petitoire*.

I would confirm the result of the judgment of the Court of Review (54 Que. S.C. 316).

Martin, J.

MARTIN, J.:—It seems clear that the strip of land in dispute formed part of the verbalised road of the municipality. If there was at any time any doubt in the minds of the appellants upon this point, such doubts must have been set at rest by the survey and bornage made on April 16, 1913, by Provincial Land Surveyor Legendre, the *proces verbal* of which survey and bornage was signed by the appellants.

Have the appellants established acts of possession of the strip of land in dispute sufficient to maintain a possessory action? In my opinion, they have not. They have not clearly established an exclusive possession of the strip of land in question.

Even if the alleged acts of possession could be said to be sufficient to maintain a possessory action in the case of private property, I do not think the occasional cutting of wood on land within the limits of the highway could be held to constitute sufficient possession for such purpose any more than cutting hay or picking raspberries within the limits of this highway could be said to be a possession of that part of the highway.

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I am not prepared to accept the doctrine laid down by the Superior Court in *Drew* v. *Désaulniers* (1895), 1 Rev. de Jur. 381.

On the other hand, the case of *Roberval* v. *Tremblay* (1914), 23 Que. K.B. 509, was a "jugement d'espèce" based on a formal admission of the plaintiff's possession made in the defendant's plea.

I do not think the question of imprescriptibility of roads presents itself here. If it did, I would be disposed to hold presents that the appellant was right in law in his contention that the respondent could not raise this question, and I think the judgment of the Court of Review was wrong on this point.

I would dismiss these appeals and maintain the dispositif of the judgment in Review for the reason that the appellants have not proved a possession sufficient to maintain a possessory action.

Considering that there is no mistake in the disposal of judgment rendered by the Court of Revision in this trial, but that, this Court is of the opinion that the Revision Court's decision dealing with the imprescriptibility ought to be withdrawn—the aforesaid decision is withdrawn and the judgment of the Revision Court is, as far as the remainder is concerned, confirmed with costs.

BLOIS v. THE CITY OF HALIFAX.

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S. C.

Nova Scotia Supreme Court, Russell and Longley, JJ., Ritchie, E.J. and Chisholm, J. January 11, 1921.

MUNICIPAL CORPORATIONS (§ II G—210)—DUTIES OF OFFICIALS UNDER CITY CHARTER—NEGLECT—LIABILITY OF CITY FOR DAMAGES.

Non-compliance on the part of the city collector and other civic officials with the provisions of the Halifax City Charter, sec. 652, will render the city liable in damages to any person suffering by such negligence.

Statement.

APPEAL by defendant from the judgment of Harris, C.J., in an action to recover damages on account of negligence of the city collector in entering certain lots of land for the purchase of which plaintiff was negotiating on the list of delinquents; (b) Negligence of the city assessors in omitting to enter in red ink the name of the present owner of the lots in the list of delinquents; (c) Negligence on the part of the city collector in omitting to serve notice of the lien upon the present owner of the land and serving the same upon James Jack who had long since ceased to be the owner; (d) Negligence on the part of various city officials in failing to furnish information required. Affirmed.

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THE CITY OF HALIFAX.

Russell, J.

F. H. Bell, K.C., for appellant; *John Read*, for respondent.

RUSSELL, J.:—This is an action against the City of Halifax for negligence on the part of its officials in failing to give correct and adequate information as to the claim of the city by way of lien for sewerage rates on three lots of land in the city in which the plaintiff was interested as a purchaser. The facts of the case are so elaborately detailed in the judgment appealed from that it is not necessary to refer to them here otherwise than in outline. The lots in question, with others to the south of them, were at one time owned by James Jack, but in July, 1906, they had been conveyed to George H. Hurchman, who by his will, probated on May 30, 1914, devised them to his wife, Martha Hurchman. The deed of the lots to the plaintiff was from Martha Hurchman and is dated June 14, 1917. In the meantime, to wit, on April 27, 1917, proceedings were taken to sell the land for sewerage rates and the lots in question were entered on the list of delinquents as those of James Jack, and were sold for sewerage rates with others listed in the name of the same owner on May 30, 1917, although Jack had ceased to own the lots in question in 1906 by virtue of his conveyance to George Hurchman. The contention of counsel for the defendant is that there was no negligence on the part of the defendant's officials. This contention renders it necessary to examine the provisions of the law with reference to the duties of the several officials concerned.

By sec. 652 of the Halifax City Charter the provisions of the Act respecting the sale of land for failure to pay the rates and taxes thereon are made applicable to the failure to discharge any lien for sewerage. Those provisions make it the duty of the collector to prepare before December 31 in each year, a list of all the lots of land in respect to which any rates or taxes have been due since June 1, in the preceding calendar year, with the amount so due, and the person by whom they are payable. In the case of ordinary rates and taxes the duty of examining and correcting this list and noting up any transfers of property is imposed upon the assessors, who return the corrected list to the collector before the last day of May to be filed in his office for public use. In the case of sewerage rates it is the duty of the engineer, under sec. 647, upon the completion of any sewer or part of a sewer, to make a plan shewing the frontage of every property and the

name of the owner of each property, and he has also to make a list of the owners of such properties with the frontage of each property and the amount due in respect to each property, and file the plan and list in his office. He is also charged with the duty of furnishing the collector and the assessors with copies of every such plan and list, or amendments thereof, with the date of filing in the office of the engineer indorsed thereon.

Assuming this duty to have been duly performed, there would be in the office of the city collector a plan shewing among others the lots of land in question here, which it goes without saying would indicate the lien for sewerage. Whether or not it was the duty of the engineer or city collector to keep note from time to time of changes in the ownership of the land so subject to lien is a question that need not be discussed. I should hesitate to conclude that such a duty was imposed on the engineer or any other official. But before any land is listed for sale for either ordinary rates or for sewerage rates it was surely the duty of the city officials to ascertain, if possible, the ownership of the land proposed to be sold.

The very first section that deals with the treatment of delinquents provides, as already stated, for the preparation of a list with the amount due and the person by whom the rates are payable. Where part of the rates in arrears are due by a former owner, the name of the present owner or the person to whom the land is assessed is to appear in red ink. Notice is to be given informing the owner of the lot or the person to whom it is assessed that it is liable to be sold for arrears under the lien. The solicitor, the engineer and the assessors are to furnish such information and assistance to the collector as may be necessary to enable him to make the requisite description of the lands to be sold. The mayor is required to satisfy himself that each lot mentioned in the statements is the same lot which was assessed for the rates and taxes set opposite thereto and that the lien notice has been duly served in respect to such lot. All these provisions, I take it, are by sec. 652 made applicable to sales for sewerage rates as well as to sales for ordinary rates and taxes. The notices cannot be duly served unless they are served upon the present owner, and the mayor cannot satisfy himself as to the fact of such service unless it is the duty of some one or other of the city officials to ascertain

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the facts. The mention of the city solicitor in connection with the preparation of these lists and the certificate of authentication and warrant provided for in sec. 466 suggests that a search in the registry of deeds may be necessary in order to acquire the requisite information and secure the notification of the proper parties. If these duties had been duly performed it would have been quite impossible to sell on May 30, 1917, as the land of James Jack, the lots which more than 10 years before this date had been sold by him to George Hurchman, and equally impossible would it have been for the collector to give plaintiff's solicitor the information that led to the loss incurred. Notice of the projected sale would have and certainly should have been given to Martha Hurchman and plaintiff had this been done would not through his solicitor in November, 1917, have paid her the balance of the purchase money as he did, after discharging the amount claimed by the city for taxes and rates. This payment was made after the plaintiff's solicitor had, on July 30, 1917, written to the city collector asking for a statement of all taxes forming a lien on the property assessed to the George Hurchman estate, situated on Longard road, being 100 by 99, lying alongside of the Owen Hill property. Possibly it might be fairly suggested that this description was somewhat vague, but it did not mislead the collector. The amounts that he gave as those of the rates and taxes were those for which the lots in question were liable and the same that he had previously given to Mosher, with a trifling addition for interest, but he said not a word about the sewerage rates, because the lots had, on the 30th of May previous, been sold for both taxes and sewerage rates as the lands of James Jack. On a later day when about to close the sale from Mrs. Hurchman to the plaintiff, Mr. Oakes, the plaintiff's solicitor, called at the office of the city collector and was informed by the person in charge that there were no sewerage rates due, but I do not deem it necessary to refer to the later history of the business. The information given to the plaintiff through his solicitor was the proximate cause of his parting with his money for land to which no title was given or could then be given. He has a right to recover the purchase money with interest.

The plaintiff claims that he is also entitled to damages because of his inability to convey the land to the Relief Commission for

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$900. To give colour to this claim he has to state it as a claim for the value of the land over and above the price he was to pay for it. Ordinarily, under English law, a purchaser cannot recover any damages in the absence of fraud for the failure of a vendor to make a good title to the land agreed to be sold even where the loss is the direct and not the remote consequence of the breach of the agreement for title implied in the agreement for sale. *Flureau* v. *Thornhill* (1776), 2 Wm. Bl. 1078, 96 E.R. 635. The rule is said to be "exceptional and anomalous." Fry on Specific Performance, 1911, 5th ed., 642, and possibly it has no application to the circumstances of this case. But there is another principle that I think does apply to the plaintiff's claim for damages. His loss of his bargain was not the direct but the remote consequence of the negligence of which he complains. The loss of a contemplated profit would not be the measure of damages even for the breach of a contract unless the course of the anticipated profit was within the contemplation of the parties. That principle should at least if not *a fortiori* apply to such a case as the present. The suggestion that the proposed sale to the Relief Commission furnishes a measure of the value of the land is ingenious but I think inadmissible. A better measure of the value at the time of the breach is the amount the plaintiff was willing to pay for the land. But I incline to the view that the reasons underlying the rule applied in *Flureau* v. *Thornhill*, 2 Wm. Bl. 1078, 96 E.R. 635, would be found to be equally applicable here and that the plaintiff can only recover the amount he has paid with any expenses to which he has been put and the costs of the action.

Both appeals are dismissed with costs to be set off.

Ritchie, E. J. Chisholm, J.

RITCHIE, E.J., and CHISHOLM, J., concurred with Russell, J.

Longley, J.

LONGLEY, J.:—I have read over the judgment of my brother Russell in this matter and I am proposing to concur in it entirely.

I did think that the plaintiff is entitled to further damages not only for his loss of his money which he put into the property, but the loss at terms which would have given him a handsome profit. The question was argued exceedingly well on behalf of the plaintiff, but for the reasons that are given in Russell, J.'s, opinion and in my view of the execution of the law being necessary in this matter I am compelled to decline to grant the larger sum.

Appeal dismissed.

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MARCONI WIRELESS TELEGRAPH Co. v. CANADIAN CAR AND FOUNDRY Co. Ltd.

*Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 21, 1920.**

PATENT (§ V—50)—INSTALLATION IN SHIPS BUILT FOR FOREIGN GOVERNMENT—INFRINGEMENT—USER—PATENT ACT, R.S.C. 1906, CH. 69, SECS. 21, 30 and 53.

The owner of a patent for certain machines, suing for damages for infringement of the same, cannot succeed when it is shewn that the machines in question were placed on board "foreign ships" and were not used so as to make the defendant liable under the Patent Act, R.S.C. 1906, ch. 69, sec. 30.

[See also (1918), 43 D.L.R. 378, 18 Can. Ex. 241.]

Statement.

APPEAL by plaintiff from a judgment by Audette, J. (1919), 50 D.L.R. 702, 19 Can. Ex. 311, in an action for infringement of a patent. Affirmed.

Eugene Lafleur, K.C., for appellant.

A. Wainwright, K.C., for respondent.

Idington, J.

IDINGTON, J.:—The appellant claims that because respondent having a contract from the French Republic during the late war to construct a dozen vessels at Fort William for use in that war, by a supplementary contract thereto, agreed to provide in each of said structures a space so framed and fitted as to receive a device or machine serviceable for wireless telegraphy, and permitted, and possibly assisted in removing from the warehouse in which each of such devices or machinery was deposited, to each of the said vessels and placing it therein, there was such a breach of the Patent Act, R.S.C., 1906, ch. 69, under and by virtue of which the assignors of the appellant had obtained a patent for such device that appellant is entitled to recover damages herein. The Patent Act, by sec. 30, provides as follows:

> Every person who, without the consent in writing of the patentee, makes, constructs or puts in practice any invention for which a patent has been obtained under this Act or any previous Act, or who procures such invention from any person not authorized by the patentee or his legal representatives to make or use it, and who uses it, shall be liable to the patentee or his legal representatives in an action of damages for so doing; and the judgment shall be enforced, and the damages and costs that are adjudged shall be recoverable, in like manner as in other cases in the Court in which the action is brought.

The respondent according to the evidence adduced herein certainly did not "make or construct" the devices or machines in question herein for they had been bought in New York, already made, and shipped by the French Republic to Fort William and

*Duff, J., being absent took no part in the judgment.

all the respondent had to do with them was suffering its men under the direction of an officer of the French Republic to place them as he directed in the compartment built in each vessel, designed to receive some unspecified sort of wireless device.

The vessels were each so far finished that only 5% of the work to be done, under the original contract, remained to be executed when this placing of each of the said devices or machines took place.

It is argued that inasmuch as the title to the property in, and of, the vessels remained in the respondent, therefore the title in and to each of these devices in question supplied by the French Republic became vested in the respondent.

I cannot accept such a proposition as tenable under all the facts and circumstances in evidence.

A perusal of the evidence here leaves me rather unenlightened as to the exact nature of the device or machine, but I infer that it was something portable and a piece of property belonging to the French Republic independently of the property in the vessel.

The respondent's relation to the article in question which I have designated a "device or machine" was analogous to that of the custom's agent in question in the case of *Nobel's Explosives Co.* v. *Jones, Scott & Co.* (1881), 17 Ch.D. 721, whom the Court of Appeal refused to hold liable for damages.

I am, therefore, not able to hold that the respondent in any way "put in practice" the invention in question.

It is not necessary, therefore, for me to pass any opinion upon the effect of sec. 53 of the Patent Act, R.S.C. 1906. ch. 69.

As I suspected during the argument the cases cited in support of appellant's contentions rest for the most part upon the right to an injunction which it is frankly admitted could not now be granted.

None of those cases cited maintain any such pretensions as set up herein.

They might support a claim to an injunction had that been applied for during the course of construction.

But this case is reduced, notwithstanding what is set up in the affidavit upon which leave to appeal was granted herein, to a bare right of claim for damages arising from an alleged tort.

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Anglin, J.

And to found that I find no evidence and hence I conclude this appeal should be dismissed with costs.

ANGLIN, J. (dissenting):—The novelty and utility of the plaintiffs' patent, No. 74799, was *primâ facie* established, if not by its production (*Electric Fireproofing Co.* v. *Electric Fireproofing Co. of Canada* (1907), 31 Que. S.C. 34 [affirmed (1910), 43 Can. S.C.R. 182]; Fisher & Smart on Patents, 1914 ed., p. 215; Fletcher Moulton on Letters Patent, 1913 ed., p. 188, note [c]), by the evidence of the witnesses Cann and Morse. The record contains nothing that rebuts the *primâ facie* case thus made in this respect.

Infringement is, I think, sufficiently established, as to the apparatus installed on the S.S. "Navarrine" by the uncontradicted testimony of the witness Cann. By the fourth paragraph of its statement of defence the defendant admitted having installed wireless apparatus on 12 small war vessels being constructed by it for the French navy at Fort William, Ontario. The evidence sufficiently shews that the "Navarrine" was one of these vessels and there is no suggestion anywhere in the record that the apparatus installed on her differed in any respect from that placed on the other 11 ships. Indeed, Canfield, the defendant's superintendent, expressly stated that all the ships had the same installation although he admitted on cross-examination that he had not made personal investigation to ascertain that fact. He added that the vessels were all delivered by the defendant at Fort William. Atwood, assistant to the president of the defendant company, never heard of any difference in the apparatus installed on the several vessels and McCoy, the general master mechanic who looked after the installation for the defendant, called as a witness on its behalf, is not asked whether there was any such difference. The apparatus was all obtained by the French Government from Emil J. Simon at New York and shipped to its representative at Fort William. I think it *primâ facie* appears therefore that the apparatus on the 12 vessels was identical.

The only substantial defences are: (a) That, if there were such user by the defendant of the apparatus purchased from Simon as would otherwise be an infringement of the plaintiffs' patent, it was upon foreign vessels and therefore fell within the protection of sec. 53 of the Patent Act, R.S.C., 1906, ch. 69; (b) That there was in fact no such user made of the apparatus by the defendant

as would constitute a violation of the exclusive right of the plaintiffs under sec. 21 of the Patent Act; (c) That the plaintiffs are at most entitled to nominal damages, any infringement by the defendant having been innocent.

(a) Sec. 53 of the Patent Act was meant to cover the case of a foreign ship visiting a Canadian port and having on board some article the use of which in Canada would amount to an infringement of a Canadian patent, such as was the subject of litigation in *Caldwell* v. *Vanvlissengen* (1851), 9 Hare 415, 68 E.R. 571. The section was not meant to, and does not, cover the installation in Canada on a visiting foreign ship, and *a fortiori* not on a ship built here for foreign owners, of a device, the use of which is otherwise in violation of the exclusive right conferred by sec. 21. The case of *Vavasseur* v. *Krupp* (1878), 9 Ch.D. 351, cited by the assistant Judge of the Exchequer Court, Audette, J., 50 D.L.R. 702, 19 Can. Ex. 311, is clearly distinguishable. The French Republic is not a party to this action and no relief is sought against nor is interference with its property asked. Moreover, under the terms of the agreement between the defendant company and the French Government the property in the vessel had not passed to the latter but was still vested in the former when it did the work of installing the Simon apparatus. They were therefore not foreign ships at that time.

(b) There was, in my opinion, user by the defendant of the infringing apparatus in violation of the plaintiffs' rights under sec. 21. The installation was, and was intended as, a step towards the effective use of it and in the absence of any evidence warranting such an inference it cannot be assumed that there was to be no user of the wireless equipment until after the vessels should have left Canadian territorial waters. If such an intention would, if proven, have afforded a defence, the burden of establishing it satisfactorily was on the defendant. The French Government could not authorise the use in Canada of such apparatus. While it is not itself subject to answer in the Courts of Canada for its acts or those of its agents, its Canadian contractors enjoy no such immunity. They are properly sued (*Denley* v. *Blore* (1851), 38 Lond. Jour. 224, cited in Frost on Patents, 3rd ed., vol. 1, p. 389, and Edmunds on Patents, 2nd ed., p. 364) and are answerable for whatever damages were occasioned to the plaintiffs by

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the infringement of their rights which they aided or helped to bring about. The principle of such cases as *British Motor Syndicate* v. *Taylor & Son*, [1900] 1 Ch. 577, and *Upmann* v. *Elkan* (1871), 7 Ch. App. 130, at 132, applies.

(c) Innocence of intention is immaterial in considering the question of infringement. *Stead* v. *Anderson* (1847), 4 C.B. 806, 136 E.R. 724. In the absence of a Canadian statutory provision corresponding to sec. 33 of the Patents and Designs Act, 1907, 7 Edw. VII. (Imp.), ch. 29, the fact that the defendant was an innocent infringer does not entitle it to relief from liability for the damages sustained by the plaintiffs—(*Nobel's Explosives Co.* v. *Jones, Scott & Co.* (1882), 8 App. Cas. 5, at pp. 11-12; *Boyd* v. *Tootal Broadhurst, Lee Co.* (1894), 11 R.P.C. 175, at p. 181)—the measure of which is the loss actually suffered by them as a direct and natural consequence of its acts, *Boyd* v. *Tootal Broadhurst, Lee Co.*, *supra*, at pp. 181, 184. This is not the case of an innocent defendant submitting and offering restitution as in *Nunn* v. *D'Albuquerque* (1865), 34 Beav. 595, 55 E.R. 765. The defendant here contests the plaintiffs' right. *Proctor* v. *Bayley* (1889), 42 Ch.D. 390, at pp. 393-4 n.

The appeal should be allowed and judgment entered declaring that there has been an infringement by the defendant company of the plaintiff's patent No. 74799 and referring this action to the registrar of the Exchequer Court to inquire into and ascertain the amount of the plaintiffs' damages. The plaintiffs are entitled to their costs both of the action and of the appeal.

Brodeur, J.

BRODEUR, J.:—The mere fact that the respondent furnished certain labour and material in connection with the installation of wireless apparatus on mine sweepers which it was building for the French Government would not render the respondent liable in damages. These wireless apparatuses never were the property of the respondent but belonged to the French authorities, had been bought by the latter in New York and had been shipped into Canada at Fort William, where the ships were being built. There is no evidence that these apparatuses were used or put in practice by the respondent before they delivered those ships. Terrell, 5th ed., p. 312. As far as the respondent company is concerned, there was no infringement of the patent claimed by the appellant.

The appeal should be dismissed with costs.

MIGNAULT, J.:—On one ground I think this appeal should be dismissed, that furnished by sec. 53 of the Patent Act, R.S.C., 1906, ch. 69, which says: "No patent shall extend to prevent the use of any invention in any foreign ship or vessel, if such invention is not so used for the manufacture of any goods to be vended within or exported from Canada."

This section, which has been in our statutes since at least 1872 (35 Vict. (Dom.) ch. 26, sec. 47), was apparently suggested by a provision of the English Act, now sec. 48 of 7 Edw. VII. ch. 29, but is in somewhat wider terms. It is contended that it was meant to cover the case, not of a foreign ship built in Canada—for a foreign ship can undoubtedly be built here—but of a foreign ship visiting a Canadian port and having on board an article patented in Canada, and the use of which here would amount to an infringement of a Canadian patent. This, no doubt, may be the usual case, but there is no such limitation in sec. 53, which, in general terms, permits the use of any invention in any foreign ship or vessel, the only restriction being that the invention is not to be used for the manufacture of any goods to be vended within or exported from Canada.

It is further argued that the English Act was amended after the decision of Turner, V.-C., in *Caldwell* v. *Vanvlissengen*, 9 Hare 415, 68 E.R. 571, which was the case of a visiting ship. The appellant also refers us to the Hansard Debates when the English Act was amended, as shewing the intention of Parliament in adopting this amendment. I am quite clear that we cannot look at these debates (Beal's Cardinal Rules of Legal Interpretation, 2nd ed., p. 288). And even granting that this amendment was made in view of the decision in *Caldwell* v. *Vanvlissengen*, *supra*, this should not, in my opinion, make us hesitate to give effect to the clear and unambiguous language of our statute.

The only "use" here relied on was the installation by the respondent of the wireless device. If the vessels in question were foreign vessels, no patent could extend to prevent the use of any invention therein, and when these vessels were on the way to the sea, it does not seem to me that the use by the foreign crew of this device could have been enjoined.

The trial Judge found that these vessels were foreign vessels. It is true that the respondent had a lien thereon, which lien went

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so far as to stipulate that property in the ships would not pass to the French Government until the price was fully paid, and it had been paid when the "Navarrine" was inspected in the Montreal harbour. I think, however, that this clause was inserted in the contract for the protection of the respondent, and of course could have been waived by it. The vessels were constructed for the French Government as a part of its navy. The wireless apparatus was purchased by that Government in New York and was consigned to it at Fort William. All the respondent did was to install it, being paid merely the actual cost of installation. Under these circumstances, I do not think the respondent should be treated as an infringer of the appellant's patent.

I would dismiss the appeal with costs.

Appeal dismissed.

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S. C.

SOLDIERS SETTLEMENT BOARD of CANADA v. JACKSON.

Alberta Supreme Court, Harvey, C.J., Stuart, Beck and Ives, JJ. October 15, 1920.

INTERPLEADER (§ III—30)—PURCHASE OF PROPERTY BY SOLDIERS SETTLEMENT BOARD — RIGHTS OF EXECUTION CREDITOR — SEIZURE — SOLDIER SETTLEMENT ACT, 9-10 GEO. V. (CAN.) CH. 71, SEC. 34.

The produce of property sold by the Soldiers Settlement Board to the debtor, but severed from the land prior to the agreement between the Board and the debtor, may be seized by the execution creditor with the exception of the debtor's exemptions unless such seizure is dealt with under the Soldier Settlement Act, 9-10 Geo. V. (Can.) ch. 71, sec. 34.

Statement.

APPEAL by plaintiff in an interpleader issue to determine the right of an execution creditor to certain produce of land sold by the plaintiff. Affirmed.

S. B. Woods, K.C., and *H. Staples*, for plaintiff.

K. C. Mackenzie, for defendant.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—This is an interpleader issue in which the trial Judge decided in favour of the execution creditor. Jackson was an execution creditor of one Falcus, a returned soldier. The Board became the registered owner of a certain quarter section of farm land. The Board agreed to sell this land to Falcus under an agreement for sale dated September 19, 1919, for $2,000; $200 down and the balance with interest in 25 annual instalments. The down payment was made. By agreement in writing of the same date, Falcus agreed to purchase from the Board at a sum not exceeding $700

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all the live stock and chattel equipment from time to time purchased by the Board and delivered to the purchaser on the purchaser's requisition and as more fully described in said requisitions which shall from time to time as issued, be attached to the Board's copy of this agreement and be deemed to be part of and incorporated into the agreement.

The Board delivered to Falcus certain chattel property listed in requisitions. The subject matter of this contest is a quantity of oats, wheat and hay. This produce was the produce of the land sold by the Board to Falcus but had been severed from the land prior to the agreement for sale to Falcus and was not the subject of any of the requisitions and was not therefore "chattel equipment" under the agreement. The portion seized under Jackson's execution against Falcus was that portion of this produce remaining after the debtor had been allowed his exemptions. The Soldier Settlement Act, 9-10 Geo. V. 1919, ch. 71 (assented to July 7, 1919) calls for interpretation. The Board seeks to maintain its claim to the produce in question by virtue of sec. 34.

Clause (*a*) says that:—

While any sum shall remain unpaid upon the aggregate advances or payments made from time to time pursuant to the provisions of this Act by the Board to or on behalf of a settler and secured by or charged whether under this Act or otherwise, upon properties, real, personal or other, of the settler or upon the settler's interest in any of such properties, all of the properties *so charged* shall continue to be security for repayment of such sum etc.

Clause (*b*) says that

. . . no judgment recovered or attachment, *execution* or other process issued against him shall, as against the Board, bind or affect the lands or the live stock and equipment *sold by the Board to such settler*.

Clauses (*c*) and (*d*) are not material to the question under consideration. Clause (*e*) says that

If the *produce or crop* of any lands which were sold by the Board to the settler . . . is seized or taken in execution or under any other process, whether the settler shall or shall not have fully paid for said lands, and whether said produce or crop is seized or taken standing or cut or in barn or otherwise, such produce or crop shall stand charged with a lien in favour of the Board for payment of all instalments due or overdue by the settler to the Board at the time of seizure or taking, in respect of the settler's land, live stock, equipment and permanent improvements, and, as well, all such instalments in respect as aforesaid as will mature within 12 calendar months thereafter.

It is clear to me that the words "produce or crop" in clause (*e*) refer to produce or crop arising from the land after the sale of the land by the Board and not to any produce or crop which might happen to be upon the land in the form of a chattel at the time of the sale.

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Then as to the word "equipment" in clause (*b*). Even if in some circumstances "equipment" might include produce or crop as I think it might for the purpose of food or feed, the equipment in this clause is limited to such as has been sold by the Board; as to the settler's lands it is limited to such lands as have been sold to him by the Board or as have been specifically charged with the amount of advances.

So also in clause (*a*) "the properties real, personal or other of the settler" are limited to those upon which the Board has a security or a charge.

The only question it seems to me that is open to argument is that the produce in question is equipment under clause (*b*).

It might well be that in a sale of land, a crop already severed, even threshed and garnered, might be intended to be included in the sale and the price of the land and crop combined fixed accordingly and that by an error there should be no express documentary conveyance of the crop. Doubtless in such a case the purchaser taking possession of the land with the crop upon it would have an effective title to the crop. The crop in this case perhaps became the settler's property; but this still leaves open the question whether it was "equipment sold by the Board." Further evidence might possibly shew that it was intended as equipment but on the evidence—which is all by way of admissions —this is far from clear; rather is the contrary probable and the burden is on the Board as claimant.

First, the crop which was seized was what was left after the debtor's exemptions were taken out. That means that there was taken out, what was sufficient for the necessary food for the family of the execution debtor during 6 months; feed for certain farm stock; and seed grain sufficient to seed the land of the debtor to the extent of 80 acres. *Primâ facie*, at least, I should think these exemptions would be the extent to which farm produce could be taken to be equipment. Secondly, the agreement for purchase of chattel equipment specified by requisition and specifically purchased by the Board for sale to the settler seems to be what is intended by the Act. Thirdly, it is quite clear that the Act contemplates that the settler may become the owner of both lands and chattels to which no charge or lien in favour of the Crown would attach.

I think the Board has failed to make out its claim, one by way of security upon the goods by virtue of the Act. In truth the case seems to have been carried on with the view of obtaining the opinion of this Court upon the constitutionality of the provisions of the Act to which I have called attention; but in the view I have stated it is unnecessary to discuss or decide that question.

I would therefore dismiss the appeal with costs.

Appeal dismissed.

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Nova Scotia Supreme Court, Russell and Longley, JJ., Ritchie, E.J., and Chisholm, J. January 11, 1921.

SALE (§ IV—90)—BULK SALES ACT, 3 GEO. V. 1913 (N.S.) CH. 5—PROCEDURE THEREUNDER — EXECUTION CREDITORS' SEIZURE — "VOIDABLE" SALES.

When sales of goods have been made under the Bulk Sales Act, and the provisions of that statute have not been complied with, an execution creditor may avoid such sales by levying upon the goods under execution, and the seizure will be upheld.

APPEAL from the judgment of Harris, C.J., in an action claiming damages for the alleged wrongful seizure of plaintiffs' goods. Affirmed. Statement.

S. Jenks, K.C., and *James Terrell*, K.C., for appellants.

C. J. Burchell, K.C., and *J. L. Ralston*, K.C., for respondents.

CHISHOLM, J.:—This is an appeal from the decision of Harris, C.J., in three actions tried together and involving the validity of certain sales of goods made by the William Taylor Co., Ltd., to the several plaintiffs. The Consolidated Rubber Co., Ltd., recovered judgment in a large amount against the William Taylor Co., Ltd., and issued execution thereon and the sheriff levied on and sold certain of the goods so sold and found in the premises of the plaintiffs. The plaintiffs thereupon began actions against the sheriff and the Consolidated Rubber Co., Ltd., for the conversion of the goods. The defendants plead that the said sales to plaintiffs were void under the provisions of the Bulk Sales Act, 3 Geo. V. 1913 (N.S.), ch. 5. The trial Judge dismissed the actions. Chisholm, J.

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The only question argued on the appeal was whether the Bulk Sales Act applied to the transactions in question, and, if the Act applied, whether the sales were void or voidable under the Act.

Sec. 2 of the Act provides that it shall be the duty of every purchaser of any stock of goods before closing the purchase or paying the vendor to demand and receive from the vendor and it shall be the duty of the vendor to furnish a written statement verified by statutory declaration containing the names and addresses of all the creditors of the vendor, together with the amount of the indebtedness due to each creditor.

Sec. 3 provides that any agreement for the purchase or sale of any stock of goods in bulk shall be in writing, that it shall contain an inventory of the property sold, and that it shall within 10 days be filed in the registry office where the vendor resides, or if he is a non-resident in the registry office of the district where the property is situate.

Sec. 6 gives a definition of "as sale in bulk" as being any sale or transfer of a stock of goods, wares or merchandise, or part thereof out of the usual course of business or trade of the vendor, etc.

Sec. 4 provides that when a sale is made, and the provisions of secs. 2 and 3 are not observed.

Such sale shall be deemed to be fraudulent and shall be absolutely void as against the creditors of the vendor, unless the proceeds of sale are sufficient to pay the creditors of the vendor in full and are in fact actually so applied, etc.

It is admitted that the provisions of secs. 2 and 3 of the Act were not complied with; and it is clear that the proceeds of the sale were not sufficient to pay the creditors of the vendor in full.

The contentions made by counsel for appellants were:

1. That the Bulk Sales Act applies only to the sale of "a stock of goods," and not to sales of parts of a stock as were the sales attacked in these actions; 2. That the sales were not "out of the usual course of business or trade of the vendor"; 3. Section 3 of the Act, if it does apply, makes such sales voidable at the instance of the creditors and not void; and 4. That if the sales were so voidable, they should be set aside by an action brought for that purpose by a creditor on behalf of itself and all other creditors.

1. The Bulk Sales Act is not well drawn; but I think it is sufficiently clear that sec. 6 must be read with and into the provisions of secs. 2 and 3. If secs. 2 and 3 were held to apply only to cases

where the whole stock of goods was sold, then the purpose of the Act could easily be completely defeated by the vendor disposing of the stock in portions; and, moreover, it would be impossible to find any useful office for the words "or part thereof" in sec. 6. If am of opinion, therefore, that secs. 2 and 3 apply not merely to a sale of the whole stock but also to a sale of part of the stock out of the usual course of business or trade of the vendor.

2. The trial Judge has found as a fact and the evidence in the case abundantly supports the finding, that the sales were not in the usual course of the vendor's trade or business. The facts detailed in the judgment appealed from establish this, and do not require to be restated.

3. There is much to be said in favour of counsel's contention that the word "void" should be construed as meaning "voidable." That the terms are frequently used without discrimination is shewn in 40 Cyc., p. 214:

> These terms have not always been used with nice discrimination; indeed in some books there is a great want of precision in the use of them, and much confusion has resulted from the looseness in the use of the terms. The terms have frequently been used indiscriminately and what is merely voidable is frequently called void. So often has the word void been used in the sense of voidable that it may be said to have almost lost its primary meaning, so that when it is found in a statute or judicial opinion, it is ordinarily necessary to resort to the context in order to determine precisely what meaning is to be given to it. Indeed it is said that the term "void" is oftener used to point out what may be avoided than to indicate a nullity.

And as observed by Perdue, J.A. (now C.J.M.), in *Draper* v. *Jackson* (1916), 26 D.L.R. 319, at 323, 26 Man. L.R. 165:

> The expression "absolutely void" is not, I think, any stronger than "void." If a thing is void, it is of no effect and there cannot be degrees in nullity. When an instrument is void as against persons who may or may not take advantage of it, it is voidable only.

4. But assuming the sale to be voidable and not void as against the creditors of the vendor, the creditor in this case was entitled to avoid the sales and it did so by levying on the goods under execution. There could not be a more unmistakable way for the creditor to manifest its intention to attack the sales. It has long been the practice in this Court to attack a fraudulent or voidable sale or conveyance collaterally in this way. It is not necessary that a direct action shall be instituted for the purpose. Legislation respecting bulk sales, so called, originated in the United States. The first statute regulating such sales was enacted in the State

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of Louisiana and within a year or two similar statutes were passed by the Legislatures of over a score of States and Territories. There are numerous cases in the Courts of the various States dealing with the statute; and in the case of *Dickinson* v. *Harbison* (1909), 72 Atl. Rep. 941, the facts were similar to the cases in which we have heard argument. Dickinson recovered judgment against Harbison, and levied under execution on goods sold in bulk by Harbison to one Bauer. The Court held that that was one way in which the sale could be successfully attacked.

In my opinion the appeals in the three cases should be dismissed with costs.

RUSSELL, J.:—I agree.

RITCHIE, E.J.:—I agree.

LONGLEY, J.:—These three cases are practically the same and are embodied in one appeal. They came before Harris, C.J., and judgment was given by him to the defendant in all the cases.

It appears that the defendant James Hall, Sheriff of Halifax, in making a levy upon the property of William Taylor & Co., dealers in boots and shoes, went and made a levy upon boots and shoes in the stores of Webber, Aronoff, and Mosher and Jacobson, which had been bought from William Taylor & Co. The goods were pointed out by G. H. Taylor, who was not at all connected with the firm of William Taylor & Co., at that time, and the goods were taken according to his representation, and they all bore the marks upon them of William Taylor & Co.

The goods in the three respective shops were purchased and obtained from Eckersley, who was the manager, etc., of William Taylor & Co., and at certain prices, which were greatly reduced from the ordinary prices for the same goods sold to other parties.

It would appear that Eckersley was in difficulties in regard to money and under those circumstances he would send for Samuel Webber and ask him to take from him $100 or $200 or $500 worth of goods and give him the immediate cash for them, and Samuel Webber would take them and place them respectively in the stores of Harry Webber, Aranoff, and Mosher & Jacobson. In some instances the sales were made for considerably less than the wholesale prices, and in some cases only slightly below the wholesale prices, but altogether were sold more cheaply than they could be bought from any wholesale party in the Dominion.

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The defendant put his taking of these goods and the selling of them as being placed within the category of 3 Geo. V. 1913 (N.S.), ch. 5, where an Act was passed to regulate the purchase and sale and transfer of goods in bulk. The Bulk Sales Act, which consists of eight paragraphs, is one that will require a great amount of consideration, and it unfortunately happens that there is scarcely any cases under it decided by other Courts which form a guide for one in dealing with it now. There have been some dealings under it in the American Courts, but their Act may not be in all respects like ours.

The Act requires that when a person shall make a sale of any stock of goods, wares or merchandise in bulk, that he shall first obtain a written statement verified by the statutory declaration of the vendor or his duly authorised agent, or, if the vendor is a corporation, by the declaration of the president, vice-president, secretary-treasurer or manager of such corporation, which statement is to contain the names and addresses of all the creditors of the said vendor, together with the amount of the indebtedness or liability due, owing, payable or accruing due, or to become due and payable by said vendor to each of said creditors, which said statement may be in the form set forth in schedule "A" to the Act.

It is quite manifest from this that the object is not to deal with ordinary sales from a store, but that it intended the sale should be such a large quantity and some extraordinary method of dealing with the stock in trade that it might prejudice other creditors and therefore this formality was required and that by way of protecting other creditors of the firm, and if such an agreement as this was not filed then such sale shall be deemed fraudulent and shall be absolutely void as against the creditors of the vendor.

One would be inclined to take the view that this Act only referred to the selling of a whole stock in trade, or such a large portion of the stock in trade as would manifest a disposition to sell out the business as a whole, and if such were the case the Bulk Sales Act of 3 Geo. V. 1913, ch. 5, would not apply in the present instance. According to the evidence the stock of William Taylor & Co. amounted to between $20,000 and $30,000 and the amounts that had been sold in this manner for some months previously had not been over $6,000 or $7,000, which would make

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out that scarcely more than one-third of the stock had been sold in this manner. But it is quite manifest it was not the usual course of business or trade of the vendor. These goods were sent out suddenly and quickly at any prices that could be agreed upon, for instant cash, to meet emergencies; and therefore we are compelled to look at the Act thoroughly to find out if there is anything that will cover partial sales of goods under such circumstances, and we find this in sec. 6, which reads as follows:

> 6. Any sale or transfer of a stock of goods, wares or merchandise, or part thereof, out of the usual course of business or trade of the vendor, or whenever substantially the entire stock-in-trade of the vendor, shall be sold or conveyed, or whenever an interest in the business or trade of the vendor is sold or conveyed, such sale, transfer or conveyance shall be deemed a "sale in bulk" within the meaning of this Act.

This applies to the sale and transfer of merchandise or part thereof out of the usual course of business or trade of the vendor. To Mosher & Jacobson fully $2,000 worth had been sent out, and to the others a smaller quantity, and it seems that these goods, being part of the stock, are thus by the Act included in the term "sales in bulk." It would scarcely do to take it as applying to sales of the whole or one block, because if a person were disposed to dispose of his property dishonestly he could sell one block to one person and another block to another person, and still another to a third, and so on, dividing it into twenty or thirty different blocks and selling it at different times, whereby he could get rid of all his goods and expropriate the money instantly and deprive the creditors of all chance of getting any payment, or receiving any dividends, and this itself would evidently make the Bulk Sales Act apply. And if William Taylor & Co. had gone on, it is quite probable that the result would have been that in a few months he would have disposed of nearly everything in order to meet current liabilities that were pressing upon him, and therefore, although the Act seems to apply only to the sale of the whole stock, yet the sale of a portion of it under sec. 6, although out of the usual course of business and trade, seems to be within it. I am, therefore, compelled upon hearing the matter to uphold the judgment of Harris, C.J., completely and recommend the dismissal of the appeal with costs.

Appeals dismissed.

REX v. LANGLOIS.

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Ontario Supreme Court, Meredith, C.J.C.P. October 21, 1920.

INTOXICATING LIQUORS (§ III H—90)—SEIZURE—FORFEITURE—EVIDENCE—MOTION TO QUASH ORDER OF MAGISTRATE.

Although no magistrate may determine how much or how little intoxicating liquor a person may have, the quantity may be circumstantial evidence of the purpose for which it is obtained. If there is evidence upon which reasonable men would be convinced that the liquor was kept for purposes of sale, in contravention of the provisions of the Act, the order of the magistrate cannot be quashed.

Statement.

MOTIONS by the defendants to quash orders made by the Police Magistrate for the City of Windsor for the forfeiture of certain quantities of intoxicating liquors, contained in bottles and cases, seized by a license inspector when in possession of an express company, at an express office, consigned to each of the defendants.

The orders were made pursuant to sec. 70 of the Ontario Temperance Act, 6 Geo. V. 1916, ch. 50, as amended by 7 Geo. V. 1917, ch. 50, sec. 26.

Section 70, as amended, is in part as follows:—

(3) Where liquor has been seized under sub-section 1 or sub-section 2 the person seizing the same shall give information under oath before a Justice of the Peace, who shall thereupon issue his summons directed to the shipper, consignee or owner of the liquor if known, calling on him to appear at a time and place named in the summons and shew cause why such liquor should not be destroyed or otherwise dealt with as provided by this Act.

(6) At the time and place named in the summons any person who claims that the liquor is his property and that the same is not intended to be sold or kept for sale or otherwise in violation of this Act may appear and give evidence before the Justice, and the Justice shall receive such evidence and the evidence of the person who seized the liquor and such other evidence as may be adduced in the same manner as upon a complaint or information made under this Act.

(7) If no person claims to be the owner of the liquor, or if the Justice disallows such claim, and finds that it was intended that such liquor was to be sold or kept for sale or otherwise in contravention of this Act he may order that such liquor and

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any vessels containing the same shall be forfeited to His Majesty to be destroyed or otherwise dealt with in such manner as the Minister may direct.

(8) If the Justice finds that the claim of any person to be the owner of the liquor is established, and that it does not appear that it was intended to sell or keep such liquor for sale or otherwise in contravention of this Act he shall dismiss the complaint and order that such liquor be restored to the owner.

J. M. Bullen, for defendants.

Edward Bayly, K.C., for magistrate.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—As there seems to be a somewhat widespread mistake as to that which was decided in these cases, it seems to be proper to put in writing precisely what was decided in them.

A magistrate has no power to determine how much or how little intoxicating liquor any one may have. Every one may have as much or as little as he or she sees fit, if it has been lawfully obtained and is had in a lawful place for a lawful purpose.

Intoxicating liquor in transit, and under some other circumstances, may be seized by an officer if he believes that it is to be sold or kept for sale in contravention of the provisions of the Ontario Temperance Act; and, if a magistrate finds, upon a proper investigation, that it was intended that the liquor seized should be so sold or kept for sale, he may order that it be forfeited to His Majesty.

The quantity of the liquor may be circumstantial evidence of the purpose for which it is obtained; evidence of more or less weight according to all the other circumstances and evidence of the case.

If there is evidence, circumstantial, or direct, or both, upon which reasonable men could find that there is no reasonable doubt that the liquor was to be sold or kept for sale in contravention of the provisions of the Act, the order of the magistrate cannot be quashed in this Court.

In these cases there was such evidence, and therefore the applications to quash the forfeiture orders were refused.

Motions dismissed.

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Quebec Court of Review, Lemieux, C.J., Letellier and Dorion, JJ. February 27, 1920.

MASTER AND SERVANT (§ II A—67)—MAINTENANCE BY COMPANY OF OCCUPATION ROADS—ABANDONED PUBLIC HIGHWAYS—OBLIGATION TO EMPLOYEES FOR CONDITION OF SAME—INJURY TO HORSE—DAMAGES.

When occupation roads are made by a company or abandoned public highways converted to the company's use, it is obliged to maintain them in good condition, and is liable in damages for injuries to employees or their horses.

Statement.

APPEAL from the judgment of the Superior Court in an action for damages caused to plaintiff's horse by its fracturing its foot by stepping into a deep hole in an abandoned road over which plaintiff was carrying supplies for defendant company.

The judgment of the Superior Court of the District of Quebec, delivered November 12, 1919, by Gibsone, J., is reversed.

The facts of the case are related in the judgment of the Superior Court, which had dismissed the action, as follows:—

Whereas the plaintiff claims from the defendant the sum of $238 for damages under the following circumstances: that on or about November 13th, 1918, while the plaintiff, being in the defendant's employ, was driving a wagon, drawn by two horses, for carrying supplies upon a road to Stoneham, commonly called the old Lake St. John Road, one of the horses put its foot in a deep hole and fractured its foot, and the plaintiff had to kill the horse on the ground; that the defendant has for several years been making pulpwood at Stoneham and has always used this road for said purpose only and that the defendant is bound to maintain this road and keep it in repair for the protection of drivers in its employ and of horses and vehicles thereon; that the said accident is due to the fault and gross negligence of the defendant who has always neglected to properly maintain this portion of it where the accident took place; that in fact, at the time of the accident, the entire road, and particularly the place in question, was impassible, on account of a great number of large stones, ruts and deep holes; that the said horse was originally the property of the father of the plaintiff and had been entrusted and given up to the latter in order to gain his livelihood, and that on March 20th, 1919, by private deed, the father of the plaintiff transferred to the latter all rights which he might have against the defendant by reason of the loss of the said horse, and authorized the plaintiff to proceed against the defendant as if he had always been the owner of the animal; that the plaintiff is entitled to claim from the defendant the value of the said horse, namely, $150, and also the loss of time which he suffered from November 13th to 27th at the rate of $5.50 per day, namely, $88, making a total of $238, and in consequence be paid for the same.

Whereas the defendant by its defence denies the different allegations of the claim and alleges that the action is ill founded in fact and in law; that the plaintiff knew the said road and that he agreed to travel on it at his own risk and peril; that the defendant pays large wages for carrying small loads on account of the condition of this old abandoned road; that the road is 60 miles

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in length and that it is practically and physically impossible for the defendant to do otherwise than what it has done in the past; that the plaintiff undertook the transport of the supplies at his own risk and peril on a road which he already knew, and that he should have refused the contract if the roads were, to his knowledge, dangerous, and the defendant prays for the dismissal of the action.

Considering that it appears from the evidence that the defendant is the owner of certain limits situate upon the road in question, namely, the old Lake St. John Road, that the defendant uses this road for the conveyance of its supplies; that the said road is not the defendant's property, but that it uses it only because it is the only road which leads to its limits, and that it is a road which was in existence long before the defendant was in occupation of this district; that it appears from the evidence that the plaintiff was engaged as a carrier, with a vehicle and two horses, for carrying supplies between the various camps of the company, situate upon the said road, but that it does not appear that at the time of such engagement the plaintiff knew of the state of the road, as alleged by the defendant, nor that there was any understanding on the subject of the risks to be run, and that, consequently, the losses which might have resulted from such risks should be ascribed in accordance with the common law; that there is no evidence proving that the road in question is the private property of the defendant, nor that such road forms part of the property occupied by the latter, but on the contrary, it appears that the said road is an old public road connecting Stoneham with Lake St. John; that the said road cannot be considered as something under the defendant's care, for the said road was not under the defendant's care, but was used merely for its own requirements; that the circumstances proved, shew no warranty, express or implied, by the defendant to the plaintiff to guarantee against consequences which might result from using the said road; that the plaintiff has proved no responsibility on the part of the defendant for the accident which happened to his horse.

Dismisses the plaintiff's action, with costs.

Francoeur, Vien and *Larue*, for appellant.

Taschereau, Roy, Cannon, Parent and *Casgrain*, for respondent.

The above judgment was set aside for the following reasons:—

Letellier, J.

LETELLIER, J.:—The road where the accident took place is evidently not the property of the defendant, but we think that the defendant has control of this road. It had been constructed by the Government to allow communication with Lake St. John before the construction of the railroad, but it had been abandoned long since, when the defendant undertook to make use of it for the operation of its limits. It has repaired the road and spent a considerable sum for that purpose. It had possession by tolerance, but it has absolute control of it for the purpose of its industry, a control which it had assumed and which was allowed it without difficulty since it acquired its limits from the Provincial Government, which had abandoned this now useless road. We see no

difference from the point of view of liability, between this road, in the way the company had possession of it, and a road which it might open upon its own limits, for the purpose of operating them. It certainly cannot prevent hunters or other persons from going on this road, but it is not liable to such persons. It is not the same with regard to its employees. It employs drivers to carry necessary things to its camps, and it requires them to do such carriage on this particular road. The road thus becomes something which it puts at the disposal of the drivers for doing their work and it must keep it in good repair and be answerable for accidents which happen to its drivers on this road.

It is not a public road governed by provincial or municipal laws, but is a road that the company has made its own, although it is upon a property other than its own.

We see similar cases throughout the Province, especially in winter time. A contractor for cutting wood opens a road upon one, two, ten or twenty properties with the consent of the owners or with their tolerance only. Such road forms part of the timber yard and is under their control. Strangers can go on it at their own risk, but the men the contractor hires to do the cartage on such road have a right to a good road, and it is the contractor who is liable for damages which may be sustained by his men on account of the bad state of the road. This is to be seen in every parish in the Province upon a greater or less scale. The defendant is well in the same position. If an employer is liable for the bad state of a floor where he makes his workmen work, he is equally liable for the bad shape of roads where he places his men to do cartage. The question of contributory negligence cannot be set up here, for there was none. The question whether the plaintiff took a part of the risk, by working on this road, cannot be raised either, for no evidence was given of such an agreement. The wages paid to the plaintiff is more than usual and does not cause any presumption that the plaintiff took such a risk.

For these reasons we think that the recital of the judgment of first instance, declaring that the road was not under the care of the defendant, in accordance with art. 1054, C.C. (Que.), is ill founded. The defendant has all the responsibilities of this article of the Code; it assumed them all by making this road its own

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property, one of the essential parts of its business premises. From the moment that it puts this road at the disposal of its carriers it must keep it in such a state as not to cause such an accident as that which happened. It is a tool, it is a machine which it entrusts to its workmen and it is liable for the bad state of such thing, even if the workman should know of the bad state. The liability of the company is that of a good father of a family, which should protect its servants against dangers. If it cannot make it a road fit for vehicles it must, at least, keep it free from holes and ruts, which good ordinary repair would remove.

Judgment: Considering that the defendant company operates forest limits behind Stoneham, and that the road which leads to the said property is known under the old name of the Lake St. John Road; that the said road is the only way of communication to go through the said forest, both for the lumbermen of the company and for the carriers or waggon drivers who carry supplies to the camps in the company's limits; that the road in question does not appear to serve as a way of communication for others than the defendant company and a man named Dansereau, who himself also cuts wood in that part of the country; that the said road is under the surveillance, jurisdiction and authority of the said company; that it alone keeps the said road in repair or has kept it in repair or has been at the cost of keeping it in repair; that the said road is not a public road or a municipal road, in a legal sense, but may be likened to a road of tolerance in a municipal matter, open and kept in repair on account and for the benefit of a particular person, who, in such case, is liable for damages resulting from the bad state of such road; that the defendant company is liable for damages resulting from accidents happening to its employees or to those whom it invites or employs to traverse the said road for its benefit and advantage, and particularly for the operation of its timber limits; that the road in question, at the place where the plaintiff's horse broke its foot which necessitated it being destroyed, was, at the time of the said accident, in a bad state of repair; that the accident and the *quantum* of damages proved are not denied by the witnesses for the defendant nor by the latter in its factum; that the defendant has not proved the agreement alleged in its defence that the plaintiff undertook the carriage on the said road at his own risk and peril; that the

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plaintiff has established the essential allegations of his action and that the said action, instead of being dismissed, should have been maintained as to amount, interest and costs; that there was error in the said judgment appealed from.

For these reasons the Court sets aside the said judgment, and proceeding to pronounce the judgment which should have been given in the Court of first instance, maintains the said action and orders the defendant to pay to the plaintiff the sum of $238, with interest from the issue of the writ, and the costs both in the Court of first instance and those incurred in review.

Appeal allowed.

HAWKS v. HAWKS.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. October 5, 1920.

HUSBAND AND WIFE (§ II G—100)—TITLE TO PROPERTY—BOUGHT AND PAID FOR BY HUSBAND—HELD IN WIFE'S NAME—TRUSTEE—MUTUAL RIGHTS.

Property bought and paid for by the husband even though held in the wife's name belongs to the husband failing an agreement between them to the contrary.

The doctrine of common law that what belongs to the husband belongs to the wife cannot be upheld.

[See Annotation, Property Rights between Husband and Wife, 13 D.L.R. 824.]

APPEAL by defendant from the judgment of Morrison, J., in an action by a wife to establish her right to certain lands registered in her name but bought and paid for with the husband's money. Reversed. Statement.

D. Donaghy, for appellant; *G. H. Dorrell*, for respondent.

MACDONALD, C.J.A.:—I do not find it necessary to decide the question raised by the appellant as to the jurisdiction of the Court below to entertain this action, because in my opinion, assuming such jurisdiction the appellant must succeed. Macdonald, C.J.A.

The respondent has completely failed to make out her cause of action. The trial Judge has given no reasons for his conclusion, but since my opinion is founded on respondent's own evidence, the question of demeanour does not come into the case. It is not even necessary to express an opinion as to the extent of respondent's own interest, if any, in the lands referred to in the pleadings. She does not claim them as her own in fact but bases her claim

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on the doctrine of the common law that husband and wife are one, and she contends that what is her husband's is hers. In my opinion she could succeed, if at all, only upon shewing that the husband is a bare trustee for her of the title deeds in dispute and this she has entirely failed to do.

MARTIN, J.A., would allow the appeal.

GALLIHER, J.A.:—In the view I take of the evidence I do not find it necessary to deal with the point of law raised. Even on the plaintiff's own testimony she fails to make out a case.

Her view seems to be that because she was defendant's wife, any property acquired belonged to her as much as to him. She sets up no agreement between them by which property put in her name was to belong to her.

The husband explains the reason why this method was pursued, and while this devious way of acquiring property from the Crown for himself may be a matter of comment, we are not very much concerned with that here.

This fact stands out clear and uncontradicted that the husband acquired all this property, carried through the transactions, paid all moneys out of his own funds for obtaining the property and for improvements thereon and all taxes on the property up to 1915. None of the plaintiff's money went into this, in fact she had none except what was given her from time to time or what she was permitted to take out of her husband's business. It is true she paid some $978.36 taxes on the parcels held in her name in 1919, and a letter from the husband was written her notifying her of these taxes and that if she did not pay them they would be liable to an additional impost of 10% on other taxes (Ex. 2), also stating that if she needed his assistance in paying them it would be necessary to make business arrangements at once.

The defendant explains this letter by saying that he was trying to bring pressure upon her to deed to him these properties which she was refusing to do and which by verbal agreement she had undertaken to hold in trust for him. The plaintiff denies this verbal trust, but I think the facts are against her being considered the real owner. It is true she went out on the property to fulfil settlement duties but that would be quite natural for a wife to do, besides, in all property her husband might acquire in that way, she would be bettering her own condition to the extent of her dower interest in the property acquired.

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McPhillips, J.A.

The trial Judge has given no reasons, but with every respect, I am unable, upon the evidence, to see upon what principle she can claim to be the owner of these lands or to have the title deeds delivered over to her.

I would allow the appeal.

McPHILLIPS, J.A. (dissenting):—I am of the opinion that the judgment of the trial Judge should be affirmed. The subject matter of the action is the right to the possession of certain Crown Grants, the respondent, the wife of the appellant, being the grantee therein. The contention of the appellant is, that he is really the owner of the lands, *i.e.*, that there is a resultant trust in the lands and that he is entitled to the possession of the Crown Grants as against the respondent. Unquestionably *primâ facie* the respondent being the grantee possession should follow the title. It is contended that the subject matter of the action is one in relation to *immovables* and the lands being in the Province of Ontario, there is no jurisdiction in the Courts of British Columbia to pass upon the question as to who is entitled to the possession of the Crown Grants as it will involve the determination of title in the lands. The action, in my opinion, is one of *detinue* (27 Hals., par. 1566, page 888), and does not involve the determination of title. Admittedly, the respondent has the legal estate in the lands and this gives her the right to the possession of the title deeds, *i.e.*, the Crown Grants (see Tindal, C.J., *Barclay* v. *Collett* (1838), 4 Bing. (N.C.) 658 at 668, 132 E.R. 942). This is not an action to recover land situate in the Province of Ontario and no obstacle would appear to me to be in the way of deciding merely the possessory title to the deeds; the appellant is attempting to set up what may be a matter which is solely for the determination of the Courts of the Province of Ontario—the *forum rei sitæ*—(Dicey on Conflict of Laws, 2nd ed., at 357, 358), *i.e.*, involving the determination of the title to the foreign immovables. Here there is the absolute title to sue and the relief accorded to the respondent does not in any way involve the determination of any trust or outstanding equity in the lands that the appellant may have. I look upon the action in the present case as a personal action and transitory, the defendant is in this jurisdiction and this fact gives jurisdiction (see Lord Herschell, L.C., in *British South Africa Co.* v. *Companhia De Mocambique*, [1893] A.C. 602 at 623. "It has been already stated that by the common law personal actions

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being transitory may be brought in any place where the party defendant can be found.")

The present action is not one that involved the assessment of any damages for trespass to land situate abroad. It involved only the determination of the right to the custody of the title deeds. I would refer to what Wright, J., at 366, said in *Companhia De Mocambique* v. *British South Africa Co.*, [1892] 2 Q.B. 358 (the decision of Lawrance and Wright, JJ., being restored in the House of Lords, [1893] A.C. 602):—

> It does not, in any way, involve a denial of jurisdiction to give relief *in personam* or against property in this country in any case where title to the foreign land is not directly involved or can be proved as a fact by the judgment of a competent Court in the foreign country.

The action, as brought by the respondent, may be also supported on the ground of the relief claimed and the remedy being strictly *in personam* and the judgment under appeal did not decide the title to foreign immovable property. (See *Re Clinton; Clinton* v. *Clinton* (1903), 88 L. T. 17, 19 T.L.R. 181, Joyce, J., at p. 19). The most recent pronouncement upon the question of the exercise of jurisdiction—in any way—relating to foreign lands is that of Viscount Finlay in the House of Lords in *Brown* v. *Gregson*, [1920] A.C. 860 at 875:—

> It is quite true that the Courts in Scotland or in England may, with regard to persons within their jurisdiction, make orders in certain cases with reference to land in a foreign country. A contract with regard to land bought may be enforced here *in personam* so long as it is not contrary to the *lex situs* which, with regard to real property, must be the governing law.

In passing, it is a matter for remark that the case the respondent sets up discloses illegal conduct upon his part, the illegal acquirement of lands as against the *lex situs*, *i.e.*, the attempted acquirement of the lands by and through his wife, the respondent, he having exhausted his right of acquirement of further lands under the existent land laws. It is conceivable that the appellant is not anxious to resort to the Courts of the *lex situs* but in this jurisdiction attempts to withhold title deeds to which he has no right—the alleged colour of right as set up to the title deeds having the insecure and ineffectual foundation of an illegal transaction (see *Farmers' Mart Limited* v. *Milne*, [1915] A.C. 106, *per* Lord Dunedin, at 111). I am clearly of the opinion that the trial Judge arrived at the right conclusion and that there was jurisdiction to adjudge that the appellant should deliver up the title deeds to the respondent and I would dismiss the appeal.

Appeal allowed.

Re TORONTO R. Co. and CITY of TORONTO.

ONT.

S. C.

Ontario Supreme Court, Orde, J. October 22, 1920.

MOTIONS AND ORDERS (§ I—1)—MOTION FOR DECLARATORY ORDER AS TO INTERPRETATION OF CONTRACT — PRACTICE — RULE 604 — WHEN GRANTED.

A motion for a declaratory order of the Court under Rule 604 is not justified when there is no right of the applicant either invaded or threatened or requiring some immediate remedy or relief.

APPLICATION for an order determining and declaring the true interpretation of a certain contract. Statement.

E. D. Armour, K.C., and *William Laidlaw*, K.C., for the Toronto Railway Company.

G. R. Geary, K.C., for the Corporation of the City of Toronto.

R. S. Cassels, K.C., for the trustees for the holders of bonds of the railway company.

R. B. Henderson, for G. L. Smith, a bondholder.

ORDE, J.:—This is a motion to interpret those provisions of the contract between the Corporation of the City of Toronto and the original purchasers of the railway (whose rights and obligations are now vested in and borne by the Toronto Railway Company) which relate to the payments for mileage and for percentage upon gross receipts, in so far as they affect the priority of the city corporation as against the bondholders. There is no present issue between the city corporation and the bondholders, and there is no question as to the railway company's obligation to discharge its liabilities to both the city corporation and the bondholders. Notwithstanding that the question of priority has not been raised either by the city corporation or by the bondholders, the railway company claims to be entitled to submit the question of priority to the Court, under Rule 604. Orde, J.

Rule 604 provides that "where the rights of any person depend upon the construction of any deed, will or other instrument, he may apply by originating notice, upon notice to all persons concerned, to have his rights declared and determined."

The notice of motion sets out several questions which the Court is asked to decide, but each involves the question of priority as between the city corporation and the bondholders. Counsel for the city corporation and for the bondholders disclaim any desire at the present moment to have this question

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decided; and, so far as I can see, they are the only parties interested in its determination. It is true, of course, that the railway company, as the debtor, has to some extent an interest in that question, but I do not think the Rule was intended to apply to such a case as this. What the Rule does provide for is the submission of the question of construction, in order that the rights of the person making the application (not those of some other person) may be declared and determined. I am at a loss to see what "rights" of the Toronto Railway Company are in any way affected by the question of priority. If there are any such, they can only arise in some remote and incidental way, and the questions which are here submitted to the Court involve in the most direct and vital manner the rights of the city corporation and of the bondholders as between themselves, which they express no desire to have determined. If any rights of the railway company are involved at all, they must merely be incidental to the larger question. I do not think that Rule 604 was intended for any such purpose as that proposed here.

There was a good deal of argument as to the Court's power to make a declaratory order, upon a motion of this sort. I do not think it is necessary to go into that question at all. I decide the motion upon the simple ground that there is no right of the railway company either invaded or threatened or requiring some immediate remedy or relief, which justifies any such motion as this. The result would be the same if the matter had been the subject of an action.

The motion will be dismissed with costs.

Motion dismissed.

CAN.
EX. C.

ANDERSON v. THE KING.

Exchequer Court of Canada, Audette, J. June 15, 1920.

RAILWAYS (§ III B—50)—ACCIDENT AT CROSSING—BREACH OF STATUTORY DUTY—RESPONSIBILITY—RES IPSA LOQUITUR.

Although there may be no witness to an accident at a railway crossing, the Court may, in view of the circumstances related in evidence, consider the probabilities and draw the necessary inferences that the deceased met his death in such a way; and it being shewn that the neglect of the engine crew to perform their statutory duties was the proximate cause of the accident, the railway company will be held responsible for damages due.

[See Annotation, Negligence or Wilful Act or Omission, 35 D.L.R. 481.]

PETITION of right to recover the sum of $10,000 damages alleged to have been suffered by reason of the premature death of petitioner's husband by being struck by a shunting engine of the Intercolonial Railway, and killed at a railway crossing.

J. Friel, K.C., for suppliant; *R. Trites*, for respondent.

AUDETTE, J.:—The suppliant, by her petition of right, seeks, both for herself and on behalf of her two minor children, to recover the sum of $10,000 damages, alleged to arise out of the death of her husband, the result of an accident on the Intercolonial Railway.

At about 5.30 p.m., on the night of October 31, 1918, Anderson went over to the freight shed office, at Sackville, to see Harris, an old friend, a witness heard in the case, with the object of finding out what was the best time to go to Moncton to get in touch with one of the railway engineers, as related at trial by Harris. He remained at the latter's office for 15 to 20 minutes, and when leaving Harris accompanied him out in the alleyway, and afterwards saw him pick up, inside the building, an umbrella and a small parcel of 8 or 9 inches long by 5 inches in diameter.

This is the last ever heard of Anderson until he is found dead on the crossing within comparatively a short time after leaving the freight shed building.

A few minutes after Anderson's departure Harris was standing in the clerk's office, in the freight shed building, looking out of the window, and saw a locomotive passing from the direction of the station to the freight shed crossing—the location of which is shewn on plan, Ex. 1, filed herein.

Now, from all accounts, this was a shunting engine doing work in the railway yard, at Sackville—extending east and west of the station. It is in evidence that before the engine went over the crossing, fireman Carter had tried to light, with six matches, he says, the headlight of the locomotive, and having failed to do so, the engineer had decided to back over the crossing in question to some place of shelter to light. It was a very stormy night, blowing and raining heavily. The wind was blowing quite hard. However, no attempts were made to light the side or tail lights, at the rear end, on both sides of the tender.

While the locomotive was thus moving reversely, brakeman Keswick was on the step at the western side of the far end of the tender, facing Lorne St. He was holding on with one hand, and

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had a lamp in the other, which he moved for a while, and was unable to tell us with what hand he was holding; however, he says he did not signal all the time, because his hand could not stand it. And on this point, Engineer Ison says Keswick signalled within a few feet of the crossing, but not at the crossing.

Brakeman Hicks who was at the rear, on the pilot of the locomotive, with a lamp in his hand, when at the crossing or thereabout, felt the pilot scraping over something. He was then facing Lorne St., and turning around saw something which, on jumping off and going back, he ascertained to be an umbrella, with two ribs sticking out, and close by it was the body of Anderson lying—one leg and one arm on one side of the rail and the body between the two rails—at about 4 feet from the crossing, as if the engine had struck him at the crossing and had dragged him that distance. He then advised the crew of the locomotive of the accident.

Some of the witnesses testify the bell was ringing, and engineer Ison says he blew the whistle before starting, and being inside of 60 rods of the two crossings contends one whistle was sufficient. However, brakeman Hicks says he does not know that they whistled before the crossing.

The accident happened somewhere around ten minutes to six o'clock in the evening, on a very stormy night, the wind blowing very hard and with heavy rain. Under the evidence which is somewhat conflicting on the subject, it must be found it was also quite dark at the time of the accident, as testified to by witness Hicks.

There was no witness of the accident, but it was taken for granted by the witnesses who spoke upon the subject, that Anderson had been killed at the crossing, by the locomotive.—*Res ipsa loquitur.*—Considering the balance of probabilities and drawing the necessary inference from the circumstances related in the evidence, the Court must come to the conclusion that the deceased was so killed at the crossing by the locomotive in question.

Now, the locomotive, which was travelling at a low rate of speed, at the time of the accident, was travelling without her headlight and her two side lights or tail lights at the rear—the tail lights being missing entirely, and with proof establishing that no attempt had even been made, that night, to light them before going over the crossing.

The Rules and Regulations in force at the time of the accident, respecting trains on the Canadian Government Railways, approved by the Governor-in-Council, were filed as Ex. "A" herein.

At p. 7 of the booklet containing these rules we find that the definition of a train covers the case of an engine without cars—and under R. 9, that night signals are to be displayed from sunset to sunrise. That, under R. 17, a headlight must be displayed at the front of every train by night. And, under R. 18, that yard engines (as in the present case), *must display the headlight to the front and rear by night;* and that when not provided with a headlight at the rear, two white lights must be displayed, and that yard engines will not display markers. And under conditions not requiring display of markers, *road engines* without cars will display a white light on the rear of the tender by night.

Then, under R. 102, whenever an engine is moving reversely in any city, town or village, *a man must take a position on the tender to warn persons* standing on or crossing the track of the railway of the approach of such train or engine.

These rules and regulations which are made under the provisions of sec. 49 of the Government Railway Act, R.S.C. 1906, ch. 36, have, under sec. 54 thereof, the same force and effect as if made by the statute itself, since it is there said that they shall be taken and read as part of the Act.

In starting to travel over the crossing without his headlight and tail lights, the engineer became guilty of a breach of R. 9, 17 and 18.

There can be no doubt that there is good reason to assume that if the strong headlight had been lighted, the glare of that light could have been seen by the deceased; but it is obvious the accident would not have happened if the engine had had proper tail lights burning when they went over the crossing. Being a yard engine, the locomotive should have displayed a rear light by night, when not provided with a headlight at the rear, two white lights should have been displayed, as required by R. 18.

There was no attempt made to light the tail lights—the most important lights under the circumstances. These side lamps, with which the locomotive was provided, could, as testified to, have been taken out of their sockets, and very likely lighted in the cab of the locomotive or in the shelter of the locomotive.

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One brakeman with a lamp was placed on the side step of the tender facing Lorne St. No one was on the corresponding side step, on the side next to the freight shed, upon which side Anderson was travelling.

Under R. 106, in all cases of doubt, or uncertainty—the safe course must be taken and no risks run. Obviously, the crew of the locomotive assumed a great and unnecessary risk in travelling without lights. They should have placed the other brakeman on the other side of the tender with a lamp in hand. In that position, he would either have been seen by the deceased before taking the crossing, or the brakeman himself would have seen Anderson and warned him and thereby, in both hypotheses, the accident would have been avoided.

If the hearing of the deceased was not the very best, we are told his eyesight was good. And if the wind was blowing with such violence, and the rain falling so heavily on that occasion, is it unreasonable to assume that a person of ordinary hearing could very well not hear a locomotive travelling at the slow speed of 4 to 5 miles an hour? Had the lights been on, they would very likely have been seen.

Therefore, I find that the crew was, under the circumstances, guilty of a breach of their statutory duties as above defined and set forth.

On the question of *quantum*, the evidence is conspicuously meagre. We have evidence shewing that Anderson was 78 years old, that he retired 29 years ago. He had a nice home of about 3 acres with buildings, valued at about $2,500. He kept five cows and two horses, and had 48 acres of marsh land, and $500 of stock in a paper box company; but there is no evidence as to his yearly revenue or income. However, his services were not without real value. He attended to the chores, administered his home and lands, and he attended to his garden, and made all carpenter's, plumber's and painter's repairs to his home.

All of his estate has passed to his wife and children at his death. By the accelerated enjoyment of the estate by the suppliant and her children, it is a question whether this share in the expenses of the deceased is not made up by his work, management and services generally. It would, however, be improper for the purpose of ascertaining the pecuniary loss to treat the widow and the children as benefiting by Anderson's premature death.

Under some of the tables of mortality, the expectation of life, at the age of 78, is between 5 and 7 years.

Now in assessing damages in a case of this kind, while it is obviously impossible to arrive at any sum with mathematical accuracy, several elements must be taken into consideration and one must strive to compensate for the loss, to make good the pecuniary benefit which might reasonably have been expected had the accident not taken place. In doing so one must necessarily take into account the age of the deceased at the time of the accident, his state of health, his expectation of life, his income, not overlooking on the other hand the several contingencies to which every person is subjected, such as being subject to illness, involving expense and care. All of these circumstances must be taken into account.

It is alleged by the statement in defence the Crown tendered $1,500 without admitting liability. However, the suppliant did not reply to that allegation, and under R. 114 that allegation is deemed denied and put in issue. No evidence was offered upon this point. This fact is mentioned because it is with great hesitation I have come to the conclusion that $1,500 was not a reasonable offer under the circumstances. However, taking all the circumstances into consideration, I hereby fix the compensation at the sum of $2,000.

There will be judgment declaring that the suppliant and her children are entitled to recover from the respondent the sum of $2,000 and costs. *Judgment accordingly.*

SUFFIELD v. KENNEDY.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron and Fullerton, JJ.A. October 26, 1920.

PARTNERSHIP (§ VII—30)—ACTION—STYLE OF CAUSE—DEFAULT JUDGMENT—STATEMENT OF CLAIM NOT SERVED ON ONE PARTNER—JUDGMENT VOIDABLE—DELAY—ACQUIESCENCE.

If the defendants are sued as "A.B.C. & Co., carrying on business under the firm name and style of A. & Co.," the action is against the partners individually, and a judgment "against the said defendants" is against the said individuals.

A default judgment entered against a defendant who was not served with the statement of claim is not void but voidable, but if the defendant, knowing of the same, allows it to stand a long time without attacking it, the Court may, on the grounds of acquiescence, refuse to open it up.

MAN.

C. A.

SUFFIELD v. KENNEDY.

Perdue, C.J.M.

APPEAL by plaintiff from a judgment of Curran, J., vacating a judgment. Reversed.

C. H. Locke, for appellant; *W. R. Mulock*, K.C., for respondent Brown.

PERDUE, C.J.M.:—This action was brought in March, 1914, to recover the amount due on a dishonoured cheque for $1,000 made by J. H. M. Kennedy & Co. In the statement of claim the defendants are named as follows: "John H. M. Kennedy, Daniel Brown and Arthur O. Myers, carrying on business under the firm name and style of J. H. M. Kennedy & Company." The statement of claim was served upon the defendant Kennedy on March 16, 1914, but does not appear to have been served upon either Brown or Myers. On April, 6, 1914, judgment in default of a statement of defence was entered against the defendants as named in the statement of claim.

It is provided by King's Bench Rule 283 that where partners are sued in the name of their firm, the statement of claim shall be served either upon any one or more of the partners, or at the principal place of business of the partnership. It is clear that this rule would not apply in the present case because the alleged partners are not sued in the name of the firm. Partners may still be sued individually, as under the former practice, if the plaintiff so desires (see Holmsted's Ontario Judicature Act, 4th ed., p. 488). But in such case the defendants should each be served with the statement of claim.

About 6 months after the judgment was signed, Brown, who was conveying a piece of land to a purchaser, found that the judgment had been registered in the land titles office. In order to free his title he paid the plaintiff $55.75 for a release of the judgment in so far as it affected the piece of land he was selling. Brown made the payment on the understanding that he admitted no liability on the judgment and the plaintiff received the payment on that understanding.

The defendant Brown appears to have done nothing further in regard to the judgment until December, 1919, when he made a motion to the Referee in Chambers to vacate the judgment as against him and to set aside a writ of *fieri facias de bonis* which the plaintiff had issued against him in August, 1919, under which the sheriff made a seizure of his goods. The Referee dismissed

the motion on the ground of laches and acquiescence on the part of the defendant. On appeal, Curran, J., reversed the Referee and ordered that the judgment be vacated and set aside in so far as it affects the defendant Brown.

Under the old practice, if the plaintiff proceeded in the action as if personal service had been effected without serving the defendant, the proceedings might be set aside. They would not, however, have been null but only irregular and an application to set them aside would have to be taken within the time for moving against an irregularity. Archbold's Queen's Bench Practice, 12th ed., 211, citing *Holmes* v. *Russell* (1841), 9 Dowl. 487; *Sheehy* v. *Professional Life Ass'ce Co.* (1853), 13 C.B. 787, 138 E.R. 1411. In *Holmes* v. *Russell*, Coleridge, J., giving the judgment of the Court of King's Bench held that non-service of the writ of summons rendered the judgment irregular but not a nullity and that a delay from February 15 to the third day of the following term operated as a waiver of the irregularity.

The present practice as to the effect of non-compliance with the rules is stated in the King's Bench Rules 363-364. By Rule 363:—

> Non-compliance with any of these rules shall not render any proceeding in any action or matter void, unless the Court or a Judge so directs; but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with, in such manner and upon such terms as the Court or Judge thinks fit.

By Rule 364:—

> No application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity.

The respondent, Brown, however, relies on Rule 621, which is as follows:—

> 621. In no case shall any judgment be signed in an action until a statement of claim has been duly issued and served therein, and the time allowed by rule 182 or rule 183 for filing a statement of defence, has expired. A judgment signed in contravention of this rule and all proceedings thereupon or thereunder shall be void, but a Judge shall, nevertheless, set aside the same upon application in Chambers.

This rule, which is not found in the English or Ontario Act, is in our Act grouped with the rules forbidding confessions of judgment and other means theretofore existing by which a defendant facilitated judgment against himself in a suit brought by a favoured creditor. Rule 621 was framed to put a stop to that

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practice. The expression "until a statement of claim has been duly issued and served therein," means the issuing and serving of a statement of claim in accordance with the rules provided for the taking of such proceedings. The words, "and the time allowed by rule 182 or rule 183 for filing a statement of defence has expired," means that the judgment shall not be signed too soon through the connivance of the defendant. The latter part of Rule 621 must be read in conjunction with Rules 362-364. The word "void" must therefore be construed with reference to the provisions of Rule 363 as "voidable," and the application to set aside the judgment must be made within a reasonable time under Rule 364.

In *Reynolds* v. *Coleman* (1887), 36 Ch. D. 453, the defendant moved to set aside a judgment against him, on the ground that the order allowing service of the writ upon him in America had been improperly obtained, and on the further ground that the Court had not jurisdiction to make it. There had been a delay of a little over a year in making the motion. It was held, both by Kay, J., and the Court of Appeal, that the defendant was too late in bringing the motion. I would also refer to the case of *McLean* v. *Smith* (1883), 10 P.R. (Ont.) 145, mentioned by the Referee.

In the present case the defendant after becoming fully aware of the existence of the judgment against him waited for over 5 years before moving to set it aside. In the meantime the defendant Kennedy has died and the defendant Myers is not available to give evidence as to the existence of the partnership. From the affidavits filed I am by no means satisfied that Brown has shewn that he was not a partner. There are many circumstances that tend to shew that he had allowed himself to be held out as a partner. He was much involved in the firm's transactions. He appears to have been generally regarded as a partner. He was sued as a partner in at least one other action in which he, Kennedy and Myers, through their solicitors, paid money into Court in satisfaction of the claim. He has allowed the judgment in the present case to remain in force against him unimpeached until by lapse of time and the disappearance of necessary evidence to shew his connection with the firm, the plaintiff's position in respect to that issue has been greatly impaired.

MAN.

C. A.

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Perdue, C.J.M.

On the ground of delay and acquiescence I think the judgment should not now be opened up. I would allow the appeal, set aside the order appealed from and restore the Referee's order. The defendant Brown will be ordered to pay the costs of this appeal, of the motion to the Referee and the appeal therefrom to Curran, J.

Cameron, J.A.

CAMERON, J.A., concurred with Perdue, C.J.M.

Fullerton, J.A.

FULLERTON, J.A. (dissenting)—The statement of claim in this action, which was issued on March 7, 1914, described the defendants as "John H. M. Kennedy, Daniel Brown and Arthur O. Myers, carrying on business under the firm name and style of J.H.M. Kennedy & Co." The plaintiff served only Kennedy. On April 6, 1914, judgment was entered as follows: "It is this day adjudged that the plaintiff recover against the said defendants $1,030.00 and $24.95 costs taxes." Notice of motion dated December 19, 1919, was given on behalf of the defendant Brown to vacate and set aside the judgment on the ground that he had not been served with the statement of claim. The Referee dismissed the application. On appeal, Curran, J., set aside the order of the Referee and opened up the judgment.

Rule 283 of the King's Bench Rules provides as follows:—

> Where partners are sued in the name of their firm, the statement of claim shall be served either upon any one or more of the partners or, at the principal place within Manitoba of the business of the partnership, upon any person having at the time of service the control or management of the partnership business there; and, subject to the rules hereinafter contained, such service shall be deemed good service upon the firm.

No doubt the judgment in this case was entered on the strength of this rule. While I know that it has been the practice in suing a firm to describe the defendant as ". . . and . . . carrying on business under the firm name and style of . . .," I cannot see how it can be justified by the Rules of the Court of King's Bench. The rule says: "Where partners are sued *in the name of their firm.*"

In Chitty's King's Bench Forms, 14th ed., p. 607, under the heading "Actions by and against Firms," I find the following:—

> Writ of Summons. Same as usual, describing the plaintiff or defendant partners by the name of their firm; *e.g.*, as "A.B. and Co.," or "C.D. and Son." If the defendants be described as "A.B. and C.D., trading as A.C. & Co.," the action will be, not against the firm, but against the individual partners.

MAN.

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Fullerton, J.A.

I think the action in this case was against the individual partners and the judgment as entered "against the said defendants" is clearly against the individual partners.

No service of the statement of claim having been made on Brown, the judgment entered against him was clearly irregular if not entirely void.

If irregular only, Brown cannot succeed. He knew of the judgment shortly after it was entered and allowed nearly 6 years to elapse before applying to open it up. In the meantime Kennedy has died, the whereabouts of Myers doubtful and the books and documents of the firm probably not obtainable.

The contention is that the judgment is absolutely void. Rule 621 of the King's Bench Rules provides: [See judgment of Perdue, C.J.M., *ante* p. 277.] Does the word "void" as used in this rule really mean void or only voidable?

Rule 363 provides that "non-compliance with any of these rules shall not render any proceeding in any action or matter void, unless the Court or a Judge so directs . . ."

Hence we have a general rule saying that non-compliance with any of the rules shall not render a proceeding void and a specific rule saying that a judgment entered in default of service shall be void.

In *Smurthwaite* v. *Hannay*, [1894] A.C. 494, at p. 501, Lord Herschell said:—

> I cannot accede to the argument urged by the respondents, that even if the joinder of the plaintiffs in one action was not warranted by the rules relied on, this was a mere irregularity of which the plaintiffs, by virtue of Order LXX [the non-compliance rule] could not now take advantage. If unwarranted by any enactment or rule, it is, in my opinion, much more than an irregularity.

The entry of the judgment in this case was clearly forbidden by Rule 621, and I think the word "void" as used in that rule means void in the sense of being without any legal force or effect.

If I am correct in this view, the delay of the defendant in making his application would not be a bar to his success.

I would dismiss the appeal. *Appeal allowed.*

ONT.

S. C.

Re TREMBLAY.

Ontario Supreme Court, Orde, J. October 22, 1920.

WILLS (§ III A—75)—CONSTRUCTION OF BEQUEST TO PARENTS—CHILDREN SUBJECTS OF GIFT—AGGREGATE GIFT—LEGATEES MUST ACCEPT OR REJECT BOTH.

When, according to the construction of a will, legatees take both a beneficial and onerous legacy under the same, the two are intended to form an aggregate gift, and both must be accepted or rejected.

[See Annotations, 8 D.L.R. 96, 31 D.L.R. 390.]

Statement.

MOTION by the administrators with the will annexed of an estate, for an order determining certain questions as to the meaning and effect of the will of the deceased.

J. P. Labelle, for the administrators with the will annexed.

A. C. T. Lewis, for the Official Guardian.

Orde, J.

ORDE, J.:—This is a motion by the Capital Trust Corporation, the administrators with the will annexed of the estate of the late Albert Tremblay. Although Vanance Tremblay and Emma Tremblay, the father and mother of the deceased, were served with notice, they were not represented on the motion, but counsel for the administrators presented their case as fully as if they had appeared by counsel.

The original will is written in French. The English translation of it in the letters of administration with the will annexed is as follows:—

"I the undersigned being about to die desire and order that all will made previous to this day be annulled by the present will and I bequeath all the property I am possessed of or all interests that may come be bequeathed to my father Vanance Tremblay and my mother Emma Tremblay, my children and all that I possess or is due to me and I make this will being sound of mind and before the witnesses who have signed their names."

A copy of the will in French was also before me, and I am satisfied that the translation in the letters of administration is correct.

The difficulty arises over the mention of the children. The Official Guardian contends that the gift is to the father and mother in trust for the children, as if the word "for" had preceded the words "my children," or, failing that construction, that the children are entitled to share with the father and mother of the testator, as if the word "and" had preceded the words "my children."

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The testator died on the 23rd May, 1920, leaving three infant children (one of whom has since died) and his father and mother. It is contended on behalf of the father and mother that upon the true construction of the will the children are not the objects of any gift, but the subjects of it, and that the testator gave his whole estate together with his children to his parents. After giving the matter much thought, I am of the opinion that this is the right construction. I can see no reason for inserting the word "for" or the word "and." The gift to the father and mother is complete, and the word "and" before the words "my mother" preclude the theory that the word "and" was omitted before the words "my children." In addition to this, there is the fact that the words "my children" are coupled with the words which follow. What I think is plain is that the testator, after giving his whole estate to his father and mother, desired to make it clear what they were to get, and accordingly added the words "my children and all that I possess or is due to me." I hold, therefore, that the gift is in favour of Vanance Tremblay and Emma Tremblay, alone, and that the infant children are not direct objects of the testator's bounty.

There is an aspect of the matter which was not argued before me, but which cannot be overlooked. As a general rule, a guardian is under no obligation to expend his own money upon the maintenance of his ward: Halsbury's Laws of England, vol. 1, p. 130. But under ordinary circumstances the acceptance of the office of guardian would, either by arrangement or otherwise, involve some obligation to maintain and educate the infants. It is not conceivable that the testator could have intended that his parents would accept the gift of his whole estate and at the same time cut his children adrift. The gift of his children to their grandparents is of course in effect an appointment of the grandparents as guardians of their persons, carrying with it the custody and control of the children. It is a well-established principle, under the equitable doctrine of election, that when a legatee takes under the same will a beneficial legacy and an onerous legacy, and the two are intended to form an aggregate gift, he must accept or reject both: Halsbury, vol. 13, p. 117,

note (*m*); *Talbot* v. *Radnor* (1834), 3 My. & K. 252, 40 E.R. 96; *In re Hotchkys* (1886), 32 Ch. D. 408. Here the gift of the children and the gift of the estate to the parents of the testator are intended to form one aggregate gift. I do not know that this principle has ever been applied to a case like the present, but I can see no reason why it should not apply. It is most equitable and just that it should, and to apply it must be in accord with the testator's intention, though not expressed in the will. I hold, therefore, that the beneficiaries cannot accept the gift of the estate without at the same time accepting the guardianship and custody of the children with the accompanying obligation of maintaining and educating them, and that, in declaring that Vanance Tremblay and Emma Tremblay are entitled to the whole estate of the testator, the order shall likewise declare that they take the estate subject to the obligation of maintaining and educating the two surviving infant children of the testator during infancy.

The costs of the application, including those of the Official Guardian, are to be paid out of the estate, those of the administrators as between solicitor and client.

Judgment accordingly.

McDONALD v. MONTREAL TRAMWAYS Co. and the latter in warranty v. BEAUREGARD, defendant in warranty.

Quebec Court of Review, Demers, Panneton, and de Lorimier, JJ. February 28, 1920.

WARRANTY (§ I—1)—BRAWL IN STREET CAR—DAMAGES PAID BY COMPANY—SUIT BY COMPANY AGAINST BRAWLERS—INDEMNITY.

When a street railway company is ordered to pay damages to one of its passengers for injuries received in one of its cars during a brawl, it may maintain an action in warranty jointly and severally against those engaged in such quarrel.

[*Sneesby* v. *The Lancashire and Yorkshire R. Co.* (1875), 1 Q.B.D. 42; *Victorian Ry. Commissioners* v. *Coultas* (1888), 13 App. Cas. 222, referred to.]

Statement.

APPEAL by defendants in warranty from the judgment of the Superior Court of Quebec, in an action in warranty to recover the amount which the plaintiff was ordered to pay as the result of a brawl on one of its cars. Affirmed.

The judgment of the Superior Court, which is affirmed, was delivered by Greenshields, J., on June 20, 1919.

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In the principal action in this case the company, plaintiff in warranty, was ordered to pay to the principal plaintiff the sum of $1,000, damages caused by the fault of one of its conductors, by the judgment of the Superior Court, sitting with a jury, on June 29, 1917, the judgment being affirmed by the Court of Appeal (1918), 27 Que. K.B. 566.

The facts in the case, the judgment and the notes of judgment will be found in the report of the case.

Subsequently, the company brought an action in warranty against the persons who took part in the brawl in the car, and who were the cause of the panic as well as the damages sustained by the principal plaintiff, for which the plaintiff in warranty (the company) was ordered to pay.

The defendants in warranty Nöel Beauregard and E. Beauregard, plead that they were insulted and attacked in the car by the other defendant Coutu and that they acted in self-defence.

The defendant in warranty Coutu refutes the charge of the Beauregards, and adds that at the moment when the wife of the principal plaintiff was struck he had gone out of the car.

The Superior Court maintained the action in warranty for the following reasons:—

Considering the initial and determining cause of the injuries to the wife of the principal plaintiff, and for which she obtained a condemnation against the plaintiff in warranty, was the illegal act of the defendants in warranty, and the defendants in warranty are liable for the consequences thereof, and are bound and obliged as joint *tort feasors*, jointly and severally, to indemnify and hold harmless the plaintiff in warranty against the condemnation which intervened against it; that although the action is taken as an action in warranty, it is in reality an action in indemnity; doth dismiss the plea of the defendant in warranty, Coutu, with costs; doth dismiss the plea of the defendant in warranty, Noel Beauregard, with costs; doth dismiss the plea of the defendant in warranty, E. Beauregard, with costs; doth maintain the action of the plaintiff in warranty, and doth condemn the defendants in warranty, jointly and severally, to pay to the plaintiff in warranty the sum of $1,000, with interest and costs.

Perron, Taschereau and *Rinfret, Vallee* and *Genest*, for plaintiff.

L. C. Meunier, for defendants.

de Lorimier, J.

DE LORIMIER, J.:—It was proved by the evidence that the defendants fought like madmen in the car, that they broke the glass in the windows and that blood flowed; that the wife of the plaintiff got up to leave the car and that she was close to the rear door of the car and that the conductor of the plaintiff in warranty,

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being unnerved, making his way to the side of the combatants, in passing close to the wife of the plaintiff pushed her, and that the latter fell sitting upon the seat, that such blow caused her illness and that the combatants did not touch her at all.

The jury found that there was neglect of duty on the part of the plaintiff in warranty because its employee had allowed this woman to enter the car while the defendants were fighting.

It is said that the damages claimed by the plaintiff in warranty are too remote, and that the judgment of the Court of first instance should be reversed.

We find that it was this fight which caused the woman to get up in order to leave the car and also unnerved the conductor, the employee of the plaintiff in warranty; that it was also the fight which obliged the employee of the plaintiff in warranty to go towards the combatants and that in the state of nervousness in which he was, he unknowingly pushed the wife of the plaintiff.

In *Vandenburgh* v. *Truax* (1847), 4 Den. (N.Y.) 464, we find a case similar to this; in which it was decided by the Supreme Court of New York as follows:—

One who does an illegal or mischievous act, which is likely to prove injurious to others, is answerable for the consequences which may directly and naturally result from his conduct, thought he did not intend to do the particular injury which followed.

Therefore, where the defendant, having had a quarrel with a boy in the street in a city, took a pick-axe and followed him into the plaintiff's store, whither he fled, and in endeavouring to keep out of defendant's reach, the boy ran against and knocked out the faucet from a cask of wine, by means of which a quantity of the wine ran out and was wasted; held that the defendant was liable to the plaintiff in damages.

This case is referred to in that of *Victorian Ry. Commissioners* v. *Coultas* (1888), 13 App. Cas. 222, 57 L.J. (P.C.) 69, in which the Judges of the Privy Council say:—

The decision of the Supreme Court of New York which he referred to in support of this contention, was a case of palpable injury caused by a boy who was frightened by the defendant's violence, seeking to escape from it, and is like the case of *Sneesby* v. *The Lancashire and Yorkshire R. Co.* (1875), 1 Q.B.D. 42.

In the *Coultas* case, the Judges found that there was not what they call "impact"; a train of this company passed so near to the carriage in which a woman was, without touching her, that she had a fright, from which she became ill, and sued the company for damages; but the Privy Council refused her damages because

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they were too remote. However, they seem to have made a distinction between this case and that of *Vandenburgh*, where they find that when a person who commits an illegal act is pushed into doing something which caused damages, there is a "palpable injury."

Now, in this case, the "palpable injury" was caused by the fault of the defendants, who required the employee of the plaintiffs in warranty to go to the combatants to attempt to quiet them.

We think that the damages which the plaintiff in warranty has been obliged to pay and has paid, follow immediately and directly from the fact of the fight between the defendants.

For these reasons we are of opinion that the judgment appealed from is well founded and should be affirmed.

Appeal dismissed.

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Ex. C.

Re CHRISTIE BROWN Co.'s TRADEMARK

Exchequer Court of Canada, The President of the Court. September 7, 1920.

TRADEMARK (§ VI—30)—NAME ON MANUFACTURED PRODUCT—REGISTRATION.

The petitioners having used the word "Christie" as a trademark and to denote and advertise the products which they had manufactured for a great many years, it may be registered as a trademark to be used in connection with those products.

[*Re Horlick's Malted Milk Co.* (1917), 35 D.L.R. 516, followed.]

[See also annotation following the *American Druggists Syndicate* v. *The Centaur Co.*, *ante* p. 154.]

Statement.

PETITION praying for an order directing that the trademark "Christie" may be registered as a specific trademark to be used in connection with the manufacture and sales of biscuits, etc.

In the petition it is alleged that petitioners are the proprietors of a trademark consisting of the word "Christie" which has been used by them for many years in connection with the manufacture and sale of biscuits, cake, puddings and infants' food, manufactured and sold by them and which distinguishes said goods from similar goods manufactured and sold by others, which said trademark is known throughout Canada as denoting and distinguishing the goods of your petitioners.

That the petitioners made application to the Minister of Agriculture of the Dominion of Canada, for the registration of the said trademark as above described as a specific trademark to be used in connection with the manufacture and sale of biscuits, cake,

puddings and infants' food, in accordance with the provisions of the Trademark and Design Act, R.S.C. 1906, ch. 71.

That the Minister of Agriculture by letter dated December 15, 1914, refused to register the said trademark on the grounds that it is a surname and could be registered only in accordance with an order from the Exchequer Court of Canada.

That as a matter of fact the word "Christie" has through long continued use and extensive sale acquired a secondary and trademark meaning denoting and distinguishing goods manufactured and sold by the petitioners.

From several affidavits filed it is established that the petitioners have been manufacturing biscuits, cake and infants' foods for a great number of years and that the trademark "Christie" has been used by them to denote the goods manufactured by them and has acquired a distinctive meaning; that the said word "Christie" has been used alone, and not the name of the petitioners' company, as a specific trademark aforesaid; and that said word "Christie" was not associated with the word "biscuits" or other words; and that, for a great number of years, biscuits manufactured by the petitioners have had the word "Christie" alone stamped thereon and said word has been used in advertising and on labels to denote and distinguish the goods of the petitioners.

The application first came before the President of Court, on March 2, 1920, but was then enlarged to permit petitioners to furnish further evidence.

The application again came up on September 7, 1920, and order for registration of the trademark as prayed for, was granted on the same day.

Russel Smart, for petitioners.

THE PRESIDENT OF THE COURT:—This application stood over with the view of furnishing further evidence. The petitioner has now shewn that for a great number of years the word "Christie" alone has been used on the biscuits manufactured by the firm. I should doubt very much the validity of such a trademark as the word "Christie" alone. My granting the order to register does not conclude any validity of the trademark, should an action be brought on the trademark, for contesting its validity. It has the effect merely of casting the onus upon the parties sued. In any event I find myself bound by the judgment of the Supreme

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EX. C.

RE CHRISTIE BROWN CO.'S TRADEMARK.

Court in the petition of the Horlick Malted Milk Co. to have their trademark "Horlick's" registered (*Re Horlick's Malted Milk Co.* (1917), 35 D.L.R. 516). The Supreme Court have thought that they were entitled to register such a trademark and directed by their formal judgment that the word "Horlick's" be registered. The case of "Christie" is very much stronger than that of Horlick and I am bound by the judgment of the Supreme Court. I order that the word "Christie" as applied to biscuits, cake, puddings and infants' foods be registered as prayed.

Ordered accordingly.

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McDOWELL v TOWNSHIP of ZONE.

Ontario Supreme Court, Orde, J. October 1, 1920.

HIGHWAYS (§ V B—256)—REQUEST FOR SURVEY—BOUNDARIES LAID DOWN—THE SURVEYS ACT, R.S.O. 1914, CH. 166, SEC. 13.

A municipality having set in motion an application for a survey under sec. 13 of the Surveys Act is bound by the result, and, notwithstanding sec. 478 of the Municipal Act, is estopped and cannot question in any Court the order of the Minister or question the fact that the boundaries laid down by the surveyor are not the permanent boundaries of the highway.

Statement.

ACTION for an injunction restraining defendants, a municipal corporation, from trespassing upon certain lots, and from tearing down or interfering with plaintiff's fences thereon, and for a mandatory order compelling defendants to re-erect the fences torn down by them, for a declaration, and other relief.

T. G. Meredith, K.C., for plaintiff.

J. M. Pike, K.C., for defendants.

Orde, J

ORDE, J.:—The Gore concession of the township of Zone is a small and irregularly shaped concession, lying between the northerly bank of the river Thames and the tier of concessions which make up the rest of the township, being separated from them by a road-allowance known as "the Base-line." The lots in the Gore concession front on the Base-line, but the remaining concessions run at right angles thereto. There is also a side-road running down from the Base-line between lots 3 and 4 in the Gore concession, lot 3 being to the west of the side-road and lot 4 to the east. The frontage of lots 4, 5, and 6 corresponds on the south side with the depth from front to rear of the 5th concession on the north side. It may be of interest to note in passing that the

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plaintiff's lands are known as the "Tecumseh Farm" from the fact that it was there that Tecumseh died after the Battle of Moraviantown.

What had been understood to be the location of the original road-allowance had been for many years opened up by the township, and had been used as a highway, that is, there was a travelled road within what were supposed to be its limits, and there had been fences placed upon or supposedly upon those limits.

There had, however, been a long standing dispute between the owners of the lands on the north side and those on the south side as to the true location of the Base-line. On the 31st May, 1915, the plaintiff appeared before the township council, and as a result the council resolved that the plaintiff's request as to the bringing on of a Government engineer to establish a line from the road-allowance between concessions 3 and 4 easterly to the River road, along the Base-line, be complied with, and the township clerk was by resolution instructed to write to the Crown Lands Department requesting the department to send an engineer for the purpose.

On the 18th June, 1915, an order in council was passed directing "that, pursuant to the provisions of sections 13 and 14 of chapter 166, R.S.O. 1914, a survey be made of the line in the township of Zone from between the 3rd and 4th concessions across concessions 4, 5, and 6 to the Longwoods road, and that permanent monuments be placed to mark the said line."

The "Longwoods road" and the "River road" are the same.

One George A. McCubbin, an Ontario land surveyor, was thereupon instructed by the Government to make a survey, and on the 17th April, 1916, he made his report to the department, accompanied by his plan and field-notes.

In accordance with the provisions of sub-sec. 4 of sec. 13 of the Surveys Act, the Minister of Lands Forests and Mines duly published notice of a hearing before him on the 7th June, 1916, and on that date certain persons attended and objected to the survey, on the ground that the council had rescinded the resolution requesting that the survey should be made, because the cost of building a new road in accordance with the survey would be too great, and they preferred to use the road as then travelled. The Minister decided, after due consideration and summing up of all

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the evidence taken at the hearing, that the survey was a proper and legal one and had been made previous to the resolution of the council rescinding the previous resolution, and accordingly, on the 15th December, 1916, confirmed the survey and ordered that it "be final and conclusive upon all parties and shall not be hereafter questioned in any court whatsoever."

Subsequent to the completion of the survey by McCubbin and the making of his report to the Minister, but before the Minister had dealt with the matter, the township council endeavoured to stay further proceedings, and on the 11th May, 1916, passed a resolution purporting to rescind the resolution of the 31st May, 1915, and instructed the clerk to write the Department "asking permission to withdraw the request of the 31st May, 1915, for a survey of the Base-line." This application was not acceded to by the Minister, on the ground, as stated in his order of the 15th December, 1916, that the survey had been performed before the council had passed the rescinding resolution.

McCubbin's survey placed the southerly limit of the road-allowance along the Base-line, where it passed the plaintiff's three lots, some distance to the north of where the plaintiff's fence had theretofore been; and the plaintiff proceeded, about the 1st June, 1917, to erect a fence along the southerly limit of the road-allowance as established by the survey.

The defendant municipality objected to the erection of the plaintiff's fence along the line established by McCubbin, and on the 14th July, 1919, passed a by-law which recited that "a highway known as the 'Base-line' . . . was opened for public use many years ago, and has been since continuously used by the public as a highway," and that "the said highway when so opened was intended to be upon the original road-allowance in respect thereof," and that "some of the owners of those portions of lots 1, 2, 3, 4, 5, and 6 in Gore of Zone, lying south of and adjoining the southerly limit of the said Base-line as so originally opened up and used, have recently moved their fences and planted posts upon such highway," etc., and then enacted in effect that no person should build or maintain fences upon the Base-line "to the full width and extent as heretofore opened up and used by the public," that any owners to the south who had placed fences and obstructions be required to remove them, that notice be given to such

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owners, and that, if the obstructions were not removed within a certain period after such notice, the pathmaster be directed to remove them. This by-law was amended in some particulars by two further by-laws passed on the 11th May, 1919, and the 15th November, 1919, respectively.

Notice to remove his fence was given to the plaintiff on the 13th July, 1919; and, as he failed to comply, the defendants, on or about the 4th September, 1919, removed those portions of the fence which were upon what the defendants claimed to be the highway. The plaintiff then restored them, and on the 15th November, 1919, the defendants again notified the plaintiff to remove them, and, upon his failing to do so, the defendants again tore them down. The plaintiff thereupon brought this action.

The plaintiff's position is a very simple one, namely, that under the provisions of sec. 13 of the Surveys Act, R.S.O. 1914, ch. 166, McCubbin's survey and its confirmation by the Minister of Lands Forests and Mines are final and binding, and their effect is to fix the southern boundary of the road-allowance, and consequently the northern boundary of his land, on the line laid down by McCubbin.

The defendants say that a highway intended to be upon the original road-allowance, known as the Base-line, was laid out and opened up for public use more than 60 years ago, and has since been continuously used as a highway, and that statute-labour has been performed and public money spent thereon; that the defendants are not aware that any part of the highway so laid out is upon the plaintiff's lands; but, if so, the defendants set up sec. 478 of the Municipal Act, R.S.O. 1914, ch. 192; that the plaintiff's lands were purchased with full knowledge of the existence of the highway as so laid out and opened; that he and his predecessors in title have acquiesced in the location of the same, and that the plaintiff is estopped.

There was a great deal of evidence adduced for the purpose of establishing the location of the highway which had been opened up along the Base-line for many years. While there was no doubt that a travelled road had been opened up and used along the road-allowance for a long time, it was not suggested that the whole width of 66 feet or one chain of the road-allowance had been prepared for purposes of travel. Whether it has any bearing on

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the points in issue or not, it is well to note that this travelled way does not at any point run south of the southern line laid down by McCubbin, though in some places it comes very close to it, and there are doubtless places where one vehicle passing another might have been obliged to go to the south of that line. The evidence as to the location of the fences along the highway was contradictory, much of it turning upon the location of what was known as the "Dickson stone," which was said to have marked the north-west angle of lot 4, and also to mark the southerly limit of the Base-line. Upon the view which I hold of the effect of sec. 13 of the Surveys Act and the Minister's decision thereunder, it is unnecessary for me to go into the evidence for the purpose of locating the original boundaries of the road-allowance as they were supposed to be prior to McCubbin's survey. The Dickson stone was, according to McCubbin's survey, 44 links south of the true line. The plaintiff says he moved his fence at this point about 1½ or 2 rods to the north in order to place it on the McCubbin line. I mention these facts to make it clear that there is no case here of a road having been dedicated to the public either deliberately or by user and accepted by the municipality so as to become a public highway, without reference to any original allowance for road, but that this is a case where there has been some uncertainty as to the real boundaries of the road-allowance as laid down on the original survey of the township.

With the exception of sub-sec. 4, sec. 13 of the Surveys Act has formed part of the Surveys Act for upwards of 70 years.

The material parts of the section as it now stands read as follows:—

"13—(1). Whereas in several townships some of the concession lines and side road lines, or parts of the concession lines and side road lines, were not run in the original survey performed under competent authority, and the survey of some of the concession lines and side road lines, or parts of the concession lines and side road lines, have (*sic*) been obliterated, and owing to the want of such lines the inhabitants of such concessions are subject to serious inconvenience, therefore the municipal council of the township in which such lines are situate may, on application of one-half the resident land-holders in any concession or part of a concession, or upon its own motion . . . apply to the Lieutenant-Governor in Council to cause any such line to be surveyed," etc.

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"(4) On the return of such survey to the Minister he shall cause a notice thereof to be published . . . and shall specify . . . a day . . . on which the report of the survey will be considered, and the parties affected thereby heard, and on the hearing the Minister may either confirm the survey or direct such amendments or corrections to be made as he shall deem just, and shall confirm the survey so amended or corrected, and the lines or parts of the lines so surveyed and marked shall thereafter be the permanent boundary lines of such concession or side roads or parts of concessions or side roads to all intents and purposes, and the order of the Minister confirming the survey shall be final and conclusive upon all persons and shall not be questioned in any court."

Until 1897 the statute contained no provision for a hearing upon notice before the Minister or for any amendments or corrections, but simply enacted that the lines of the survey should thereafter be the permanent boundary-lines to all intents and purposes whatsoever. By 60 Vict. ch. 27, sec. 14, this provision was repealed and sub-sec. 4 as it now stands substituted.

It may be noticed in passing that the Surveys Act has, since the trial of this action, been re-enacted (10-11 Geo. V. ch. 48), and that the provisions of sec. 13 of the Revised Statute now appear in secs. 16 and 18.

Assuming that prior to the making of the application to the Lieutenant-Governor in Council and the survey thereunder, and the Minister's confirmation, the land in question had been so used by the public or accepted by the municipality as to give it the character of a public highway, what is the effect of sec. 13 by virtue of the proceedings taken under it? Has it the effect of actually shifting the boundaries of the highway as they actually existed upon the ground so as to transfer the title to that strip of land over which the highway as actually used has encroached, from the municipality back to the plaintiff, whose predecessors in title must at some time have owned it?

Counsel for the plaintiff contends that this is the plain meaning of sec. 13; that where in error, as the survey shews, the municipality has assumed the boundaries of the road-allowance to be different from those which the survey proves them to be, the municipality is bound, under the express provisions of the section, by the survey and the order of the Minister.

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Counsel for the defendants says that, whatever may be the effect of the section and the order of the Minister as determining the real boundaries of the road-allowance as originally laid out, the strip of land which the plaintiff now claims to be his became in fact many years ago part of a public highway; and that under the provisions of the Municipal Act relating to highways, and especially under sec. 478, the roadway as actually laid out and used became vested in the municipality; and that, whatever sec. 13 of the Surveys Act may mean, it cannot have the effect of divesting the title of the municipality in any part of that highway, and restoring it to the original owner.

Apart from the effect of sec. 13 of the Surveys Act, sec. 478 of the Municipal Act seems designed to cover the exact circumstances of this case. It provides that where the council "desiring to open an original allowance for road has by mistake opened a road which was intended to be, but is not wholly or partly, upon such allowance the land occupied by the road as so opened shall be deemed to have been expropriated under a by-law of the corporation, and no person on whose land such road or any part of it was opened shall be entitled to bring or maintain an action for or in respect of what was done or to recover possession of his land," and then provides for compensation, if claimed within one year after the land was first taken by the corporation.

Had no proceedings been taken under sec. 13 of the Surveys Act, the foregoing provision of the Municipal Act might have been a complete bar to any action by the plaintiff to establish the true boundary-lines of the road-allowance, and his claim to compensation would have been long since barred. What then is the meaning of sec. 13 of the Surveys Act? It can hardly have been intended to apply merely to cases where doubts arise as to unopened road-allowances. There is nothing in the section to indicate any such limitation of its provisions. It creates a tribunal, namely, the Minister of Lands Forests and Mines, to whom is given power, after due notice and hearing of the interested parties, to determine where the doubtful lines are. The machinery of the section is set in motion by the township council, either upon the application of one-half the resident land-holders in any concession or part of a concession, or upon its own motion. Whether or not the word "may" is to be construed as "shall," when the procedure is based

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upon the application of "one-half the resident land-holders," may be open to question, but in the present case the council made the application of its own motion, though at the request of the plaintiff. Having done so, the council now repudiates its action and in effect refuses to act upon or to be bound by the Minister's confirmation of the survey. Neither the survey nor the order of the Minister was made arbitrarily. McCubbin's report shews that it was made after careful investigation and after taking the evidence of numerous witnesses upon both sides of the dispute, most of whom were also witnesses upon the trial of this action. The Minister gave a hearing to the interested parties, and, having heard them, pronounced his decision confirming the survey. Is all this futile because of the apparent conflict with the provisions of sec. 478? I can hardly think so. And, in my judgment, the conflict is merely an apparent one, and the solution of the difficulty rests within a very narrow compass. The municipality, having set in motion the application for the survey under sec. 13 of the Surveys Act, must be held to be bound by the result. If that result is to shift the boundaries of the road-allowance from the lines upon which they were supposed by the municipality to stand, then the municipality must accept the judgment of the tribunal to which it has submitted the matter in dispute. It cannot surely be permitted to accept the result if favourable and to reject it if adverse. It may be argued that the result might throw the whole of the travelled roadway outside the true boundaries of the road-allowance, and so subject the municipality to needless expense; but I think the answer to this is that it is not to be supposed that the Minister would fail to take such a matter into consideration, and, by the exercise of the power to amend the survey given him by sub-sec. 4, duly protect the municipality. The effect of the survey and the Minister's order must, in my opinion, be to revest in the adjoining owner any land of which he may have been dispossessed by the opening up of the roadway along an erroneous line, notwithstanding sec. 478 of the Municipal Act. So long as the provisions of the Surveys Act were not invoked, sec. 478 of the Municipal Act was effective; but, by resorting to sec. 13 of the Surveys Act, the municipality opened up the whole question as to the location of the true boundary-lines;

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and I think the defendants are now estopped and cannot now question in any court the order of the Minister or be heard to say that the boundary-lines as laid down by McCubbin are not the permanent boundaries of the Base-line "to all intents and purposes."

Counsel for the defendants also relied upon the decision of the Supreme Court of Canada in *Hislop* v. *Township of McGillivray* (1890), 17 Can. S.C.R. 479; but I am unable to see its application to the issues in this action. The plaintiff in that action sought to compel the municipality to open an original road-allowance, and it was held that the Court had no jurisdiction to compel the municipality to do so, at the suit of a private individual. The plaintiff here is not asking the municipality to open the road-allowance. He claims that the effect of McCubbin's survey and the Minister's order, under sec. 13 of the Surveys Act, is to establish the northern boundary of his three lots along the southern boundary of the Base-line as established by that survey. Mr. Pike referred me to numerous authorities in support of his contention; but, as they relate either to the principles laid down in *Hislop* v. *Township of McGillivray*, or to the question of dedication, they are not, in my judgment, applicable here.

The plaintiff is entitled to a declaration that McCubbin's survey is final and conclusive as establishing the boundary-line of that part of the road-allowance commonly called the Base-line which it covers, and to an injunction restraining the defendants from trespassing upon the plaintiff's lands as established by that survey, and from tearing down or removing the plaintiff's fences thereon, and to judgment for the damages which the plaintiff has sustained by the wrongful acts of the defendants in tearing down the fences erected since the Minister's order. Counsel at the trial said there would be no difficulty in fixing these damages; otherwise there will be a reference to the Local Master at Chatham to do so.

The plaintiff will also get his costs.

Judgment accordingly.

CAN.
Ex. C.

POINTE AUX TREMBLES TERMINAL RAILWAY v. CANADIAN NORTHERN QUEBEC R. Co., and CANADIAN NATIONAL RAILWAYS.

Exchequer Court of Canada, Audette, J. May 11, 1920.

COURTS (§ III—196)—ORDERS OF RAILWAY COMMISSIONERS—RAILWAY ACT, 9-10 GEO. V. 1919 (CAN.), CH. 68—EXCHEQUER COURT—SEQUESTRATION—INTENTION—PRACTICE.

When, by virtue of sec. 49 of the Railway Act, 9-10 Geo. V. 1919 (Can.), ch. 68, an order of the Board of Railway Commissioners has been made an order of the Exchequer Court, a Judge of the Court has no power to modify or vary the same. And before a writ of sequestration can issue in proceedings in contempt for disobedience of such an order, such disobedience should appear to have been wilful and intentional, and this order can only be granted against a corporation where the requirements of practice have been strictly observed. [*McKeown* v. *Joint-Stock Institute Ltd.*, [1899] 1 Ch. 671, referred to.]

Statement.

APPLICATION by the Pointe aux Trembles Terminal Railway Company for a writ of sequestration against the defendants for an alleged contempt of Court by them.

The facts of the case are as follows:—

On April 3, 1914, the plaintiff company obtained an order from the Board of Railway Commissioners for Canada authorising them to construct its lines and tracks across the lines and tracks of the defendant companies at a certain point on a plan filed, subject to certain conditions as to control by defendant companies and as to costs of maintenance, etc.

On April 1, 1920, the plaintiff obtained a further order reading as follows:—

> It is ordered that the Pointe aux Trembles Terminal R. Co., and the Canadian National Railways be, and they are hereby authorised to operate their trains over the said crossing without their first being brought to a stop.

These orders were filed with the Registrar of the Exchequer Court of Canada under art. 49 of the Railway Act, 9-10 Geo. V. 1919 (Can.), ch. 68, and being entered of record thereby became an order of the Court.

On May 7, application was made by the plaintiff company before this Court asking for the issue of a writ of sequestration against the defendant companies on the ground that they had refused to allow the plaintiff to cross its tracks and this in contempt of the orders of the Railway Commissioners, above referred to. This was enlarged to May 11 at request of defendants.

R. Holden, K.C., and *E. F. Newcombe*, for plaintiff.

G. F. Macdonnell, for defendants.

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AUDETTE, J.:—I find, after hearing counsel and taking cognisance of the affidavits filed of record, it is unnecessary for me to ask for further evidence in order to arrive at a conclusion, as to how the matter should be disposed of. It will serve no purpose to delay my decision.

As appears by the notice filed of record, this is an application by the Pointe aux Trembles Terminal R. Co., for the issue of a writ of sequestration against the Canadian Northern Quebec R. Co., and (as mentioned in the notice of such application) in so far as may be necessary to that end, against also the Canadian National Railways, inasmuch as the said two last mentioned railway companies are alleged to have refused, failed and neglected to obey the orders of the Board of Railway Commissioners for Canada, Nos. 21592 and 29513 of April 3, 1914, and April 1, 1920, which have been made orders of this Court. The charge made against the said two railways, is that, on April 17, 1920, they refused to permit the Pointe aux Trembles Terminal R. Co., and its officers and servants to use its crossing over the Canadian Northern Quebec Railway and prevented them from doing so, in direct contempt and contravention of the said orders of the Railway Board.

The application is for the issue of a writ of sequestration, a very drastic process that can issue only upon circumstances *strictissimi juris*, and when the disobedience of the judgment or order of the Court has been wilful and intentional.

In the case in question the service of these notices and orders upon the defendants has not been made in the manner required by the Rules of this Court. The first order of the Railway Commissioner (April 3, 1914), has been made against the Canadian Northern Quebec Railway Company while the second order (April 1, 1920), has been made against the Canadian National Railways, pursuant to 9-10 Geo. V. 1919, ch. 13.

Before any such writ can issue to enforce obedience, the order or judgment in question must be personally served upon the director or such other responsible officer of the company, as required by the Rules of this Court Nos. 70 and 245 and as further set forth in the Annual Practice, 1920, p. 738. (See *McKeown* v. *Joint-Stock Institute, Ltd.*, [1899] 1 Ch. 671.

There is before me no evidence of a wilful and intentional disobedience of these orders, the conflict, to the contrary, seems to result from some local friction that some common sense and business acumen could easily overcome.

Sitting here and dispensing justice in this Court my powers are limited by the statute, the Railway Act, in respect of such orders which are made orders of this Court. I am not in the position of a Judge sitting in proceeding in contempt where there has been disobedience to his orders made under full knowledge of all the circumstances of the case. I cannot go behind the orders of the Railway Commission, cannot modify, review, vary or supplement these orders. I am not seized of the facts or evidence which determined the making of the orders. It is obviously a question for the Railway Commission to *say how these orders are to be understood*. To say whether the Terminal Co. can, under its charter and under the orders made by the Board, enter into contract with all the railways in the land, a contract to which the Canadian National Railways would not be a party—and allow them under the leave given to go over the railway crossing in question.

The best and only remedy the Terminal Railway can now have is from the Railway Board under the provisions of the Railway Act, sec. 33, sub-sec. 3 of sec. 34, and sub-sec. 5 of sec. 49. The Railway Board can make these orders clear and supplement them, if necessary, by enforcing them by a daily penalty or such other money penalty as they see fit and if the defendant companies set these orders at defiance, a writ of sequestration might then issue for the payment of such moneys. I feel sure that when the matter is brought again before the Railway Board that some acceptable remedy, acceptable to all parties concerned, will be arrived at. In the meantime I am unable to issue a writ of sequestration which would have the effect of stopping service on the Government Railways, a public utility of great importance, whereby the public at large would be the sufferers. This trouble, resulting from a trifling local friction, must be adjusted in another manner.

Moreover, the small train which is alleged to have been stopped appears to be a train belonging to and manned by the crew of a company other than the Pointe aux Trembles R. Co.

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Under these circumstances, my order will be to take nothing by this application, which stands dismissed with costs, which are hereby fixed at the sum of $50.

Judgment accordingly.

QUE.
K. B.

ROBIDOUX v. THE ROYAL BANK OF CANADA.

Quebec King's Bench, Lavergne, Carroll, Pelletier, Martin and Désy, JJ. April 30, 1919.

PRINCIPAL AND AGENT (§ II A—7)—POWER OF ATTORNEY TO SOLICITOR TO COLLECT MONEY—DEPOSIT BY SOLICITOR IN BANK—DRAWN OUT AND USED BY HIM PERSONALLY—SUIT AGAINST BANK—NO PRIVITY OF CONTRACT.

One who gives a power of attorney to collect funds to a solicitor who deposits the funds collected in his own bank, and draws the money out later for his own use, cannot recover as against the bank—there being no privity of contract between the giver of such power and the bank.

Statement.

APPEAL by plaintiff from the judgment of the Court of Review, 44 D.L.R. 765, reversing the Superior Court, in an action to recover money paid into the bank by plaintiff's attorney and fraudulently withdrawn by him. Affirmed.

The facts of the case are set out in the report of the judgment of the Court of Review (1918), 44 D.L.R. 765, 54 Que. S.C. 529.

Pélissier, Wilson and *St-Pierre*, for appellant.

Brown, Montgomery and *McMichael*, for respondent.

Pelletier, J.

PELLETIER, J.:—It is admitted by all parties that the advocate A.D. who had made the deposit at the bank could withdraw the money in the same manner as that in which he deposited it, that is to say, by cheques conforming to the deposit slip and the entries in the bank books. But the appellant says, with much plausibility at first sight, that "when the bank received this deposit made by my solicitor as my attorney, it was at the same time notified of the terms and of the extent and limitation of the powers my mandatary had." This contention is well founded in fact. When A.D. deposited the cheque the respondent bank received at the same time, and kept in its custody, the appellant's power of attorney. The decision of this case rests then entirely, in my opinion, upon the interpretation that should be given to the terms of this power of attorney, the text of which is reproduced above, and which was signed by the appellant in the presence of an agent of the respondent Harwood. If, by this power of attorney, the

mandate of A.D. was at an end after the deposit was made, the bank was not justified in permitting A.D. to withdraw as attorney, by cheque payable to his own order, moneys which did not belong to him. But the power of attorney which at first sight I would believe conclusive in favour of the contentions of the appellant, is susceptible of two interpretations.

A.D. was authorised to withdraw the sum of $2,025 in money; the Harbour Commissioners give him a cheque; in virtue of this power of attorney A.D. has the power to indorse this cheque and to withdraw the amount in money. If then A.D. presented himself at the Bank of Montreal and drew out the money the appellant could only request him to remit it. Instead of drawing out the money, A.D. deposits the cheque. Now the power of attorney contains the following words "and ratifying in advance all that A.D. will do to withdraw said sum."

These words should be interpreted as ratifying in advance all that A.D. would do to withdraw the amount of the Harbour Commissioners' cheque in money, or do they intend to say that the powers of A.D. comprised all that he would do to withdraw in money the proceeds of the said cheque if this is a cheque that the Harbour Commissioners give him? The respondent bank adopted the latter interpretation and it seems that this interpretation is possible, even plausible. The power of attorney authorised A.D. to do more than make a deposit, it authorised him to withdraw the sum in money. And that is what he did. In place of depositing the cheque at the respondent bank A.D. could have presented himself at the counter with his power of attorney and demanded the sum in money after having indorsed the cheque as he was authorised to do; that is, moreover, practically what he did at the same time as to more than half the amount, namely, $1,025; in drawing out this $1,025, A.D. did something to withdraw said sum and the power of attorney ratified that in advance. When he made his 8 other cheques he was also in the position of withdrawing the said sum and that again was ratified in advance. In other words, A.D. was authorised to withdraw the amount in money; he did withdraw it, and in all that he did for the purpose he found himself ratified. As the citations made above shew the appellant clearly recognised that it was A.D. who was his debtor,

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and he cannot now turn to the bank to be reimbursed for that which his mandatary has in custody after having withdrawn it as the power of attorney permitted him to do.

The sound doctrine, I believe, in the matter of mandate, is that if a power of attorney is incomplete, or susceptible of two interpretations, it is the person giving the mandate who should suffer; it is for him to draw his power of attorney in such a form that his agent cannot abuse it, and if he does not take precautions sufficient to protect himself the benefit of the doubt should be given to the third party who acts with evident good faith.

In view of what I have said I do not believe that there was any privity of contract between the appellant and respondent; I am sorry for the unfortunate woman who suffers from all this, to be obliged to arrive at this conclusion, but I do not see how it is possible to do otherwise.

In consequence I would confirm the judgment of the Court of Review, 44 D.L.R. 765, 54 Que. S.C. 529.

Carroll, J.

CARROLL, J.:—If there is privity of contract between the bank and Madame Robidoux it can only be by reason of the deposit of a cheque by the agent D. The appellant in bringing her action against the respondent admits then that D. was authorised to deposit this cheque for her.

If D. could withdraw at any time the amount of the cheque that he had deposited, is there any juridical reason which prevents him from withdrawing it by several cheques of different amounts? The appellant is then obliged to admit that D. was her agent in making this deposit. The authority was not at an end by this act. She ignores this deposit; the sum has not been remitted to her. D. did not render any account and the relations of agent and principal cannot come to an end so long as she has not been put in possession of the sum, or of a commercial document representing the sum, that her agent should remit to her. It is then with reason that Lamothe, C.J., declared that the deposit made by the agent did not effect a novation of the debt.

If the relations of agent and principal had continued the agent D. could have withdrawn the money from the bank and the latter was not obliged to inquire whether or not he had violated his mandate; the bank had no reason to believe that such was the case and is protected by arts. 95 and 96 of the Bank Act.

Agent D. had the right to draw out this sum for his principal. Instead of doing so he deposited the cheque in the bank after having indorsed it. Being authorised to deposit this cheque, as Madame Robidoux was obliged to admit in order to give her a right of action, D. was in the position of a depositor mentioned by McLaren in his work Banks and Banking, 4th ed., p. 389, where he says that if the bank accepts a cheque it is as if the depositor had drawn out the money and redeposited it to the credit of the holder of the cheque, and he cites Daniel on Negotiable Instruments, vol. 2, sec. 1603. It is true that the cases are not absolutely *ad rem* but there is some analogy.

A cheque is an order to the bank by the drawer to pay the holder. When the bank accepts the cheque the funds of the debtor are remitted to the holder or perhaps the cheque is deposited and it is the bank which becomes debtor to the holder of the cheque. The agent who is authorised to indorse has thereby a power of attorney to the effect that he may receive the money which is an order given to the debtor to pay the holder. The latter, as Pothier says, is constituted by this act *procurator in rem suam*. The payment made to an agent so appointed is a payment made to the creditor and so long as the bank has not been informed that the relations of agent and principal are at an end it can continue to deal with D. as the person duly authorised to receive the amount.

I would confirm the judgment of the Court of Review.

Martin, J.

MARTIN, J.:—The power of attorney given Delisle was not only to receive cheque from the Harbour Commissioners, but to endorse the cheque and obtain the cash. It must be borne in mind that she had already given the Harbour Commissioners a receipt and discharge for the sum of $2,025.

I do not think it could be seriously contended but that Delisle could have gone to the Bank of Montreal under this power of attorney, endorsed the cheque and received the money; in fact, this was conceded by appellant's counsel at the argument. Instead of doing this directly, he did it indirectly through the Quebec Bank. If Delisle had cashed the cheque and put the money in his pocket, the appellant would have had no claim against the Bank of Montreal or against any one, except Delisle.

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Suppose that instead of putting the money in his pocket he had given it to A. for safe keeping and obtained from A. a receipt in the terms of the deposit account and came back the next day, or the next week or the next month, and demanded the money from A. Would not A. be justified in paying it to him?

What Delisle did was to make the Quebec Bank his intermediary for cashing the cheque and so far as the appellant is concerned, if Delisle was entitled to receive the money from the bank in one sum, I fail to see how the legal situation is altered by receiving it in nine sums. If Delisle was authorised to endorse the cheque and draw the cash thereon from the Bank of Montreal, how is the appellant more prejudiced by what Delisle actually did, namely, employ the Quebec Bank to obtain the money for him? The real reason why appellant suffered a loss is because she trusted Delisle, her attorney, who committed a breach of trust. The appellant never accepted the Quebec Bank as her debtor and there is no privity of contract between her and the bank. The bank's contract was with Delisle and she cannot claim the benefit of that contract until she has accepted it.

Suppose the Quebec Bank had in the meantime become insolvent and Delisle was perfectly solvent and able to pay, could not the appellant make him pay and would it be a good answer by Delisle to say to appellant, "Exercise your recourse against the insolvent bank"? Could not the appellant reply, "I never authorised you to deposit my money in a bank. I have never accepted a bank as my debtor. There is no *lien de droit* or privity of contract between me and the bank and I decline to look to anybody but you"?

The Quebec Bank was in no way her debtor nor had the appellant ever accepted the Quebec Bank as her debtor.

Under the provisions of the Bank Act, the bank is not bound to see to the execution of any trust, whether expressed, implied or constructive, to which any deposit is subject.

I concur in the opinion of Demers, J., in the Court of Review on this point (see 54 Que. S.C. at 533):

> I believe that we are in the same hypothetical position as if Delisle had deposited this money, after having withdrawn it in trust for Dame Lapoint, because, to say that the deposit is made for Dame Lapoint by Arthur Delisle, attorney, brings us back to the same thing. There is no doubt that the knowledge that the bank may have that the money is deposited by the agent

of a designated person, does not take away the right of this agent to withdraw the money. According to the authorities it is only in the case where the bank has profited by these funds so deposited by agents, that it becomes responsible.

It is only when the bank has profited by the transaction, as for instance the payment to it of a debt of the agent out of the moneys. In the present case, there is no allegation or evidence of personal benefit by the bank or allegation that the bank was cognisant of any intended misapplication of the money by Delisle constituting a breach of trust.

The appellant specially ratified and confirmed in advance all that Delisle might do to withdraw the said sum, etc., "et ratifiant d'avance tout ce qu'il fera pour retirer ladite somme, etc."

These words cannot be construed as being limited to the receipt of money from the Harbour Commissioners. The appellant had already given the Harbour Commissioners a receipt and discharge for the money. She was ratifying and confirming all that he might do to convert the cheque into cash.

Unfortunately, he did not pay the cash over to her. It is a sad and unfortunate case for the appellant, but we must not allow our sympathies to cloud our sense of justice. In the view I take of this case, it is not necessary to consider the other points raised by respondent, though strong authority could be found to support the proposition that the appellant for some months after having become aware of the fraud practised upon her by her attorney, negotiated with the wrong-doer and received from him $365 on different occasions and might therefore be estopped from exercising recourse, if any, she might have against the bank.

The appeal, in so far as it is taken in her quality, was not authorised, but this objection is not raised.

I would confirm the judgment of the Court of Review and dismiss this appeal with costs. *Appeal dismissed.*

TROST v. COOK.

Ontario Supreme Court, Lennox, J. October 9, 1920.

TRUSTS (§ II B—51)—TRUSTEE—ADMINISTRATION—TRUST PROPERTY—REASONABLE CARE—GOOD FAITH—LOSS—TRUSTEE ACT, R.S.O. 1914, CH. 121, SEC. 37—RELIEF.

If the administrator of an estate and trustee of trust property acts honestly and in good faith, and having regard to all circumstances, reasonably, he ought to be excused for breach of trust, if there is a breach, and should be entitled to be relieved from all personal liability.

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ACTION against the administrator of an estate, to recover a sum of money lost to the estate by reason of defendant's negligence and breach of trust. Dismissed.

M. J. Kenny, for plaintiff.

W. F. Langworthy, for defendant.

LENNOX, J.:—The defendant is administrator of the estate of Matthew Trost, late of the city of Port Arthur, who died suddenly on the 8th September, 1913, intestate, leaving him surviving his wife, Catherine Trost, and the plaintiff, his only child, then an infant of about 15 years of age, and leaving real estate of the value of about $1,500, and upwards of $12,000 on deposit, at interest, in the hands of Ray Street & Co., private bankers in the city of Port Arthur.

At the instance of Catherine Trost and Mr. A. L. McGovern, a solicitor instructed by Mrs. Trost, the natural guardian of the plaintiff, the defendant was induced to apply for adminstration of the estate, and letters of administration were granted to him on the 31st December, 1913. Thereafter, as I understand, these moneys, less a comparatively small sum withdrawn for the payment of debts, and perhaps towards payment of the widow's share and other purposes incidental to administration, remained on deposit at interest with Ray Street & Co., in the name of the defendant as administrator, until the bankers suspended payment on the 29th August, 1914; the war being assigned as the cause of the bank's failure. I think the reasonable inference is that, after the grant of administration, Mr. McGovern, who is now deceased, was consulted from time to time by both Mrs. Trost and the defendant; and he advised them as to the affairs of the estate as occasion arose: and that he was in fact the solicitor of the estate and family solicitor.

Mrs. Trost renounced her right to administration with a view to the appointment of the defendant in her place. The plaintiff was living at home and under the protection and natural guardianship of his mother at that time. The evidence of Frank Gehl, a half-brother and witness for the plaintiff, and the entries in Mr. McGovern's books, make it clear that McGovern was the legal adviser of the family, at all events after the death of Matthew Trost and pending the grant of letters of adminis-

tration. Computing interest to that date, the bankers when they failed were indebted to the estate in the sum of $10,592.40. A dividend of 25 to 30 per cent. has been paid on the amount, and the balance cannot be recovered. The plaintiff has come of age and claims to recover the amount of the loss from the defendant, upon the ground of negligence and breach of trust.

I have not come to a conclusion as to what I ought to do without a great deal of anxious consideration. The rule of law that a trustee must not, in the absence of special circumstances, voluntarily leave the trust funds outstanding upon personal security for an undue length of time, is of general, indeed almost universal, application. In the case of an administrator appointed by reason of intestacy there are no directions or instructions to fall back upon, as in the case of a will or settlement; there is only the general and statutory law for guidance in determining the question of responsibility or relief.

"The first duty of trustees is to place the trust property in a state of security. . . If the trust fund be a *chose in action*, as a *debt*, which can be reduced into possession, it is the trustee's duty to be active in getting it in; and any unnecessary delay will be at his own personal risk:" Lewin on Trusts, 12th ed., p. 319, referring to *Caffrey* v. *Darby* (1801), 6 Ves. 488, 31 E.R. 1159, and other cases. But each case is to be decided upon its own circumstances: *Hughes* v. *Empson* (1856), 22 Beav. 181, 52 E.R. 1077. There is no inflexible rule as to the time within which an executor or administrator is to get in the assets: *Hiddingh* v. *Denyssen* (1887), 12 App. Cas. 624; *In re Chapman*, [1896] 2 Ch. 763, at p. 782, and reasonable latitude in the exercise of their discretion as to what is most in the interest of the estate, even though it turns out that they erred in judgment, is usually accorded to trustees, particularly where there are no positive directions: *Buxton* v. *Buxton* (1835), 1 My. & Cr. 80, 40 E.R. 307; *Marsden* v. *Kent* (1877), 5 Ch. D. 598.

There is no hard and fast rule as to what constitutes undue or unreasonable delay, but the Courts always attach importance to the question whether the alleged breach of trust by failure to convert or to realise the assets, and consequent loss, occurred within or beyond a year of the testator's death or the grant of administration. There are many cases upon this point.

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The decision in *Sculthorpe* v. *Tipper* (1871), L. R. 13 Eq. 232, holding the executors liable, although they acted as they believed in the best interests of the estate, is generally regarded as rather a harsh decision.

There is a distinction, of course, between an unauthorised investment made by the trustee and the trustee leaving the money outstanding (particularly where it is for a brief period only and pending the winding-up of the estate) where the trustee found it. Trustees were held not to be liable for the loss who left money in the hands of a representative bank during the first year from the testator's death, where there were no special directions in the will, and the estate had not been wound up: *Johnson* v. *Newton* (1853), 11 Hare 160, 68 E.R. 1230; *Swinfen* v. *Swinfen* (1860), 29 Beav. 211, 54 E.R. 608. The distinction is shewn in such cases as *Rehden* v. *Wesley* (1861), 29 Beav. 213, 54 E.R. 609; *Wilkinson* v. *Bewick* (1858), 4 Jur. N.S. 1010; *Moyle* v. *Moyle* (1831), 2 R. & M. 710, 39 E.R. 565; and *Darke* v. *Martyn* (1839), 1 Beav. 525, 48 E.R. 1044. And whether the fund which has been lost was an ordinary outstanding indebtedness to the deceased or on the other hand an investment, although on personal security only, made by the deceased with persons in whom he had confidence, is a matter of consequence in considering whether the trustee ought or ought not to be exonerated from liability.

In *Dorchester* v. *Effingham* (1829), Taml. 279, 48 E.R. 111, the decision goes further than merely leaving the deposited moneys of the estate with persons whom the testator had trusted with money in his lifetime. The Master of the Rolls held that no blame could be attached to the executors in trusting the persons in whom the testator had confidence.

In *In re Grindey*, [1898] 2 Ch. 593, the testator lent money on note at 5 per cent. The executor did not call it in, and the debtor failed; and, referring to that case, it was declared in *Dover* v. *Denne* (1902), 3 O.L.R. 664, at p. 677, that "whether he" (the trustee in that case) "so acted" (that is, reasonably) "must be determined in the light of all the surrounding circumstances, not as they would appear in the eyes of lawyers and judges, but as they would appear in the eyes of ordinary pru-

dent business men, and if he acted under such circumstances, as they so appeared, as a majority of ordinary prudent business men would have acted under the like circumstances, he ought, I think, to be held to have acted 'reasonably as a trustee.'"

In *In re Gasquoine*, [1894] 1 Ch. 470, Lindley, L.J., at pp. 476 and 477, said: "It is urged that the co-executors were guilty of negligence in not looking more closely into James's proceedings. I do not think so. Perhaps if they had suspected him and watched him more closely the loss might have been avoided; but considering that James was a person trusted by the testator and whom they had no reason to suspect, and that the whole of these transactions took place well within a twelvemonth after the testator's death, I do not think that they were guilty of any such negligence as can make them liable for the loss."

In *In re Chapman*, [1896] 2 Ch. 763, Rigby, L.J., at p. 782, said: "The case is, however, entirely different when you have to deal with securities already existing at the testator's death. As far as I know, the Court has never laid down that, even with regard to risky securities, such as Turkish bonds for instance, or to shares in an unlimited company, there is an absolute unvarying obligation on executors and trustees to call them in within the twelve months regardless of the opinion the executors or trustees may have as to the prudence or the advisability of doing so. . . There is no such rule, and the Court has never been so unreasonable as to say to a trustee, 'There is a fixed and binding rule; you have not acted upon it; you have acted as you thought for the benefit of the estate, but what you have done has turned out unfortunately, and you must bear the loss.' There is no such rule."

The same principles, with qualifications of course, run through the decisions in *Clark* v. *Bellamy* (1900), 27 A.R., (Ont.) 435; *Dover* v. *Denne* (1902), 3 O.L.R. 664; and *Churchill* v. *Hobson* (1713), 1 P. Wms. 241, 24 E.R. 370, there discussed; and many other cases to which I need not refer. Assuming that the defendant has committed what is often referred to, but I think inaptly, as a technical breach of trust, I have to consider whether he ought fairly to be excused.

"If in any proceeding affecting a trustee or trust property it appears to the Court that a trustee, or that any person who

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may be held to be fiduciarily responsible as a trustee, is or may be personally liable for any breach of trust whenever the transaction alleged or found to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the Court in the matter in which he committed such breach, the Court may relieve the trustee either wholly or partly from personal liability for the same:" **The Trustee Act, R.S.O. 1914,** ch. 121, sec. 37. This provision corresponds with sec. 3 of the Judicial Trustees Act (Imperial), 59 & 60 Vict. ch. 35.

The trustee must have acted reasonably, as well as honestly: *In re Turner,* [1897] 1 Ch. 536; *In re Stuart,* [1897] 2 Ch. 583; and not only must these two conditions concur, but in addition to all this he must satisfy the Court that it is a case in which he "ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter:" *per* Moss, C.J.O., in *Whicher* v. *National Trust Co.* (1910), 22 O.L.R. 460, at p. 466, and Maclaren, J.A., at p. 472. The cases in which relief has been refused have occurred most frequently under wills or settlements. Of course if the trustee acts in defiance of the plain directions of the trust instrument, he ought not to be excused, for he cannot be said to have acted reasonably. In *Henning* v. *Maclean* (1901), 2 O.L.R. 169, in which the executors were relieved under the statute, the meaning of the will was obscure. The burden of satisfying the Court as to all the conditions lies on the trustee seeking relief: Lewin, 12th ed., p. 1170; *In re Turner, supra.*

Now as to some further relevant facts. Ray Street & Co. had been in business as bankers since 1884, and it is said that thereafter until his death they were the bankers of the deceased. All his money was in their hands at the time of his death. It was not a mere deposit on current account, it was an investment chosen by the deceased. It was the bank chosen by the widow, and the bank in which the defendant kept his own money. It was a big concern. At the time of the failure there were 3,000 deposit accounts, aggregating almost $400,000. It was supposed to be prosperous, wealthy in fact, and if this has any significance —but I do not think it has—Ray was accepted by the Surrogate

Court Judge as one of the defendant's sureties. Even after the bank suspended payment, the management of the Bank of Montreal, it is said, regarded it as solvent, at all events they put up money to pay a 25 per cent. dividend to the depositors. Reference is made to the undertaking signed by McGovern upon payment of the dividend. It is not shewn that this was authorised by the defendant or that he knew of it; but, even if authorised or concurred in, it does not appear to have occasioned loss. It was to the advantage of the estate, and even without it an action would have been restrained, after the assignment.

It was argued that the disastrous result was the direct consequence of the war. I have not evidence to guide me as to this. A statement sent out to the creditors, on the 15th October, 1914, signed by the trustees and inspectors, shewed assets valued at $1,441,818.89, liabilities amounting to $645,876 (of which more than $256,000 was owing to the Bank of Montreal and the Imperial Bank), and a surplus of $795,742.15 claimed.

Matthew Trost having died intestate, his estate could not be regarded as a fund for permanent investment. It was in the hands of the defendant for the payment of debts, expenses of administration, and distribution. He appears to have applied himself promptly to the execution of his trust. He was appointed administrator, as I have said, on the 31st December, 1913, advertised for creditors within 15 days, and applied to have his accounts passed, with a view to distribution of the assets, on the 12th May, 1914. At or about the same time Catherine Trost, acting through Mr. McGovern, applied to be appointed guardian of the plaintiff, then an infant. Long vacation, absence of the Surrogate Court Judge, doubts he entertained, and correspondence with the Official Guardian—all of which are incorporated in admissions of fact filed—prevented the appointment of Mrs. Trost as guardian (and prevented the withdrawal and distribution of the money in question) until the 30th October, 1914. In the meantime, as already stated, Ray Street & Co. suspended payment on the 29th August, and just after Mr. Ray must have become aware, as shewn by the correspondence filed, that the Matthew Trost money might be demanded almost any day.

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It is not suggested and could not be fairly argued that the defendant did not act honestly and with the utmost good faith, and, having regard to all the circumstances, I am of opinion that he also acted reasonably, and that, in the terms of the statute, he "ought fairly to be excused for the breach of trust" (if what is complained of was a breach of trust) and for omitting to obtain the directions of the Court, and that he is under the statute entitled to be wholly relieved from personal liability accordingly.

There will be judgment dismissing the action. It is not a case for costs against the plaintiff.

Action dismissed.

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THE KING v. BROWN.

Exchequer Court of Canada, Audette, J. July 5, 1920.

1. EXPROPRIATION (§ III A—105)—LEASEHOLD—ABANDONMENT—REPUDIATION OF CONTRACT—DAMAGES.
The Crown, having expropriated a certain leasehold term of eighteen months, and prior to the expiration of the said term, having filed an abandonment, which practically amounted to the repudiation of a contract, is liable in damages to the lessors for loss of rent from the date of cancellation to the end of the term, either by reason of such repudiation or under the provisions of the Exchequer Court Act, sec. 23, sub-sec. 4.
[See Annotations, Damages for Expropriation, 1 D.L.R. 508; Allowance for Compulsory Taking, 27 D.L.R. 250.]

2. EVIDENCE (§ II B—105)—EXPROPRIATION—ABANDONMENT—DAMAGES—ONUS PROBANDI.
The *onus probandi* in respect of mitigation of the damages flowing from an abandonment by the Crown in expropriation proceedings is upon the Crown.

Statement.

INFORMATION by the Attorney-General of Canada to have certain leasehold interest in land described expropriated and valued.

F. W. Turnbull, for plaintiff.

G. H. Barr, K.C., and *C. M. Johnston*, for defendants.

The facts are fully set out in the judgment.

Audette, J.

AUDETTE, J.:—This is an information exhibited by the Attorney-General of Canada, whereby a certain leasehold interest in the lands hereinafter described and belonging to the defendants were taken and expropriated, by the Crown, for the purposes of a temporary military barracks, at Regina, Province of Saskatchewan.

by depositing a plan and description of such leasehold term in the Land Titles Office for the Assiniboia Land Registration District, in the Province of Saskatchewan. This leasehold interest is described as follows:—

A leasehold term of 18 months, commencing on the *14th day of October, 1918*, of, in and to the following lands, namely:—Lots numbered five (5) to ten (10) inclusive, in block three hundred and seventy-two (372) in the city of Regina, in the Province of Saskatchewan, according to a plan of record in the Land Titles Office for Assiniboia Land Registration District as Old No. 33, as *well as of all buildings situate thereon.*

The Crown, by the information, offers for said leasehold interest in the said land and buildings, the sum of $1,200 per month net, paying taxes, insurance, light and heat, and the defendants by their statement of defence claim the sum of $2,500 per month net to them, in addition to taxes, insurance, light and heat.

Now, counsel at Bar on behalf of the plaintiff, at the opening of the case, filed an undertaking to abandon, under the provisions of sec. 23 of the Expropriation Act, the expropriation of the leasehold in question in this case, and in compliance thereto, such an abandonment was filed in the Land and Titles Office for the Assiniboia Land Registration on October 31, 1919.

The controversy therefore becomes twofold. First, in respect to the fixing of the monthly rent payable by the Crown from the date of the expropriation to October 31, 1919, and secondly, the fixing of the compensation for the damages resulting from the abandonment under the provisions of sub-sec. 4 of sec. 23, of the Expropriation Act, R.S.C. 1906, ch. 143.

In respect of the rent that should be paid for the time that the Crown occupied the premises, a deal of evidence has been adduced on both sides, with the usual conflicting character as is met with in expropriation cases.

The evidence on behalf of the owners may be summarised in the following manner: Witness Linton values the property at $300,000, and the monthly rental at $2,800. Witness McCarthy values the property, in the fall of 1918, at $240,000 to $250,000, and contends he should get 8% net on that amount for rent. He is of opinion that the parties who built the Sherwood block were not justified in building it; it is too expensive a building for that locality, and it was a mistake. Witness Lecky values the property at $350,000, and says the owners should get 8% net per month;

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but that there was no market for that price in October, 1918, and that in October, 1918, the property should command a rent of $2,200 to $2,300 per month. Witness Darke values the property at $250,000 in October, 1918, and the rent at $1,700 per month—with respect to the abandonment, the plaintiff should pay half the rent since the cancellation of the lease, and take care of the carrying charges. Witness Delai fixes the rental at $2,810 monthly.

On behalf of the Crown, witness McAra places the value of the rent at $1,200 net, monthly, in the fall of 1918. Witness Gibsone considers that a fair rental in the fall of 1918 would be $1,000 to $1,200, and values the property at $225,000, which, at 6%, would give $1,350 net. Witness Carmichael, an architect in the employ of the plaintiff, as clerk of works since June, 1919, and before that date assistant for a while, says that he was asked to report on the Sherwood Building in September, 1918. The Government was offering $1,200. Mr. Brown did come down and was asking $1,500. Mr. Mollard was at the head of the Department when defendant Brown was asking $1,500. He stated the Government would pay taxes from January 1 to October 31, 1919.

The parties admitted that Mollard at one time in the course of the negotiations, recommended a rent of $1,475, but that was not accepted by the Department at Ottawa.

However, the most cogent evidence and the most helping evidence in the circumstances is the fact that this property was previously occupied by the Crown under a lease for a term of 4 months and 8 days, ending on April 30, 1918, and this lease, although signed only by the owners of the Sherwood Stores, contained the following provision:—

> That the lessor will, on the request of the Minister, before the expiration of the term hereby created, grant to His Majesty a lease of the demised premises for the further term of . . . years from the expiration of the said term at the same rent, and containing the like covenants, provisos and condition.

The monthly rent payable under that lease was the sum of $1,346. The amount now offered by the Crown is the sum of $1,200 per month net to the lessors, the Crown paying taxes, insurance, light and heat. If it is considered, as established by the evidence, that the taxes for the year 1919 amount to the sum of $4,374.65, and the insurance without the sprinklers being kept in operation at $2,000, these two amounts added together alone represent the sum of $6,374.65, which added to the $14,400

represented by the monthly rent for 12 months at $1,200, that will give a yearly rental of $20,774.65, as compared with $16,152 for 12 months' rent at $1,346, under the lease above referred to.

It therefore results that the rent of $1,200 net per month, offered by the Crown, is a most fair and reasonable one, under the circumstances. The owners of the Sherwood Building having already during the same year (1918), between the same parties, accepted a rent of $1,346, looking after the carrying charges, with the undertaking to continue the renting at the same price for an unlimited number of years, I therefore, without any hesitation, think that the amount offered by the Crown at $1,200 per month net, is most reasonable, yielding to the owners of the building placed at a value of $240,000, a net income of 6%.

It appears from the evidence that the erection of the building in the locality in question was a financial mistake.

Moreover, as appears by the affidavit of Styles, the manager of the company, notwithstanding his numerous and earnest efforts to rent the building since the Crown has abandoned, he has been unable to secure a tenant, as shewn by the affidavit filed herein on May 14, 1920.

Coming now to the question of compensation arising under the abandonment, the Crown practically takes the position of one repudiating a contract and therefore entitling the lessors to damages resulting from the loss of such rent from the date of cancellation, or under the provisions of sub-sec. 4 of sec. 23, of the Expropriation Act, R.S.C. 1906, ch. 143, which reads as follows:—

> The fact of such abandonment or revesting shall be taken into account, in connection with all the other circumstances of the case, in estimating or assessing the amount to be paid to any person claiming compensation for the land taken.

Upon this branch of the case, the evidence is very meagre, if any, on the record that could satisfy one to arrive at any just conclusion and none in that respect was adduced on behalf of the Crown.

Is not the lessor, under the circumstances, entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have had the effect of mitigating the loss?

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The *onus probandi*, in respect of mitigation of the damages flowing from the abandonment, is upon the Crown and not upon the defendants. Moreover, under sub-sec. (c) of sec. 26, of the Expropriation Act, the plaintiff is bound by the information to set forth:

"(c). The sums of money which the Crown is ready to pay to such persons respectively, in respect of any such estate, interest, charge, lien or encumbrance," and the Crown has made no offer in connection with the abandonment.

With respect to the damages resulting from the abandonment, the Court at trial was unable to say whether the defendants would be able to rent their premises before the expiration of the life of the lease. It could not then comply with the provisions of sub-sec. 4 of sec. 23, of the Expropriation Act, R.S.C. 1906, ch. 143, which says that:—

> The fact of such abandonment or revesting shall be taken into account, in connection with all the other circumstances of the case, in estimating or assessing the amount to be paid to any person claiming compensation for the land taken,

and give judgment fixing such compensation without proper evidence, without being seized with all the facts and "all the circumstances of the case." By doing otherwise a most egregious piece of justice would be done.

If such damages could be mitigated by circumstances that would happen between the time of the trial and the expiration of the 18 months, they would be taken into consideration before fixing the damages and the Court would be justified in staying its hand.

The damages must be fixed once for all, *Dominion Coal Co., Ltd.* v. *Dominion Iron and Steel Co. Ltd.*, [1909] A.C. 293. Furthermore, there is authority for the proposition that in fixing damages for loss of profits arising out of a breach of contract, events which happened between the date of the commission of the wrong and the time of the trial must be taken into account in estimating the loss for which one is entitled to compensation, *Findlay* v. *Howard* (1919), 47 D.L.R. 441, 58 Can. S.C.R. 516.

Therefore, before proceeding to render judgment, I called the parties before me and asked them whether it would not be proper, under the circumstances, for the Crown to undertake to pay to the defendant the amount of the rent offered by the information

at $1,200 per month net, up to October 31, 1919, the date of the abandonment, and ask the Court to stay its hand until the expiration of the 18 months, when evidence by affidavit or *viva voce* might be adduced shewing what has really taken place since October 31, 1919, the defendants, in the meantime, shewing diligence in their endeavour to rent or use the premises in question.

This course having been accepted and an application having been made, I refrained from giving judgment at the time, allowing the matter to rest until the expiration of the lease, and proceeding now to render judgment upon all the questions involved herein.

I hereby fix the compensation for the rent, up to October 31, 1919, at the sum of $1,200 per month, the Crown paying the carrying charges of taxes and insurance.

With respect to the unexpired portion of the rent and the abandonment—counsel for the defendants having at Bar declared his readiness to accept half of the rent—the Crown paying the carrying charges—stating that this course would be satisfactory, I shall therefore direct that judgment be entered accordingly, the defendant having in the meantime been paid and accepted the sum of $3,000 in full settlement of all repairs to the building during the time it was occupied by the Crown.

Therefore there will be judgment in favour of the defendants declaring them entitled to recover from the plaintiff the rental of $1,200 a month, together with all charges mentioned in the information such as taxes, insurance and heat, between October 14, 1918, and October 31, 1919—and from October 31, 1919, to the end of the lease the sum of $600 a month together with all cost of taxes and insurance. The defendants being entitled to their full costs, after taxation thereof.

Judgment accordingly.

MAN.

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JUBILEE LODGE No. 6 v. CARMEN'S COUNCIL, SECTION "A."

Manitoba King's Bench, Prendergast, J. October 28, 1920.

LABOUR ORGANISATIONS (§ I—1)—DISPOSITION OF FUNDS ON DISSOLUTION—TRANSFER OF FUNDS TO ANOTHER ORGANISATION ATTACKED—PARTIES.

Funds belonging to a union can be disposed of by majority vote only for objects provided for by its constitution; and at dissolution, funds consisting of dues and assessments paid in from time to time by members, in the absence of a provision for disposition of unexpended funds, belong to members in good standing at the time of dissolution.

Statement. ACTION for a declaration as to the right of possession and ownership of certain moneys paid from time to time to plaintiff lodge as assessments and dues and which it is alleged the defendants illegally appropriated when said lodge went out of existence. Dismissed as to the plaintiff lodge suing in its own name, but judgment given for individual plaintiffs.

A. A. Fraser, for plaintiffs; *H. W. H. Knott*, for defendants.

Prendergast, J. PRENDERGAST, J.:—Jubilee Lodge No. 6, which has its seat in the city of Winnipeg, is a local division of the Brotherhood of Railway Carmen of America, of which the grand lodge is in New York and which is part of what is known as the International. The objects of the brotherhood are the usual ones in such organisations and the name indicates sufficiently the class which the membership is recruited from.

Jubilee Lodge is composed of C.P.R. men; and two sister lodges, having also their seats in Winnipeg, being North Star Lodge and Transcona Lodge, are respectively composed of men from the National and Transcontinental Railway systems.

Jubilee Lodge came into existence several years ago by issue of a charter of the grand lodge, constituting 11 persons therein named, and their successors, a subordinate lodge under that name; and all the individual plaintiffs as well as all the individual defendants became members of said lodge.

In April, 1919, Jubilee Lodge voted a certain sum of money to a certain labour organisation known as the One Big Union, and which is not of the International, for propaganda work.

The grand lodge took the view that this was a diverting of lodge funds to a purpose and object not recognised by the Order, as provided by sec. 131, p. 85, of the subordinate constitution; and on May 9 following, the general president sent Jubilee Lodge a

letter charging that the motive for such action could only have been to destroy and depreciate the usefulness and standing of the brotherhood, and intimating that unless their officers shewed cause to the contrary within 15 days from date their charter would stand revoked. There was a similar letter sent on the same date to the North Star Lodge, which had also made a contribution to the One Big Union.

No action was taken by Jubilee Lodge on the general president's letter and it appears that the grand lodge considered the charter revoked at the time stated.

Then, on June 20, 1919, the grand lodge issued a charter bearing that date to 8 persons therein named, constituting them and their successors a subordinate lodge under the name of Jubilee Lodge No. 6. This charter is in the same terms as the previous one, and purports to be in the form used when a lodge is originally formed. It, however, bears at the bottom, presumably written there by someone connected with the grand lodge, the word 'n red ink: "Reorganized June, 1919."

N ne of the 8 persons named in the last charter are named in the first charter; but they all were members of the lodge as it existed under the first charter.

All the individual plaintiffs, besides being members of the lodge under the first charter, are members of the lodge as constituted under the second one.

For some time, perhaps a year before the revocation of the Jubilee Lodge charter, there had been discontent with some of the members in the three international lodges named, which was attributed by one of the witnesses to the unsatisfactory manner in which he said appeals were handled by the joint protective board, which is a grievance board to which questions are brought up from the local protective boards respectively attached to the local lodges. But it seems that the discontent was more fundamental, and that with many it was born of a feeling that the constitution of the brotherhood as it stood did not offer the necessary scope for the adoption and pursuit of sufficiently militant means of action.

It was stated in evidence, that as the strike was then on, the general president's letter to Jubilee Lodge was delayed for some

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days, and that it was too late to take action thereon when it was received. I, however, believe that owing to the discontent I have referred to, no effort would have been made by the lodge, even had there been time, to try and prevent the revocation of the charter. I feel that both the satisfied and dissatisfied members were content to let the charter be revoked; the former, because they felt that they could subsequently reorganise the Lodge without the dissatisfied members, and the latter, because they saw a welcome opportunity to transfer their allegiance to another organisation which could be made to give more scope to the adoption of the methods and means which they favoured.

In fact, such another organisation was already more or less in existence, although those who were satisfied with the brotherhood did not yet consider it as opposed to the Order. That was the Carmen's Council, which was formed February 28, 1919. It was composed of the executives of the three International lodges named, acting jointly as one body. I think the three lodges were at first wholly favourable to its establishment. It was a piece of machinery not provided, of course, by the constitution of the brotherhood, and which would moreover render the joint protective board practically useless. But as it was composed of elements all belonging to the brotherhood, even the members favourable to the latter seem to have seen in this new body only a device to allow the three lodges, through their officers, to confer on the matters of common interest.

One of the witnesses for the defence expressed the opinion that Carmen's Council was solely brought into existence so that the three lodges could reach a common understanding as to the application of the McAdoo award, which establishes a schedule of wages and conditions of employment for railwaymen in the United States. But the same result could have been obtained by resorting to the machinery provided by the constitution of the brotherhood.

It was natural in the circumstances that to those who were not satisfied with the brotherhood, Carmen's Council should take added importance as time went on, as they could foresee even at that time that they would find in it later on, a prepared foundation for an altogether new and independent organisation.

Conditions, as I think, were being made to gradually drift towards that end by the discontented element when the revocation of the Jubilee Lodge charter gave them the occasion of turning Carmen's Council, which was so far more or less a wheel within the wheels of the brotherhood, into an altogether independent organisation. But whilst the occasion for this was the revocation of Jubilee Lodge charter, it must be remembered that the occasion for the revocation of the charter was the lodge's contribution to an outside organisation whose aims were considered antagonistic to that of the brotherhood, an organisation in fact with which Carmen's Council later became affiliated.

I will now come to the series of meetings which culminated in the transfer of lodge moneys complained of.

The regular meetings of Jubilee Lodge as constituted under the old charter were on the first and third Thursdays of the month, and the appointed place was the Labour Temple.

In April, 1919, the officers of the lodge were and had been for some time: President, defendant John Wilson; recording secretary, defendant Roderick Murray; treasurer, plaintiff James W. Wilson; and trustee, plaintiff John Speed.

On or previous to May 10, 1919, certain officers of Jubilee and North Star Lodges, having been apprised of the pending revocation of the two charters, decided to call a joint meeting of their executives, together with that of Transcona Lodge, for Sunday, May 11, at the Labour Temple, their usual place of meeting. The meeting was accordingly called and held. One of the witnesses stated that it was a full meeting of the executives of the three lodges. Robert Hewitt, deputy of the grand lodge and northwest organiser of the same, but not a member of either of the three local lodges, was also present but apparently took no active part. It was there decided to call a meeting of the full membership of the three local lodges for Tuesday, May 13, at the Industrial Bureau, which was done.

At this meeting of the 13th, it appears that 1,500 or 2,000 were present and nobody was admitted without shewing a card of good standing in one of the three lodges. It does not appear whether the individual plaintiffs were there. At all events, it was there

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decided to form an organisation to come into being on revocation of the lodge charters. Defendant John Wilson, who presided at the meeting, says:

> That was done so it would not cause chaos amongst the brotherhood as the charter was the only bond between the members and we took it as an accepted fact that the charter would be revoked on the 24th . . . We decided we would form ourselves in Carmen's Council, sections A, B and C, so that members of the three sections could discuss matters either between themselves or together. We all agreed to that. . . . There was nothing said there as to Jubilee funds, because the other two lodges had nothing to do with that . . . We did not go at all into the details of the constitution, we only decided that as a policy.

On May, 15, being the third Thursday in the month, there was a regular meeting of Jubilee Lodge at the Labour Temple, the usual place of its sittings. There were apparently 300 or 400 members present or three-fourths of the membership—an unusual number due probably to the fact that the strike was declared on that date and that it had become known that the general president had intimated by letter that the charter would be revoked unless cause was shewn. Hewitt, deputy grand lodge officer, was also present but again took no part. The general president's letter was read and a motion that it be filed was agreed to. There was some discussion as to whether the grand lodge would be entitled to the *per capita* tax for May as the tax was not due until the end of the month and the charter would be revoked on the 24th; but that was all that was said about the funds which the lodge then had in hand. Then, just before the meeting closed, it appears that it was decided that the executive officers of the lodge should consider themselves as executive officers of Carmen's Council section "A," when the latter came into existence. Defendant John Wilson says that that was done by resolution and that nobody dissented. That was the last regular meeting that the lodge could hold before the charter was revoked. As president, defendant John Wilson also stated that the books should be audited before the revocation and asked the treasurer and trustees to proceed with the work on the Saturday following.

On Saturday, May 21, the audit was accordingly made by plaintiff James W. Wilson, who was treasurer, and three trustees. Defendant John Wilson, president, was also present. The audit

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shewed that the lodge had over $800 deposited to its credit in two accounts in the Canadian Bank of Commerce. The president claimed that he had not been made aware that they had so much money in hand and at once called a meeting of the executive for the same day to decide what should be done with the money.

A meeting of the executive was accordingly held the same day. Defendant John Wilson says that it was easy to gather the members, who were continually coming in the Temple, as the strike was on. He says that practically all the executive was there. It was there decided to withdraw all the moneys from the bank and that they should be held by plaintiff James W. Wilson. The latter, who was treasurer of the lodge, says that it was stated there that the object was to withdraw the funds from the brotherhood and appropriate it to Carmen's Council. He says he protested as he felt that the money should go to the grand lodge, but that the motion was nevertheless passed without anyone asking that a vote be taken. The money was at all events withdrawn by means of cheques duly signed by the president, treasurer and trustee of the lodge, and placed in the hands of plaintiff James W. Wilson.

Three days after that (May 24), as assumed by all parties interested, the charter of Jubilee Lodge was revoked.

On June 5, which was the first Thursday in the month, the members of the defunct Jubilee Lodge, to the number of about 300 or 400, met in the Labour Temple as usual and the officers thereof, plaintiffs as well as defendants, took their seats and assumed to perform the same duties as in the past. Witnesses for the plaintiffs seem to say that this meeting was nothing more than a meeting of ex-members of the defunct lodge, whilst witnesses for the other side say that it was a meeting of Carmen's Council Section "A," as it had been understood that it should be at the joint meeting of the three lodges held May 13 in the Industrial Bureau. Cartwright, a witness for the defendants, states that at this meeting of June 5, report was made of the action taken by the lodge executive as to the funds in hand, and that this action of the executive "in transferring the funds from the name of Jubilee Lodge to Carmen's Council Section 'A' " was endorsed unanimously by resolution.

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Prendergast, J.

Plaintiff James W. Wilson, ex-treasurer of Jubilee Lodge, who held the funds in question, apparently considered that he had somehow become treasurer of Carmen's Council Section "A," for he sent in his resignation as such to the latter body a few days later. Shortly after, he handed over the funds to the newly appointed treasurer of Carmen's Council Section "A," and they are now deposited to the credit of that body.

Then, on June 20, as stated, the second charter was issued.

Jubilee Lodge, either as formerly or presently in existence, was never incorporated under the Trade Unions Act, R.S.C., 1906, ch. 125; nor is Carmen's Council.

I should have stated before that it appears that all the debts owing by Jubilee Lodge as first constituted have now been paid, except a sum of about $300 claimed by the joint protective board, which was withheld on the ground that the latter had not properly fulfilled their duties.

The plaintiffs in their pleadings, and on the argument, have assumed that the original Jubilee Lodge was revived by the second charter, and that the two may be considered as a continuing organisation. I do not think that this is so. There is not a single name appearing as that of a member in the one charter that also appears in the other, and it might have been that not a single member of the lodge operating under the first charter had joined the lodge operating under the second. The name in itself signifies nothing, considering that, as it was no longer in use, it could have been given to any new lodge even if it were composed altogether of strangers to the old organisation. In fact, the new lodge as constituted at the time of the issue of its charter, was composed wholly of such strangers. Nor is there anything that makes the new lodge successors to or trustees for the old lodge. There is in short no continuity between the two.

In that light, the present Jubilee Lodge No. 6 cannot sue; nor can its members either as such or as representing this lodge.

Nor can the old Jubilee Lodge No. 6 sue, as it is out of existence. For the same reason the plaintiffs cannot sue in its name, but I think they can sue individually by virtue of having been members of the same.

When the original Jubilee Lodge went out of existence, there was no provision in the constitution for the distribution of unexpended funds. The demands of the grand lodge are apparently laid at rest by Hewitt's letter of July 17, in which he claims no other moneys than the *per capita* tax up to April 1, which was paid. In the circumstances, the money left belonged to the contributors, that is to say, to the members of the original lodge being in good standing on May 24, 1919, which is the time it went out of existence. *Brown* v. *Dale* (1878), 9 Ch. D. 78; *In re Printers and Transferrers Amalgamated Society*, [1899] 2 Ch. 184; *In re Lead Companies Workmen's Funds Soc.*, [1904] 2 Ch. 196.

This was not contested and in fact was conceded at least on the argument by counsel for the defendants, who moreover declared their clients ready to distribute the fund accordingly and this admission would end the controversy were it not for the question of costs, to determine which it is still necessary to enquire what had been their attitude up to that moment.

I am decidedly of opinion that the wiser course for the defunct lodge would have been, before going out of existence, to put the funds in question in the hands of the grand lodge for distribution, as was suggested at the time by treasurer James W. Wilson. Considering, however, that the grand lodge, after being paid the *per capita* tax, apparently took a disinterested attitude as to the balance of the funds, I cannot say, particularly in the circumstances of emergency, that there was anything wrongful in the withdrawal of the funds from the lodge account and putting them in the hands of one who, as past treasurer, had evidently the confidence of the membership.

It does not appear at all, however, that the intention was that he should hold the funds for the lodge membership. The evidence of James Wilson for the plaintiffs and that of Cartwright, now One Big Union organiser, called for the defendants, leads unmistakably to the conclusion that the aim of the discontented element was to work a transformation of the membership of the lodge as a body into Carmen's Council Section "A," and that the fund should follow as a consequence and become affected to the new uses.

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Such intention, however, even if expressed by a formal resolution as James W. Wilson says that it was, was without effect. These funds could be disposed of by a mere majority vote only for objects provided for by the constitution. In the circumstances of impending dissolution it required absolute unanimity, which there was not. Defendant John Wilson himself says: "Prior to May 13th, there were about 25 who said that they would remain loyal to the old lodge and would ask for a new charter." So that notwithstanding all resolutions or understandings to the contrary the only fact that matters is that at the dissolution of the lodge we find the funds in the hands of James W. Wilson, who could only hold them for the lawful owners, and these were the contributors.

Moreover, James W. Wilson was not holding at all these funds as treasurer of Jubilee Lodge, which he was no longer. It may be that James W. Wilson by assuming, with the consent of all, to perform the duties of treasurer of Carmen's Council Section "A" should be so considered although never formally appointed. But that again did not affect the conditions of his holding the Jubilee Lodge funds, any more than it did his own individual moneys. He probably was right, although opposed on principle as he saw it, when he conformed to the orders of the lodge executive to withdraw the moneys from the bank, because the executive was the properly constituted authority in the matter; but he was altogether wrong in taking orders from the new organisation who had no authority whatsoever over him as trustee for the contributors, and in transferring the fund to the newly appointed treasurer of Section "A."

The point to be noted here is that Wilson transferred the fund to this officer as such; and the latter, accepting it also as such, deposited it in the name of the section in the bank where it now is. Now, how has Section "A" been holding these moneys, and with what intention?

As already stated, counsel for defendants said on the argument that they are ready to distribute the fund among the membership of the defunct lodge.

This, however, is altogether at variance with the position they took in their pleadings, in the examinations for discovery, and in bringing out evidence at the trial.

In the statement of defence, we read that the defendants "are entitled to the moneys they have received"; and that "in accordance with the powers vested in the said Jubilee Lodge No. 6 and members thereof, certain moneys belonging to said Jubilee Lodge No. 6 were duly and legally voted by the members of the said body *to and for* Carmen's Council, Section 'A.'" The whole statement of defence should be read as shewing how the defendants endeavoured to steer a middle course between the position which they at first openly took and the one which they meant finally to assume before the Court. The examination of witnesses was also conducted on lines not at all in harmony with the stand taken on the argument.

Then, Carmen's Council Section "A" has been holding these funds since June, 1919, and on October 6 following, when the action was instituted, they had yet done nothing whatsoever indicating that they intended to distribute the same among the old lodge membership. It should here be stated in this connection that defendant John Wilson said: "There are members not belonging to Section 'A' who paid in part of the moneys as members of Jubilee Lodge and would be entitled to it."

This inaction alone on the part of Section "A" would give the plaintiffs a right to sue.

There was an application for the plaintiffs to amend under R. 211. I do not think that this is at all necessary as far as the plaintiffs are concerned. Leaving aside James W. Wilson, whose standing is perhaps doubtful on account of his having mistakenly paid the moneys over to Section "A," any one of the other individual plaintiffs being in good standing as members of the old lodge at the time of its dissolution, have such an interest in the funds as to entitle him to the declaration prayed for.

There is perhaps at first sight a certain ground for the contention that the plaintiffs suing (as the style of cause reads) "as members . . . of said Jubilee Lodge No. 6," meant to do so as members of the new lodge which has no standing here. But the plaintiffs were members of the first lodge and are now members of the second, and their conception was that the two formed the one continuing organisation, so that the word "lodge," either in the style of cause or other parts of their pleading, may be taken fairly

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to refer either to the one lodge or the other. As individual members of the old lodge or contributors to the fund, any one of them could sue.

With respect to the defendants, I would allow to amend the style of cause so as to embrace all members of Carmen's Council Section "A."

The action will be dismissed as to Jubilee Lodge suing in its own name, but without costs.

The other plaintiffs are entitled to a declaration that the fund is the property of the members of Jubilee Lodge as originally constituted, who were in good standing on May 24, 1919.

It will also be ordered that the defendants deposit the said fund into Court. This is advisable, as it has not been clearly shewn that the grand lodge was formally notified, and it may be necessary to enquire further into the amount at one time claimed by the joint protective board. It may also be advisable that a receiver be appointed to make the distribution.

There will also be an order for further directions.

The individual plaintiffs should have their costs.

Judgment accordingly.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. January 21, 1921.

SPECIFIC PERFORMANCE (§ I E—30)—AGREEMENT FOR SALE OF LAND—COVENANT NOT TO ASSIGN—ASSIGNMENT—CONSENT OF VENDOR—QUIT CLAIM BACK—HOMESTEAD ACT—QUIT CLAIM SET ASIDE.

An agreement for the sale and purchase of land contained a clause that the purchaser should not assign the same without the written consent of the vendor. The purchaser before going into possession assigned the agreement to the plaintiffs. The defendant knew of the assignment and entered into correspondence with the plaintiff before he went into possession. The trial Judge held that this amounted to a consent to the assignment. In an action to set aside a quit claim deed given by plaintiff to defendant and for specific performance of the agreement the trial Judge held that part of the land was the homestead of the plaintiff and that as the female plaintiff had not signed the quit claim it was null and void and as to the other part he ordered specific performance of the agreement with an abatement of price.

On appeal HAULTAIN, C.J., and Lamont, J.A., held that it was unnecessary to consider the application of the Homestead Act as the plaintiff was induced to sign the quit claim by reason of misrepresentation on the part of defendant's solicitor and that the quit claim should be set aside as to the whole property. Newlands, J.A., held that the trial Judge was in error in making the order which he did as that was making a new contract between the parties which they had never contemplated, and that what the plaintiff had done was to release his equitable title under the agreement for sale when he found that he could not carry it out, that the wife was not a necessary party, and that the defendant was entitled to possession of the land. Elwood, J.A., held that the wife was not a necessary party to the quit claim, that the vendor was induced to consent to the assignment by misrepresentations as to the plaintiff's financial position and that when he discovered these to be false, the consent to the assignment was not binding on him, and that the appeal should be allowed.

Statement.

APPEAL by defendant from the trial judgment in an action to set aside a quit claim deed given by the plaintiff to the defendant and for specific performance of an agreement for sale. Affirmed.

J. F. Frame, K.C., and *F. W. Turnbull*, for appellant.

H. E. Sampson, K.C., for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurs with LAMONT, J.A.

Newlands, J.A.

NEWLANDS, J.A.:—The facts in this case as found by the trial Judge are as follows:—

The defendant and one Longmuir entered into an agreement of sale for the east ½-15-25-28-W2nd for the sum of $13,000; $1,200 in cash, and the balance by half-crop payments. Under the agreement the purchaser was to have possession on December 1, 1918. The agreement contained a clause that it was entered into on account of the confidence the vendor had in the purchaser's skill and ability as a farmer, and provided that he should not assign

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the same without the written consent of the vendor. Longmuir, before going into possession, assigned this agreement of sale to the plaintiff George Biggs, for the consideration of $1,960; $400 payable in cash, and the balance in equal annual payments secured by promissory notes. The defendant knew of this assignment, and entered into correspondence with the plaintiff, George Biggs, before his going into possession, which the trial Judge held amounted to his consent in writing to the assignment. On March 19, 1919, George Biggs went into possession, and his wife, the plaintiff Annie Biggs, joined him on April 9, 1919, and they have lived there ever since. On April 17, 1919, the defendant's solicitor wrote a letter to the plaintiffs claiming that defendant had never consented to the assignment in writing, and that defendant intended to take immediate proceedings to cancel the agreement; and, after some correspondence between them, it was agreed that plaintiffs and Longmuir should quit claim their interest in the land to defendant. Plaintiff George Biggs and Longmuir, believing what was told them by defendant's solicitor, signed the quit claim deed, but it was never executed by the plaintiff Annie Biggs, although Biggs promised that she would sign the same. The trial Judge found there was no fraud on the part of defendant's solicitor, because he had no knowledge of the correspondence between George Biggs and defendant before Biggs went into possession. As part of this arrangement, Longmuir handed back to Biggs his promissory notes and gave him an acknowledgment that he owed him $400, the amount paid him in cash. Defendant then leased the land to plaintiff Biggs. The trial Judge further held that the south-east quarter was the homestead of the plaintiffs and that the quit claim deed was void as to it without the signature of Annie Biggs, and acknowledgment given under the provisions of the Homestead Act, 6 Geo. V. 1915 (Sask.), ch. 29, and he ordered specific performance of the agreement of sale as to that quarter with an abatement of price; that Biggs should be compensated for the work done on the other quarter; the $1,200 paid by Longmuir to be applied on the homestead, and Longmuir to be paid the profit he would have made on the sale of that quarter.

I think the trial Judge is supported in his finding on the facts by the evidence, but I cannot agree with his disposition of the case.

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Specific performance with compensation is only granted when the vendor cannot make title to the whole of the land agreed to be sold by him, and the purchaser is willing to take title to the balance with compensation. That is not this case. The vendor here has the title to the whole of the land agreed to be sold, and to make him transfer only part of it to the plaintiffs would be making a new contract, and a contract that was not in the contemplation of either party. The quit claim deed was entered into between the parties on the understanding that it extinguished the plaintiffs' rights to the whole of the land, and it would be manifestly unfair to defendant to hold it good as to part only. The defendant would never have consented to such a quit claim. If it is bad as to part of the land, it must be bad as to the whole of it. To hold otherwise would also be making a new contract between the parties, which the Court cannot do. On the other hand, if the quit claim deed is merely the written evidence of a verbal agreement between the parties to abandon the contract, then it is good as to the whole of the land; because I do not think the Homestead Act applies to such a case and, therefore, the signature of the wife would not be required. The instruments specified in that Act requiring her signature are all in the nature of grants and are instruments that would only be effective under the Land Titles Act, 8 Geo. V. 1917 (2nd sess., Sask.), ch. 18, where the grantor had a certificate of title. The legal title in this case being in the defendant, I see no reason why Biggs cannot release his equitable title under the agreement of sale if for any reason he found he could not carry out the same, and I think that is what was done in this case.

As all proceedings to rescind or cancel an agreement of sale must be by proceedings in a Court of competent jurisdiction, R.S.S. 1920, ch. 72, the wife is amply protected.

I think the appeal should be allowed and the plaintiffs' action dismissed with costs. The defendant should have possession of the said lands.

Lamont, J.A.

LAMONT, J.A.:—On June 21, 1918, the defendant, by an agreement in writing, sold the east half 15-25-28-W2nd to one Longmuir for $13,000; payable $1,200 cash, and the balance by delivering to the defendant at the elevator at Craik one-half of the crop

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each year until the purchase money was fully paid. The defendant was to have possession of the land until December, 1918, together with the crop that year. Longmuir paid the $1,200. The agreement contained a clause by which Longmuir agreed not to assign his interest in the land without the defendant's consent thereto in writing, and if he was desirous of disposing of his interest he would first pay the balance of purchase money remaining unpaid. On October 17, 1918, Longmuir assigned his interest in the land to the plaintiff George Biggs, who gave him therefor $400 in cash, and notes for some $1,500. The defendant was made aware of this assignment. Between October, 1918, and April, 1919, correspondence took place between the defendant and the plaintiff George Biggs, which the trial Judge held, and in my opinion correctly so, amounted to a consent in writing on the part of the defendant to the assignment from Longmuir to Biggs. On March 15, 1919, the defendant vacated the premises, and on March 25 the plaintiff George Biggs came with his first load of chattels and took possession. On April 9 he brought his family, horses and machinery. Since that date he and his family have been in possession of the property.

In March, 1919, the defendant stated to his neighbour, Hale, that he regretted having sold the farm to Longmuir on the half-crop basis as he did not know if the man going on it would be able to work it. Hale asked him if there was not some clause in the agreement preventing Longmuir from selling without his consent. The defendant replied that he would look it up. On April 5 he consulted his solicitor, Mr. Kinsman, and was informed that the agreement contained such a clause. On April 7, Kinsman, under instructions from the defendant, wrote to Longmuir, referred to the provisions of the contract, and stated that he had assigned to Biggs and had not obtained the defendant's consent, and as a result thereof he must pay the whole balance unpaid under the contract ($12,362.51) by April 24, otherwise proceedings would be taken to cancel the contract. On April 9 the defendant met the plaintiff George Biggs for the first time, and he admits that on that occasion he told Biggs that he was "closing in on Longmuir." On April 17, defendant's solicitors wrote to the plaintiff as follows:—

Dear Sir:

Re E½-15-25-28-W2nd and re your contract of purchase from F. Longmuir.

We beg to advise you that Mr. Longmuir purchased this property from Mr. Frank Isenberg of Craik under a contract which required Mr. Longmuir to obtain a consent in writing of Mr. Isenberg before he assigned his contract or made a re-sale and that if he did so without such consent the entire money should immediately become due and payable. Mr. Longmuir did not obtain the consent of Mr. Isenberg in respect to the sale to you, nor did he pay the balance of the money owing to Mr. Isenberg. We are at once taking action for cancellation of this contract and to obtain immediate possession of the land and this is to give you notice of what we are doing in order that you may protect yourself as you will only be allowed to stay on the land a very few days.

Yours truly,

TURNBULL & KINSMAN.
W. R. Kinsman.

On April 26 the plaintiff George Biggs, Longmuir, the defendant and Mr. Kinsman, who was acting as the defendant's solicitor, met in Craik. The defendant admits that on that occasion Kinsman stated to both Biggs and Longmuir in his presence that he, the defendant, had not consented to the assignment, and that, as a consequence, the entire purchase price was then due. Biggs and Longmuir say he went further, and stated that Biggs had only 3 days to get off the place. At any rate it is admitted that, at the time of the interview, Kinsman had in his pocket papers necessary to commence proceedings for possession. Believing the representation made by Kinsman to be true, Biggs signed a quit claim deed of all his interest in the land to the defendant and took a lease of the property. Longmuir returned to Biggs the notes he had given, but could not return the $400. The defendant absolutely refused to return any part of the $1,200 he had received. Some time later, Biggs took legal advice in reference to the matter, with the result that this action was brought to set aside the quit claim deed and the lease, and for a declaration that the agreement of sale is still in full force and effect.

The trial Judge found that Kinsman did represent to Biggs that no legal consent had been obtained from the defendant, and that the entire purchase money was therefore due. He also found that this statement was not true, inasmuch as the letters written by the defendant to Biggs were sufficient to constitute such consent. But, he went on to say:—

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I think it only just to Mr. Kinsman to observe that he had no knowledge of the correspondence that had passed between the plaintiff, George W. Biggs, and the defendant and so was not guilty of any fraud or misrepresentation in any sense of the term.

He, however, held that, as the plaintiff Annie Biggs had not signed the quit claim deed and as the south-east quarter was the homestead of herself and her husband, the quit claim was null and void as to that quarter, and he ordered specific performance of the agreement with an abatement of price representing the value of the other quarter. From this judgment the defendant appeals.

Were it necessary to express an opinion in respect to the application of the Homestead Act, 6 Geo. V. 1915 (Sask.), ch. 29, I should be inclined to hold that the south-east quarter was the homestead of the plaintiffs, and that a disposal of his interest therein by the husband included a surrender thereof. I am, however, of opinion that we do not need to consider the application of that Act, because, with deference, I think that the conclusion of the trial Judge that there was no misrepresentation by Kinsman cannot be upheld.

Misrepresentation has been defined (20 Hals., p. 658, sec. 1612) as: "Any false representation made by one person to another with the object and result of inducing that other either to enter into a contract or binding transaction with the representor or to alter his position in any other way to his prejudice."

Whether the defendant did or did not consent in writing to the assignment as required by the contract is a question of fact, and a representation that he had not is a representation relating to a matter of fact, and not merely the expression of a legal opinion. The trial Judge found that such representation was not true. That it was material is obvious, and that it induced Biggs to alter his position, to his prejudice, is established by the evidence. It was, therefore, a misrepresentation. Had Kinsman known that it was not true, the making of it would have been fraudulent on his part. His belief in its truth prevented it from being fraudulent, but it did not make the representation true, or make it any the less a misrepresentation, though innocently made. The making of it, under the circumstances, constituted an innocent misrepresentation. But an innocent misrepresentation, inducing a

contract or binding transaction, is sufficient to enable the party entering into the transaction by reason of the misrepresentation to set it aside, at least until it is completely executed.

In *Derry* v. *Peek* (1889), 14 App. Cas. 337, Lord Herschell, at 359, says:—

> Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand.

By reason of the innocent misrepresentation made by Kinsman, Biggs was induced to execute a quit claim deed by which he surrendered to the defendant all his interest in the land, and that without any consideration for the money he had paid, except Longmuir's acknowledgment that he owed it, which the evidence discloses to be worthless. This he would not have done but for the representation made. He is therefore entitled, in my opinion, to have the quit claim deed set aside.

It was, however, set up in the pleadings, and contended before us, that, if the defendant did consent to the assignment, his consent was induced by misrepresentation on the part of one Humphreys, acting as Biggs' agent. In my opinion the evidence does not substantiate this contention.

Humphreys, on being asked what Biggs had told him, said:—

> He claimed that he had a good outfit of horses, six good horses and some machinery and machinery he did not have but might arrange to purchase, also that he had money enough to pay Mr. Longmuir out in full but needed it to carry on the place with.

This entire statement was true, except that part which said he had money enough to pay out Longmuir in full. Whether he had or not was not material to the defendant. When Biggs came up with his family on April 9, he had only $200 cash, which was not sufficient apparently to purchase the seed he required, but he told the defendant that all he had to do was to go to a man at Morse and he could get all the money he required. This was in no way denied. Furthermore, the defendant knew some time before this that Biggs was not very strong financially, as was disclosed by his statement to Hale. Yet, having that information, he admitted in his examination for discovery that right up to April 5, the day he learned from Kinsman that the agreement called for his consent or payment of the full purchase price, he was ready to accept Biggs in place of Longmuir. He never inti-

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mated to Biggs that his financial standing was not satisfactory, nor had it in fact anything to do with the steps he took to get back the place, and he intimated in his testimony that he changed his mind about letting Biggs have the place when he was advised that, under the contract, he was entitled to the full purchase money if he did not consent to the assignment. He evidently was aware that neither Biggs nor Longmuir could pay the purchase money, for, on April 9, he told Biggs he was "closing in on Longmuir." Apparently he thought he saw an opportunity of getting the farm back and keeping the $1,200 as well, and he could not resist the temptation.

At the trial an attempt was made to have it appear that the granting of the lease was an entirely separate transaction from the giving of the quit claim deed, and that the one had no relation to the other. I have no hesitation in holding that they both formed part of one transaction.

I am therefore of opinion that, as all the transactions between the parties hereto which took place on April 26 were induced by and based upon a material misrepresentation by the agent of the defendant, though innocently made, the defendant is not entitled to profit by that misrepresentation.

The plaintiffs are entitled to have both quit claim deed and lease set aside, and the agreement specifically performed by the defendant.

In the result the judgment of the trial Judge setting aside the quit claim deed as to the south-east quarter should be affirmed, but I would vary the judgment by making it apply to the other quarter as well. A reference as directed by the trial Judge should be held. The scope of the reference should be to ascertain the amount (if any) due to the defendant under the agreement. As the plaintiff George Biggs claimed damages only as an alternative to rescission, the damages (if any) to which he may be entitled as a result of the defendant's conduct are not claimed in this litigation, neither is the work done or money paid by the defendant as a result of the lease; but, to save further litigation, the reference may be extended to embrace these. The plaintiffs are entitled to the costs of this appeal.

Elwood, J.A.

ELWOOD, J.A.:—I concur with my brother Newlands, in holding that the trial Judge was incorrect in decreeing specific performance

with compensation with respect to the south-east quarter of the land in question, and I am also of the opinion that the transaction between the appellant and the male respondent whereby the male respondent quitted claim to the appellant of the land in question is one which, under the circumstances of the case, is not affected by the Act respecting Homesteads, 6 Geo. V. 1915 (Sask.), ch. 29, as amended by 6 Geo. V. 1916 (Sask.), ch. 27.

What took place between these parties was, in my opinion, not a conveyance of an interest in the land, but was an abandonment of the agreement of sale entered into between Longmuir and the appellant and assigned to the male respondent. It seems to me from the evidence that the male respondent, in abandoning this land, was influenced not only by the fact that he was informed that the appellant had not consented to the assignment, but also by the fact that he was not in a position to properly farm the land and to proceed with the contract.

But, whatever the reasons were that induced him to abandon the contract, he did conclude to abandon it. The legal estate in the land never passed from the appellant. The quit claim deed was merely carrying out the verbal agreement entered into. The abandonment could take place without the execution of the quit claim deed, and, in my opinion, it was not necessary to have the wife join in the transaction.

I cannot bring myself to the conclusion that the Act ever intended that, where a purchaser under an agreement of sale decides that he cannot proceed with the agreement of sale, it is necessary that his wife should join in any abandonment of that agreement.

In connection with the whole transaction, sight should not be lost of the fact that, at the time of the execution of the quit claim deed, the male respondent accepted from the appellant a lease of the land in question. Under that lease the appellant performed certain work on the land, furnished seed, paid taxes and paid half of the cost of threshing. Under the agreement, the appellant would not have been called upon to perform any of these services, or pay any of this money. This lease is, in my opinion, quite inconsistent with the continuation of the agreement of sale, and is at least evidence of an abandonment of that agreement of sale. In view of this I cannot see how the respondents could succeed in an action for specific performance of the agreement of sale.

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If the trial Judge was correct in holding that the various letters written by the appellant constituted a consent by the appellant to the assignment to the male respondent (and it is not necessary, in view of the conclusion that I have come to, that I should express an opinion as to whether or not those letters did constitute a consent—and I would incline to the opinion that they did not, at most, constitute more than a waiver of consent)—those letters were, in my opinion, written in consequence of a misrepresentation by the male respondent, through Humphrey, as to the means the male respondent had for farming the land in question. The evidence was that the male respondent represented to Humphrey that he had an outfit of horses and machinery and seed, sufficient to work the place, and he requested Humphrey to see the appellant and do anything that he (Humphrey) could do to get the matter through and to have the appellant accept him. In consequence of this, Humphrey told the appellant that the male respondent was a better man than Longmuir; that he had all his machinery, seed, and everything to work the place. The statements of the male respondent were false, and he knew they were false; and as soon as the appellant discovered that they were false he took steps to have the respondents put off the place.

Under these circumstances, I am of the opinion that the consent, or waiver of consent, of the appellant was not binding upon him.

On both of the above grounds, I am, therefore, of opinion that the appeal should be allowed with costs, and the plaintiffs' action dismissed with costs. *Appeal dismissed.*

CAN.

S. C.

ANTONIOU v. THE UNION BANK.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. December 17, 1920.

SET-OFF AND COUNTERCLAIM (§ II—40)—DAMAGES AGAINST VENDOR FOR BREACH OF CONTRACT—JUDGMENT—HOLDER OF NOTES IN DUE COURSE—UNCONDITIONAL ACCEPTANCE—NO NOTICE OF BREACH OF CONTRACT.

Damages recovered in an action for breach of contract against a vendor cannot be set off against the amount due to an assignee of such vendor in an action by such assignee on bills of exchange of which such assignee is the holder in due course and which have been accepted unconditionally by the purchaser, the assignee having no notice of any breach of contract by the vendor at the time of discounting the notes.

[*Union Bank* v. *Antoniou* (1920), 53 D.L.R. 405, 15 Alta. L.R. 482, affirmed.]

APPEAL by defendants from a judgment of the Supreme Court of Alberta (Appellate Division), (1920), 53 D.L.R. 405, 15 Alta. L.R. 482, in an action to recover the amount due on certain bills of exchange. Affirmed.

J. B. Barron, for appellant; *A. H. Clarke*, K.C., for respondent.

DAVIES, C.J.:—I concur with ANGLIN, J.

IDINGTON, J.:—The respondent recovered judgment at the trial upon certain bills of exchange drawn by one Arnett upon appellants which were accepted by them.

The appellants had entered into a written contract with said Arnett, a manufacturer at Souris, Manitoba, for the manufacture by him of certain goods which were to be shipped to them to Calgary and ultimately used by them for their place of business in Calgary.

The bills of exchange in question were drawn by said Arnett, at Souris, and discounted with respondent at its Souris agency.

These bills of exchange were respectively accompanied by shipping bills, or bills of lading, with instructions written at head of each draft "Hold for arrival of goods."

And not until and evidently in consideration of the delivery of such bills of lading was the acceptance written by appellants of the bills of exchange now in question.

Out of such an ordinary course of dealing we have presented in this appeal some remarkable contentions founded on the proposition that because the manufacturer, Arnett, had assigned (beyond question, I assume, as collateral security for advances made or to be made by respondent) the said contract to the respondent by the following memorandum:—

> For value received I hereby assign all my rights, title and interest in the attached contract between myself and the King George Ice Cream Parlors, dated February 10, 1919, and all the monies payable thereunder and in the property therein mentioned, to the Union Bank of Canada.
> Dated April, 19th, 1919. T. L. ARNETT.

Therefore, any bill of exchange drawn by Arnett and discounted with respondent, though only accepted by appellants under circumstances as above related, were possibly worthless in the hands of the respondent and, at all events, were subject to be set off by any claim for damages suffered by appellants by reason of Arnett's breach of said contract.

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Idington, J.

I submit such a proposition only needs to be stated to shew how very unfounded is this appeal. To my mind it is not arguable.

The respondent is suing upon a bill of exchange given for good and valuable consideration, accepted by appellants, as already stated, in consideration of its delivery to them of the documents enabling them to get possession of the goods. And there is no pretence of knowledge on the part of the respondent of any breach or notice by appellants to it, when so accepting these drafts, of breach or claim for damages in consequence thereof.

Even if there had been it could not have put the appellants in any better position as against the respondent. I only mention it as one of the peculiarities of the case set up.

The contracts of appellants with respondent evidenced by these several acceptances are entirely collateral to the original contract and shew no privity of contract between the respondent and appellants founded on the said original contract.

And, if possible, there is still less upon which to rest any equitable claim of set-off, or anything to entitle the appellants to have respondent restrained from enforcing the clear undoubted claim it has in respect of each of said acceptances.

The respondent was the undoubted holder, in due course, of each of these bills of exchange, and entitled to recover from the appellants by reason of their respective acceptances thereof in consideration of the delivery of the bills of lading, or shipping bills, as more usually called in speaking of shipments by railway.

And the question raised as to the certainty of the amount of each bill by reason of the words "and exchange," which for a few minutes seemed to me the only serious point taken in the argument, seems to be answered in several ways.

In the first place, the amount of such inland rate for cost of collection is so well settled by daily practice forming part of our common knowledge and that specifically referred to in the Bank Act (see 3-4 Geo. V. 1913 (Can.), ch. 9) to be a clearly fixed sum.

In the next place, the memo. written on the bill should be used in light of such common knowledge and it leaves no doubt in my mind of the exact sum covered by the use of these words.

And again, the original contract of appellants with Arnett expressly provides that appellants were to pay by accepting drafts "to bear eight per cent. per annum and bank charge for collection," which latter phrase has a well-known definite meaning.

There is also the suggestion, made by Mr. Clarke, of counsel for respondent, that the instrument, with the evidence connected therewith, was at all events evidence of a contract between the respondent and the appellants of the meaning of which there can be no doubt.

And I may repeat that it was as such a collateral contract in no way dependent upon, or reducible in effect by reason of the result of breaches by Arnett of the original contract.

Another point was faintly made by counsel for appellants that the only signature for the acceptance was that of Antoniou, which seems amply met by the following statement made on examination for discovery:—

Q. Were you authorised by your firm to accept these drafts and the contract, you have signed all of them I see, I do not see any other members of your firm on them?

Mr. BARRON:—You can take that as an admission from us that he was authorised and was acting on behalf of the King George Ice Cream Parlors and for his partners and whatever signing he did do, is the same as the signature of all the partners of the firm. I have told Mr. Carson I would admit that all the time. That will save you considerable time in getting an answer out of the witness.

I think the appeal should be dismissed with costs throughout.

Duff, J.

DUFF, J. (dissenting):—As between the respondent and the appellant the effect of the assignment of April 19, 1919, no doubt depends upon the Judicature Ordinance, C.O.N.W.T. 1915, ch. 21, sec. 10, sub-sec. 14, but the rights of the bank and Arnett *inter se* are governed by the Manitoba statute in force at the date of the assignment, the effect of which appears to be that the bank acquired a legal title to Arnett's rights under his contract with the appellant. Apart from this statute the bank became, even without notice, the owner, at least in equity, of Arnett's rights.

At the date of the bills of exchange sued upon, June 10, 1919, Arnett was largely indebted to the bank, considerably, that is to say, in excess of the aggregate of the three bills. The evidence makes it quite clear that the bills of lading were to be accompanied by drafts and I think the proper inference from the facts is that the parties recognised the legal position, namely, that the bank held the assignment and any rights accruing to Arnett under his contract with the appellant as security for this indebtedness and that the right given by the contract to require acceptance of drafts by the appellant was a right which Arnett was to exercise

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for the bank. This right as between Arnett and the bank was, as already indicated, the bank's, the drafts were drawn for the immediate benefit of the bank, the discounting of the bills was, in substance, only a recognition of the bank's right and the bank's title, in other words, in substance the bank was the drawer of the bills. In these circumstances, with great respect, I cannot accept the view that the bank was a holder in due course. It follows, moreover, that the bank was merely in exercise of its rights under the contract and assignment. The acceptance which indeed was not strictly a voluntary acceptance can be no answer to the appellant's claim to set up in reduction a claim to damages arising from Arnett's failure to observe the terms of the contract. Such a claim is not a mere personal claim or defence but a claim rising out of the very transaction upon which in the view above expressed the bank's right to recover is based.

Nor am I able to understand how the appellant's right is affected by the fact that judgment has been recovered against Arnett. The doctrine of *res judicata* is founded in justice and convenience and has no application here; the right as against Arnett arises under the contract; the right of set off against the claim of the bank rests upon the ground that the bank is not entitled to recover moneys which in the circumstances it would be unjust to call upon appellant to pay.

Anglin, J.

ANGLIN, J.:—By accepting the bills of exchange sued upon the appellants contracted directly and unconditionally with the respondent bank to pay to it the amounts thereof. An acknowledgment of absolute liability therefor was implied. The consideration for these contracts was the surrender of the bills of lading held by the bank. This alteration of the bank's position, quite apart from any right it may have as the "holder in due course" of negotiable paper, I think precludes the defence of set off of the appellants' claim for damages against Arnett, the drawer of the bills.

Moreover, for the establishment of their right of recovery on their claim for damages the appellants must invoke the judgment pronounced, but not yet entered, in their action against Arnett. They cannot successfully prefer this inchoate judgment as establishing their right to damages and at the same time deny its effect as a merger of the cause of action on which it was pronounced merely because it had not been formally entered. If effective to

establish their right to damages it must also operate to merge the claim for those damages which it is sought to set off in this action. That the judgment against Arnett can be set off against the plaintiff's claim is not contended.

The other grounds of appeal lack substance and even if well founded as answers to a claim dependent on the bank's status as a holder of the bills in due course being established, they would be ineffectual to defeat its claim based on its position as the holder of independent contractual rights on which the defendants are directly liable to it.

Pressing the defence that the acceptances by Antoniou did not bind the firm of which he was a principal and his co-partners seems to me scarcely consistent with good faith in view of the following admission of counsel for the defendants on the examination of one of his clients for discovery: [See judgment of Idington, J., *ante* 341.]

The objection based upon the insertion of the words "and exchange" in the bills is taken for the first time in this Court. In my opinion it should not be entertained, as, if it had been raised on the pleadings or at the trial, evidence might have been adduced to shew that these words import a definite and precise liability. If they have any application at all in the case of these inland bills, I think they cannot be taken to deprive the instruments before us of their character as bills of exchange because of any indefiniteness or uncertainty in the amount for which the acceptors became liable.

The appeal fails and should be dismissed with costs.

Mignault, J.

MIGNAULT, J.:—It is unfortunate for the appellants that before accepting the bills sued on, they did not consider the objections they now urge as reasons why they should not be held on their acceptance. The breach of contract they complain of had then occurred, and they nevertheless accepted the bills. They now say that as the drafts were attached to the bills of lading, they could not get the goods without accepting the drafts, but then, to get possession of the goods, they rendered themselves personally liable to the bank for payment, unless they can shew that the latter is in no better position than Arnett. The fact is however that the bank had made advances to Arnett in view of his contract with the appellants and had credited the 5 drafts drawn by him on the appellants against his overdraft so that there remained a

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credit in Arnett's favour of $360. The bank was therefore a holder in due course of the bills, and the appellants by accepting them, with full knowledge of Arnett's breach of contract, accepted an unconditional liability towards the bank and should not now be listened to when they attempt to offset Arnett's liability for breach of contract against the bank's claim against them in their acceptance of the bills. The fact that for greater security the bank took an assignment of Arnett's rights under his contract with the appellants is no reason for depriving it of its claim based on the appellant's acceptance.

But Mr. Barron now says, for the first time, that although the bills were accepted by Antoniou duly authorised by the other appellants, this is not in law an acceptance for the other appellants.

At the examination on discovery of Antoniou, Mr. Barron made the following admission: [See judgment of Idington, J., *ante* 341.]

In view of this admission, which no doubt lulled the respondent into complete security on the question of Antoniou's authority to accept, I think Mr. Barron should not be listened to when he now attempts to escape from the effect of his admission, which I can only construe as fully recognising that Antoniou's acceptance was the acceptance of the appellants.

Mr. Barron made another objection at the argument for the first time, and that is that the words "and exchange" in these bills, without indicating the rate of exchange, prevented them from being for a sum certain, under the Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 28, para. (*d*) of sub-sec. 1.

Had this objection been made at the trial, it might have been shewn that these words have, by custom of trade or otherwise, a definite meaning well understood by the parties. It seems scarcely consistent with the rules of fair dealing in judicial proceedings to consider now such a technical objection, and I do not propose to do so.

On the whole I would dismiss this appeal with costs.

Appeal dismissed.

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Saskatchewan Court of Appeal. Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. January 21, 1921.

SEDUCTION (§ I—1)—STATUTORY OFFENCE—PLAINTIFF POSITIVE AS TO LACK OF CONSENT—DISMISSAL OF ACTION.

A person cannot be awarded damages for a wrong she declares she has not suffered and therefore in an action for assault amounting to rape, where the plaintiff swears positively that the defendant had connection with her by force and without her consent, and the defendant is equally positive that he had never had connection with her at all, the Court is not justified in awarding damages for seduction.

[*E. v. F.* (1905), 10 O.L.R. 489, distinguished; *Vincent* v. *Sprague* (1847), 3 U.C.R. 283, referred to.]

Statement.

APPEAL by defendant from the trial judgment awarding plaintiff damages for seduction in an action brought for assault, amounting to rape. Reversed.

J. D. Frame, K.C., for appellant.

D. Buckles, K.C., for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—This action though avowedly brought under an Act respecting Actions for Seduction, R.S.S. 1909, ch. 139, is on the face of the pleadings an action on the part of the mother Catherine Mackenzie for loss of service by reason of an alleged criminal assault on her daughter Amelia Mackenzie, and by the daughter for the criminal assault. This will be seen from the following paragraphs of the statement of claim:—

2. On the first day of July, 1917, and ever since that date the plaintiff Amelia Mackenzie, resided with and was the servant of the plaintiff, Catherine Mackenzie. 3. On the first day of July, 1917, the defendant against the will and without the consent of the plaintiff Amelia Mackenzie seduced and carnally knew the said plaintiff, whereby she became pregnant with a child of which she was delivered on the fourth day of April, 1918. 4. The plaintiff, Catherine Mackenzie, in consequence lost the services of the said Amelia Mackenzie for a long time and incurred expense in and about the delivery of the said child. 5. By reason of the seduction of the plaintiff Amelia Mackenzie by the defendant, both plaintiffs have suffered great damage by the injury to the character and reputation of the plaintiff, Amelia Mackenzie.

The action went to trial before Taylor, J., who dismissed the action of the mother and awarded the daughter $2,500 damages for seduction.

Although the judgment so far as it concerns the plaintiff Catherine Mackenzie is not appealed from, I think that some comment on the reasons for that part of the judgment should be made. Taylor, J., in the course of his reasons for judgment, having found that there was seduction and not rape, stated his reasons for dismissing the mother's action as follows:—

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The mother would have a right of action under the statute, the daughter has a similar right of action. The action of the daughter was commenced first and in that action ordinarily all of the damages would be assessed and under all the circumstances I think that the action having first been commenced by the daughter the damages once and for all must be assessed and awarded to her and that no damages can be assessed and made payable to the mother.

This, with all deference, seems to me to be clearly wrong. The statement of claim discloses two separate and distinct causes of action, that of the mother being based on loss of service, that of the daughter on assault. These two actions should not have been joined but there was no objection raised at any time on that ground. Assuming the statement of claim to be amended in accordance with the finding of seduction, each of the plaintiffs has a separate and distinct right of action under the statute. The damages would be assessed in each case for a different wrong and upon different principles.

The evidence in regard to the daughter's claim was very conflicting. She swore positively that the defendant had connection with her by force and without her consent. The defendant on the other hand swore equally positively that he had never had connection with her at all. There was some equally conflicting evidence as to whether or not the parties had been together on the day the alleged offence took place. The trial Judge held that connection had taken place on the day in question with the plaintiff's consent but not by force and without consent as she alleged. The finding that the evidence does not establish a connection by force, which I quite agree with, completely shuts the door to any claim for assault. The plaintiff is therefore left to her statutory remedy for seduction. As I have pointed out, the action was brought for assault amounting to rape and not for seduction. The use of the word "seduced" in the statement of claim is meaningless and improper. The plaintiff supported the claim as made, by her sworn testimony. There was no other evidence given from which a Judge or jury could possibly find that she had been seduced, and the defendant denies connection at all. This case seems to me to come well within the decision in *Vincent* v. *Sprague* (1847), 3 U.C.R. 283. That was an action by the father for the seduction of his daughter, and in that case as in the present one the daughter denied consent and asserted that the defendant had forced her.

The evidence of the daughter was not so clear and positive as that of the plaintiff in this case as will appear from the report, but it was held that:—

where a witness, being called to prove the plaintiff's case, persists in making a positive though very improbable statement disproving it, the Court, in the absence of any other witness, will not allow the case to go to the jury.

Robinson, C.J., in the course of his judgment, said:—

A plaintiff must recover according to his allegations and proofs . . . the inconsistency between her (the daughter's) own conduct and her evidence upon the trial is such, that it might well shake the confidence of the jury in her testimony, so that if there had been other witnesses whose evidence conflicted with hers on any particular point, they might be disposed to discredit her and believe them; but here the plaintiff brought no other evidence. He was bound to prove the civil trespass charged, by some witness, but he proved it by none; and what he now contends is, that the jury might and ought to have inferred in his favour a fact which nobody proved, and might, upon her evidence alone, have given damages for her seduction, while she swore that she was not seduced, and there was no other evidence to prove that she had been.

It is no doubt correct to say, that although a jury must have the whole of a witness's statement, they are not bound to believe it all, but may accept part of it as true and discredit the rest; but then, if what the witness before them has sworn not to have taken place be essential to the action, it must be proved by some one else. The jury cannot found their verdict affirming a certain fact upon the mere disbelief of the witness who denies it. It is true, that if this defendant should be indicted for a rape, on the same evidence only, the jury might probably acquit him, as they should do, if they doubted the truth of the girl's evidence.

The authority of this decision is considerably shaken by the case of *E.* v. *F.* (1905), 10 O.L.R. 489, but only, I would submit, so far as actions for seduction by a parent or employer are concerned. In that case, as in the present one, the plaintiff's daughter swore that the defendant was the father of her child but that the connection was effected by force and without her consent. The trial Judge dismissed the action on the authority of *Vincent* v. *Sprague, supra*. The Divisional Court reversed this decision and ordered a new trial on the ground that on the facts of the case a jury might discredit the evidence of the daughter as to the character of the act, and find that there was seduction in spite of her evidence to the contrary. Anglin, J., in delivering judgment, said, 10 O.L.R., at pp. 497-498:—

Were the girl's evidence alone before us, to satisfactorily distinguish this case from the decision of *Vincent* v. *Sprague* might be difficult. But the present defendant did not choose to rely upon the weakness of the plaintiff's case. He called witnesses on his own behalf, and upon their evidence many

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facts appear which would justify a conclusion that a rape could not have been committed by the defendant, as alleged by the plaintiff's daughter. Upon the evidence as it stands to-day no jury would, in my opinion, return a verdict of guilty, were the defendant on his trial on a charge of rape. Yet if, disbelieving the defendant's absolute denial of the girl's entire story, the jury had in this action returned a verdict for the plaintiff, I am inclined to think that verdict could not have been successfully attacked upon the ground that there was no evidence to support it. The evidence that, consent being withheld, connection was had by force, is that not of the plaintiff, but of his daughter. Other evidence, direct or circumstantial, may be adduced to shew that upon this point the witness is mistaken or untruthful: *Stanley Piano Co.* v. *Thomson* (1900), 32 O.R. 341. Such evidence has been given and is before us. Perhaps, in view of that evidence, it would be safer to reject the woman's story in its entirety. But that is eminently a matter for the consideration of the jury. If the jury—regarding the discredited portion of her tale as something to which she was driven by an overpowering sense of shame—while rejecting it had nevertheless accepted her evidence that the defendant is the father of her child, I am unable to say that an Appellate Court would have been obliged to set aside a verdict for the plaintiff as one which no ten responsible men could find. Because sitting as jurors we should upon the evidence as a whole have reached a different conclusion, it does not at all follow that we should usurp the functions of the jury and substitute our view for theirs. Expressing no opinion upon the duty of the trial Judge where evidence identical with that in *Vincent* v. *Sprague* is presented, I cannot, upon the evidence now before us, say that, assuming consent of the woman to be essential to the actionable wrong known as seduction, there is no evidence from which an inference of such consent could reasonably be drawn.

The foregoing reasoning might very well have applied to the action of Catherine Mackenzie, but does not, in my opinion, apply to the case before us. It is the plaintiff's own evidence which has to be considered and not the evidence of a witness on her behalf which might have been shewn by other evidence to be mistaken or untruthful in part. In such a case there must be some other evidence to support the case. Here there is no evidence at all to prove that the defendant was guilty of the statutory tort of seduction. The plaintiff denies it, and the defendant denies it, and there is no other evidence to prove it, and I cannot understand upon what principle any person can be awarded damages for a wrong she declares on oath she has not suffered.

For these reasons I would allow the appeal with costs and set aside the judgment below and order judgment dismissing the action to be entered for the defendant with costs.

Newlands, J.A. NEWLANDS, J.A., concurred with HAULTAIN, C.J.S.

Lamont, J.A. LAMONT, J.A. (dissenting):—This is an appeal from a judgment in favour of the plaintiff Amelia Mackenzie in an action against

the defendant for damages for that he, on July 1, 1917, did seduce and carnally know her against her will, whereby she became pregnant with child. The plaintiff testified that she did not consent to the intercourse with the defendant. This evidence on her part the trial Judge disbelieved, but found she had been seduced by the defendant and that the defendant was the father of her child, and he allowed her $2,500 damages. From this judgment the defendant now appeals. The main ground of appeal is, that as the plaintiff swore that she was not a consenting party to the connection, she cannot recover for seduction, because seduction imports consent on her part, and as the trial Judge found as a fact that she had consented, damages could not be awarded her based upon assault, which imports a want of consent.

The damages awarded having been given for seduction, the question is, is she debarred from recovering by reason of the fact that she testified that she had not consented?

If this statement were the only evidence upon the point before us, the case would to my mind be one of greater difficulty, and it would be necessary to determine whether *Vincent* v. *Sprague*, 3 U.C.R. 283, was correctly decided. That statement, however, is not the only evidence. The girl herself testified that the act took place in a buggy, as they were driving home early in the morning; that the seat of the buggy was wide; that she was sitting on its forward edge and lying back. When asked why she did not sit back in the seat, her only explanation was that she liked to sit on the edge of the seat. Had she been sitting back the act could not have been accomplished. She did not make any outcry at the time nor any complaint afterwards. She was on friendly relations with the defendant immediately afterwards, and went with him to church. When asked why she did not jump out of the buggy, when the defendant commenced his improper advances, her reply was, "I did not like to jump out of the buggy when I was not sure of the horse." This evidence on her part is, in my opinion, consistent only with the fact that she was consenting to the intercourse. The trial Judge was therefore amply justified in finding as a fact that she did consent. Taking her story and her actions together, they illustrate once more the attitude expressed by an adaptation of the words of the poet: "While saying she would ne'er consent, consented."

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Having given evidence of facts and circumstances establishing consent on her part, while at the same time denying consent, she is in my opinion in the same position as if she had in her examination-in-chief denied having consented, and on cross-examination admitted that she had. Under such circumstances could it be said that her action must be dismissed because she had made two diametrically opposite statements upon an essential point in her case? In my opinion it could not. It could still be a question for the tribunal charged with the duty of finding the facts to say which of the statements is to be accepted as true. A jury may credit or discredit a witness in part or altogether. Meredith, J., in *The Queen* v. *Doty* (1894), 25 O.R. 362, at 365. See also Blackburne, J., in *Dublin R.W. Co.* v. *Slattery* (1878), 3 App. Cas. at 1201. In *Brown* v. *Dalby* (1850), 7 U.C.R. 160, the action was for seduction of the plaintiff's daughter. The girl swore that the connection was without her consent and against her will. The trial Judge directed the jury that,

". . . if they believed all that the witness had said according to its most obvious meaning, a felony had been committed, and then this civil action could not be sustained; but that if they received the impression that the resistance was so feeble as to be but a shew of resistance, the case might be one of seduction.

On appeal, Robinson, C.J., in giving the judgment of the Court, said:—

Here, however, the learned Judge who presided considered that he could not say with truth that there was no reason to doubt that the act was felonious; for although the only witness who spoke to the fact gave it that character, yet the same witness stated various attendant circumstances which seemed difficult to be reconciled with the belief that the defendant had accomplished his purpose by violence and against her will. It was necessary to give the whole story to the jury as she stated it, and the jury were at liberty to draw their conclusion from it.

In *Walsh* v. *Nattrass* (1869), 19 U.C.C.P., 453, an action brought by a father, the girl evidently testified that the connection took place by violence and against her will. The jury did not believe that she had been unwilling, and brought in a verdict in favour of the father. On appeal, it was argued that as the evidence shewed that the girl had been raped, the case should have been stopped until the defendant had been prosecuted for the criminal offence. The Court held that in an action for seduction the defendant could not move against a verdict in favour of the plaintiff on the ground that the evidence shewed that a rape had been committed on the girl.

Williams v. *Robinson* (1869), 20 U.C.C.P. 255, is to the same effect.

The case of *E.* v. *F.*, 10 O.L.R. 489, was also an action by a father for the seduction of his daughter. The girl swore that the seduction was by force and against her will. Boyd, C., at pp. 494, 495, said:—

> The action is by the father, and the chief witness on his behalf is the daughter. Her evidence, if believed, shews carnal connection with her by the defendant, and that he is the father of her child. That is enough, if believed, to answer some of the issues raised, in her favour. But her evidence goes further and shews that she was forced against her will by the defendant, and that, if believed, may very well establish a case of ravishment and not of seduction under the statute. Apart from this element of force, there is sufficient evidence, if believed, to shew a case of seduction, and justify a right to recover under the Ontario statute. But the Judge has taken upon himself the burden of determining whether or not, upon the whole evidence, rape has been proved, and, finding that it has, he dismisses the action. But this question, on the whole evidence, is one that should be passed upon by the jury; they may be satisfied as to her truthfulness concerning the paternity, and discount that part of her evidence which shews her resistance, and impute that to a strong desire to stand well with her own family and friends . . . I should be disposed to put the matter even more broadly and to this effect, that it would be a matter for the jury always to say, on the evidence of the girl (even if no other evidence was given) whether or not they accept her whole statement in a case where they were satisfied of the paternity and she attributed the act of connection to the force or violence (greater or less) of the defendant.

And Anglin, J., said, at p. 497:—

> If the jury—regarding the discredited portion of her tale as something to which she was driven by an overpowering sense of shame—while rejecting it had, nevertheless, accepted her evidence that the defendant is the father of the child, I am unable to say that an appellate Court would have been obliged to set aside a verdict for the plaintiff as one which no ten reasonable men could find.

On appeal to the Court of Appeal (1906), 11 O.L.R. 582, the judgment was affirmed, Moss, C.J.O., saying, at pp. 583-584:—

> And if facts or circumstances are shewn leading to conviction of the inaccuracy or want of truth in some of the girl's statements or that might fairly lead to the conclusion that she was wrong in her statements, the matter was for the jury and could not be withdrawn from them . . . Were any facts or circumstances shewn of sufficient cogency to justify the inference by the jury, that, notwithstanding the girl's assertions to the contrary, there was in fact consent, reluctantly given perhaps, but yet with enough of yielding to render the act one of seduction rather than of carnal knowledge by force and against her will? The conditions and surroundings shewn, the near vicinity of others, the likelihood of her making an outcry after the assault, her passive behaviour for hours after the occurrence, and her failure to make

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a direct charge of criminal assault the next morning or at any time afterwards, were all matters for the consideration of the jury and could not be withdrawn from them.

Garrow, J.A., went further and held, following *Kennedy* v. *Shea* (1872), 110 Mass. 147, that an action would lie, although trespass *vi et armis* might have been sustained, and that it would be no defence that the offence was rape and not seduction.

In view of these authorities it would seem to me to be established that, had this action been brought by the plaintiff's father for her seduction, the fact that she testified that the intercourse had taken place against her will would not have been a bar to the plaintiff's right to recover. Does the same rule apply where the girl herself is plaintiff? We were not referred to any Canadian cases on the point, and I have not been able to find any. But the question has received judicial consideration in a number of American cases. Some of these are referred to in *Velthouse* v. *Alderink* (1908), 18 L.R.A. (N.S.) 587. In that case the action was brought by the girl by her next friend, she being a minor, under a statute which gave a girl seduced a right to bring an action for her seduction. The declaration alleged the intercourse to have taken place without the consent of the plaintiff and against her will. Her evidence was to the same effect. The jury awarded her $1,350. The defendant appealed on the ground that to constitute seduction it must appear that there was consent by the woman to the sexual intercourse, and that the proof failed to shew such consent. The Court, following *Marshall* v. *Taylor* (1893), 98 Cal. 55, affirmed the verdict. In giving judgment, Garoutte, J., said, at p. 56:—

> Where a parent sues for seduction of his daughter, and consequent loss of service, and it appears that the intercourse was accomplished by force, such a shewing will not defeat the action, but will aggravate the injury. . . . While the recovery of the parent is based upon a different principle from that involved where the female is the complainant, yet we see no bad effect to follow an application of the same rule in her case.

It is not necessary in the case at Bar to go the length to which the Court went in the case just cited; and, without further consideration at least, I would not be prepared to hold that intercourse which took place against the will of the girl could be the foundation of an action for seduction. But I have no hesitation in going this far, that in an action by an unmarried female in her own name for her seduction, the fact that she has alleged in her

pleading and testified in Court that the sexual intercourse was without her consent and against her will is no bar to her right to maintain the action, provided the jury are satisfied that the defendant is the father of her child, and there are facts and circumstances testified to, whether by herself or someone else, which justify the jury in concluding that she did in fact consent. It is in my opinion the duty of the Court to give effect to the rights of the parties as the Court finds them to exist, and not to withhold from the plaintiff a right established by the evidence simply because in an attempt to conceal her shame she was untruthful in a portion of her testimony.

It was also argued that the action could not be maintained unless it was established that the plaintiff's consent was obtained by insinuating wiles, persuasions and blandishments, and that there was no evidence that the defendant had used anything of the kind. The only evidence given by the plaintiff upon the point was, when referring to being forced, she said, "He had carried on before that," and "He would not let me up, he would not let me alone." As the object of persuasions or blandishments could only be to secure her consent, once there is evidence that she did consent to the intercourse, it is a question for the jury to say whether or not she was seduced, and in my opinion they are entitled to find that she was, without any further evidence of persuasion or blandishment. There may be cases in which a jury would be justified in holding that the girl was the aggressor and that the defendant was the seduced and not the seducer, but that is, I think, a question for them on the whole evidence. In *Gibson* v. *Rabey* (1916), 9 Alta. L.R. 409, at 415, Beck, J., in giving the judgment of himself and Stuart, J., said:—

> I think, however, that in the absence of evidence of loose behaviour on the part of the woman, the presumption is that there was enticement on the part of the defendant in cases of this sort, and that the burden of shewing that the plaintiff cannot succeed on the ground that she was at least equally morally guilty is on the defendant.

I am therefore of opinion: (1) That the plaintiff's action is one of seduction, and that the allegation in her pleading as to the intercourse being against her will may be treated as surplusage. (2) That there was ample evidence of plaintiff's consent to the intercourse; and (3) That proof of sexual intercourse with the

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plaintiff's consent constitutes a *primâ facie* case of seduction, but that it is for the jury, upon the whole evidence, to say whether or not she has been seduced.

Where the case is tried by a Judge without a jury, the same principles apply.

Lamont, J.A.

The appeal should therefore, in my opinion, be dismissed with costs.

Elwood, J.A.

ELWOOD, J.A., concurred with HAULTAIN, C.J.S.

Appeal allowed.

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C. A.

SHAW v. McDONALD.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. January 4, 1921.

JURY (§ II A—50)—JURY ACT, 3 GEO. V. 1913 (B.C.), CH. 34—PROVISIONS AS TO PROCEDURE, DIRECTORY NOT IMPERATIVE—DUTIES OF COUNSEL—OMISSIONS OF SHERIFF—NO IMPEACHMENT OF TRIAL VERDICT.

The provisions of the Jury Act (B.C.), with reference to the procedure to be followed by the sheriff are directory, and no omission in the directions as regards the selection of jurymen, is a ground for impeachment of a trial verdict in any civil case.

[*Montreal Street R. Co.* v. *Normandin*, 33 D.L.R. 195, [1917] A.C. 170, *Ross* v. *B.C. Electric Co.* (1900), 7 B.C.R. 394, *Harris* v. *Dunsmuir* (1902), 9 B.C.R. 303, referred to.]

Statement.

APPEAL by defendant from a judgment of Murphy, J., and for a new trial on the ground that the jurors were selected from the grand jury list and not from the petit jury list. Affirmed.

J. S. Brandon, for appellant; *C. Killam*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The Jury Act, 3 Geo. V. 1913 (B.C.), ch. 34, sec. 48, imposes upon the sheriff of the county the duty in respect of a trial by petit jury of summoning 18 jurymen, to be selected by ballot in the presence of the parties or of their solicitors from the petit jury list from which the panel of 8 jurors shall be drawn to try the action.

The sheriff by inadvertence, neither party being in attendance at the appointed time, selected the jurors by ballot from the grand jury list instead of from the petit jury list, and the jury who tried this action were empanelled from said list of grand jurors. The appellant was ignorant of this fact until after the trial and now claims to have the judgment set aside and to have a new trial ordered.

Mr. Brandon, appellant's counsel, referred to a number of authorities in support of his motion, but I think it is not necessary

to consider the decided cases since in my opinion the appeal must be dismissed, in view of sec. 59 of said Act, which reads as follows:—

> 59. No omission to observe the directions in this Act contained, or any of them, as respects the qualification, selection, balloting, and distribution of jurors, the selecting of jury lists, the entry of such list in the proper books, the drafting panels from the jury lists, or the striking of special juries, shall be a ground of impeaching the verdict or judgment rendered in any civil case.

I think that section is broad enough to cover the omission to observe the directions in the Act in respect of the selection or balloting of jurors in question here. That being so, the section is operative to prevent the impeachment of the verdict.

Martin, J.A.

MARTIN, J.A., would dismiss the appeal.

Galliher, J.A.

GALLIHER, J.A.:—In *Ross* v. *B.C. Electric* (1900), 7 B.C.R. 394, at 396, it was held by Irving, J., that the "provisions of the Jury Act with reference to the procedure to be followed by the sheriff in summoning a jury are not imperative but directory only." Section 48 of our Jury Act, 3 Geo. V. 1913, ch. 34, provides the manner in which common jurors for the trial of civil cases shall be summoned, and states they shall be drawn by ballot from the petit jury list.

In the case at Bar no one being present on behalf of either plaintiff or defendant, the sheriff through inadvertence struck the jury from the grand jury list and the case proceeded to trial without this fact being discovered by either party, or at all events by the defendant who is now complaining.

A verdict for one dollar was rendered in favour of plaintiff and judgment entered accordingly.

The defendant applied to have the judgment set aside on the ground that the jury who tried the action and found the verdict was irregularly and defectively constituted and without jurisdiction. This was refused by Murphy, J., against which refusal the defendant is appealing to this Court.

It is admitted that it was not intended and none of the preliminaries necessary to the having of a special jury were taken.

I was inclined to think during the argument that what had been done went to the whole root of the matter and might not be cured by sec. 59 of our Jurors Act, but on a closer analysis of the authorities cited and of sec. 59, I have come to a different conclusion.

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Moreover, it has been laid down in the old Full Court, Hunter, C.J., Drake and Martin, JJ., in *Harris* v. *Dunsmuir* (1902), 9 B.C.R. 303, that it is the duty of the solicitor to ascertain who the jurymen are and to ascertain objections that may exist.

And Bramwell, B., in *Williams* v. *Great Western R. Co.* (1858), 3 H. & N. 869, 157 E.R. 720, says in reply to counsel (see the report in 28 L.J. (Exch. (2): "It was for you to discover it in due time—those who have the right of challenge must make enquiries with a view to its exercise."

I would dismiss the appeal.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I remain of the same opinion that I formed upon the argument of this appeal. It is not the case of want of jurisdiction. The trial was had with a jury. The Judge had jurisdiction to hear and determine the case—and either of the parties could demand a jury, and the respondent served the appellant with a copy of the District Registrar's appointment, advising that the issues of fact would be tried by a Judge with a jury. The appellant claims that he had not sufficient notice to enable attendance at the time the sheriff selected the jury.

Upon all the facts, in my opinion, the appellant has, by delay and neglect to attend at the selection of the jurors, precluded any exception being taken to the jury selected, and later by no objection taken at the time the jury as empanelled, they were rightly entitled to have committed to them by the trial Judge, the questions of fact requiring determination in the case.

It would be destructive of all certainty of procedure to have such belated objections taken and given effect to, the party objecting throughout failed to take the ordinary steps in the way of scrutiny of the possible jury panel from which the final selection would be made—and after trial and judgment following thereon —now insist that all is abortive.

The furthest point that the appellant can press his objection is, that the jury was in effect, a special jury not a common jury, *i.e.*, drawn from the grand jury list. It is difficult to see what prejudice took place—as a matter of fact, it was a matter of advantage as I look at it. In any case no prejudice has been made out by the appellant. The jury merely gave nominal damages, when upon the facts very substantial damages might have been awarded.

I cannot persuade myself that anything has occurred in this case which could be said to offend against natural justice, requiring this Court in the interests of justice to set aside all the proceedings had and direct a new trial and that not being the situation, the appeal cannot be given effect to.

If authority is necessary to support the view that the case is not one calling for a reversal of the judgment and that a new trial be directed, I would refer to *Montreal Street R. Co.* v. *Normandin*, 33 D.L.R. 195, [1917] A.C. 170; the head-note reads, ([1917] A.C. 170):—

The verdict of a jury in an action will not be set aside on account of irregularities in the due revision of the jury list unless the litigant applying proves that he has been prejudiced thereby. The circumstances under which a statutory provision for the performance of a public duty should be treated as being merely directory, considered.

Upon the facts of the present case the duties of the sheriff were directory and the failure to proceed regularly should not be held to affect the judgment recovered by the respondent—I would in particular call attention to what Sir Arthur Channell said, 33 D.L.R., at pp. 199-200:—

Having regard to the nature of the sheriff's duties and their object, it seems quite unnecessary and wrong to hold that the neglect of them makes the list null and void; and although the prothonotary's neglect, if it had been in the matter of the order of taking the names, might have resulted in a packed jury, the neglect, if there had been any in other matters, would be of the same kind as the sheriff's. It does far less harm to allow cases tried by a jury formed as this one was, with the opportunities there would be to object to any unqualified man called into the box, to stand good, than to hold the proceedings null and void. So to hold would not, of course, prevent the Courts granting new trials in cases where there was reason to think that a fair trial had not been had. The view taken by Monet, J., that he ought not to interfere where the appellant had shewn no prejudice appears very reasonable, and their Lordships are of opinion that it is also in accordance with the authorities.

And in 33 D.L.R., at p. 201, Sir Arthur Channell said:—

Another case referred to in the argument was *Williams* v. *Great Western R. Co.*, which shews that the omission to challenge, although the facts were not known until after the time for challenge, is not without effect on the rights of the parties, and a comparison of that case with *Lord Ashburnham* v. *Michael* (1851), 16 Q.B. 620, 117 E.R. 1017, shews that while in England the fact of a juryman being open to challenge, discovered after verdict, may be ground for a new trial, yet it is discretionary with the Court to grant it, and it will not do so when it is of opinion that no prejudice has been done. Their Lordships therefore are of opinion that the decision of Monet, J., on the objection to the verdict founded on the omission duly to revise the lists was right. Counsel

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for the appellants pressed the Board not to weaken any of the safeguards provided by the Legislature for securing fair and impartial juries, but their Lordships fail to see that the decision of Monet, J., has that effect.

It follows that, in my opinion, the appeal should be dismissed and the judgment entered upon the verdict of the jury should be affirmed.

EBERTS, J.A., would dismiss the appeal.

Appeal dismissed.

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ATTORNEY-GENERAL FOR CANADA v. ATTORNEY-GENERAL FOR QUEBEC. Re QUEBEC FISHERIES.

Judicial Committee of the Privy Council, Viscount Haldane, Viscount Cave, Lord Dunedin, Lord Atkinson and Duff, J. November 30, 1920.

CONSTITUTIONAL LAW (§ I G—140)—GOVERNMENT—POWER OF PROVINCE—EXECUTIVE COUNCIL—GRANTING OF EXCLUSIVE FISHING RIGHTS—POWER OF LEGISLATURE.

The Government of the Province of Quebec or any member of the Executive Council has not the power to grant the exclusive right of fishing in the tidal waters so far as navigable of the rivers, streams, gulfs, bays, straits, or arms of the sea of the Province, and of the high seas washing its coasts. Nor has the Legislature of the Province power to authorise the Government or any member of the Executive Council to make such a grant.

[*Re Quebec Fisheries*, (1917) 35 D.L.R. (annotated), varied; *Attorney-General for B.C.* v. *Attorney-General of Canada*, 15 D.L.R. 308, [1914] A.C. 153, referred to. See Annotation, Property Clauses of the B.N.A. Act, 26 D.L.R. 69.]

Statement.

APPEAL from the Quebec Court of King's Bench (1917), 35 D.L.R. 1, *sub nom* Re Quebec Fisheries, in an action to determine the right of fishing in the tidal waters of the Province of Quebec. The facts are fully set out in the judgment.

The judgment of the Board was delivered by

Viscount Haldane.

VISCOUNT HALDANE:—The controversy in this case arises over the answers to certain questions relating to the right of fishing in the tidal waters of the Province of Quebec. These questions were submitted to the Court of King's Bench (1917), 35 D.L.R. 1, 26 Que. K.B. 289, of the Province by the Lieutenant-Governor-in-Council, who so submitted them under authority conferred on him by a statute of Quebec.

The questions were these:—

1. Has the Government of the Province of Quebec, or a member of the Executive Council of the Province, power to grant the exclusive right of fishing, either by means of engines fixed to the soil, or in any other manner, in the tidal waters of the rivers, streams, gulfs, bays, straits or arms of the sea of the Province, and of the high seas washing its coasts, to a distance of 3 marine miles from the shore—(*a*) between high-water mark and low-water mark; (*b*) beyond low-water mark, and if in the affirmative, to what extent?

2. Can the Legislature of the Province authorise the Government of the Province, or a member of the Executive Council of the Province or any other person, to grant the exclusive rights of fishing set forth in the preceding question?

3. If there existed heretofore, or if there still exist, restrictions upon the granting of exclusive rights of fishing in the tidal waters as aforesaid, and if such restrictions have been or are abolished, are the fisheries in such waters, after such abolition, the property of the Province, and has the Legislature or the Government of the Province, or a Minister of the Government, or any other person the powers mentioned in the preceding question with regard to these fisheries?

The Judges of the Court of King's Bench of Quebec, 35 D.L.R. 1, 26 Que. K.B. 289, by a majority consisting of Archambeault, C.J., Trenholme, Lavergne and Carroll, JJ., answered all these questions in the affirmative. Archambeault, C.J., however, so answered the first question subject to a reservation as regards waters beyond low-water mark out to the 3-mile limit, regarding which he was of opinion, following an expression of view by their Lordships in a previous case, that no deliverance on a subject which was one of international law, ought under the circumstances to be made. He inserted a similar qualification into his answer to the third question. Cross, J., who also heard the case, dissented as to the general principle laid down by his colleagues, expressing an opinion in the negative on the two first questions, and treating the third question as consequently not arising. (See 35 D.L.R., at 22.)

The questions thus raised relate to the Province of Quebec, where the common law is based on that of France, and it is the circumstance that the common law of the Province is different from that which obtains in the rest of Canada that gives rise to a distinction which has to be kept in mind. If the common law of Great Britain had obtained, the points that have arisen would have been covered in some measure by their Lordships' decision in *Re British Columbia Fisheries*, 15 D.L.R. 308, [1914] A.C. 153, which applied principles previously laid down by the Board in *Att'y-Gen'l for the Dominion* v. *Att'y-Gen'l for the Provinces of Ontario, Quebec and Nova Scotia*, [1898] A.C. 700. It is accordingly desirable before proceeding further to refer to the principles which were laid down in the appeals in these two cases.

The decision of 1898 was concerned with a number of questions between the Dominion and the Provinces relating to rights of

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property and to legislative jurisdiction. It was pointed out that the proprietary right in the *solum* of Canada was vested in the Crown, whether the legislative and executive control is with the Dominion or with the Province, and that there is no presumption because legislative jurisdiction has been conferred on the Dominion, that therefore a proprietary title has been conferred on it. What the Board on that occasion had to determine was, among other things, whether the beds of rivers and other waters situate within the territorial limits of a Province and not granted before Confederation, belonged to the Crown in right of the Dominion or of the Province. The answer was that, generally speaking, the proprietary title to these beds, excepting where expressly transferred, remained provincial. It followed that the fishing rights, so far as they depended on property, were likewise provincial. But to the Dominion had been given by sec. 91 of the B.N.A. Act exclusive legislative jurisdiction over sea coast and inland fisheries. This power to legislate was so sweeping in its terms that it could extend to what practically might be a modification of the character of the proprietary title of a Province, and it was not possible to lay down in abstract terms *a priori* a limit to this power of legislation. All that Lord Herschell could say in delivering their Lordships' opinion, [1898] A.C., at 709, was that if the Dominion were to purport to confer on others proprietary rights which it did not itself possess, that would be beyond its power. In other words, the capacity conferred by sec. 91 extended to regulation only, however far regulation might proceed. It included the capacity to impose taxes for licenses to fish. But the Dominion had no power to pass legislation purporting directly to grant a lease of an exclusive right to fish in property that did not belong to it, however much it might in other forms impose conditions on the exercise of the right to make such a grant. It was added that the enactment of fishery regulations and restrictions was within the exclusive competence of the Dominion Parliament, and was therefore not within the legislative power of any Province, although that Province might well have power, under the capacity that belonged to it under sec. 92, to deal with property and civil rights within the Province, to pass statutes relating to modes of conveyance, or prescribing the terms and conditions upon which the fisheries that were the property of the Province might be granted, leased, or otherwise

disposed of, or relating to succession to a provincial fishing right; for such legislation would be concerned only with the proprietary title.

In *Att'y-Gen'l for B.C.* v. *Att'y-Gen'l of Canada*, 15 D.L.R. 308, [1914] A.C. 153, the principles laid down in the judgment of 1898 were further developed in their application. It was held that it was not competent for the Legislature of British Columbia to authorise the Government of the Province to grant exclusive rights of fishing in tidal rivers or in the sea, including arms of the sea and estuaries of rivers. It was laid down that in the sea, wherever the common law of England applies, the right of fishing is a public right, not dependent on a proprietary title, and that consequently the regulation of the right must rest exclusively with the Dominion Parliament. In the case of an inland lake or river, or other non-tidal water, where the *solum* is vested in a private owner or the Crown, the public in British Columbia have no such right. The fisheries are mere profits of the soil over which the water flows, and the title to fish follows the title to the *solum*, unless it has been severed and turned into an incorporeal hereditament of the nature of a profit *a prendre in alieno solo*. With such inland fisheries it is of course only by way of regulation that the Dominion Parliament can interfere. Their Lordships were chiefly concerned in the decision under discussion with the right of fishing in tidal waters and in the sea. So far as these waters were concerned, the right of fishing in them was by English law a public and not a proprietary right, and was accordingly held to be subject to regulation by the Dominion Parliament only. So far as concerned waters which were navigable but non-tidal no question arose; for, as English law governed, the fishing in navigable non-tidal waters was the subject of property, and there was no right in the public generally to fish in them. As to the sea between low-water mark and the 3-mile limit, although no doubt was raised as to the right of the public to fish there, it was pointed out that the question of the title to the subjacent soil within this zone stood in a very different position. The topic was not one that belonged to municipal law alone, for rights of foreign nations might be in question, and accordingly their Lordships did not deem it desirable that they should deal with it judicially, sitting as they did for the purpose of deciding the question of municipal law only.

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Whatever the origin and character of the title of the public to fish in tidal waters, that title had, as their Lordships observed, been made unalterable, except by a Legislature possessing competent authority, since Magna Charta. And as Magna Charta had come to form part of the common law of England, it was part of the law of British Columbia. In speaking of the public right of fishing in tidal waters, their Lordships were careful to point out that they did not refer to fishing by way of kiddles, weirs, or other engines fixed to the soil. For such methods of fishing involved a use of the *solum* which, according to English law, cannot be vested in the public, but must belong to the Crown or to a private owner. They added that the question whether non-tidal waters were navigable or not did not bear on the question they had to decide; for the fishing in non-tidal navigable waters was the subject of property, and, according to English law, must have an owner and cannot be vested in the public generally. They held that, because the right of fishing in the sea is a right of the public generally which does not depend on any proprietary title, the Dominion must have the exclusive right of legislation with regard to it as such, and that accordingly the Province of British Columbia could not confer any exclusive or preferential right of fishing on individuals or classes of individuals.

The questions which their Lordships were called on to decide in *Att'y-Gen'l for B.C.* v. *Att'y-Gen'l of Canada*, 15 D.L.R. 308, [1914] A.C. 153, were in certain important respects different from those now before them. In the first place, the questions then raised related to rights of fishing in British Columbia, where, as has been remarked, the common law applicable was that of England, whereas the common law applicable in Quebec is, generally speaking, the old French law, as it was introduced into the territory of the Province when it was subject to the rule of the King of France. The provisions of Magna Charta, now the foundation of the public right wherever the common law of England prevails, could in that case have no application to Quebec. In the second place, under that old French law, it may be that the distinction was not between tidal and non-tidal waters, but between those waters that were navigable and those that were not.

But the French law applicable to the Province of Quebec, so far as concerns the right of the public to fish in the waters of the

Province, has been modified by certain statutes competently passed to which reference will presently be made. Into the precise character of the old French law it will be found that these statutes render it unnecessary to enter for the purposes of the present appeal. Under the French *régime* the Custom of Paris was in force in the Province, and the Government of French Canada was modelled on that of a Province of France. If it were necessary to pursue the character of the French law from time to time applicable, it would have to be considered whether any part of the Ordinance, sometimes spoken of as the Code de la Marine of 1681, which declared all the subjects of the King of France to have the right of fishing in the sea and on its banks, was ever so registered as to become law in French Canada, a point which conceivably may still require investigation in view of materials which were brought to their Lordships' notice in the course of the argument. It might also be necessary to determine whether, on the cession of Canada to England in 1763, the French law as to the Royal prerogative was abrogated and the law of England substituted for it. Into this historical question, which is one over which there has been much controversy, it is, however, unnecessary to enter. For assuming that the right of fishing in navigable waters belonged, under French law, to the domain of the Crown, and that the public enjoyed the right of fishing in such waters only subject to the prerogative of the King of France to grant at his pleasure exclusive rights of fishing to individuals, it is plain that this state of the law was altered by local statutes passed after the cession of 1763. In order to find the powers under which these statutes were enacted, reference must be made to the relevant Acts of the Imperial Parliament. The first of these was the Quebec Act of 1774. This Act defined the boundaries of the large Province of Canada which had been called Quebec in the Royal Proclamation that followed on the cession effected by the Treaty of Paris. It then went on to declare that, notwithstanding previous proclamations, commissions, ordinances, etc., in all matters of controversy relative to property and civil rights, resort was to be had to the existing laws of Canada as the rule for their decision, unless varied by ordinances passed by the Governor with the advice and consent of a Legislative Council to be set up by the Crown. The criminal

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law was to be that of England. The effect of the Act was thus to retain or to reintroduce the old French law wherever applicable as to property and civil rights.

In 1791, under another Act of that year, the Province of Quebec was divided into the separate Provinces of Upper and Lower Canada, and large powers of legislation were granted. The existing laws were to remain in force until altered, but power was given to the new Governments to make laws for the peace, welfare and good government of their Provinces.

In 1840, by a subsequent Act, the two Provinces were united into the single Province of Canada, which remained as such until Confederation in 1867. This united Province possessed representative government from the beginning, and a little later on its government was made responsible also.

Acting under the powers conferred on it, the Province of Quebec from time to time had passed laws regulative of fisheries. In 1788 a statute was enacted which declared that all the King's subjects should have the right to fish and to use the shores for that purpose over a large part of the river St. Lawrence and another river which emptied itself into the Bay of Chaleurs. The right extended to rivers, creeks, harbours and roads. This statute, in conferring the right to fish on the King's subjects generally in the language it adopted, substantially followed the model afforded by the Newfoundland Fisheries Act of 1699, in which the policy of encouraging the people of Great Britain to go to Newfoundland, catch fish, and dry them on the shores and bring them back, was adopted. This policy explains the stress laid in the statute on fishing in the sea and using the banks for drying, etc. It extends, however, to the right to take bait and fish in rivers, lakes, creeks, harbours and roads generally, and rights similar for the purposes of this appeal were conferred by the series of fishery statutes passed in Canada in relation to Canadian waters.

In 1807 a further statute was passed by the Government of the Province of Lower Canada under which the right to fish and land was further extended, with the saving of rivers, creeks, harbours, roads, and land which had been made private property by title derived from the King of England, or by grant prior to 1760, or by location certificate.

In 1824 a similar Act was passed extending the right of the public to fish to the Inferior District of Gaspé and two named counties. Further Acts regulating the rights of fishing in the District of Gaspé were passed in 1829 and 1836, by the Legislature of Lower Canada.

In 1841, after the union of Upper and Lower Canada, the right of all the King's subjects to fish in the waters of Gaspé was re-affirmed, and in 1853 the Legislature of the Province of Canada further declared the right of the King's subjects to fish to extend to the Gulf of the St. Lawrence.

In 1857 an Act of the Province anew declared the right of the King's subjects to fish in all the waters and rivers of the Province, with the exception of rivers lying within the territory known as the King's Posts, as to which it was provided that the Governor-in-Council might grant permission to fish in these rivers.

In 1858, by another statute of the Province of Canada, the general right of the King's subjects was reaffirmed; but it was provided that the Governor-General might grant special fishing leases and licenses for lands belonging to the Crown, for any term not exceeding 9 years, and might make such regulations as should be found necessary or expedient for the better management and regulation of the fisheries of the Province.

In 1865 the Provincial Government of the united Provinces passed an Act for the amendment of the law and for the better regulation of fishing and protection of fisheries. It applied to the whole of Upper and Lower Canada without distinction between districts. By this statute the Commissioner of Crown Lands might, under sec. 3, where the exclusive right of fishing did not already exist by law in favour of private persons, issue fishing leases and licenses for fisheries and fishing wheresoever situated or carried on, and grant licenses of occupation for public lands in connection with fisheries; but leases or licenses for any term exceeding 9 years were to be issued only under the authority of an order of the Governor-General-in-Council.

By sec. 4 the Governor-in-Council might from time to time make regulations for the better management and regulation of fisheries, to prevent the obstruction and pollution of streams, to regulate and prevent fishing, and to prohibit fishing except under leases and licenses.

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By sec. 6, which is headed "Deep Sea Fisheries," it was in the first place declared that every subject of the Sovereign might use vacant public property for the purpose of landing, salting, curing and drying fish, etc., and that:—

All subjects of Her Majesty may take bait or fish in any of the harbours or roadsteads, creeks or rivers; subject always, and in every case, to the provisions of this Act as affects the leasing or licensing of fisheries and fishing stations, but no property leased or licensed shall be deemed vacant.

Section 17 prohibits fishing in areas described in leases or licenses now existing or hereafter to be granted. It, however, adds that the occupation of any fishing station or waters so leased or licensed for the express purpose of net fishing is not to interfere with the taking of bait used for cod fishing, nor prevent angling for other purposes than those of trade or commerce.

In 1867 the B.N.A. Act was passed, and in 1868 the Dominion Parliament repealed the Act of 1865 by sec. 20 of its Fisheries Act of 1868. The Act of 1865 was thus in force only for 3 years. Section 91 of the B.N.A. Act had conferred on the Dominion Parliament exclusive authority to legislate in regard to sea coast and inland fisheries, and it was under this authority that the repeal was effected. By the Fisheries Act of 1868 that Parliament sought to exercise its powers by enacting a number of provisions in many respects resembling those of the Act of 1865, and by further regulating the exercise of both public and private rights of fishing throughout the Dominion. The substance of this Act was incorporated into the subsequent Consolidated Statutes of Canada on the subject of fisheries. As to one of the sections, sec. 4 of the then Revised Statutes of Canada, ch. 95, so far as it purported to empower the grant of fishery leases conferring an exclusive right to fish in property belonging not to the Dominion but to a Province, it was held by this Board in the case before them in 1898, that the Dominion had no power to pass it. Their Lordships think that this is now settled law.

But the decision of this point does not conclude the question before them, which is not whether the Dominion has power to grant exclusive rights of fishing in waters the property of a Province, but whether the Provincial Government has power to grant such an exclusive right of fishing in tidal waters. When the Act of 1865 was passed, the Government of the united Provinces of Upper and Lower Canada could unquestionably confer on itself

the capacity to do this. For it had full power to make laws for the peace, order, and good government of the Provinces without any such restrictions as affected the right of a Province under the B.N.A. Act of 1867, and it could consequently abrogate the fishing rights not only of private persons but of the public. After Confederation, neither the Dominion nor any Province possessed this power in its integrity. The Dominion Parliament, having exclusive jurisdiction over sea coast and inland fisheries, could regulate the exercise of all fishing rights, private and public alike. As the public right was not proprietary, the Dominion Parliament has in effect exclusive jurisdiction to deal with it. But as to private rights, the Provincial Legislature has exclusive jurisdiction so long as these present no other aspects than that of property and civil rights in the Province, or of matter of a local or private nature within it, in the meaning of the words of sec. 92.

The result of this is that a Province cannot grant exclusive rights to fish in waters where the public has the right to fish. Now this right in the public was created by the series of statutes enacted in the old Province of Upper and Lower Canada prior to Confederation, and as it continued to exist at Confederation, only the Dominion could deal with it. As this Board said in the *British Columbia Fisheries* case, 15 D.L.R. 308, [1914] A.C. 153, the object and effect of the provisions of sec. 91 were to place the management and protection of the cognate public rights of navigation and fishing in the sea and tidal waters exclusively in the Dominion Parliament and to leave to the Province no right of property or control in them. These rights, as was observed, are rights of the public in general, and in no way special to the inhabitants of the Province. Even under the guise of their taxing powers the Government of the Province could not confer any exclusive or preferential rights of fishing on individuals or classes of individuals, because such exclusion or preference would import regulation and control of the general right of the public to fish.

It is true that the public right of fishing in tidal waters does not extend to a right to fix to the *solum* kiddles, weirs, or other engines of the kind. That is because the *solum* is not vested in the public, but may be so in either the Crown or private owners. It is also true that the power of the Dominion does not extend to enabling it to create what are really proprietary rights where it

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possesses none itself. But it is obvious that the control of the Dominion must be extensive. It is not practicable to define abstractly its limits in terms going beyond those their Lordships have just employed. The *solum* and the consequent proprietary title to the fishery may be vested in the Crown in right of the Province or in a private individual, and in so far as this is so, it cannot be transferred by regulation. But regulation may proceed very far in limiting the exercise of proprietary rights without ceasing to be regulative.

It thus appears that the question which arises in this appeal in reality bears a considerable analogy to that which arose in the *British Columbia Fisheries* case. It is true that here their Lordships have nothing to do with the public title arising out of the English common law and strengthened by Magna Charta. But on the other hand, the main consideration, although not concerned with the common law of England, is not the old French law. It is the state of the public title established by the series of statutes passed by a former Canadian Legislature which had power to abrogate all such law. That series culminated in the Act of 1865, and sec. 6 of that Act, which declares that the public have the right, subject to the power of the Government to grant exclusive leases and licenses, to fish in the harbours, roadsteads, creeks or rivers of the old Province of Canada, is the foundation of the public title. This section occurs with the heading "Deep Sea Fisheries," a heading which, in their Lordships' opinion, affects its scope. The language of the section obviously owes its origin to that used in the Newfoundland Fisheries Act of 1699, which, as has been said, was passed for the purpose of encouraging the King's subjects at home to sail to Newfoundland in order to fish. The distinction between coast and inland fisheries could hardly at that time have been an important one, and no distinction was then drawn. There is, however, one significant difference between the enumeration in the Act of 1699 of the waters in which the public may fish and that contained in sec. 6 of the Act of 1865. In the former the word "lakes" occurs; in the latter it does not. The introduction into the language of the statute of the heading to sec. 6, "Deep Sea Fisheries," when taken in conjunction with the omission of lakes, which are referred to elsewhere in the Act, indicates, in the view their Lordships take of this section, that it was intended to apply

only to such fisheries as were either "deep sea," or so accessible from the sea as to make them natural adjuncts to these fisheries. The fisheries to be regarded as so adjoining would not, accordingly, include either the fishing in inland lakes, which are not mentioned, or the right to fish in non-navigable waters. All tidal waters which were navigable would thus be included. Stated generally the test of inclusion appears to be whether the waters in question are such that those who resort to the sea coast to fish there would naturally have access to these waters and would in ordinary course conduct their fishing operations in such a fashion as to extend into them.

As to sec. 3 of the Act of 1865, which enables the Commissioner of Crown Lands, where the exclusive right of fishing does not exist by law in favour of private persons, to issue fishing leases and licenses for fisheries and fishing wherever carried on, this was obviously within the competence of the Legislature, which was then unrestricted in the scope of its power to alter the provincial law. No distinction was, or needed to be, contemplated between power of regulation and power over proprietary title. Bearing this in mind, their Lordships think that sec. 3 was in its character as much a regulative provision as it was one directed to property. These two aspects of its subject matter were really then inseparable. In so far as its powers were powers of regulation, they have passed to the Dominion Parliament. No question is at present raised as to existing rights created under any of its provisions. Although the power of the Dominion to legislate about the regulation of inland fisheries extends to all fisheries, even where the public has no right, it is obvious that in substance its powers may be more restricted in their operation wherever the only title to fish is a private one arising simply out of the property in the subjacent soil.

In the Court of King's Bench of Quebec, 35 D.L.R. 1, 26 Que. K.B. 289, the first of the questions raised in this appeal was answered by the majority of the Judges to the effect that the Government of the Province did possess power to grant exclusive rights of fishing in tidal waters. Archambeault, C.J., thought that the effect of the Act of 1865 was that the public right to fish had been abrogated. This seems to import that sec. 3 had brought about a transfer of the entire title to fish to the Crown in right of the Province. Their Lordships are unable to concur in this view. They think that sec. 3 must be read along with sec. 6 which

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maintains the public right. No doubt that is maintained subject to the powers given in sec. 3, and those powers might have been so exercised as to destroy the public right in a certain place. But if so exercised they would be fulfilling a double function; the disposal of property and the exercise of the power of regulation. The former of these functions has now fallen to the Province, but the latter to the Dominion; and accordingly the power which existed under sec. 3 of the Act of 1865 no longer exists in its entirety.

Exclusive rights actually granted while the Act of 1865 was in force are another matter. It has not been brought to the notice of their Lordships that any such have been granted. If there are their position will have to be separately considered.

Archambeault, C.J., following their Lordships' view, expressed in the *British Columbia Fisheries* case, 15 D.L.R. 308, [1914] A.C. 153, declined to answer so much of any of the questions raised as related to the 3-mile limit. As to this their Lordships agree with him. It is highly inexpedient, in a controversy of a purely municipal character such as the present, to express an opinion on what is really a question of public international law. If their Lordships thought it proper to entertain such a question they would have directed the Home Government to be notified, inasmuch as the point is one which affects the Empire as a whole.

In the result the answer to the questions submitted must be as follows:—

(1) To the first question, neither the Government of Quebec, nor any member of the Executive Council, has power to grant the exclusive right of fishing in the tidal waters so far as navigable of the rivers, streams, gulfs, bays, straits or arms of the sea of the Province and of the high seas washing its coasts. In so far as the soil is vested in the Crown in right of the Province, the Government of the Province has exclusive power to grant the right to affix engines to the *solum*, so far as such engines and the affixing of them do not interfere with the right of the public to fish, or prevent the regulation of the right of fishing by private persons without the aid of such engines. The tidal waters may not extend so far as the limits of the navigable waters, but no distinction between the two descriptions is enacted in the statute of 1865, which is the governing authority. There is everywhere a power of regulation in the Dominion Parliament, but this must be exercised so as not

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to deprive the Crown in right of the Province or private persons of proprietary rights where they possess them. This answer applies to waters between low and high mark. As to waters beyond low mark no answer can properly be given.

(2) To the second question, as to the power of the Legislature of the Province, the answer is in the negative.

(3) To the third question, the answer is that restrictions in the interest of the public on the granting of exclusive rights of fishing in tidal waters still exist, and that therefore the question does not arise.

Their Lordships will humbly advise His Majesty accordingly. There will, following the general practice, be no costs of this appeal.

Judgment accordingly.

Viscount Haldane.

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MONTREAL LOCOMOTIVE WORKS v. McDONNOUGH.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. December 17, 1920.

NEW TRIAL (§ III B—15)—JURY'S ANSWERS INCONSISTENT—NATURE OF QUESTIONS SUBMITTED—CHARGE OF TRIAL JUDGE.

A new trial will be granted where the trial Judge by his charge has not brought home to the comprehension of the jury the nature of the questions upon which they had to pass and where there is substantial doubt as to the meaning of the jury's finding.

APPEAL from the Quebec Court of King's Bench, in an action for damages for injuries received. New trial ordered. Statement.

A. C. Casgrain, K.C., for appellant.

E. Pélissier, K.C., for respondent.

IDINGTON, J.:—There is much in the form of the verdict of the jury which is open to criticism. Idington, J.

But reading it as a whole there is one thing clear and that is that the contention of the appellant never was intended by the jury as its verdict.

I prefer giving it, as the evidence justifies and the trial Judge and the unanimous holding of the Court of Appeal did, a rational meaning.

To do so this appeal should be dismissed with costs.

DUFF, J.:—I concur in the view of the Court below that there was evidence to support the verdict for the plaintiff if the jury had found such a verdict after a complete proper direction by the trial Judge. Duff, J.

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But the questions for the jury were eminently debatable ones and it is a case in which a judgment for the plaintiff ought not to be sustained unless two conditions are satisfied: 1. That the trial Judge by his charge brought home to the comprehension of the jury the nature of the questions upon which they had to pass and, 2. That there should be no substantial doubt as to the meaning of the jury's finding. Neither of these two conditions is satisfied. I think it is gravely questionable that the jury understood the questions they were asked to answer; and further, after a good deal of consideration, I am quite unable to satisfy myself as to the meaning of their answers. There should be a new trial and all costs, including the costs of this Court, should abide the event of the new trial.

Anglin, J.

ANGLIN, J.:—Greatly as I regret the necessity for the adoption of that course I see no way to avoid ordering a new trial of this action. The meaning of the jury's findings is at best obscure. Putting upon them the most benevolent interpretation of which they are susceptible they seem to be hopelessly inconsistent.

The fault attributed to the defendants is the operation of a machine known to be defective. But, admittedly, the defect in the machine did not itself expose the plaintiff to any risk. Unless we are to attribute to them an utter disregard of the requirement that to be actionable fault must be a proximate cause of the injury—*dans locum injuriae*—the jury must be taken to have meant that the operation of the defective machine entailed duties on the plaintiff in the discharge of which he was exposed to unnecessary and unwarranted risk of injury. Yet they found as fault on his part that in performing the act which was the immediate cause of his being injured he exceeded what he was told to do and took unnecessary risks.

It is suggested for the plaintiff that by this latter finding the jury merely meant that, although it was part of his duty to see that the defective bearing did not become overheated and therefore to ascertain its condition from time to time by feeling the casing covering it, he was not sufficiently cautious in doing so. But the verdict scarcely admits of that interpretation and attributing the intention of the jury of making such a finding is almost pure conjecture. If taken literally, the finding ascribes to the plaintiff fault of such a character, that the conclusion is almost

inevitable that it was the sole cause of the accident. But the jury negatived that view and expressly found that there was fault on the part of the defendants which contributed to causing the injury. A somewhat meagre charge, particularly as to the necessity for direct causal connection between any fault to be found, and the injury sustained, may to some extent account for the difficulties which the findings present. At all events it seems to me that they are insuperable and that justice to both parties requires that a new trial should be had. Costs of the abortive trial should abide the event. The costs of the appeals to the Court of King's Bench and to this Court should be costs in the cause to the appellant, payable to it in any event of the action.

BRODEUR, J.:—I concur in the result. Brodeur, J.

MIGNAULT, J.:—In this case the majority of the Court is of opinion to allow the appeal and to order a new trial. I would have been ready to express my views on the merits of the respondent's action and to state whether it should be maintained or dismissed. I realise, however, that such an expression of opinion might possibly influence or embarrass the new trial now ordered. So, while I would have preferred to dispose immediately of the action on its merits, I will not dissent from the judgment ordering a new trial. Mignault, J.

New trial ordered.

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Judicial Committee of the Privy Council, Viscount Haldane, Viscount Cave, Lord Dunedin, and Duff, J. November 23, 1920.

CONSTITUTIONAL LAW (§ I G—140)—INDIAN LANDS—SURRENDER—TITLE IN CROWN—PROVINCIAL RIGHTS—B.N.A. ACT, SEC. 91, SUB-SEC. 24.

The Dominion Government has full authority to accept the surrender of Indian lands in Quebec Province but has neither authority nor power to take away from the Province the interest assigned to it by the British North America Act, and the title to the lands affected by the surrender vests in the Crown in the right of the Province.

[*St. Catherine's Milling & Lumber Co.* v. *The Queen* (1888), 14 App. Cas. 46, followed.]

APPEAL from the judgment of the Quebec Court of King's Bench in an action for rescission of a contract for the purchase of land, on the ground that the property was in the Crown and that the vendor was without title at the time of the sale. Statement.

The facts of the case are fully set out in the judgment delivered.

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The judgment of the Board was delivered by

DUFF, J.:—By an order of the Governor of the late Province of Canada in Council, of August 9, 1853, pursuant to a statute of that Province, 14-15 Vict., 1851 (Can.), ch. 106, the provisions of which are hereinafter explained, certain lands, including those whose title is in question on this appeal, viz., lots 6, 7 and 8, in the thirteenth range of the township of Coleraine in the county of Megantic, were appropriated for the benefit of the Indian tribes of Lower Canada, those particularly mentioned being set apart for the tribe called the Abenakis of Becancour. By an instrument of surrender of February 14, 1882, which was accepted by an order of the Governor-General of Canada in Council of April 3, 1882, this tribe surrendered, *inter alia*, the lots above specified to Her Majesty the Queen; and on July 2, 1887, the Dominion Government professed to grant them by letters patent to Cyrice Tetu, of Montreal, whose interest in them passed on his death to Dame Caroline Tetu.

On April 10, 1893, the lands in question, having been seized in execution by the sheriff of the district of Arthabaska, under a judgment against Dame Caroline Tetu, were sold by the sheriff to one Joseph Lamarche, whose title was eventually acquired by the respondent Dame Rosalie Thompson. The appellants, the Star Chrome Mining Co., Ltd., having purchased the property from the respondent Thompson, in February, 1907, the company took proceedings against the vendor, claiming rescission of the sale and demanding repayment of the purchase money with damages, on the ground that the property was in the Crown in the right of the Province of Quebec, and that the vendor was consequently without title at the time of the sale.

The action of the appellants having come on for trial on June 4, 1909, the trial was adjourned, and on June 29, 1912, an order was made suggesting that the Dominion Government and the Government of Quebec should intervene for the purpose of determining the controversy touching the authority of the Dominion Government to dispose of the lands in question on behalf of the Crown. On October 2, 1914, the appellant, the Attorney-General of Quebec, intervened, claiming by his intervention that the grant to Cyrice Tetu, of July 2, 1887, was null and void, on the ground that the lands which the grant professed to dispose of were the

property of the Crown in the right of Quebec; and on October 7, 1914, the respondent, the Attorney-General of Canada, met the intervention of the Attorney-General of Quebec by a contestation in which he maintained the validity of the grant to Cyrice Tetu. On May 7, 1917, the Superior Court pronounced judgment rejecting the intervention of the Attorney-General of Quebec, and the appeal from this judgment was dismissed by the Court of King's Bench on November 20, 1917, Lavergne, J., dissenting.

The first question which arises concerns the effect of the deed of surrender of April 3, 1882—whether, that is to say, as a result of the surrender, the title to the lands affected by it became vested in the Crown in right of the Dominion, or, on the contrary, the title freed from the burden of the Indian interest, passed to the Province under sec. 109 of the B.N.A. Act.

The claim of Quebec is based upon the contention that at the date of Confederation the radical title in these lands was vested in the Crown, subject to an interest held in trust for the benefit of the Indians, which, in the words used by Lord Watson, in delivering judgment in *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas. 46, was only "a personal and usufructuary right dependent upon the goodwill of the Crown." On behalf of the Dominion it is contended that the title, both legal and beneficial, was held in trust for the Indians.

In virtue of the enactment of sec. 91, sub-sec. 24, of the B.N.A. Act, by which exclusive authority to legislate in respect of lands reserved for Indians is vested in the Dominion Parliament, it is not disputed that that Parliament would have full authority to legislate in respect of the disposition of the Indian title, which, according to the Dominion's contention, would be the full beneficial title. On the other hand, if the view advanced by the Province touching the nature of the Indian title be accepted, then it follows from the principle laid down by the decision of this Board in *St. Catherine's Milling and Lumber Company* v. *The Queen*, *supra*, that upon the surrender in 1882 of the Indian interest the title to the lands affected by the surrender became vested in the Crown in right of the Province, freed from the burden of that interest.

The answer to the question raised by this controversy primarily depends upon the true construction of two statutes passed by the

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Legislature of the Province of Canada, 13-14 Vict. (Can.), 1850, ch. 42, and 14-15 Vict., 1851, ch. 106. The last-mentioned statute is entitled, "An Act to authorise the setting apart of lands for the use of certain Indian tribes in Lower Canada," and, after reciting that it is expedient to set apart certain lands for such "use," it enacts that tracts not exceeding 230,000 acres may, under the authority of Orders in Council, be described, surveyed and set out by the Commissioner of Crown Lands, and that:—

such tracts of land shall be and are hereby respectively set apart and appropriated to and for the use of the several Indian tribes in Lower Canada, for which they shall be respectively directed to be set apart . . . and the said tracts of land shall accordingly, by virtue of this Act . . . be vested in and managed by the Commissioner of Indian Lands for Lower Canada, under

the statute first mentioned, 13-14 Vict., ch. 42. This statute (13-14 Vict., ch. 42) is entitled, "An Act for the better protection of the Lands and Property of the Indians in Lower Canada," and, following upon a recital that it is expedient to make better provision in respect of "lands appropriated to the use of Indians in Lower Canada," enacts, by sec. 1, as follows:—

That it shall be lawful for the Governor to appoint from time to time a Commissioner of Indian Lands for Lower Canada, in whom and in whose successors by the name aforesaid, all lands or property in Lower Canada which are or shall be set apart or appropriated to or for the use of any Tribe or Body of Indians, shall be and are hereby vested, in trust for such Tribe or Body, and who shall be held in law to be in the occupation and possession of any lands in Lower Canada actually occupied or possessed by any such Tribe or Body in common, or by any Chief or Member thereof or other party for the use or benefit of such Tribe or Body, and shall be entitled to receive and recover the rents, issues and profits of such lands and property, and shall and may, in and by the name aforesaid, but subject to the provisions hereinafter made, exercise and defend all or any of the rights lawfully appertaining to the proprietor, possessor or occupant of such land or property.

and by sec. 3:—

That the said Commissioner shall have full power to concede or lease or charge any such land or property as aforesaid and to receive or recover the rents, issues and profits thereof as any lawful proprietor, possessor or occupant thereof might do, but shall be subject in all things to the instructions he may from time to time receive from the Governor, and shall be personally responsible to the Crown for all his acts, and more especially for any act done contrary to such instructions, and shall account for all moneys received by him, and apply and pay over the same in such manner, at such times, and to such person or officer, as shall be appointed by the Governor, and shall report from time to time on all matters relative to this office in such manner and form, and give such security, as the Governor shall direct and require; and all moneys and movable property received by him or in his possession as Commissioner,

if not duly accounted for, applied and paid over as aforesaid, or if not delivered by any person having been such Commissioner to his successor in office, may be recovered by the Crown or by such successor, in any Court having civil jurisdiction to the amount or value, from the person having been such Commissioner and his sureties, jointly and severally.

The rival views which have been advanced before their Lordships touching the construction of these enactments have already been indicated.

In support of the Dominion claim it is urged that, as regards lands "appropriated" under the Act of 1851, the words "shall be and are hereby vested in trust for" the Indians, create a beneficial estate in such lands, which by force of the statute is held for the Indians, and which could not lawfully be devoted to any purpose other than the purposes of the trust, and indeed is equivalent to the beneficial ownership.

While the language of this statute of 1850 undoubtedly imports a legislative acknowledgment of a right inhering in the Indians to enjoy the lands appropriated to their use under the superintendence and management of the Commissioner of Indian Lands, their Lordships think the contention of the Province to be well founded to this extent, that the right recognised by the statute is a usufructuary right only and a personal right in the sense that it is in its nature inalienable except by surrender to the Crown.

By sec. 3 the Commissioner is not only accountable for his acts, but is subject to the direction of the Governor in all matters relating to the trust; the intent of the statute appears to be, in other words, that the rights and powers committed to him are not committed to him as the delegate of the Legislature, but as the officer who for convenience of administration is appointed to represent the Crown for the purpose of managing the property for the benefit of the Indians. If this be the correct view, then, whatever be the nature or quantum of the Commissioner's interest, it is held by him in his capacity of officer of the Crown and his title is still the title of the Crown; and this, it may be observed, is apparently the view upon which the Dominion Government proceeded in accepting the surrender of 1882, the lands surrendered being treated (and their Lordships think rightly treated) for the purposes of that transaction as a "Reserve" within the meaning of the Act of 1882—in other words, as lands "the legal title" to

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which still remained in the Crown (sec. 2 (6)). It is not unimportant, however, to notice that the term "vest" is of elastic import; and a declaration that lands are "vested" in a public body for public purposes may pass only such powers of control and management and such proprietary interest as may be necessary to enable that body to discharge its public functions effectively (*Mayor of Tunbridge Wells* v. *Baird*, [1896] A.C. 434), an interest which may become devested when these functions are transferred to another body. In their Lordships' opinion, the words quoted from sec. 1 are not inconsistent with an intention that the Commissioner should possess such limited interest only as might be necessary to enable him effectually to execute the powers and duties of control and management, of suing and being sued, committed to him by the Act.

In the judgment of this Board in the *St. Catherine's Milling Company's* case, already referred to, it was laid down, speaking of Crown lands burdened with the Indian interest arising under the Proclamation of 1763, as follows, (14 App. Cas., at 58):—

> The Crown has all along had a present proprietary interest in the land, upon which the Indian title was a mere burden. The ceded territory was, at the time of the union, land vested in the Crown, subject to "an interest other than that of the Province in the same," within the meaning of sec. 109, and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed.

and their Lordships said, at p. 55:—

> It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a *plenum dominium* whenever that title was surrendered or otherwise extinguished.

The language of the statutes of 1850 and 1851 must, therefore, be examined in light of the circumstances of the time and of the objects of the legislation as declared by the enactments themselves, for the purpose of ascertaining whether or not the Crown retained in lands appropriated for the use of an Indian tribe a "paramount title" upon which the Indian interest was a mere "burden" in the sense in which these phrases are used in these passages.

The object of the Act of 1850, as declared in the recitals already quoted, is to make better provision for preventing encroachments upon the lands appropriated to the use of Indian tribes and for the defence of their rights and privileges, language which does not

point to an intention of enlarging or in any way altering the quality of the interest conferred upon the Indians by the instrument of appropriation or other source of title; and the view that the Act was passed for the purpose of affording legal protection for the Indians in the enjoyment of property occupied by them or appropriated to their use, and of securing a legal status for benefits to be enjoyed by them, receives some support from the circumstance that the operation of the Act appears to extend to lands occupied by Indian tribes in that part of Quebec which, not being within the boundaries of the Province as laid down in the Proclamation of 1763, was, subject to the pronouncements of that proclamation in relation to the rights of the Indians, a region in which the Indian title was still in 1850, to quote the words of Lord Watson, "a personal and usufructuary right dependent upon the good will of the Sovereign." It should be noted also that the Act of 1851, under which the lands in question were set apart, is plainly an Act passed with the object of setting lands apart "for the use" of Indian tribes, and that by the same Act the powers of the Commissioner of Indian Lands under the Act of 1850 are referred to as "powers of management."

Their Lordships do not find it necessary to enter upon a consideration of the precise effect of the words of sec. 3, investing the Commissioner with power to "concede," "lease" or "charge" lands or property affected by the statute. It is sufficient to say that, having regard to the recitals of the same statute and the language of the Act of 1851 just referred to, as well as to the policy of successive administrations in the matter of Indian affairs which, to cite the judgment of the Board in the *St. Catherine's Milling Company's* case, 14 App. Cas., at 54, *per* Lord Watson, had been

> all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract, duly ratified at a meeting of their chiefs or head men convened for the purpose.

Their Lordships think these words ought not to be construed as giving the Commissioner authority to convert the Indian interest into money by sale or to dispose of the land freed from the burden of the Indian interest, except after a surrender of that interest to the Crown.

It results from these considerations, in their Lordships' opinion, that the effect of the Act of 1850 is not to create an equitable

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estate in lands set apart for an Indian tribe of which the Commissioner is made the recipient for the benefit of the Indians, but that the title remains in the Crown and that the Commissioner is given such an interest as will enable him to exercise the powers of management and administration committed to him by the statute.

The Dominion Government had, of course, full authority to accept the surrender on behalf of the Crown from the Indians, but, to quote once more the judgment of the Board in the *St. Catherine's Milling Company's* case, it had "neither authority nor power to take away from Quebec the interest which had been assigned to that Province by the Imperial statute of 1867." The effect of the surrender would have been otherwise if the view, which no doubt was the view upon which the Dominion Government acted, had prevailed, namely, that the beneficial title in the lands was by the Act of 1850 vested in the Commissioner of Indian Lands as trustee for the Indians, with authority, subject to the superintendence of the Crown, to convert the Indian interest into money for the benefit of the Indians. As already indicated, in their Lordships' opinion, that is a view of the Act of 1850 which cannot be sustained.

One further point remains. On behalf of the respondent Thompson it is contended that her title is validated by reason of the adjudication of the sheriff's sale. Their Lordships concur in the view which prevailed in *Les Commissaires d'Ecole de St. Alexis* v. *Price* (1895), 1 Rev. de Jur. 122, that arts. 399 and 2213 of the Code of Civil Procedure have not the effect of conferring upon the purchaser at a sheriff's sale a title to Crown property which has not been alienated by the Crown.

The appeal should, therefore, be allowed and the action remitted to the Superior Court to give judgment against the respondent Thompson for the amount of the purchase money and of the damages which, if any, she shall be found liable to pay to the appellants the Star Chrome Mining Co., and their Lordships will humbly advise His Majesty accordingly.

The respondent Thompson will pay the costs of the Star Chrome Mining Co. here and in the Courts below. There will be no order as to the costs of other parties.

Appeal allowed.

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Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. January 7, 1921.

SCHOOLS (§ IV—70)—LANDS AND BUILDINGS REQUIRED FOR SCHOOL PURPOSES—POWER OF TRUSTEES TO LEVY AND COLLECT SUMS REQUIRED—PUBLIC SCHOOLS ACT (MAN.) SECS. 57(o) AND 203 TO 224—CONSTRUCTION.

Section 57(*o*) of the Public Schools Act simply declares the duty of trustees of rural school districts to call on the municipal council to levy and collect by rate sums required for school purposes during the year, but in performing this duty regard must be paid to secs. 203 to 224 of the Act which provides the powers of the trustees in borrowing money and issuing debentures. An indebtedness of $30,000 must be raised under and in compliance with the provisions of these sections and in no other way, and where a by-law to issue debentures for this amount for the purchase of a site and the erection of a school building has been twice defeated by a vote of the ratepayers the trustees have no authority under sec. 57(*o*) to request the municipality to raise such capital sum by levy in a single year.

Statement.

APPEAL by plaintiff from the trial judgment in an action for an injunction restraining a municipality from passing a by-law to levy money for a school district. Reversed.

C. P. Wilson, K.C., and *W. C. Hamilton*, for appellants.

A. B. Hudson, K.C., and *H. E. Swift*, for school trustees.

A. H. Warner, for municipality.

The judgment of the Court was delivered by

Perdue, C.J.M.

PERDUE, C.J.M.:—This action was brought by James Phillips and James Fewster who sued on behalf of themselves and of all other ratepayers of the rural municipality of Roland, other than the persons named as defendants, against the reeve and councillors of the municipality and the municipality itself to obtain an injunction to restrain the defendants from passing a by-law to levy the amount demanded by the Myrtle Consolidated School Dist., No. 708. An interim injunction was granted until August 12 last. The application to continue the injunction came before Mathers, C.J.K.B., and by consent the school district was allowed to intervene and oppose the continuance of the injunction, it being made a party defendant for that purpose. The application to continue the injunction was turned into a motion for judgment. Mathers, C.J.K.B., dissolved the injunction and dismissed the action. From that judgment the plaintiffs appeal.

The facts of the case are as follows:

The Myrtle Consolidated School District was formed in August, 1919. It is a rural school district and also a union school, the main portion of the school district being in the rural

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municipality of Roland and the remainder being in the rural municipality of Morris: See the Public Schools Act, R.S.M. 1913, ch. 165, secs. 122-128, as to formation of union schools. On December 13 last, a special meeting of the ratepayers of the Myrtle School District was held at which a resolution was passed for the erection of a four-roomed school-house, the type of building being left to the trustees. The plaintiffs were present and raised no objection. It was also resolved that the question of issuing debentures to raise the necessary money should be left to the trustees. On the same day the trustees held a meeting and passed a by-law to issue debentures for $30,000 for the purchase of a site and the erection of a school-house. The municipality of Roland was requested by the trustees to submit the by-law to the ratepayers. This was done and a vote was taken on January 16 last when the by-law was defeated. A similar by-law was submitted to a vote of the ratepayers on April 30 and again defeated. On July 19, a contract was let for the construction of the school-house. In the meantime temporary accommodation for school purposes was provided. When it was anticipated that the by-law might be defeated for the second time the trustees resolved to request the municipality to raise the amount required for school purposes by a levy in a single year. On March 27, an estimate of the amount required for the school "during the year commencing January 1st, 1921," including $30,000 for the erection of the school-house, was sent by the secretary-treasurer of the school district to the municipality. This estimate is dated March 22 and calls for a special district tax of $42,005. The amount required includes $30,000 for school buildings, $625 for school sites and $3,500 for furnishing and repairs. The municipality was requested to levy the amount of the special tax. The request to the municipality to levy the amounts mentioned as required for the year commencing January 1, 1921, was a mistake caused, no doubt, by the use of a printed form intended for use at a time when the school year commenced on January 1, instead of commencing as it now does on July 10: the Public Schools Act, secs. 50, 57 (*b*). The council of the municipality introduced a by-law on July 16, 1920, to levy the rates for the municipality for the year 1920. In this was included a special school rate for the school district of Myrtle of 281 mills in the dollar to provide

the amount required. The municipality seems to have acted on the assumption that the levy was required for the current school year. The by-law received its first reading only and stood over to the meeting to be held on July 31. On July 30, the plaintiffs obtained an interim injunction restraining the municipality from proceeding with the proposed by-law until August 12.

At the opening of the argument upon this appeal it was admitted that the council of the municipality had abandoned the by-law introduced on July 16 and had passed a by-law levying rates for the year 1920 from which the amount requested for school purposes by the school district of Myrtle had been excluded. The plaintiffs have therefore attained their purpose through the action of the municipality. The appeal was argued not only on the question of costs but this involved a consideration of the rights of the plaintiffs to bring the action and an expression of opinion on its merits also to obtain an expression of opinion as to the powers of the trustees.

The failure of the ratepayers of the school district to ratify the first by-law authorising the borrowing of the money required for the erection of the school-house and the anticipated rejection of the second by-law for the same purpose induced the trustees of the school district to invoke the provisions of sec. 57 (*o*) of the Public Schools Act to raise the amount required. The provision relied on is as follows:

> 57. It shall be the duty of the trustees of rural school districts, . . .
> (*o*) to apply to the municipal council, at or before its first meeting after the thirty-first day of July, for the levying and collecting by rate of all sums for the support of their school or schools and for any other school purposes authorised by this Act to be collected from the ratepayers of such district, or to raise the amount necessary for the purchase of school sites, the erection or otherwise acquiring of school houses, teachers' residences and their appendages, either by one yearly rate or by debentures as provided in secs. 203 to 224, as may be required by the trustees, said application to shew the amounts required respectively for (1) salaries, (2) sinking fund or debentures, (3) interest, (4) school buildings, (5) school sites, (6) furnishings and repairs, (7) transportation, (8) fuel, (9) sundry expenses not specified.

The above section deals with the duties of the trustees. The duties imposed by sub-sec. (*o*) must be read in connection with the other sections of the Act dealing with the same matters. Secs. 203 to 224 provide the *powers* of the trustees in borrowing money and issuing debentures.

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Section 203 is as follows:

203. The ratepayers of any rural school district may, at a public meeting duly called, require the trustees to borrow any sum of money, not exceeding the sum of five thousand dollars, or, in case the school district be already in debt, such a sum as will not increase the debt of the district beyond the sum of five thousand dollars, for the purpose of school sites or the erection and furnishing of school-houses and their appendages, or the purchase thereof, or the purchase or erection of a teacher's residence, or for the purpose of paying off any debt, charge or lien against the school-house or teacher's residence, or against the corporation.

Section 204 provides for giving notice of the meeting. By sec. 205 a majority of the ratepayers shall be sufficient to authorise the loan, that is, a loan not exceeding $5,000.

By sec. 206 where the amount of the loan is greater than that authorised by secs. 203-205, "it shall be necessary for the trustees to pass a by-law and submit the same to the ratepayers," to be voted on in the manner provided in the Municipal Act, R.S.M. 1913, ch. 133, in case of by-laws creating debts. The provisions of the Municipal Act as to voting are applied and it shall be the duty of the municipal council to submit the by-law to a vote on the request of the board: secs. 207-208.

Section 209 declares that in the case of rural school districts, the persons entitled to vote on such by-laws *shall be all the owners of real estate within the district* whose names appear upon the last revised assessment roll. But where a vote is not necessary under the provisions of sec. 203, a majority of *ratepayers* may authorise it.

"The expression 'ratepayer' means any person appearing on the last revised assessment roll in respect of property situated within the school district." R.S.M. 1913, ch. 65, sec. 2 (*l*).

By sec. 219 all school loans shall require the assent of the Department of Education. A form of minutes of the meeting of ratepayers of the school district called for the purpose of borrowing money under sec. 203 is provided by sec. 219 (*a*). These minutes shall contain a list of the names of the ratepayers who voted at the meeting, distinguishing those who are freeholders from those who are not, and recording the vote given by each person for or against the question: sec. 219 (*b*). Under sub-sec. (*d*) of the same section, it shall be the duty of the secretary-treasurer of the board of school trustees on the sanctioning of the loan by the ratepayers to transmit to the department a state-

ment shewing the assessed value "of the real and personal estate of such school district and its indebtedness, debenture or otherwise." The department may refuse or approve the loan: sec. 219 (*e*) and (*f*).

From the above provisions of the Act it appears that in the case of a rural school district borrowing money for the purchase of a school site or the erection of a school-house, or for other purposes mentioned, the borrowing is restricted to the sum of $5,000 if the by-law is not submitted to a vote of the ratepayers. Where the borrowing is to exceed $5,000 the by-law must be submitted to a vote of the ratepayers, and the ratepayers entitled to vote are only those who are owners of real estate within the district whose names appear on the last revised assessment roll. Further, every school loan requires the sanction of the Department of Education.

In construing sub-sec. (*o*) of sec. 57 it must be read with other parts of the Act and especially those dealing with the raising and expending of money. The sections I have referred to shew how carefully the borrowing of money by a rural school district where the sum exceeds $5,000 is controlled by restrictions and indispensable preliminary procedure. If the defendant school district desired to borrow the sum of $6,000 to build a school it could only do so subject to compliance with the procedure provided in secs. 203-219. This would include the submission of the by-law to a vote of the ratepayers who are *owners of real estate* in the district and the securing of a majority vote in favour of it. A majority of the ordinary ratepayers would not necessarily suffice. But the rural school district in this case claims that it has power under sec. 57 (*o*) to raise more than five times the above amount to build a school-house by calling upon the municipality to levy the whole amount on the ratepayers in a single year. If the sub-section will bear such a construction, trustees of rural school districts can evade a hostile vote of the property owners or the disapproval of the department, and carry out their own plans without restriction. This would be contrary to the spirit and intention of the Act. I think that sub-sec. (*o*) of sec. 57 simply declares the duty of the trustees of rural school districts to call on the municipal council to levy and collect by

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rate sums required for school purposes during the year, but in performing this duty regard must be paid to the sections dealing with the borrowing of money and creation of debt.

Section 203 restricts the powers of the trustees, even where requested by the ratepayers at a public meeting, to create an indebtedness of the school district by borrowing to an amount exceeding $5,000, unless the provisions contained in secs. 203-224 have been observed and performed. Now as soon as a tax is levied by the municipality it becomes a debt of the ratepayer on whom the tax is levied. The Assessment Act, R.S.M. 1913, ch. 134, sec. 144. It becomes a lien on his land or personal property having preference over every claim or encumbrance of any party except the Crown (sec. 140). The levy for school purposes would become an immediate indebtedness of the ratepayers, against each one of whom his share would be enforceable by distress or suit (secs. 129-134, 144). It is not in accordance with the spirit of the Act that this rural school district should be permitted to raise in a single year by taxation of the ratepayers in the district an amount for capital expenditure exceeding $30,000. The Act contemplated that an indebtedness of that magnitude should be raised under, and in compliance with, the provisions of secs. 203-224 and in no other way. Having obtained the assent of the ratepayers to the by-law and the sanction of the department the trustees might borrow the money on debentures. In such case the payment of the principal might be spread over a considerable number of years (secs. 213-217). If the debentures were not payable in instalments an annual sinking fund would be raised (sec. 214). These carefully considered provisions for lightening the burden on the ratepayers are in marked contrast to the attempt in the present case to levy the whole capital sum in a single year.

The provision corresponding to sec. 57 (*o*) of the present Act is found in the Public Schools Act of 1890, sec. 37 (3). That Act, however, contained a section, 102, which provided that:

> No board of school trustees in a rural municipality, city, town or village shall have the right to include in their estimate or levy for school purposes for any year, any amount for any of the purposes for which the trustees of rural school districts have power to borrow as provided in sec. 98 hereof, if thereby, the special school rate for such district is increased beyond eight mills in the dollar.

That sec. 98 and following sections filled the place in school legislation now occupied by secs. 203-224. Sec. 102 of the Act

of 1890 is found in the Revised Statutes, 1892, as sec. 142, but it was repealed in 1896, by 59 Vict., ch. 23, sec. 6. I do not think that the existence and subsequent repeal of the above sec. 142 help in construing the statute as it stands at present. It was no doubt considered by the Legislature that a maximum of 8 mills in the dollar for school purposes set an unduly narrow limit. But it can hardly be argued that in removing that limit the Legislature intended that school trustees might disregard the provisions governing the borrowing of money and the creation of debts.

I have discussed the powers of the trustees of the school district under sec. 57 (*o*), at considerable length because the parties desired to have the opinion of the Court as to the effect of that provision, but the question involved in this case might have been decided upon another and a simpler ground. The estimate of expenditure sent by the trustees of the school district to the municipality with the request to levy the special tax was stated to be for the year commencing January 1, 1921. The estimate, with the request, was sent in March, 1920. The secretary-treasurer explains that the mistake was made by reason of his being under the impression that the school year commenced on January 1. But that does not explain why the estimate was made for the year 1921 instead of the year 1920. The money was required for immediate expenditure. The building of the school was to be proceeded with and completed in the year 1920. I think the request was not warranted by the Act and that the municipality was justified in refusing to levy in the year 1920 a rate for school purposes for the year 1921.

The council of the municipality, however, did introduce a by-law containing the levy complained of, and threatened to pass it. The action of the plaintiffs was therefore justified. An order for an injunction is now unnecessary, but the plaintiffs are entitled to a declaration that the council of the municipality was not authorised by law to obey the requisition of the trustees of the school district to levy the amount requested.

The municipality must pay the plaintiffs' costs of the action including the costs of this appeal.

Appeal allowed.

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S. C.

NORTHERN ALBERTA NATURAL GAS DEVELOPMENT Co. v. ATTORNEY-GENERAL FOR ALBERTA. Re THE PUBLIC UTILITIES ACT.

Supreme Court of Canada, Davies, Idington, Duff, Anglin and Mignault, JJ. December 17, 1920.

MUNICIPAL CORPORATIONS (§ II D—147)—GAS COMPANY—CONTRACT—MAXIMUM RATE—EXISTING RATE—PUBLIC UTILITIES ACT (1915), ALTA., CH. 6, SEC. 23(c).

A gas company which has agreed with a municipal corporation as to the maximum rate to be charged for the supply of gas to the corporation, but which has not by by-law fixed any rates which it proposes to charge, has not fixed an "existing rate" over which the Board of Public Utility Commissioners has jurisdiction under sec. 23(c) of the Public Utilities Act 1915 (Alta.), ch. 6.

[*City of Edmonton* v. *Northern Alberta Natural Gas Dev'p't Co.* (1919), 50 D.L.R. 506, 15 Alta. L.R. 416, affirmed.]

Statement. APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1919), 50 D.L.R. 506, 15 Alta. L. R. 416, allowing an appeal by the Attorney-General of Alberta from a decision of the Board of Public Utilities Commissioners. Affirmed.

The Board had adjudged that it possessed jurisdiction under the Public Utilities Act of Alberta to make an order increasing the prices for the sale by the appellant of gas to consumers in the city of Edmonton beyond the maximum rates fixed by an agreement between the city and the company appellant, whereby the company was granted its franchise by the city and which agreement was confirmed by 6 Geo. V., 1916 (Alta.), ch. 29.

A. H. Clarke, K.C., and *H. R. Milner*, for appellant.

E. Lafleur, K.C., and *B. D. Howatt*, for respondent.

Davies, C.J. DAVIES, C.J.:—After consideration I have reached the conclusion that this appeal must be dismissed.

I concur with the reasons for such dismissal stated by my brother Anglin.

Idington, J. IDINGTON, J.:—To maintain this appeal, we must hold that a municipal corporation having, with the assent of the electors, known as burgesses, made a contract, of such an unusual and *ultra vires* character, with a company of adventurers, to make it legal required legislative rectification thereof, and then that the Legislature by enacting such merely ratifying legislation, impliedly enabled the Board of Public Utilities Commissioners to go a step further than had been given by either contract so ratified, or the legislation creating this Board; and hence, without the consent of

said burgesses to a variation of the contract, by adding to the maximum price named in such a contract for the services to be rendered, although it might never come to be operative.

The company in question never got beyond the stage of expending some money in way of exploitation or construction, and never operated, nor was ready to operate, anything, yet claims that it is a public utility within the meaning of the definition thereof in the Public Utilities Act, 5 Geo. V., 1915 (Alta.), ch. 6, sec. 2 (*b*), which reads as follows:—

(*b*) The expression "public utility" means and includes every corporation other than municipal corporations (unless such municipal corporation voluntarily comes under this Act in the manner hereinafter provided), and every firm, person or association of persons, the business and operations whereof are subject to the legislative authority of this Province, their lessees, trustees, liquidators, or receivers appointed by any Court that now or hereafter own, operate, manage or control any system, works, plant or equipment for the conveyance of telegraph or telephone messages or for the conveyance of travellers or goods over a railway, street railway, or tramway, or for the production, transmission, delivery or furnishing of a water, gas, heat or light, power, either directly or indirectly, to or for the public; also the Alberta Government telephones, now managed and operated by the Department of Railways and Telephones.

The company in question pretends that it intends to supply gas. How such a company, merely exploiting the territory from which it expects to supply gas, can claim that it "owns, operates, manages or controls, any system," within the meaning of said description (sec. 2 (*b*) of the Act), I am unable to understand.

And much less am I able to understand how a Board merely given a possible jurisdiction to assent to the entry of such a company into a particular field to operate in, and then, when in operation, regulate its rates, can imagine that it has not only the powers duly assigned it, but also the power to override the legislative limitations of powers of contract, which a municipality has had imposed upon it by its charter, and extend those limited powers further than the legislative creator had seen fit to grant by special legislation, and in doing so to exceed not only the contractual power or the expression thereof, and the specific legislation, but also something far beyond the powers assigned the Board itself.

It seems to me as plain as the English language can make it, in the use thereof by a draftsman trying to express a Canadian

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legislator's meaning, that the Board can only deal with existent public utilities, and have nothing to do with the birth, growth, and finishing of same ready to be owned and used.

And, despite the resistance of the Attorney-General of the Province and the unanimous opinion of the Supreme Court, 50 D.L.R. 506, 15 Alta. L.R. 416, thereof specifically designated by the legislation creating the said Board as the only authority which is to determine the limits of the jurisdiction of the Board, the company comes here asking us to overrule such determination, notwithstanding said Court has pointed out many other insuperable objections in the way of the Board exercising such autocratic powers as the company desires it to exercise.

The company, of course, is entitled to say that it got leave from this Court to come here, but that is no more conclusive as to our jurisdiction than any leave, given by a single Judge, for example, under the Winding-up Act, R.S.C. 1906, ch. 144, or another Court inadvertently giving leave to appeal in a case over which we never have been given jurisdiction.

Although appearing of record in this case as a party to the order granting leave, I wholly dissented therefrom for reasons assigned in writing.

I hold that we are not here to pass upon mere administrative acts of any branch of government, unless expressly assigned that duty by Parliament, as, for example, in regard to appeals from the Board of Railway Commissioners for Canada.

I have, however, in deference to what is assumed to be the contrary opinion of the majority of the Court, set forth above what seem to me amply sufficient reasons for dismissing the appeal as well as that of want of jurisdiction.

I think the appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—I agree with the conclusion of the Court of Appeal, 50 D.L.R. 506, 15 Alta L.R. 416. The judgment of the Board in which the question of jurisdiction is fully discussed sets forth as follows:—

> Any jurisdiction the Board may possess so far as increasing rates is concerned is derived from sec. 23 (c) of the Public Utilities Act, 5 Geo. V., 1915, ch. 6. That section provides that the Board may after hearing fix "just and reasonable" rates . . . whenever the Board shall determine any existing individual rate . . . to be unjust or unreasonable, insufficient or unjustly discriminatory or preferential.

The order of the Board, having regard to the circumstances which it is unnecessary to recapitulate, in effect is simply an order authorising the company to exact charges exceeding the limit fixed by the agreement between the company and the municipal corporation of Edmonton and by the statute confirming the agreement. The company is providing no services, it is in no position to provide any services consequently it is not in fact exacting any rate and it has not, by any corporate act, fixed the rates it is to charge. The order is therefore an order changing the limits fixed by the agreement between the company and the municipality ratified as already mentioned by statute in respect of tolls and it is nothing else.

Duff, J.

The question is: Does the provision quoted sanction such an exercise of authority by the Board?

If such be the purpose of the provision the language is not apt; it is a provision for substituting just and reasonable rates for rates which have been held by the Board on investigation to be unreasonable or insufficient. The provision does not appear to contemplate orders which merely expand or restrict the limits fixed by statutory contract in respect of tolls and charges. Whether in exercising authority under the section the Board may disregard the limits fixed by such contracts is another question. The language in my opinion is not sufficiently precise to support an order which merely changes such limits.

Anglin, J.

ANGLIN, J.:—The appellant company has not yet established a service. While it has a number of wells drilled and ready for operation, it has not constructed pipe lines to carry their output. By its agreement with the City of Edmonton, whereby it obtained its franchise, certain maximum rates of charge for its services are established. That agreement has been validated and confirmed by statute. The company, however, has not, by by-law or otherwise, fixed any rates which it purposes to charge.

Alleging that the maximum rates specified in the agreement with the city are quite inadequate, the company applied to the Board of Public Utilities Commissioners to fix increased rates for its future services. The Board heard and granted this application, notwithstanding the intervention of the Attorney-General contesting its jurisdiction. On an appeal taken under the provisions of the statute the Board's order was vacated by the Appellate

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Division as made without jurisdiction, 50 D.L.R. 506, 15 Alta. L.R. 416, and from that decision the present appeal has been brought by leave of this Court.

Three objections are taken to the jurisdiction of the Board:—(a) That because it has not begun to render service to the public the appellant company is not yet a "public utility" within the purview of the Public Utilities Act, 5 Geo. V., 1915, ch. 6; (b) that the Board's jurisdiction is confined to increasing, reducing or approving of existing rates, and a maximum rate is not an "existing rate"; and (c) that, except for the reduction of excessive rates, provided for by sec. 20 (*b*) of the statute, the Board has no power to interfere with rates fixed by the terms of a contract between a public utility and a municipality.

The status of the appellant company to apply to the Board and to assert the present appeal depend alike upon its existence as a public utility. Objection (a) should therefore be dealt with whatever view may be taken of objections (b) and (c). I am, with respect, of the opinion that it should not prevail. If it is sound, a company ready to operate cannot obtain the sanction or approval of the Board to the rates it proposes to charge before actually commencing to do business, but must wait until it is in actual operation and actually charging such rates before it can legally apply for such sanction or approval. That this was the intention of the Legislature seems highly improbable. The appellant company, in my opinion, "owns, . . . or controls . . . works, plant or equipment . . . for the production or furnishing of gas . . . to or for the public" and is therefore within the definition of "public utility" found in clause (*b*) of sec. 2, 5 Geo. V., 1915, ch. 6. Nothing in that clause imposes actual operation or even complete readiness to operate as a condition precedent to such a company as the appellant attaining the status of a "public utility." On the contrary, the tenor of the Act, taken as a whole, appears to contemplate that in the stage of development which the appellant's works, plant and equipment have reached that status should be accorded to it.

But objection (b) seems to be fatal to the jurisdiction of the Board whose powers are purely statutory. Sec. 20 (*b*) clearly does not apply. Nobody suggests that the maximum rates authorised by the agreement with the municipality of Edmonton are

excessive. Sec. 23 (*c*) is the only other provision which purports to direct jurisdiction over rates. But the operation of that section is by its terms confined to cases where "the Board shall determine any existing individual rate . . . to be unjust, unreasonable, insufficient or unjustly discriminatory or preferential." It may be that it is not necessary to have a rate in actual use and in course of collection to render this clause of the statute applicable. But there must at least be a fixed rate which the company had determined, by by-law or in some other proper method, to impose and charge whenever it shall render the service for which such rate is prescribed. A rate merely stipulated as the maximum which the company may exact, but which has not yet been charged or authorised is not an "existing rate." I am therefore of the opinion that the case before us does not fall within sec. 23 (*c*).

The only other suggestion offered in support of the appellant's position which seems to call for observation is that the Board has jurisdiction under sec. 37 to deal with and prescribe the rates to be charged by a public utility as a condition of giving approval to a "privilege or franchise" granted to it by the municipality. But, in view of the explicit provisions of the statute empowering the Board to deal with rates and delimiting its jurisdiction in that connection, sec. 37, in my opinion, cannot be invoked for that purpose. The principle of the decision in *Grand Trunk Pacific Railway Co.* v. *Fort William Landowners*, 13 Can. Ry. Cas. 187, [1912] A.C. 224, seems to be in point. The conditions authorised to be imposed by sec. 37 are "conditions as to construction, equipment, maintenance, service or operation." "Operation" is the only word in this group which could possibly cover the fixing of rates. I had occasion to consider its meaning and scope in the recent case of *Ottawa Electric R. Co.* v. *Tp. of Nepean*, (1920), 54 D.L.R. 468, at p. 487, 60 Can. S.C.R. 216. As used in the statute now before us, in my opinion, it does not include the fixing or regulation of rates or charges.

Mr. Clarke pressed for an expression of opinion upon objection (c) whatever view should be taken with regard to objections (a) and (b). But, having regard to my conclusion that objection (b) is well taken and is fatal to the company's application, I think

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NORTHERN ALBERTA NATURAL GAS DEVELOPMENT CO. v. ATTORNEY-GENERAL FOR ALBERTA, RE THE PUBLIC UTILITIES ACT.

objection (c) should not now be passed upon. It is not only unnecessary to deal with it, but any expression of opinion upon it might well be regarded as purely academic.

Moreover, we were informed by counsel that an appeal is actually pending under a similar statute in the Appellate Court of another Province in which this very question is presented for decision, in the case of a public utility in actual operation and charging fixed rates or tolls. We should not embarrass the presentation or determination of that appeal by any expression of opinion here which could be regarded as unnecessary or premature.

Anglin, J.

Because the appellant's application does not fall within sec. 23 (c) owing to there being no "existing rates," the Board in my opinion was without jurisdiction to entertain it and to make the order reversed by the Appellate Division, 50 D.L.R. 506, 15 Alta. L.R. 416. Solely on this ground I would affirm the judgment *a quo* and dismiss the appeal with costs.

Mignault, J.

MIGNAULT, J.:—On the ground that the so-called rate which the appellant seeks authority from the Board of Public Utilities Commissioners of Alberta to increase is not an "existing rate" within the meaning of sec. 23 (*c*) of the Public Utilities Act, 5 Geo. V., 1915, ch. 6, my opinion is that this appeal fails and should be dismissed. The appellant's franchise agreement with the City of Edmonton fixes no rate, but establishes a maximum price for gas which the appellant cannot exceed. Under this agreement and within this maximum the appellant must by by-law determine the price to be paid by the consumers of gas, and then only will there be an existing rate. It has not yet done so, for it has not yet laid down the pipe lines through which the gas will be supplied. There is therefore no existing rate, but merely a maximum agreed upon by the appellant and the city, and it is this contractual maximum which the appellant seeks to have increased. In my opinion, the condition required for the exercise of the Board's jurisdiction is wanting. Looking at the whole situation and the changed conditions since the agreement was made, it would seem that resort should be had to the Legislature rather than to the Board whose powers clearly do not extend to a case like this one.

Appeal dismissed.

IMP.

P. C.

ROUNTREE v. WOOD.

Judicial Committee of the Privy Council, Viscount Haldane, Viscount Cave, Lord Sumner and Lord Parmoor. December 16, 1920.

CONTRACTS (§ II A—127)—SALE OF SHARES—COMMISSION—CASH AND STOCK—UNDERTAKING TO BUY BACK STOCK—LIMIT OF TIME—EXERCISE OF OPTION—INTERPRETATION.

Provision being made in a contract for the sale of shares in a company for the exercise of an option as regards the stock sold and a further provision being made for the event of the option not being exercised, the two sentences must be read together, and form the terms of the contract. [*Rountree* v. *Wood* (1919), 16 O.W.N. 77, affirmed.]

Statement.

THE appellant sued for the price of 925 common shares of the Guardian Realty Co., Ltd., of Canada, which he purported to have sold to the defendants at $15 per share. He recovered judgment at the trial (1918), 15 O.W.N. 264, which was reversed by the Appellate Division of the Supreme Court of Ontario (1919), 16 O.W.N. 77, and he now appeals.

The judgment of the Board was delivered by

Lord Sumner.

LORD SUMNER:—The respondents, stockbrokers in Toronto, who were interested in getting the shares of the above company subscribed, employed the appellant, a stockbroker in Montreal, to place $250,000 preferred stock for a cash commission and a bonus of 925 common shares under an underwriting letter, dated December 10, 1913. In addition to the terms as to commission and bonus, the letter contained the following:—

> The said underwriting shares to be delivered to you when the underwriting is fully paid. You are to have the privilege of selling to us all or any part of said 925 shares at a price of $15 per share. Any of the said shares that you do not sell to us and retain for yourself are not to be offered except through us for a period of six months from 1st October next.

The plaintiff procured subscriptions to the amount named, which were fully paid by July, 1914. He received the whole of his cash commission and 300 of the bonus shares, and from time to time pressed for the residue. On September 24, certificates were tendered to him, which were in the defendants' names. He asked for certificates in his own name, which the defendants agreed to procure, but compliance with his wish involved some delay, and they were not actually handed to him until October 5. In November he called on the respondents to buy these shares off him at $15 per share. This they refused to do. Their case, both at the trial and on appeal, was that the option to sell the shares was, on the true construction of this letter, only exercisable

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before October 1, 1914. The plaintiff's case was that it was exercisable within a reasonable time of the delivery of the share certificates to him. This was the principal issue and, if it is decided against the plaintiff, sundry minor questions become immaterial.

The Appellate Division of the Supreme Court of Ontario, 16 O.W.N. 77, was of opinion "that the true meaning of the agreement is, that all shares that had not been sold prior to the 1st October should be considered as retained by the plaintiff," and were, therefore, not such as he could call upon the defendants to buy from him, though for the 6 months named he could only sell the shares through the defendants. The Court considered that the second and third of the sentences above quoted hung together, so that their effect would be: "You can sell these shares to us at $15 if you like, and, if you keep them and do not sell them, there will follow a period of six months from the 1st October during which, if sold at all, they must be sold through us only." The plaintiff sought to read the sentences independently of one another, thus:—"From the 1st October to the 31st March, if you sell to third parties, you must sell through us; but for a reasonable time after we deliver your shares, you can sell them back to us if you like, and we will buy them ourselves at $15 each."

Their Lordships think that the view of the Appellate Division of the Supreme Court, 16 O.W.N. 77, was right. After the plaintiff had become entitled to his bonus shares, he might say that he would not sell them to the defendants, in which case he retained, or kept them, or he might exercise the right of returning them to the defendants at a certain price. So far as he returned them, the matter ended in payment of money by the defendants: so far as he did not return but kept them back, he was limited, as to his channel of sale, for 6 months. The two sentences cannot be independent of one another, and, provision being made for the event of the option not being exercised, by fixing a limited period during which there was to be a restricted power of sale to third parties, it follows that the period for the exercise of the option terminates before the period for the restriction on the sales begins. This being the true construction of the words, it is enough to add that the practical business of the transaction is all on the side of the defendants, without further elaborating the matter.

The appellant further contended that delivery of the share certificates to him was a condition precedent to his exercise of the

option to sell the shares to the respondents, and that, as delivery did not take place till after October 1, 1914, an extension of the time for the exercise of the option would be the legal consequence. This argument does not appear to have been presented to the Supreme Court. The letter says nothing about any condition precedent, for it is pressing the word "retain" too far to say that it imports delivery of some physical document of title, which could then be physically held back, and there is no other reason for implying it. Delivery of the shares would be material to the performance by the appellant of a contract to sell them to third parties, but, as the defendants had or controlled the shares already, an election to require the defendants to buy them at $15 was entirely independent of their delivery of the certificates. Between the plaintiff and the defendants, even if the words "privilege of selling to us" import a transfer and not a mere contract, it is not necessary to presuppose delivery of the share certificates to the plaintiff. All that the defendants had to do was to pay the price for those which the plaintiff elected to sell, and to reduce in proportion the number of shares to be delivered to him. So far from its being necessary that he should receive certificates before he could elect how many he would not retain but would sell, it might be a useless formality to make out certificates in his name in substitution for certificates in the defendants' name, if they were only to be returned against a cheque for the appropriate amount.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

LOISELLE v. THE KING.

Exchequer Court of Canada, Audette, J. September 23, 1920.

RAILWAYS (§ II D—37)—LICENSEE ON RAILWAY PREMISES—HIS OWN BENEFIT—ACCIDENT—NOT A TRAP—NO LEGAL DUTY.

A person who enters upon the premises of a railway as a mere licensee, solely for his own benefit, cannot succeed in an action for damages for injuries received, as the company is not under any legal duty to guard a licensee against any risks or dangers which he voluntarily incurs.

Statement.

PETITION OF RIGHT to recover from the Crown damages alleged to have been suffered by reason of an accident in a railway yard of the Intercolonial Railway Company.

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A. Stein, K.C., and *D. Levesque*, for suppliant.

L. Bérubé, for respondent.

AUDETTE, J.:—The suppliant, by his petition of right, seeks to recover $4,660.10, damages for personal injuries caused by the negligence of the Intercolonial Railway's servants.

The accident in question occurred on November 16, 1917, and the petition of right was filed in Court only on January 20, 1919. While on its face the claim would therefore appear to be prescribed, the evidence established the petition of right had been lodged with the Secretary of State, pursuant to sec. 4, of the Petition of Right Act, on November 14, 1918, and it must be found that such compliance with the statute interrupted prescription.

The suppliant, having purchased three cars of potatoes, entered into agreement with the Intercolonial Railway Co., as appears by the bill of lading and the way-bill, filed herein as exhibit No. 13, to transport the same to destination upon his undertaking to place a wooden lining inside the car, heat the same, and supply the fuel therefor—the question of frost being thereby at his own risk and peril.

The cars of potatoes in question were placed at Mont-Joli, near the freight shed, at the place indicated on the plan, exhibit No. 2, as "*chars de patates.*"

At 4 o'clock on the afternoon of the day of the accident, the suppliant had gone and heated his cars, and, as he says, that fire could last only about 4 hours—at 8.15 p.m., of the same day, November 16, he started to attend to his fire again.

He went to the station, at the office marked B on the plan, with the object of advising the employees he wished to leave that night, and to have his cars weighed, and he was informed the employees were in the yard.

It was then he started from point B, on his errand to heat his cars, and followed the dotted line shewn on the plan and marked "*trajet parcouru par Loiselle.*" He states it was then difficult to cross opposite the station towards his cars, as there was shunting going on. The Mont-Joli yard is at a divisional point of the Intercolonial Railway, and it is also the terminus of the Gulf & Terminal Railway running down to Metis and Matane. There are two shunting engines in that yard to attend to the considerable shunting necessarily involved in such a locality.

Loiselle, after leaving point B, followed the dotted line above mentioned, and being carried beyond his bearings, reached point A and fell at that point into the viaduct from a height of 12 feet, 7 inches, upon the grating of a drain and was injured. He now claims for the bodily injury resulting from such accident. Can he recover under such circumstances? Was the suppliant justified in crossing the railway yard to go to his cars, instead of taking the road leading to them? What were his rights?

In answering this question let us follow the modern tendency of the Courts and view the facts of the case in the light of the first principles of the law of negligence rather than to seek to establish an analogy between the facts of this case and those obtained in decided cases. Negligence is want of care in the circumstances, and every case must be determined upon its own set of facts. An observation upon this point of Lord Finlay, in the case of *Craig* v. *Glasgow Corp.* (1919), 35 T.L.R. 214, at 216, is quite instructive. His Lordship was then dealing with a case of injury to the person arising out of alleged negligence on the part of the driver of a tram-car. He says:—

> The use of cases was for the propositions of law which they contained, and it was of no use to compare the special facts of one case with the special facts of another for the purpose of endeavouring to ascertain the conclusion to be arrived at in the second case.

In determining the question of liability in all such cases as the one before the Court, it is necessary to examine the conduct of both parties in the circumstances, and note the bearing that the acts of each had upon the resultant injury. Want of care must be posited as the cause of the injury. Then whose incuria was the proximate or active cause of the accident? Liability is established where it is shewn that the party injured had some legal right to be on the locus of the accident and did not know of a peril to his safety that was known to the defendant, but in respect of which he took no care to warn the plaintiff.

Holmes, J., in the case of *Commonwealth* v. *Pierce* (1884), 138 Mass. 165, at 176, says:—

> So far as civil liability is concerned, at least, it is very clear that what we have called the external standard would be applied, and that, if a man's conduct is such as would be reckless in a man of ordinary prudence, it is reckless in him. Unless he can bring himself within some broadly defined exception to general rules, the law deliberately leaves his idiosyncrasies out of account, and peremptorily assumes that he has as much capacity to judge and

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to foresee consequences as a man of ordinary prudence would have in the same situation. In the language of Tindal, C.J., "Instead, therefore, of saying that the liability for negligence should be coextensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe."

Vaughan v. *Menlove* (1837), 3 Bing. (N.C.) 468, at 475, 132 E.R. 490.

To succeed in the present instance, the suppliant must bring the circumstances of his case within the ambit of sec. 20 of the Exchequer Court Act. There must be, 1st, a public work; 2nd, there must be negligence of an employee or servant of the Crown while acting within the scope of his duties or employment, and 3rd, the accident must be the result of such negligence.

Coming back to the course pursued by the suppliant on the night of the accident, it must be noted that there is a road indicated on the plan at the back of the station, joining when travelling west, the King's highway which runs north under the viaduct in question. Then both to the northeast and southeast of the letter N, on the plan, there are good travelled roads leading from the King's highway, to the freight shed and therefrom to the cars of potatoes in question.

Leaving the station, the suppliant could and should have gone to his cars in that way, or on leaving his hotel, which was to the west of letter **X**, he just had to walk east almost straight down to the freight shed. However, he says he was unfamiliar with Mont-Joli, and did not know of the roads; but, that is no excuse for running through a busy railway yard or any dangerous locality in Mont-Joli. He could easily have enquired and been told.

He had gone across the yard in the afternoon, without interference or objection from the railway company. The most favourable construction of the suppliant's complaint is that he was in the railway yard, or at the place in question, in pursuance of a usage by the public, which usage was permitted passively by the railway company. It does not go further than this. The suppliant was not passing over the tracks at a crossing or on a road which had been adopted or recognised by the railway company; but was simply making use of this "short cut" from one place to another, which is said to have been used by many persons for convenience. Such user of the tracks or "short cut" is unquestionably dangerous

and regarded as an intrusion upon the legal rights of the railway who maintain their railway yard solely for the purpose of operating the railway. It is not easy to see how such a user of the railway yard by the public could be wholly prevented without force, which would be attended with difficulties that might not be overcome without the imposition of unnecessary burdens upon the railway company. Conceding, however, that the suppliant had the tacit and passive permission, resting upon usage, to walk through the railway yard and that in the circumstance he might be termed a licensee, his presence there was not especially invited and was of no advantage to the railway company.

Where a licensee, for his own benefit, is upon the premises of a railway, without objection from it, such railway company cannot be said to be under the legal duty to guard such licensee against the obvious risks and dangers attending his crossing or walking through a railway yard at night, to get to his cars at the freight shed, when his business can be looked to by following the safe roads made and provided by the company to reach the freight shed or the siding adjoining thereto. In other words, the licensee must under such circumstances take care of himself in using the premises as he finds them at the time he made his contract for transportation, and is not entitled to be protected from existing conditions upon the property in their ordinary state, *Sullivan* v. *Waters* (1864), 14 Ir. C.L. 460.

The suppliant might have the right to complain of a wilful act of the railway company in running him down or of traps and pitfalls, which would be an allurement to unexpected dangers. There is no natural or possible relation between the injury and the fact that there was no cattle fence at the viaduct or that the latter was not lighted, as requested by the municipality, for its traffic. That is *nihil ad rem*. Had he not crossed the railway yard, had he not lost his way, there would have been no accident. As the station-master at Mont-Joli testified: "We do not give permission to pass over the tracks, but we do not prevent any one from doing so." The suppliant had no right to be where he was at the time of the accident, and in no case, can this passive leave to go across without objection, referable to the obliging act of the Crown, be said to give rise to a legal right of action. A wrongful act cannot impose a duty. There is no act of negligence on behalf of any officer or

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servant of the Crown, which caused the injury. The proximate and direct cause of the accident is the obvious *incuria*, want of elementary prudence for the suppliant to venture on a dark night through a busy railway yard, and to wander and grope his way therein to his cars which were accessible through a good travelled road, free from any such dangers.

A man gifted with ordinary prudence would not, at night, have ventured through that yard. He should have reached his destination by the ordinary road, and not choose to go through the yard. *Volenti non fit injuria*. As between himself and the railway company, he has obviously shewn greater *incuria* and the railway can only be liable for cases of negligence.

The accident being obviously the result of the suppliant's *incuria* and imprudence, he is adjudged not entitled to any portion of the relief sought by his petition of right.

Judgment accordingly.

N. S.

S. C.

STANFORD v. THE IMPERIAL OIL Co.

Nova Scotia Supreme Court, Russell and Longley, JJ., Ritchie, E.J., and Chisholm, J. December, 18, 1920.

INJUNCTION (§ I F—56)—STOPPAGE OF FLOW OF STREAM—DAMAGES TO PROPERTY—RIGHT TO INJUNCTION.

An injunction will be granted when it appears to the Court to be just or convenient under the circumstances. Damage caused by cutting off the flow of water to which a party is entitled is an obvious case.

[*Stollmeyer* v. *Trinidad Lake Petroleum Co.*, [1918] A.C. 485, distinguished. See Annotation, When Injunction Lies, 14 D.L.R. 460.]

Statement.

APPEAL by defendant from the judgment of Harris, C.J., in an action claiming an injunction to restrain defendant from obstructing and diverting water, flowing through plaintiff's lands, in such a manner as to interfere with plaintiff's rights as owner and occupier of such lands. Affirmed.

H. McInnes, K.C., and *S. Jenks*, K.C., for appellant:

J. L. Ralston, K.C., and *T. W. Murphy*, K.C., for respondent.

W. A. Henry, K.C., for the Acadia Sugar Refining Co.

The judgment of the Court was delivered by

Ritchie, E. J.

RITCHIE. E.J.:—This is an appeal from Harris, C.J. I am in entire accord with his judgment and adopt it without going over the same ground.

It was urged by Mr. Jenks, for the defendant, that injunctions are granted because continual user ripens into right, and that the reason for an injunction was taken away by sec. 5 of 9-10 Geo. V. 1919 (N.S.), ch. 5.

Two cases were cited on this point: *Harrop* v. *Hirst* (1868), L.R. 4 Exch. 43, and *Roberts* v. *Gwyrfai District Council*, [1899] 2 Ch. 608.

These cases are authorities for the proposition that where the plaintiff has suffered no actual personal damage or inconvenience an injunction may be granted on the ground that user may ripen into right; that is one ground on which an injunction may be granted, but no authority was cited and I venture to say that no authority can be found, for the proposition that it is the exclusive ground for an injunction in cases of this kind.

An injunction is granted when it appears to the Court to be just or convenient under the circumstances. If Harris, C.J., is right, as I think he is, the defendants for their own purposes were diminishing the flow of water to which the plaintiff was entitled, thereby causing him damage. It would, I think, be difficult to find a more obvious case for an injunction. The point was made that all the circumstances of the case should be taken into consideration. I agree, but I think that was exactly what Harris, C.J., did. He said:

> I think I have no alternative to granting an injunction, but as there seems to be sufficient water until the dry season comes on, I will suspend the issue of the injunction until August 1, 1920, and trust that the parties will be able to arrange a satisfactory working basis, or that defendant will be able to make other provision for a water supply in the meantime.

Stollmeyer v. *Trinidad Lake Petroleum Co.*, [1918] A.C. 485, was cited. In that case a sensible diminution of water was caused by the works of the defendant company. The plaintiff's land was unsuitable for agriculture and was not used for any purpose. He was not damnified. The Court held, at p. 486:

> That the appellants' rights were being infringed, and that they were consequently entitled to relief; that under the circumstances of the case there should be declarations as to their rights, but that no injunction should issue until the respondents had had time to execute works which would enable them to conduct their operations differently; that it should be ordered accordingly that the respondents undertaking to pay from time to time any pecuniary damage which the Court of first instance should find that the appellants had suffered, the appellants should have liberty to apply to that Court for an injunction after a period of 2 years.

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The plaintiff in that case, as I have said, was not damnified; the defendants' counsel undertook to pay any damages that might be found to have accrued; the Court under these circumstances while holding that the plaintiff was entitled to relief held up the injunction to give the defendants time within which to find some means of securing themselves in their operations.

I am wholly unable to see that the case has any application to the case at Bar.

The appeal, in my opinion, should be dismissed with costs.

Appeal dismissed.

ONT.

S. C.

PLEET v. CANADIAN NORTHERN QUEBEC R. Co.

Ontario Supreme Court, Latchford, J. November 20, 1920.

CARRIERS (§ III D—406)—FREIGHT SHIPPED—PERISHABLE GOODS—CONSIGNEE NOTIFIED OF ARRIVAL—DELAY—GOODS DAMAGED—BURDEN OF PROOF ON PLAINTIFF.

In a suit for damage to potatoes shipped to the plaintiff, the onus is upon him to prove that the damage occurred while the potatoes were under the control of the defendants.

On the lapse of a reasonable time after knowledge of the arrival of goods at their destination by the consignee, the carriers are liable as warehousemen only, that is, for negligence.

[*Chapman* v. *Great Western R. Co.* (1880), 5 Q.B.D. 278; *Richardson* v. *Canadian Pacific R. Co.* (1890), 19 O.R. 369; *G.T.R. Co.* v. *McMillan* (1889), 16 Can. S.C.R. 543, referred to.]

Statement. ACTION to recover damages for loss suffered by the plaintiff by injury to goods in transit on the defendants' railway.

A. E. Honeywell, for plaintiff; *G. F. Macdonnell*, for defendants.

Latchford, J. LATCHFORD, J.:—This action is brought by a produce-merchant of Ottawa against the defendants, who are common carriers, for damages resulting from the loss sustained by the plaintiff on a shipment on the 15th January, 1920, by the defendants' line of railway, of a car-load of potatoes from a siding near Huberdeau station, about 40 miles north of St. Jerome, in the Province of Quebec, to the City of Ottawa.

The plaintiff alleges that the potatoes when shipped were in good order, and that when delivered to him at Ottawa they were greatly depreciated in value, owing to the fact that they were frozen, through the neglect or default of the defendants in not keeping the car properly heated while in transit from Huberdeau to the point of delivery at Ottawa.

The defendants assert that the potatoes were carried at the owner's risk of deterioration, and deny that they entered into any contract to heat the car, although they did supply it with two heaters, which were kept burning from the time the car was loaded until it was unloaded. They also allege that the potatoes were not frozen while in their possession.

Upon the evidence I find that the potatoes were not frozen when loaded near Huberdeau.

Loading was begun on Tuesday the 13th January about 1 p.m., and was finished on Wednesday about 5 p.m. Four hundred and thirty bags of potatoes were placed upon the car, which was a potato car, or a car used as a refrigerator car in summer, and in winter for the shipment of potatoes and other commodities likely to be affected by frost. At each end of such cars is a small compartment, in which ice is placed at times for refrigerating purposes, and stoves at other times for the production of heat. The car, although an old car, corresponded to the description ordered from the defendants by the plaintiff, and while loading was going on the heaters were working well and kept supplied with oil.

The weather on Tuesday afternoon was mild, but was somewhat colder on Wednesday. The records of the meteorological service of Canada, filed at the trial, indicate that on the 14th the maximum at Huberdeau was 9° and the minimum −16°. On the 15th it varied there from −3° to −34°. The time of maximum or minimum temperature is not stated, but it is not improbable that the minimum was as usual some time during the night.

The shipper telephoned from Huberdeau to the agent of the defendants at St. Jerome on the 14th, and asked for a bill of lading. In reply the agent informed him that he could not give a bill of lading until the car arrived at St. Jerome and was found to be in good order. The car was picked up at Huberdeau on the morning of Thursday the 15th, and taken to St. Jerome, where it was inspected and found to be in good order, with the heaters burning. The agent then issued a bill of lading, which the shipper attached to a draft for the price of the potatoes, and forwarded by mail to La Banque Nationale, Ottawa.

The potatoes arrived at Ottawa on the evening of Thursday the 15th. The weather was colder there than on the previous

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day, the maximum and minimum temperatures being -2° to -18°. Early on the following morning the heaters were inspected. They were burning and in apparently good condition. A clerk in the freight office of the defendants says that she telephoned to the plaintiff's place of business about 10 a.m.; that the plaintiff came out in the afternoon and asked permission to inspect the car; but that, as he had not the bill of lading with him, his request was not complied with. Zero weather still prevailed— -4° to -25°.

The plaintiff states that he was not notified of the arrival of the car until 9 a.m. on Saturday the 17th; that he went to the bank as soon as it was open, paid the draft, which was for $1,017.80, and proceeded to the freight-shed, where he paid the freight, $89.70, and a charge of $5.85 for switching the car from the tracks of the defendants to a point about a mile nearer to the plaintiff's place of business on the tracks of the Grand Trunk Railway Company. An additional charge of $2 for heating was omitted by mistake from the original freight-bill, and was afterward, on demand, paid by the plaintiff. It does not appear that Pleet examined the potatoes on Saturday when at the freight office of the defendants.

The heaters were burning on Saturday morning when Barette, one of the defendants' men, inspected them. The car lay on a siding until 3.30 on Saturday afternoon, when it was moved to the tracks called "exchange tracks" between the defendants' and the Grand Trunk system. About 10.30 on Saturday night it was placed on the delivery or truck tracks of the Grand Trunk Railway, at the central station, as requested by the plaintiff—too late, however, even had the plaintiff been then notified, to permit of its being unloaded that night. The weather was less severe on Saturday, 17° to -8°.

On Sunday morning, about 7.10, the car was examined by a freight foreman of the Grand Trunk Railway. He found both heaters burning and tested the temperature inside the car-door, finding it to be 40°. Outside the thermometer registered from zero to -14°.

At about 11 a.m. on Monday, Mr. Charles H. Snow, a fruit inspector for the Dominion Government, in the discharge of his duties and of his own motion, opened the car and found the contents to be, he states, "frozen solid."

Mr. Snow's was the only inspection of the car made between Sunday morning and Tuesday morning.

Although notified early on Monday of the arrival of the car at the delivery tracks, the plaintiff took no steps to unload it on that day. He says that it was impossible to unload it owing to the extremely cold weather prevailing. This cannot be the true reason, as unloading was proceeded with on Tuesday morning, when the temperature was still below zero. The records for Ottawa are for Monday -6° to -29°—and for Tuesday -2° to -28°. That the plaintiff did not wait for a milder day was doubtless due to his inability to supply from stock the demands of his customers.

The plaintiff's men found the potatoes badly frozen, and at once notified the plaintiff and the railway officials.

There is a conflict of testimony as to the condition of some of the potatoes. Two witnesses for the defendants depose that the upper layer of bags were damp or wet, indicating that the contents had been frozen and had thawed; and, while this circumstance was unobserved or denied by the plaintiff and his witnesses, it may well have been the case at the time the car was opened. The temperature would naturally be higher where the currents of heated air arising from the burners at each end of the car would meet than at any other place not directly affected by radiation from the heaters themselves; and frozen potatoes in the top layer, especially near the centre of the car, would be the first to be thawed. In any case the wet bags would freeze dry very soon after the car was opened.

Whether certain bags were wet or not is, I think, unimportant. The point is, however, stressed by the defendants, as indicating that the potatoes were frozen at or before shipment. All it does indicate is that some frozen potatoes were thawed before Tuesday morning.

I find that the potatoes were not frozen when shipped or when inspected at St. Jerome. Between the morning of the 15th and the morning of the 19th, it is certain that they were badly damaged by frost. Just when in the interval the damage was done, it is, I think, impossible to conclude, except as a matter of probability.

At Ottawa, zero weather had been continuous from the 15th to the 20th, except during some hours on the 17th, when the

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mercury rose to 17°. The cold was even more severe on the 18th, 19th, and 20th than it had been on the three days prior to the 18th. From 3.30 in the afternoon of the 17th, the car was standing on sidings, except while in motion for about a mile.

If Mr. Snow's opinion is well-founded, and I know of no reason for doubting it, that the potatoes were more likely to freeze while the car was at rest than when in motion, they were probably frozen after their arrival at Ottawa.

I find that the plaintiff, notwithstanding his denial, was notified on the morning of Friday that the potatoes had arrived on the previous evening at the point to which they were consigned, and that he went out to the defendants' freight-station on the afternoon of that day. He had ample time to have taken delivery on Friday if he had first paid the consignor's draft and obtained the bill of lading.

Time began to run against him from Friday morning, when he had knowledge of the arrival of the car, though formal notice mailed on that day did not reach him until the morning of Saturday.

It is well-established law that on the lapse of a reasonable time after knowledge, actual or implied, on the part of a consignee, of the arrival of his goods at their destination, the liability of the carriers undergoes a change and they are thereafter responsible as warehousemen only, that is, merely for negligence: *Richardson* v. *Canadian Pacific R.W. Co.* (1890), 19 O.R. 369; *Grand Trunk R.W. Co.* v. *McMillan* (1889), 16 Can. S.C.R. 543, 555.

"What will amount to reasonable time is sometimes a question of difficulty, but as a question of fact, not of law. As such it must depend on the circumstances of the particular case:" *per* Cockburn, C.J., in *Chapman* v. *Great Western R.W. Co.* (1880), 5 Q.B.D. 278, 282.

In this case the most obvious circumstances are the known susceptibility of potatoes to damage from frost, their shipment in mid-winter from a point well to the north in Quebec, the intensity of the cold continuously prevailing during loading, transit, and the delay after notice of arrival, the greater danger from frost as stated by Mr. Snow while the car was not in motion, and the proximate incidence of a Sunday, when unloading would be illegal, and further exposure inevitable.

In the *Chapman* case, Lord Chief Justice Cockburn observes (pp. 281, 282) that the consignee "cannot, for his own convenience, or by his own laches, prolong the heavier liability of the carrier beyond a reasonable time."

It was merely as a matter of convenience that the plaintiff desired the defendants to switch the car to the exchange tracks with the connecting railway. After Friday evening—a reasonable time for unloading having elapsed—the defendants were, in my opinion, liable only as bailees. Negligence subsequent to that time not having been proved against them, their only liability is as carriers for acts done or omitted before Friday evening, unless their position is altered to their prejudice by the switching contract made with the plaintiff.

Under sec. 1 of the conditions of the bill of lading, the carriers of the goods therein described are declared to be liable for any loss thereof or damage thereto except as thereinafter provided.

Section 2 of the conditions provides, *inter alia*, that, in the case of shipments from one point in Canada to another point in Canada, the carrier issuing the bill of lading, in addition to any other liability thereunder, shall be liable for any loss, etc., from which another carrier to whom the goods are delivered is not by the terms of the bill of lading exempt, "caused by or resulting from the act, neglect, or default of any other carrier to whom such goods may be delivered in Canada . . . or over whose line or lines such goods may pass in Canada . . . the onus of proving that such loss was not so caused or did not so result" being upon the carrier issuing the bill of lading. The defendants are not, by any other provision, exempt from liability for loss occasioned by the other carrier.

The defendants are thus made responsible for any loss to the plaintiff caused by the *act, neglect, or default* of the Grand Trunk Railway Company, and must satisfy the Court that the plaintiff's loss was not so caused.

The onus cast upon the defendants by sec. 2 has, I find, been fully discharged. Affirmative proof has been given that the loss was not caused by or resulting from the act, neglect, or default of the other carrier. The car was promptly moved, the heaters

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were in good order and burning on Sunday morning when inspected, and on Tuesday when the car was opened. It is, I consider, fairly to be inferred that they were burning during the interval.

At common law and under sec. 1 of the bill of lading, the defendants were liable, as *and while* carriers, for damage to the potatoes, unless the damage can be attributed to the "act of God" or an "inherent vice in the goods" mentioned in sec. 3.

In *Ham* v. *McPherson* (1842), 6 U.C.Q.B. (O.S.) 360, Robinson, C.J., says (p. 364): "Nothing is better settled than that, in the case of common carriers, the rule which makes them in effect insurers against all risk (with the two exceptions specified) is inflexible." The exceptions referred to are the act of God and the King's enemies. "Act of God" he defines (p. 364) as "such an accident as must in its nature have been wholly independent of human means." His Lordship observes further (pp. 365, 366): "We must presume the law to be founded on good reason; and, at any rate, if it is clearly with the plaintiff, it is our duty to give him the benefit of it. On the other hand, before we throw the loss upon the defendants, not on the ground that they have been in any way to blame, but simply because they came within a rule, which, whether it be fair or not, is inflexible, it is obviously necessary that we should be satisfied that the case comes *really* within the rule."

In the present case the plaintiff has failed to prove—and the onus was on him to prove—that the damage to the potatoes took place while they were under the control of the defendants. As I have stated, the probabilities all favour the conclusion that the freezing occurred after the car had passed out of their possession.

In two American cases—*Wolf* v. *American Express Co.* (1869), 43 Mo. 421, and *Vail* v. *Pacific R.R. Co.* (1876), 63 Mo. 230, it was held that freezing was an act of God.

In West Virginia, where frost doubtless more commonly prevails than in Missouri, the freezing of a quantity of potatoes was held not to fall within the definition of a cause operating without any act or interference from man: *McGraw* v. *Baltimore and Ohio R.R. Co.* (1881), 18 W. Va. 361. After stating several definitions of "act of God", including that of Lord Mansfield in *Forward* v. *Pittard* (1785), 1 T.R. 27, Mr. Justice Patton observes (18 W. Va. at p. 365): "It seems to me that freezing weather

coming especially in that season of the year" (February 13-16) "cannot be brought within the definitions above given of the act of God." The defendants were held liable because they had not, at a time when cold weather might be expected, promptly moved the potatoes after loading was completed.

The inherent vice or character of potatoes—their susceptibility to damage from low temperatures—imposed upon the defendants in the present case the duty of moving the potatoes as soon as possible; but it is not suggested that there was any delay on the part of the defendants. They manifested in fact the utmost expedition in moving the car, and in notifying the plaintiff of its arrival at Ottawa.

None of the allegations that the defendants were negligent has been proved. The contrary has, in fact, been established. The car supplied was of the type asked for by the plaintiff. The method of heating it was that known to him to be in common use on such cars. The heaters were in good order, well supplied with oil, inspected from time to time, and kept burning. More the defendants could not do.

The plaintiff, on the other hand, did not exercise ordinary business prudence. He should have anticipated that the delay in unloading in continuous zero weather—a delay for which he alone is responsible—would result precisely as it did result. His action wholly fails, and is dismissed with costs.

Action dismissed.

WELLAND HOTEL AND BEAUCHAMP v. CITY OF MONTREAL.

Quebec Superior Court, Mercier, J. September 8, 1919.

COMPANIES (§ VI F—357)—WINDING-UP—LIQUIDATOR CARRYING ON BUSINESS—EXPENSES—PREFERENCES—WATER RATES—BUSINESS TAX.

Where a liquidator has been duly authorised to carry on a company's business, whereby certain assets have been realised, the expenses of the employees, the fees of the liquidator and inspectors, the costs of the attorneys, the costs of the first seizure, and the rent during the period of liquidation, all have preference under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, to any claims by the City Corporation for water rates and business tax.

When a company in Quebec is being wound up under the Dominion Winding-up Act, the distribution of moneys must be made in accordance with that Act and not under the Civil Code of Quebec.

Statement.

ACTION contesting the distribution made to the creditors by the liquidator of a company and claiming priority for certain claims. Dismissed.

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Lamothe, Gadbois and *Nantel*, for Beauchamp.

Laurendeau, Archambault and Co., for the City of Montreal.

MERCIER, J.:—The liquidator of the company had prepared a statement shewing the distribution to creditors of the sum of $10,278.37, realised by time.

The City of Montreal contested this distribution. It alleges that it produced a claim of $666, for water rates and business tax for the year 1917; that this claim is privileged, but was not placed in its proper class of creditors; that the claim of the contestant takes precedence of the fees of the liquidators and inspectors and all other expenses of the insolvent estate, other than those necessary for the inventory and the sale of the property, subject to the privileged claim of the contestant and for the distribution of the proceeds of the sale of the property.

The liquidator replies, in substance, that he was duly authorised to carry on the company's business, and that by reason thereof he has been able to realise assets of $10,278.36; that the amounts made to rank in priority to that of the contestant represent the expenses of employees required to carry on the commercial business of the hotel, the fees of the liquidator and inspectors, the costs of the attorneys necessary to the liquidation, the costs of the first seizure and the rent during the period of liquidation, namely, claims which, under the Dominion Winding-up Act, all have preference to that of the City of Montreal for water rates and business tax.

The Superior Court dismissed the contestation of the City of Montreal for the following reasons:—

Deciding on the merits: Considering that this is a matter of the liquidation of a joint stock company, and that such liquidation is governed by a Dominion statute, namely, the Winding-up Act, R.S.C. 1906, ch. 144; that ch. 144 contains, in the matter of the liquidation of companies with capital stock, special provisions which the Court shall apply before all other general laws and that it is only when this chapter is silent that recourse must be had to such general laws; that under the said ch. 144 the liquidator of such companies may under the authority of the Judge of a Court, carry on business during the liquidation of the company, if it is in the interest of the creditors to do so; that, in the present case,

the liquidator was duly authorised to carry on, in the general interest of the creditors, the business of the said company in liquidation, and, also to do everything legitimate to attain the end in view; that the liquidator has so carried on the business of the company up to November 22, 1907, the date on which he finally liquidated the assets of the company, the said liquidation bringing in a total sum of $10,278.36, made up as follows: Proceeds of sales made from April 15, 1917, to November 22, 1917, $8,344.21; sale *en bloc* to R. A. Fuller, $1,900; sale of merchandise $34.16; that the liquidator then proceeded with the distribution of the moneys arising from the liquidation of the assets and did so in the way set out in this said statement, and that the question is now whether such distribution was made according to law; that under R.S.C., 1906 ch. 144, sec. 92, "all costs, charges and expenses properly incurred in the winding-up of a company, including the remuneration of the liquidator, shall be payable out of the assets of the company in priority to all other claims"; that the contestant does not contest, in this case, the legitimacy and the *quantum* of the claims of the creditors as ranked in the statement, but only contests their ranking, claiming to have the right to rank before them and in preference to them; that the evidence shews that all the debts which have been ranked in preference to that of the contestant, except those of Beaubien and Lamarche and MacKay and Place, solicitors, are the claims which arose during the carrying on of the business of the company in liquidation, and that these claims have been productive of the $10,278.36 realised by the curator, less a sum of a hundred and some dollars forming the sole asset of the company at the very moment it was put into liquidation, if we except, besides the license held by the company, the claims of Beaubien and Lamarche and MacKay and Place having a right to their rank seeing that they were attaching creditors at the time the company went into liquidation; that all the claims so ranked are absolutely privileged under the said Act and are so even within the spirit of the common law, in view of the circumstances which surrounded their creation and that, therefore, the contestant's right to contest is ill founded both in fact and in law, the present statement of the liquidator, the costs, charges, expenses and debts constituting these claims having been contracted by the said liquidator in the general interests of the liquidation; the decision given on May 15, 1919, by Guerin, J., in *Re Carlton Ltd.*,

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*and Beauchamp**, and also the decision given on January 10, 1917, by Maclennan, J., in *Re Colonial Toy & Show Case Co.* (1917), 53 Que. S.C. 420, consequently, dismisses the contestation of the contestant with costs. *Judgment accordingly.*

*The judgment of *Re Carlton, Ltd., and Beauchamp:*—Considering that the legitimate expenses and costs of the liquidation of a company, which include the remuneration of the liquidator, are payable out of the assets of the company and in preference to all other claims: R.S.C. 1906, ch. 144, sec. 92; that the amount of the liquidator's account has already been fixed by judgment of this Court at the sum of $1,379.45; that by judgment of this Court, on September 5, 1918, the liquidator was authorised to carry on the business of the company until the assets were sold, or until he might be otherwise ordered; that, in order to make such judgment effective must make purchases and pay wages the validity of which is not contested, and which amount to the sum of $21,404.20; that this expense of $21,404.20 was incurred by the liquidator in the interest of all the creditors, and forms a charge on the liquidation, and which is also a privileged claim under R.S.C. 1906, ch. 144, sec. 92; that there are also included the following items: Messrs. de Sola and McNaughton, costs of solicitors, $166.10; M. Ant. Lamothe, costs of solicitors, $158; transfer of license, $179; inspector's fees, $6; Strathcona Assurance, $61.66; P. de Chateauvert, insurance premium, $39.60; newspapers, for notices, $21.20; Marcotte, for auction, $99.86; that the claims of those supplying provisions and of servants of the liquidation are privileged upon the proceeds of the sale of all the assets of the liquidation, likewise fixtures, under the said judgment of September 5th, 1918, authorising the liquidator to carry on the business of the company; that under the explicit wording of the Winding-up Act, R.S.C. 1906, ch. 144, sec. 92, creditors contesting cannot, as owners of the premises leased, found a claim under art. 1994, C.C. (Que.), against creditors, supplies of provisions and servants' wages while the liquidation is proceeding, all having been authorised in the interest of all the creditors by the said judgment of September 5, 1918; that the contesting creditors might if they had so desired have applied to the Court as such creditors, and ask that the liquidator be ordered to cease doing these things, and the Court might then have exercised its discretion and ordered accordingly, if such was in the interest of the liquidation; that the contesting creditors have not deemed it their duty to make such request, and, in default of evidence to the contrary, it is to be presumed that the curator was guided by the advice of the inspectors, and that they acted in the interest of all the creditors; that the contesting creditors are erroneously described, in the statement of distribution, as ordinary creditors; that on the contrary they are privileged creditors, and are entitled to be recognised as such; considering, however, that this fact cannot, under the circumstances, be of any practical utility, in view of the payment of $625, which has been already made to them; that the assets of the liquidation are exhausted, and that there is no legal way to increase their dividend as privileged creditors or as ordinary creditors; considering that the contesting creditors have given no evidence which would justify the Court in changing the dividend sheet, and that they have no right to complain of the disposition which was made of their claims; that the contestation of the dividend sheet is not justified; dismisses the contestation of the contesting creditors with costs.

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C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 23, 1920.

DAMAGES (§ III J—200)—LOAN OF ARTICLE FOR SPECIFIC PURPOSE—USED FOR ANOTHER PURPOSE—INJURY TO ARTICLE.

A party loaning an article to another party for a specific purpose is entitled to damages for injuries occurring to the article when the same was being used by the borrower, or his servant, for an unauthorised purpose.

[*Coggs* v. *Bernard*, (1704), 2 Ld. Raym. 909, 92 E.R. 107; *Murray* v. *Collins* (1920), 53 D.L.R. 120, 13 S.L.R. 310, applied.]

Statement.

APPEAL by defendant from the trial judgment in an action for damages for injuries to an engine which plaintiff had loaned to defendant. Affirmed.

G. H. Barr, K.C., and *R. D. McMurchy*, for appellant.

F. W. Turnbull, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurs with ELWOOD, J.A.

Newlands, J.A.

NEWLANDS, J.A.:—In this case the plaintiff loaned the defendant, gratis, his engine, to pull the defendant's engine around the yard for the purpose of starting it, the pistons operating in the cylinders being so tight that that was the only way of starting it. Before this work was completed, the defendant's hired man took the plaintiff's engine to pull a separator from the end of the pasture field to a place near the defendant's house, a distance of some 80 rods. While doing this work the crank-shaft of the plaintiff's engine broke. This action was brought for the damage sustained.

There is a conflict in the evidence as to whether the break was caused by the negligence of the defendant or by a defect in the crank-shaft due to crystallisation.

I do not consider that it is necessary for us to consider this conflicting testimony, because the engine was damaged while being used for a purpose not authorised by the plaintiff when he loaned it to the defendant, therefore, the defendant is liable for all injuries occurring while being so used.

Lord Holt, C.J., in *Coggs* v. *Bernard* (1704), 2 Ld. Raym. 909, at 915, 92 E.R. 107, lays down the law as follows:—

> As to the second sort of bailment, viz., commodatum or lending gratis, the borrower is bound to the strictest care and diligence, to keep the goods, so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect, he will be answerable; as if a man should lend another a horse, to go westward, or for a month; if the bailee go northward, or keep the horse above a month, if

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any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under, and it may be if the horse had been used no otherwise than he was lent, the accident would not have befallen him.

Newlands, J.A.

For these reasons, the appeal should be dismissed with costs. I would fix the damages at the amount specified in my brother Elwood's judgment.

Lamont, J.A.

LAMONT, J.A., concurs with ELWOOD, J.A.

Elwood, J.A.

ELWOOD, J.A.:—The trial Judge, *inter alia*, found the following facts:—

> The plaintiff loaned the defendant his traction engine to be used by the defendant in hauling about defendant's own gasoline engine for the purpose of starting same. The plaintiff would have been willing that his engine be used in any proper way for any proper purpose, but no express permission was given to use it save as above set up. The defendant caused the plaintiff's engine to be used by his servant in hauling defendant's separator over certain rough ground when the crank-shaft broke. On the evidence I am unable to come to a conclusion as to whether the accident resulted from improper operation or from a defect in the crank-shaft.

Judgment was given for the plaintiff, and from this judgment the defendant has appealed.

In *Murray* v. *Collins* (1920), 53 D.L.R. 120, 13 S.L.R. 310, this Court held that where a person hires an animal and takes it into his possession and it dies while in his custody, the onus is upon him to establish that he took the care which a prudent man would take of his own animals under the circumstances; that the onus was on the defendant to shew circumstances negativing negligence on his part. In the case at Bar, the trial Judge was unable to come to a conclusion as to whether the accident resulted from improper operation or from a defect in the crank-shaft. It was urged on behalf of the respondent that the crank-shaft was broken in consequence of the engine being driven by the servant of the appellant over rough ground without easing or releasing the clutch, and that, in consequence of this, a sudden and unusual strain was placed upon the crank-shaft, which caused it to break. On the other hand, evidence was given on behalf of the appellant that the crank-shaft broke through crystallisation.

I have to confess that, upon a perusal of the evidence, I have reached the same conclusion as the trial Judge, and am unable to come to a definite conclusion as to which of these causes the acci-

dent resulted from. The onus being upon the appellant to negative negligence on his part, I am of the opinion that that onus has not been discharged.

On this appeal, counsel for the appellant sought to introduce further evidence in support of the contention that the accident was due to crystallisation. The evidence consisted of the production of a portion of the crank-shaft in question, shewing the break, and affidavits of various parties who had recently seen this portion of the crank-shaft and who gave it as their opinion that the accident was due to crystallisation. It appears that, some time prior to the trial of the action, certain parties on behalf of the Red Cross were collecting metals, to be afterwards sold to realise money for Red Cross purposes, and in the process of this collection got possession of this crank-shaft. I am of the opinion, on the material before us, that the defendant by the use of reasonable diligence could have ascertained where this crank-shaft was. The respondent had been examined for discovery before the trial, and on the argument before us it was stated by counsel that that examination disclosed sufficient information to have enabled the appellant to have discovered this crank-shaft if he had seen fit to endeavour to do so. In addition to this, I do not think that the proposed evidence is at all conclusive. Affidavits in answer to the affidavits filed by the appellant in support of the application to admit the new evidence were filed on behalf of the respondent, and these latter affidavits would go to shew that the break was not due to crystallisation.

In my opinion, the proposed new evidence would leave the matter just as much, or about as much, abroad as it was before the admission of the evidence.

In *Auger* v. *Langas* (1920), 52 D.L.R. 626, 13 S.L.R. 333, this Court held, that the Court will not admit new evidence in an appeal before it, under R. 654, unless it appears that such evidence is conclusive. I am therefore of the opinion that the proposed new evidence should not be admitted.

The respondent gave notice of a cross-appeal, asking to have the judgment varied by adding the following:—

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Cost of repairs	$ 2.02
Loss of profit on Baker's threshing	75.00
Extra cost of threshing plaintiff's wheat	543.00
Cost of four trips to Regina for repairs	100.00
Paid Baker for conveyance to Lajord	5.00
	$727.02
Less amount allowed on trips	10.00
	$717.02

and by allowing the plaintiff $18.90 for the suit-case referred to in the statement of claim.

So far as the item "cost of repairs, $2.02" is concerned, that amount should be added to the original judgment, as there must have been some error in computation; these repairs cost $139.27, and only $137.25 was allowed.

So far as the claims for loss of profit and extra cost of threshing are concerned, the trial Judge found on the evidence that the respondent was not entitled to these sums as he never intended to do his own threshing, nor did he intend to use the engine to thresh for profit, and I would not disturb this finding.

So far as the next two items are concerned, the trial Judge held that there was no necessity for any trips to Regina, and I agree with him; and so far as the sum of $18.90 for suit-case is concerned, the suit-case was returned to the respondent after the action was commenced, and I would not allow him for that item.

In the result, therefore, I would dismiss the appeal with costs, and I would allow the cross-appeal to the extent of $2.02.

Appeal dismissed.

MAN.

C. A.

ST. VITAL INVESTMENTS Ltd. v. HALLDORSON AND CLEMENTS.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. November 29, 1920.

COMPANIES (§ IV D—85)—SALE OF LAND—COMPANIES ACT, R.S.M., 1913, CH. 35, SEC. 68—INTERPRETATION OF—DIRECTORY NOT RESTRICTIVE.

There is nothing in sec. 68 of the Companies Act, R.S.M., 1913, ch. 35, that restricts or abrogates the rights of a land company to dispose of or convey its lands in any manner that would have been sufficient or effective prior to the passage of the section. The section is enabling and directory and not restrictive and exclusive.

[*Houghton Land Corp.* v. *Ingham* (1914), 18 D.L.R. 660, 24 Man. L.R. 497, distinguished.]

APPEAL by plaintiff from the trial judgment dismissing an action to recover the balance of purchase-price under an agreement of sale. Reversed.

W. P. Fillmore and *R. T. Robinson*, for appellant.

W. L. McLaws and *A. M. Campbell*, for respondent Clements.

H. A. Bergman, K.C., for respondent Halldorson.

PERDUE, C.J.M.:—This is an action brought to recover purchase-money due under an agreement for sale of land to the defendants. The main defence is that the sale in question was not specially authorised by a by-law of the board of directors of the plaintiff company under sec. 68 of the Companies Act, R.S.M., 1913, ch. 35. Macdonald, J., before whom the case was tried, held that he was bound by the decision of this Court in *Houghton Land Corp.* v. *Ingham* (1914), 18 D.L.R. 660, 24 Man. L.R. 497, and he dismissed the action upon that ground. The other defences raised were decided by the trial Judge in the plaintiff's favour. With these I need not deal beyond saying that I approve of the disposition the trial Judge made of them.

At the trial the plaintiff put in evidence an agreement for the sale of the lands in question by the plaintiff to the defendants and for the purchase of the same by the defendants at the prices and on the terms set forth in the document. This agreement was executed by the plaintiff company under its corporate seal, the name of the company and the signatures of its president and one of its directors being placed beside the seal. The agreement was executed under seal by each of the defendants. There was no by-law of the directors of the company produced which specially authorised the agreement under sec. 68 of the Companies Act.

In *Houghton Land Corp.* v. *Ingham*, 18 D.L.R. 660, 24 Man. L.R. 497, the majority of the Court of Appeal refused upon the particular facts of that case to enforce an agreement for sale of land by a land company to a purchaser, there being no by-law of any kind authorising or enabling the directors to sell. An important element in that case was that the defendant, although he executed the agreement, made no payment of purchase-money and repudiated the agreement within 2 weeks after signing it and before action was brought upon it.

In the present case the defendants made the first payment and never, so far as the evidence shews, repudiated the agreement.

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The defendant Clements when about to leave this Province a year after the agreement was signed, executed a quit-claim deed and left it in Hansson's office. The latter was the general sales agent of the company. This quit-claim deed was not accepted by the company.

A person who has not signed an agreement may bring an action to enforce it against another who has signed it. The defendant cannot in such a case object to the want of mutuality for want of execution of the agreement by the plaintiff, because the plaintiff would admit the contract by suing on it, and would be bound to perform it as a condition of obtaining specific performance of it. See Leake on Contracts, 6th ed., pp. 831-833; Fry on Specific Performance, 5th ed., pp. 83-88, and cases cited by the authors: See also *Montgomery* v. *Ruppensburg* (1899), 31 O.R. 433. But where the plaintiff is a corporation and the contract is one which requires the corporate seal to bind the plaintiff, and there is not such part-performance as would entitle the defendant to enforce the contract against the plaintiff, then it is not binding on the defendant because the plaintiff was not bound: *Kidderminster Corp.* v. *Hardwick* (1873), L.R. 9 Exch. 13; *Oxford Corp.* v. *Crow*, [1893] 3 Ch. 535.

In the present case the contract upon its face has been executed by the plaintiff under its corporate seal. The objection of the defendants is that the execution of the document was not authorised under sec. 68 of the Act. The presumption is in favour of legality and of due compliance with all necessary requirements and formalities. The onus is on the defendants to establish their contention.

Amongst the records of the plaintiff company produced at the trial is by-law No. 2 passed at a shareholders' meeting held March 9, 1912. This by-law authorises the purchase of the tract of land which was afterwards subdivided into town lots, four of which comprise the land mentioned in the agreement in question. The company was in fact primarily formed for the purpose of purchasing and re-selling that subdivision. See minutes of shareholders' meeting of February 15, 1913. The by-law purports to empower the directors to subdivide the land into building lots and to sell them at such price and on such terms as to the directors may seem advisable. It further declares that the directors "may

and shall pass and enact from time to time such resolutions and by-laws as may prove necessary to carry out the objects aforesaid."

The above is a general by-law of the company passed at a meeting of the shareholders and intended to fully authorise the directors to sell its town lots, the acquiring and selling of which was the main, if not only, business in which it was engaged. It is objected by counsel for the defendants that the shareholders cannot initiate and pass a by-law, that the directors must do this, the shareholders having only the power to ratify, amend or reject it. Power is conferred on the directors by sec. 32 of the Act to make by-laws for the various purposes set out in the section. It is not an exclusive power that is conferred by that section. It does not cover the sale of lands, and prior to the enactment of secs. 67 and 68 the directors do not appear to have been specifically authorised to pass a by-law for that purpose. In case of a company, other than a land company, mortgaging its land to secure debentures or other liability of the company the directors' by-law must be confirmed by a meeting of the shareholders.

A meeting of shareholders duly called is a meeting of the company. The directors are the agents of the company appointed by the shareholders. I see no reason why at a regular meeting of the company, shareholders and directors being assembled together, a by-law might not be passed giving authority and instruction to the directors concerning the transaction of an important part of the company's business. It is to be noted that this same by-law, and not a by-law of the directors, authorises the purchase of the property in question. It is evident that the whole transaction—the purchase of the land, the subdivision into lots and the disposal of them—was laid by the directors before the shareholders at the meeting when the by-law was passed. If it is essential that the directors should initiate the by-law I would be prepared to assume in this case that that had been done and that the re-enactment of it at a shareholders' meeting was the form adopted by the shareholders for ratifying and confirming it.

I think the appeal should be allowed and judgment entered for the amount claimed by the plaintiff together with costs in both Courts. The amount of the judgment should, however, be paid into Court and remain there until the plaintiff shews a clear

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title to the lands and tenders a sufficient conveyance of the same, both to be approved by the Master of the Court. Either party to have liberty to apply.

CAMERON, J.A.:—The plaintiff, a land company incorporated under the Manitoba Joint Stock Companies Act, R.S.M., 1902, ch. 30, brought this action to recover the sum of $1,513.20 claimed to be due on an indenture whereby the plaintiff agreed to sell and the defendant agreed to buy certain lands therein mentioned at and for the price of $1,200, to be paid, $240 in cash and the balance in sums of $240 on October 12, 1912, April 12, 1913, October 12, 1913, and April 12, 1914, with interest at 6%. No other payment than the cash payment was made. Amongst the various defences set up to the action it was alleged that the agreement for sale in question was not specially authorised by a by-law passed by the board of directors of the company as required by sec. 68 of the Companies Act, R.S.M. 1913, ch. 35, and that, therefore, the alleged contract was null and void.

It was shewn at the trial that at a meeting of the directors of the company duly held on April 3, 1912, the secretary submitted a proposed plan of subdivision of the company's property, and it was "moved and resolved that the new plan be accepted as the official plan of the subdivision, and that the prices be as follows".

Then followed the prices at which the property was to be sold; "And it is resolved that Skuli Hansson & Co. be and they are hereby authorised and directed to sell said property in accordance herewith on such terms as they may see fit."

The trial Judge held that this was a resolution and not a by-law, that it did not conform with the requirements of sec. 68 of the Companies Act, that "it shall be sufficient if . . . specially authorised by a by-law passed by the board of directors" and that the case was indistinguishable from *Houghton Land Corp.* v. *Ingham*, 18 D.L.R. 660, 24 Man. L.R. 497, and dismissed the action. All other defences raised he disposed of in favour of the plaintiff.

In the judgments of two of the Judges of this Court as it was then constituted (the present Chief Justice [then Perdue, J.A.] and Haggart, J.A.) a rigidly restrictive interpretation was given sec. 68. Richards, J., held that to enable a land company to contract to sell a shareholders' by-law or a by-law under sec. 68

was necessary. On appeal to the Supreme Court the case was not decided on that point, but on the question of fraud. Fitzpatrick, C.J., and Brodeur, J. (with Anglin, J., inclined to the same opinion) held that the purpose of the amendment was rather to make valid contracts that were invalid or doubtful than to make invalid that which before the enactment was valid.

In *Quinn* v. *Leathem*, [1901] A.C. 495, at p. 506, Lord Halsbury held that every judgment must be read as applicable to the particular facts proved and that "a case is only an authority for what it actually decides." What was actually decided in *Houghton Land Corp.* v. *Ingham*, 18 D.L.R. 660, 24 Man. L.R. 497, was merely that the defendant was entitled to relief on the ground of fraud and misrepresentation. In such circumstances this Court is not bound by previous expressions of opinion of its members on the construction to be given to sec. 68, and I am at liberty to reaffirm the dissenting opinion I gave in that case. I am unable to see anything in sec. 68 that restricts or abrogates the rights of a land company to dispose of or convey its lands in any manner that would have been sufficient or effective prior to the passage of that section in 1911. I hold the section enabling and directory and not restrictive and exclusive. In this view the allegations setting up sec. 68 as a defence are bad in law.

Whatever may have been the distinctions previously existing between the powers and capacity of corporations at common law and those created under statute, these have been modified by the modern tendency in favour of giving a statutory corporation, as far as possible, the capacity of a natural person. This tendency has been marked in the case of commercial and trading corporations and corporations created for special purposes and is in response to the necessities and demands arising out of the vast increase in their number and the multiplicity of their transactions. We have now the statute passed by our Legislature, an Act respecting the Capacity of Companies, 7 Geo. V., 1917, ch. 12, by which every corporation or company heretofore or hereafter created under the Companies Act of Manitoba or by any special Act "shall . . . have and be deemed to have had, from its creation, . . . the general capacity which the common law ordinarily attaches to corporations incorporated by Royal charter under the great seal."

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Under the provisions of the general by-laws of the company full provision is made with respect to the duties and powers of the directors, president, secretary-treasurer and other officers of the company. The agreement sued on is executed in accordance with these by-laws and under the provisions of the Companies Act, particularly of sec. 66, making binding on the company contracts made on its behalf by its officers or agents in general accordance with their powers as such and of sec. 67 empowering land companies to alienate and convey their real estate, is, in my opinion, valid and binding on the company. I agree with the views expressed by Dennistoun, J., whose judgment I have read, on the subject of the validity and effect of these general by-laws. Even without these by-laws, I would be prepared to say that, in the circumstances of this case, the agreement binds the company.

I do not, therefore, need to discuss the resolution of April 3, 1912, authorising Skuli Hansson & Co. to sell the property of the company including that in the agreement. I may say that it seems to me a sufficient compliance with sec. 68. True, the word "resolved" is used, yet this is in substance a by-law for all practical purposes, duly authenticated and within the words and true intent and meaning of sec. 68.

Other grounds in support of the judgment were pressed on the argument, but they do not appeal to me any more than they did to the trial Judge.

I think the appeal must be allowed and judgment entered for the plaintiff for the amount claimed with costs of this appeal and in the King's Bench.

Fullerton, J.A.

FULLERTON, J.A.:—This action was brought to recover the balance due under an agreement for the sale of land made on April 12, 1912. The defendants by their pleading raised the point that the plaintiff was a land company and the agreement, not having been specially authorised by a by-law passed by the board of directors as required by sec. 68 of the Companies Act, was "null and void and of no effect and never became a contract binding upon this defendant."

The trial Judge decided the point in favour of the defendant, holding the decision of this Court in *Houghton Land Corp.* v. *Ingham*, 18 D.L.R. 660, 24 Man. L.R. 497, conclusive of the question.

The plaintiff company was incorporated by letters patent pursuant to the provisions of the Manitoba Joint Stock Companies Act, R.S.M. 1902, ch. 30.

Section 2 of the Companies Act, R.S.M., 1913, ch. 35, provides that:—

This part applies to—

(*b*) all companies incorporated under the Manitoba Joint Stock Companies Act, being ch. 30 of R.S.M. 1902, or any Act or Acts for which said Act was substituted.

It is admitted that the plaintiff company is a land company within the meaning of the Companies Act and the minute book which was put in evidence shews that the sole object of incorporation was the purchase, subdividing and sale of a block of land which included the lots purchased by the defendants.

At a meeting of the shareholders of the company called for the purpose of organisation on March 9, 1912, directors were appointed and general by-laws passed.

The sections of the general by-law which were referred to in the argument are the following:—

Section 3. The affairs of the company shall be managed by a Board of Directors to consist of five persons, each of whom shall be a shareholder in the Company holding at least one share of the capital stock thereof.

Section 7. The directors shall have power—(2) To appoint and remove for cause all officers, and to appoint and remove at pleasure all agents or employees of the Company, prescribe their duties, fix their compensation. (4) To conduct, manage and control the affairs and business of the Company, and to make rules and regulations not inconsistent with the laws of the Province of Manitoba or the by-laws of the Company, for the management of the affairs of the Company. 14. The President shall sign all certificates of stock and all contracts and instruments in writing which have been approved of by the Board of Directors. 18. The managing director of the Company shall have general control over the direction of all business and affairs of the Company and shall manage and superintend the same. 19. The President, Vice-President and Secretary-Treasurer or any two of them may make contracts and engagements of any kind on behalf of the Company, subject to the control of the Board of Directors.

At the same meeting of the shareholders on March 9, 1912, by-law No. 2 was passed which, after authorising the purchase of the lands, in which the lots in question are included, enacts as follows:—

And be it further enacted that the directors of the company may and do cause to be subdivided into building lots and may and do resell the same at such price and at such terms as to the directors shall from time to time seem advisable, and may and shall pass and enact from time to time such resolutions and by-laws as may prove necessary to carry out the objects aforesaid.

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At a meeting of the directors held on March 13, 1912, J. G. Carter was elected president of the company and Skuli Hansson, secretary-treasurer and general manager.

At a meeting of the directors held on March 16, 1912, Skuli Hansson & Co. were appointed selling agents for "South View," the subdivision in question, and the selling-price of the different blocks in the subdivision was fixed.

At a meeting of the directors held on April 3, 1912, a new plan of subdivision was accepted and new prices fixed. The following resolution was then passed: "That Skuli Hansson & Co. be and they are hereby authorised and directed to sell said property in accordance herewith, on such terms as to them may seem fit."

Acting under the authority of the above resolution Skuli Hansson & Co. sold the lots in question to the defendants, and both the plaintiff and defendants executed the agreement for sale sued on herein. The agreement for sale is under the seal of the plaintiff company and executed by J. G. Carter, the president of the company, and Skuli Hansson, the secretary, the officers of the company authorised by sec. 19 of the general by-laws to "make contracts and engagements of any kind on behalf of the company."

The defence to this action is based on an amendment to sec. 65 of the Manitoba Joint Stock Companies Act, now sec. 68 of the Companies Act, R.S.M. 1913, ch. 35. This section provides as follows:—

> Every such land company may mortgage or convey or make an agreement of sale of land without the assent of the shareholders, and it shall be sufficient if each such conveyance, mortgage or agreement be specially authorised by a by-law passed by the Board of Directors. This provision shall be retroactive and shall apply to all such transactions heretofore entered into by any such land company.

Counsel for the plaintiff contended that the resolution of the directors passed on April 3, 1912, above recited, can be treated as a by-law. It is true that a by-law may be in the form of a resolution. One test is to ascertain whether the company itself has treated it as a by-law. The by-laws of the plaintiff company are recorded by themselves in the minute book, numbered consecutively and are expressly called by-laws. I hold, therefore, that the resolution in question was not a by-law.

The defendants contend that under the Companies Act a by-law of the directors is essential to the validity of an agreement for sale, that in the absence of such a by-law the agreement is not binding on the company, and there being no mutuality the defendant is not bound.

The case of *Houghton Land Corp.* v. *Ingham*, *supra*, a decision of this Court, is cited as directly so holding and the head-note to that case supports that position.

I have carefully read the reasons for judgment given by the different Judges who decided that appeal and the conclusion I have arrived at is that the case is not authority for the broad proposition that a company can only authorise a sale of land by a by-law of its directors. The action there, as here, was to recover the amount due on the sale of land to the defendant. No by-law of either the shareholders or the directors had ever been passed to authorise the sale to the defendant. Two defences were raised: 1. Misrepresentation; 2. Want of mutuality. The case was tried by Metcalfe, J., (1913), 14 D.L.R. 773, 24 Man. L.R. 497, who held the defendant had failed in both defences. With regard to the defence of want of mutuality he said (14 D.L.R., at 777):—

> I do not think the Legislature intended to lay down a hard and fast rule by which a company must alienate its lands; but rather to establish a definite procedure which, if followed, would legalise a transaction. At all events, if there was any such intention it has not been so expressed as to deprive a trading company such as this of its rights to carry on its business according to the law which was in force prior to the passing of the statute.

The appeal, 18 D.L.R. 660, 24 Man. L.R. 497, was heard by Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. Richards, J.A., said (18 D.L.R., at 665): "I am of opinion, therefore, that, to enable the plaintiffs to agree, or contract, to sell the land here in question, *a shareholders' by-law* or a by-law such as contemplated by sec. 68 was necessary, and there never has been either."

Perdue, J.A., held that a by-law of the directors was essential to the validity of a sale. He said (18 D.L.R., at 670):—

> In the present case the objection of want of mutuality seems to me to be fatal to the plaintiff's case. The requirements of the amendment to the statute passed in 1911, . . . are to my mind quite as stringent as the common law necessity for the affixing of its corporate seal by a municipal corporation when entering into a contract. A special by-law to authorise this transaction was required by the statute and none was passed. Without such authority the company was not in a position to contract.

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Perdue, J.A., also held that the defence of misrepresentation had been established.

Haggart, J.A., agreed with Perdue, J.A., as to the effect of the amendment. Howell, C.J.M., and Cameron, J.A., dissented. Howell, C.J.M., holds that the agreement in this case having been validly entered into prior to the amendment was not rendered invalid by the amendment. He expresses no definite opinion as to the effect of the amendment. All he says on the point is that, (see 18 D.L.R., at 662):—

> Perhaps, as to deeds and contracts executed after the passage of the statute, it might be held to be a procedure directed by the Act, but I do not think that the Legislature intended to make invalid that which was before the enactment valid.

Cameron, J.A., on the other hand, held that the procedure provided by the amendment was not exclusive. He says (18 D.L.R., at 675-676):—

> I consider that sec. 68 merely provides that a by-law authorising each special transaction shall be a sufficient authority, and that no further evidence that proof of the existence of such a by-law shall be necessary. That is to say, the Legislature indicates one method of procedure which, if adopted, shall be deemed sufficient. But the existing provisions of the law are not annuled or intended to be annuled . . . I think the sec. 68 is directory only and not mandatory, within the rules laid down in well-known cases, and failure to comply with it has not the effect of invalidating transactions perfectly valid under the law as it existed prior to the enactment of this section.

The case was appealed to the Supreme Court, where the decision was upheld on the ground that the misrepresentations proved were such as to render the contract unenforceable.

Fitzpatrick, C.J., who dissented, held that the agreement was duly executed and constituted at the time a valid contract and that the amendment of 1911 was not intended to render null contracts already executed.

Brodeur, J., who also dissented, held that the provisions of the amendment were permissive and enabling and not prohibitive.

Anglin, J., who was a party to the judgment, said that he would not be prepared to uphold the judgment on the ground taken by the Court of Appeal for Manitoba, 18 D.L.R. 660, 24 Man. L.R. 497. While he expressly states that he does not intend to express a concluded opinion, he says that the statute is in its form curative and permissive rather than restrictive or prohibitive, and that if it was the intention of the Legislature to enact that no contract of a land company for the sale of real estate in which it was dealing

should be valid or enforceable unless expressed by a special directors' by-law he would not expect to find that intention expressed in the language used in that statute. The judgments of Davies and Idington, JJ., relate entirely to the question of misrepresentation.

In my view the head-note to *Houghton Land Corp* v. *Ingham*, as reported in 24 Man. L.R. 497, does not correctly state what the Court decided. Only two Judges—Perdue and Haggart, JJ.A.—held that compliance with the amendment is essential to the validity of an agreement for sale. We are therefore, I think, at liberty to consider the effect of the amendment and are in no sense concluded by the authority of that case.

I entirely agree with the view expressed by Cameron, J.A., in *Houghton Land Corp.* v. *Ingham* (18 D.L.R., at 672), as to the effect of the amendment.

There is nothing in it to indicate that the method there provided for was to be the sole and exclusive method of evidencing the authority of the company as to any particular sale. It merely provided for the future one method which would be sufficient, namely, a by-law of the directors. It does not purport to interfere with the procedure in vogue before the passing of the amendment. If the procedure followed here was sufficient to validate a sale made before 1911, I think it is perfectly good.

Here we have an agreement of sale, under the seal of the company and executed by its president and secretary-treasurer, the latter of whom was at the time the general manager of the company.

Primâ facie the company was bound by its contract under seal. While the defendant was fixed with knowledge of the provisions of the Manitoba Joint Stock Companies Act, R.S.M., 1902, ch. 30, and probably of the terms of the letters patent, he was not bound to inquire into the regularity of the internal proceedings, but was entitled to assume that all had been regularly done.

As stated in Palmer's Company Law, 10th ed., 1911, p. 45: "This rule is based on the principle of convenience, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed." See *McKnight Construction Co.* v. *Vansickler* (1915), 24 D.L.R. 298, 51 Can. S.C.R. 374.

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The plaintiff company was a land company and its sole business was the sale of the lots contained in its subdivision. One would think that a land company stands in the same position as any other trading company and that its general manager alone can make binding contracts for the sale of its land in the same way as the manager of an ordinary trading company can make binding contracts for the sale of its goods.

In *Houghton Land Corp.* v. *Ingham* (1916), 10 W.W.R. 1252, Fitzpatrick, C.J., at 1255, speaking of land companies, says:—

> These land companies must, I think, be considered as standing in a different position as regards sales of land which is their stock in trade from other companies and persons. It is true, as Richards, J., points out, that there are certain necessary differences between sales of lands and those of goods, but our ideas concerning the ownership and transfer of land and the rules by which it is governed are those of countries where all available land has been settled for centuries past and companies carrying on such business as land companies in the West could hardly be found in them.
>
> There is no essential between the contract for sale and any other . . .

McKnight Construction Co. v. *Vansickler*, 24 D.L.R. 298, 51 Can. S.C.R. 374, was an action to enforce specific performance of a contract entered into on behalf of the company by its secretary-treasurer alone. The company was an ordinary trading company and the sale was of its business premises. Idington, J., who dissented from the judgment of the Court, said (51 Can. S.C.R., at 380):—

> If this company had been formed with one of its objects to be the dealing in real estate, then the matter would have been very simple. Either his position as secretary-treasurer or assistant manager of such a corporation might well have implied authority to sell real estate, for that would be its business.

Whether the views above quoted are sound or not, it is unnecessary for us to decide in this case, as we have here express authority conferred by the shareholders on the president and secretary to make all contracts and engagements of any kind on behalf of the company. See general by-law No. 1, sec. 19, quoted above, *ante* p. 425.

The *McKnight* case, 24 D.L.R. 298, 51 Can. S.C.R. 374, goes much further than is necessary to support the validity of the agreement for sale in this case. The head-note to that case (51 Can. S.C.R. 374) reads as follows:—

> Where the contract is executed by an officer of the company to whom the necessary authority might be given the other party thereto is not called upon to ascertain if proper steps had been taken to clothe him with such

authority; it is sufficient that he is the apparent agent of the company to transact business of the kind and that the power which he purports to exercise is such as, under the constitution of the company, he might possess.

In this case the company was not a land company, the contract was not under the seal of the company and was signed only by one Douglass, who was secretary-treasurer and assistant general manager.

In the case at Bar, the contract is under the seal of the company, and is signed by the president and secretary-treasurer who was also the general manager.

Apart from other considerations I think the objection of want of mutuality is overcome by the institution of the action itself. The directors at a meeting held on May 6, 1919, authorised the bringing of the action.

In *Dowell* v. *Dew* (1842), 1 Y. & Coll. C.C. 345, 62 E.R. 918, it was held that in order to establish the validity of an agreement in a Court of Equity it is not necessary to shew that it was binding on both parties at the time of its being signed; it is sufficient if an agreement signed by one party be afterwards accepted and acted on by the other.

In Fry on Specific Performance, 5th ed., at pp. 236-237, the law is stated as follows:—

> Mutuality may be waived by the subsequent conduct of the person against whom the contract could not originally have been enforced . . . Where, from the relation of the parties to one another, the contract is originally binding on the one and not on the other, the latter may by action waive that want of mutuality, and enforce the specific performance of the contract; as in the case of an action by a *cestui que trust* against his trustee for the performance of a contract for sale, such a contract being originally binding on the trustee, and not on the beneficiary.

I would allow the appeal.

Dennistoun, J.A.

DENNISTOUN, J.A.:—The plaintiff company is incorporated as a land company under the Manitoba Joint Stock Companies Act, R.S.M., 1902, ch. 30. By sec. 67 of the Act (which is now the Companies Act, R.S.M., 1913, ch. 35), a land company is one which is incorporated for the purpose of buying and selling land and is authorised to acquire, hold, alienate and convey real estate in addition to any real estate requisite for the business of the company.

The company acquired a large parcel of land in the vicinity of the city of Winnipeg, which it subdivided into building lots and offered for sale at prices fixed by the board of directors.

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On April 12, 1912, an agreement of sale was executed by the company as vendor and by the defendants as purchasers.

This agreement is unexceptionable as to form. It is signed on behalf of the company by the president and a director who was also secretary and the corporate seal is affixed thereto. The defendants signed and sealed the document on their part, and paid the sum of $240 as part of the purchase-price. Nothing further has been paid, and on August 28, 1919, action was entered to recover $1,513.20 and interest. The trial Judge dismissed the action upon the ground that there is no by-law of the directors specifically dealing with this sale, being under the impression that he was bound to do so under the authority of a judgment of this Court in *Houghton Land Corp.* v. *Ingham*, 18 D.L.R. 660, 24 Man. L.R. 497.

A close examination of the reasons for judgment in that case delivered by the majority of this Court (Richards, Perdue, and Haggart, JJ.A.) discloses that Perdue and Haggart, JJ.A., were of opinion that a directors' by-law was necessary under sec. 68 of the Companies Act, but that Richards, J.A., considered a by-law of either the shareholders or directors sufficient. Howell, C.J.M., and Cameron, J.A., dissented.

In the case at Bar there is a shareholders' by-law which authorises the subdivision and sale of the lands in question which the late Richards, J.A., might have considered sufficient. In the Supreme Court of Canada the point was not decided as the appeal was dismissed on the ground of misrepresentation and not on the ground of want of mutuality. Fitzpatrick, C.J., Anglin and Brodeur, JJ., intimate their non-concurrence with the view taken by the majority of this Court concurring with the views of Howell, C.J.M., and Cameron, J.A., that sec. 68 of the Act was enabling and permissive rather than prohibitory and restrictive. It was intended to make valid what may have been invalid, not to make invalid what was previously valid.

In view of the diversity of opinion which prevailed not only in this Court, 18 D.L.R. 660, 24 Man. L.R. 497, but in the Supreme Court of Canada, *Houghton Land Corp.* v. *Ingham* can only be regarded as determining the facts which were in issue in that case and not as an authority governing general principles as to the requisites of contracts for the sale of land by land companies.

Lord Halsbury says, in *Quinn* v. *Leathem*, [1901] A.C. 495, at p. 506:—

> Now, before discussing the case of *Allen* v. *Flood*, [1898] A.C. 1, and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it.

Houghton Land Corp. v. *Ingham*, in my humble opinion, is only an authority for the dismissal of an action upon a contract on the ground of misrepresentation as found by the Supreme Court, or for want of mutuality as found by the Court of Appeal (18 D.L.R. 660).

It is now necessary to consider the validity of the contract sued on and the weight to be given to the defence raised that it is unenforceable by reason of the absence of a by-law of the directors specially authorising the agreement of sale in accordance with the provisions of sec. 68 of the Companies Act, which reads as follows: [See *ante*, p. 426.]

This section was introduced into the Companies Act by the amending Act of 1911, which also introduced sections restricting the charging, hypothecating, mortgaging or pledging of the company's real or personal property (other than the property of a land company) except under authority of a directors' by-law confirmed by a vote of not less than two-thirds in value of the shareholders.

Land companies were specifically excepted from these restrictions, and, in my opinion, sec. 68 was not intended to make new law, but to provide an easy method of establishing and assuring the validity of a sale by a land company either in a land titles office, or to a purchaser, or otherwise, in the event of doubt being raised in respect to the transaction.

Had the Legislature intended to alter the law and make invalid a sale under the hand of the principal officers of the company and the corporate seal, such sale being made in the ordinary course of business of a company dealing in land, it would have said so in clear and unmistakable terms.

MAN.

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ST. VITAL INVESTMENTS LTD. v. HALLDORSON AND CLEMENTS.

Dennistoun, J.A.

In *McKnight Construction Co.* v. *Vansickler*, 24 D.L.R. 298, 51 Can. S.C.R. 374, at p. 380, Idington, J., dealing with an agreement to sell land signed by the secretary-treasurer of a company without the corporate seal or by-law authorising the transaction, says:—

> If this company had been formed with one of its objects to be the dealing in real estate, then the matter would have been very simple. Either his position as secretary-treasurer or assistant manager of such a corporation might well have implied authority to sell real estate, for that would be its business.

Fitzpatrick, C.J., in his reasons for judgment in the *Houghton Land Corp.* v. *Ingham*, 10 W.W.R., at 1254, deals with the identical point under consideration in the case at Bar. He puts it in this way:—

> It seems unnecessary to refer to authorities to shew that all corporate bodies are *primâ facie* bound by contracts under their common seal. It is not, however, really open to dispute that this agreement was duly executed *and constituted at the time a valid contract*. In saying this I must point out that we have the advantage which the Court of Appeal had not of seeing the letters patent of incorporation of the appellant company. It is, of course plain from these that the whole purpose and object of the company was the buying and selling of land, and dealing in real estate as a business or trade. These land companies must, I think, be considered as standing in a different position as regards sales of land which is their stock in trade from other companies and persons.

Fitzpatrick, C.J., then proceeds to discuss sec. 68 of the Companies Act in order to ascertain if it had rendered invalid a contract which prior to the passing of the Act was valid and binding. Although the provisions of the section are declared to be retroactive he came to the conclusion in agreement with Howell, C.J.M., in the Court of Appeal (18 D.L.R. 660) that the purpose of the section "must have been rather to make valid contracts which were invalid or doubtful, than to make invalid that which before the enactment was valid."

Anglin, J., at p. 1259, while not desiring to express a concluded opinion on the point as he preferred to base his judgment on the ground of misrepresentation, says:—

> If it was the intention of the Legislature to enact that no contract of a land company for the sale of real estate in which it was dealing should be valid or enforceable unless authorised by a special directors' by-law, I certainly should not expect to find that intention expressed in the language used in the statute before us. That statute is in its form curative and permissive rather than restrictive or prohibitive.

Brodeur, J., at p. 1261, says: "The provisions are permissive and enabling and not prohibitive. Any other construction which would be made upon that statute would have the effect of invalidating a very large number of transactions, which would make it almost impossible for any land company to maintain any contract."

I agree with the view of my brother Cameron in *Houghton Land Corp.* v. *Ingham* (18 D.L.R., at 675), to the effect that:—

> Section 68 merely provides that a by-law authorizing each special transaction shall be a sufficient authority, and that no further evidence that proof of the existence of such a by-law shall be necessary. That is to say, the Legislature indicates one method of procedure which, if adopted, shall be deemed sufficient. But the existing provisions of the law are not annuled or intended to be annuled. If such had been the intention of the Legislature, other methods would, in that case, have been expressly prohibited, or all transactions in contravention of sec. 68 would have been declared invalid. But it is not so enacted.

In addition to the production of the agreement of sale under the hand of the principal officers of the company and the corporate seal we have the provisions of sec. 66 of the Companies Act that every contract or agreement made on behalf of the company by any officer of the company in general accordance with his powers as such officer under the by-laws of the company or otherwise, shall be binding upon the company, and in no case shall it be necessary to have the seal of the company affixed to any such contract or agreement, or to prove that the same was made in pursuance of any by-law.

There are also by-laws passed by the shareholders on March 9, 1912, at what was apparently the organisation meeting of the company. These are recited to be "by-laws for the regulation of the management of the business of the St. Vital Investments Ltd. of Winnipeg." They make provision for the election by the directors of the principal officers of the company—president, vice-president, secretary, treasurer and managing director—and assign their duties. The secretary is made custodian of the corporate seal and authorised to affix it to all instruments requiring a seal: By-law 18 (3). The president, vice-president and secretary-treasurer or any two of them may make contracts and engagements of any kind on behalf of the company, subject to the control of the directors.

It is objected that the directors alone have power to initiate by-laws and that the shareholders are restricted to powers of

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confirmation, repeal and amendment. Sec. 32, and subsections of the Companies Act.

I agree with the author of Mitchell's Canadian Commercial Corporations, ch. 24, at p. 934, that "although under the letters patent Acts, no express power is given to the shareholders to initiate and enact by-laws," no such power is necessary, as by common law the right of enacting by-laws resides in the shareholders at large and not in the directors, and they can only be deprived of this right by statute, either by express terms or by implication.

That the statute has deprived the shareholders of this right in many cases is undoubted. See sec. 24 and sec. 32 of the Companies Act; and *Colonial Assce. Co.* v. *Smith* (1912), 4 D.L.R. 814, 22 Man. L.R. 441; *Kelly* v. *Electrical Construction Co.* (1907), 16 O.L.R. 232; *Rex* v. *Westward* (1830), 7 Bing. 1, 131 E.R. 1; *Stephenson* v. *Vokes* (1896), 27 O.R. 691; *Beaudry* v. *Read* (1907), 10 O.W.R. 622, and many other similar cases.

But when I find the general by-laws of a company—the *de facto* by-laws—which have been acted upon from the inception of the company 8 years ago until the present by shareholders and directors alike, I am prepared to assume that they were regularly passed, without requiring formal proof to be given that they were initiated by the directors and confirmed by the shareholders, there being no contest between shareholders and directors as to their validity.

The shareholders at this first meeting passed another by-law numbered 2, which authorises the purchase of the property in question, its subdivision into building lots and sale. The purchase of this property and its re-sale apparently comprised the whole undertaking of the company. This by-law determined the policy and character of the business to be undertaken. It was intended to confine the operations of the business to town lots to the exclusion of farm lands. To my mind it was within the general common-law powers of the shareholders to pass and did not in any way detract from the powers of the directors to manage and administer the affairs of the company. In any event the directors raised no question. They acted upon the by-law, bought the property, subdivided it and sold part of it to the defendants.

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Moreover, the directors passed resolutions directing how the property should be subdivided, the prices to be charged for lots, and appointed a selling agent to carry their directions into effect.

To my mind this company was most effectually bound by the contract in question and there can be no escape for the defendants on the ground of want of mutuality, and for the reasons stated no by-law of the directors under sec. 68 was necessary.

I do not consider it necessary to deal with the carefully prepared and presented arguments of Mr. McLaws and Mr. Bergman with regard to the delegation by the directors to Skuli Hansson & Co., selling agents, of power to fix the terms of sale other than the price. In view of the adoption of the terms by the concluded agreement, any force which might otherwise lie behind this contention is expended. The agreement is itself conclusive and binds both the vendor and the purchasers.

I would allow the appeal on the terms indicated by Perdue, C.J.M. *Appeal allowed.*

JOHNSON v. DIGNEY AND THE ONE NORTHERN MILLING COMPANY.

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C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 23, 1920.

SALE (§ II B—26)—WARRANTY AS TO FITNESS—GOODS UNFIT—CANCELLATION OF SALE.

A contract made between two parties through an agent upon a condition precedent that the goods in question have certain characteristics cannot be enforced when the condition is not fulfilled.

APPEAL by plaintiff from the trial judgment in an action for the price of goods sold and delivered. Affirmed. Statement

W. F. A. Turgeon, K.C., for appellant.

A. McL. Mathieson, for respondents.

The judgment of the Court was delivered by

ELWOOD, J.A.:—In this matter the trial Judge on conflicting evidence found that there was no sale to Digney of the oats in question. He further expresses the opinion that Digney was acting as agent for the plaintiff and the defendant Milling Company. Elwood, J.A.

I am of the opinion that there is ample evidence to support the finding that there was no sale to Digney, and that Digney was acting as agent for the plaintiff. I do not think, however, that

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he was agent for the defendant Milling Company. It is not necessary that I should go over the whole of the evidence, but I wish to refer to certain portions of it which, I think, point very conclusively to the conclusion that I have come to. According to the plaintiff, he was selling his oats for 74 cents. The evidence of Bristowe, secretary of the Milling Company and a witness for the plaintiff, is, that early in October he had a telephone conversation with Digney, who wanted to know if the company could handle any oats, that there was someone there who wanted to know if he could handle them. Bristowe stated that he could handle the oats if they were good and dry; that some little time elapsed before a reply came to that; that he had the idea that Digney was consulting someone at the other end about it, and that in a few minutes the reply came back that they were good and dry, and that the price arranged was 74 cents. This evidence, to my mind, corroborates the evidence of Digney as to the conversation and as to what took place. He stated that, when he was asked by Bristowe if they were good and dry, he turned to the plaintiff and asked him that question and he said they were. It is quite true that when the oats were shipped the sight draft was made for 76 cents and a little over, but I am of the opinion that it is clear from the evidence that it was through an error of one of the employees of the bank that the draft was made for this sum instead of 74 cents. The oats were, therefore, being shipped to the Milling Company for the exact price that the plaintiff was to get for them. The agreement of the Milling Company in effect was that they were to pay the price which the plaintiff was to get for the oats, and therefore it is most improbable that Digney would be buying the oats from the plaintiff for the same price that he was selling them for. The evidence further shews that the oats were never inspected by Digney, and it is not conceivable that he would have purchased oats without inspecting them. It is quite true that a handful of oats was brought to him by the plaintiff's brother, but I cannot bring myself to the conclusion that if he were buying the oats he would be satisfied with such a casual inspection as could be had from this handful. The oats were shipped in the name of the plaintiff as consignor per Digney, which would be unusual if Digney were the purchaser. Both the plaintiff and his brother had at least an opportunity of inspecting

the bill of lading, and an inspection of that would have disclosed that the Milling Company was the consignee of the oats, because the bill of lading provided that the Milling Company was to be notified. The course of dealing with respect to these oats was so different from what it would have been if the sale had been made to the Farmers' Club Elevator Co., of which the defendant Digney was the agent, that I cannot bring myself to the conclusion that the plaintiff or his brother could have been of the opinion that the sale was made to the Farmers' Club Elevator Co. In the past when the plaintiff had made sales to the latter company, there had been no question of waiting until the grain was sold before getting his money; he always had his money at the time he sold his oats to the company. But in this case he had to wait until the draft was paid by the defendant Milling Company. The plaintiff, both in his examination for discovery and in his evidence at the trial, distinctly stated that he knew he was not selling to the defendant Digney, that Digney was not in a position to buy.

The subsequent action of the parties also points to the conclusion that there was no sale to Digney. Within a day or two of the shipment of the oats, Digney discovered that the oats were wet and at once notified the Milling Company not to accept them without inspection, and also notified the plaintiff. The plaintiff subsequently went to Prince Albert, saw the defendant Milling Company and wanted to know what the company would give him for the oats.

It was contended for the appellant that the evidence of the defendant Digney that he was to receive from the plaintiff 2 cents a bushel for his services, should not be believed, because such a remuneration was altogether too great for the services rendered. Digney's evidence is, that he didn't ask for any remuneration, but that, on the day the oats were shipped, the brother of the plaintiff asked him what he wanted for his services. He said, "nothing," and the brother offered him 2 cents a bushel. In considering whether or not, under the circumstances, this is reasonable, sight must not be lost of the fact that it was through the efforts of the defendant Digney that the sale to the defendant company was made. The evidence shews that the oats in question were damp; that the car of similar oats which the plaintiff had already sold was sold for 71¼ cents a bushel, whereas on the sale in question

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the plaintiff was to get 74 cents a bushel. There is evidence, too, that these latter oats were worth not more than 65 cents a bushel, and under all these circumstances it might very well be that the plaintiff or his brother would be quite willing to offer the defendant Digney 2 cents a bushel for getting rid of the oats.

Under all the circumstances, therefore, I would not disturb the judgment appealed from, and, in my opinion, this appeal should be dismissed with costs. *Appeal dismissed.*

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Ex. C.

FRASER v. S.S. "AZTEC."

Exchequer Court of Canada, Quebec Admiralty District, Maclennan, D.L.J.A. July 6, 1920.

ADMIRALTY (§ II —18)—CASE SENT BACK—FURTHER EVIDENCE—EXPERT EVIDENCE—NAUTICAL ASSESSORS—PRACTICE.

When a case is sent back for further evidence, there being a nautical assessor at the previous trial, expert evidence will not be admitted where all matters requiring nautical or other professional knowledge have been advised upon and settled at the first trial.

[*Montreal Harbour Commissioners* v. *The "Universe"* (1906), 10 Can. Ex. 305, referred to.]

Statement.

THE case was tried in the first instance by Maclennan, D.L.J.A., and was dismissed, the Judge finding that the accident was caused by the gross negligence of the lockmen and not of the "Aztec" and her crew (1920), 52 D.L.R. 175, 19 Can. Ex. 454.

The plaintiff then appealed from the Deputy Local Judge to the Exchequer Court [see Memoranda, 19 Can. Ex. at p. ii]. At the opening of the appeal, application was made by plaintiff to be permitted to examine further witnesses. Audette, J., presiding, considered that such evidence should be given before the Judge who had heard the case in the first instance and therefore ordered that the case be remitted before the Local Judge in Admiralty, and that the case be there reheard and the evidence which the parties desired to adduce and which might be legal be there taken and that judgment be rendered by the said Judge upon such new evidence as well as upon the evidence already of record.

R. A. Pringle, K.C., and *A. H. Elder*, for plaintiff.

A. R. Holden, K.C., for defendant.

Maclennan, D.L.J.A.

MACLENNAN, D.L.J.A.:—This case was tried before me some time ago and, on March 16, 1920, I dismissed the action with costs, having come to the conclusion that the accident

was caused by the gross negligence of the lockmen, and that the "Aztec" and her crew were not to blame, 52 D.L.R. 175, 19 Can. Ex. 454.

On a motion by plaintiff by way of appeal from that judgment Audette, J., of the Exchequer Court, on May 26, 1920, ordered and adjudged that said judgment be set aside and the case be re-heard and thereafter determined by me upon the evidence already adduced and upon such further evidence as the parties might see fit to adduce, and that the costs of the first trial or hearing be reserved to be dealt with by me.

The new trial was held on June 22, 1920, when I had the assistance of Captain Grey as Nautical Assessor. The plaintiff adduced some new evidence, including a number of photographs of the lock where the accident occurred. Among the photographs several purport to shew the water in the lock, some with one, others with two valves in the upper gates open and all valves in the lower gates open. No steamer was in the lock at the time these photographs were taken and they do not shew what the result would have been had the steamer "Aztec" or a ship of similar size been in the lock. The evidence of experiments made with the water in the lock without any steamer being in it is of the nature of expert evidence, and as the Court had the assistance of a Nautical Assessor to advise upon any matters requiring nautical or other professional knowledge, such expert evidence is inadmissible. *Montreal Harbour Commissioners* v. *The "Universe"* (1906), 10 Can. Ex. 305.

Two witnesses examined at the first trial, Albert Durocher and Joseph H. McDonald, the two lockmen in charge of the lock at the time of the accident, were recalled by plaintiff and testified that after the "Aztec" entered the lock her bow was tied up to the north wall of the lock and her stern was to the south wall. The "Aztec" had a right hand propeller and I am advised by my assessor that its action as the steamer came to a standstill when it was tied up to the north wall would be to cause the stern of the steamer to lie against the north wall of the lock, and I am also advised that the effect of water coming through one or more of the valves in the upper gates and striking against the lower gates would cause a back eddy, and the effect of such eddy would

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EX. C.

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be to keep the stern of the steamer against the north wall. Neither Durocher nor McDonald, at the first trial, said anything about the stern of the steamer being against the south wall of the lock. They were both examined at considerable length at the first trial and neither of them suggested the steamer was in the position in which they said she was when examined at the new trial. I was not impressed at the first trial with their credibility and I am not disposed to accept their evidence at the new trial on this point. At the first trial Heppel, a lockman, swore that the steamer when it went astern hit the north gate. Lebeau, a witness called on behalf of the defendant, said it hit the south leaf of the west gate. McDonald said she went into the centre of the upper gates, and Durocher could not say if the steamer canted into the middle of the lock or went straight astern. In my opinion it is immaterial whether the steamer, when thrown astern, struck the centre, the north leaf or the south leaf of the upper gates.

The new evidence, so far as it is expert evidence, is inadmissible and I am advised by my assessor that the mooring of the steamer was sufficient. At the first trial, 52 D.L.R. 175, 19 Can. Ex. 454, I came to the conclusion that the non-observance of canal Rule 27 regarding the number of lines to be used in making the steamer fast in the lock did not contribute to the accident in any manner whatsoever, and there is nothing in the evidence adduced at the new trial to make me change my opinion on the question.

Having regard, therefore, to the evidence adduced at the first trial and the further evidence adduced by plaintiff at the new trial, I have come to the conclusion that plaintiff's action should be dismissed for the reasons given in support of the first judgment.

The costs of the first judgment were given against plaintiff and there is no reason why that order should not be followed. Plaintiff's action fails and there will be judgment dismissing it with costs of both trials against plaintiff.

Judgment accordingly.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. December 17, 1920.

MASTER AND SERVANT (§ II B—156)—DANGEROUS TRACK AND ROAD BED—NEGLIGENCE IN REPAIRING—INJURY TO ROAD MASTER IN CHARGE OF REPAIRS—"VOLENTI NON FIT INJURIA."

The principle "*volenti non fit injuria*" does not apply to a road master of a railway company, caused by the unnecessary prolongation of the risk arising from defective rails, owing to the company's failure to comply with his reasonable and reiterated request for good rails to replace the old ones. The implication of the doctrine is not warranted either from his assumption or retention of the position of road master.

[*Mulcahy* v. *E.D. and B.C.R. Co.* (1920), 53 D.L.R. 77, 15 Alta. L.R. 464, affirmed.]

Statement.

APPEAL by defendant from the judgment of the Alberta Supreme Court, Appellate Division (1920), 53 D.L.R. 77, in an action for damages for injuries received by plaintiff in the course of his employment as a road master on defendant's railway. Affirmed.

C. Wilson, K.C., for appellant; *E. Lafleur*, K.C., for respondent.

Davies, C.J.

DAVIES, C.J. (dissenting):—At the conclusion of the argument at Bar I was of the opinion that Mr. Wilson had made out a good case for this appeal. As, however, my colleagues seemed to have a different impression, I found it necessary to read with care all the pertinent evidence in the case referred to by counsel on either side, as also the judgment of the trial Judge, Hyndman, J., and that of the Court of Appeal reversing it (1920), 53 D.L.R. 77, 15 Alta. L.R. 464.

As a result, I am clearly of the opinion that, alike on the applicability of the maxim *volenti non fit injuria* and of the law of contributory negligence, the defendants are not liable and that the appeal should be allowed with costs and the judgment of Hyndman, J., restored.

If there ever was a case, in my opinion, to which the doctrine of the maxim *volenti* was applicable and should be applied, it is this case.

The actual work and duty of the plaintiff, for which he was employed, was to put in repair the very roadbed, the dangerous condition of which, it is contended by the plaintiff Mulcahy, caused the accident in question. He undertook the employment and continued in it with full knowledge of the very bad and unsafe condition of the roadbed. His knowledge of its condition

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was probably better than that of any other man. He applied, after going to work at the repairs in August, for new rails, and before, and in the beginning of September, was informed that the company would supply new rails for a portion of the road, but could not do so, for that part of it where the accident occurred, namely, between McLennan and Grande Prairie. On receiving this definite information, he, on September 6, 1917, wrote to his foreman the following letter:

SPIRIT RIVER, Sept. 6, 1917.

MR. FRANK DONIS,
Ex Gang Foreman.

Dear Sir:

When you are working your gang from Manir Tank Mile 341 to Smoky 297 getting worst places out of track you will notice you will find some very bad rails. I have made requisitions for rails to Mr. Sutherland and he claims that he cannot give me any rails between McLennan and Grande Prairie so when you find a very bad one go to the nearest siding and take out rails from side track and put in maia line and put your bad rail in side track that you take from main line leave a man to protect side track until you return with bent rail to replace good rail taken out. I understand this is a very expensive way to do but it is the only way we can get some of the very worst rails out which will cause bad derailments if left in track when repaired I know it will break up your gang so you cannot make a good showen but I understand all of this and will proct (protect?) you if anything is sayed about your work not showen up be shure and tamp up under new rail in low places good.

Yours truly,

J. W. MULCAHY, R.M.

No evidence could more clearly establish plaintiff appellant's full knowledge of the road's condition and of the liability of the company to supply new rails on that portion of the road where the accident occurred. The instructions he gave his foreman in this letter as to how he should remove and replace very bad rails, taken in conjunction with the other letters in evidence, shew his complete knowledge of all the facts, namely, the bad condition of the road on this particular section, the liability of the company to supply new rails for the comparatively untravelled section as all the rails they could procure were required for the section of the road where there was the greatest traffic for freight and passengers, and the means he directed the foreman should take to supply the new rails required as substitutes for any "very bad ones."

This letter is, to my mind, also a complete answer to the suggestion that the company had aggravated the dangers to which plaintiff was exposed by neglecting to supply him with new rails. It shews his full knowledge of the company's inability to supply new rails between McLennan and Grande Prairie where the accident occurred as all the new rails they could procure were required for the more travelled sections of the road. With all this actual knowledge, the plaintiff continued in his position as road master, repairing the road for which he had been specially employed. I can only, without quoting more from the evidence, repeat my strong opinion that the doctrine of *volenti* should be applied.

Then, as to the contributory negligence of the plaintiff, I am also of the clear opinion that it has been proved up to the hilt. He was in control of the car, called a speeder, at the time of the accident and sat in the front seat along with a workman named Carbonneau. Donis, who was running the car under his instructions sat behind him, and the evidence shews clearly it was plaintiff Mulcahy's custom and duty to signal to him the rate of speed. As usual, the witnesses differ somewhat as to the rate, but Mulcahy's own evidence is that, at the time of the accident, the speeder was running at between 10 and 15 miles an hour.

Accepting plaintiff Mulcahy's own evidence of the state and condition of the road bed and rails over which they were running, this rate of speed, I think, was not short of reckless imprudence and negligence. It no doubt thereby contributed to throw the car off the rails and cause the accident which occurred.

If, however, the evidence of the other witnesses, Donis and Sutherland and Carbonneau, is accepted, that the roadbed, at the place in question, was not at all in the very bad condition that Mulcahy describes, but, as one of them, Sutherland, said, "about the best piece of track up there, the land dry and the ditching very good, there was no chance for water to remain around the track and keep it soft or give it a chance to become rough," then the proper conclusion to be drawn is that which I think the trial Judge, accepting their evidence, drew, that the car ran off or jumped the track, not from the bad condition of the roadbed or rails, but from some unexplained cause.

My conclusion, therefore, is clear that the appeal should be allowed with costs and the judgment of the trial Judge restored.

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Idington, J.

IDINGTON, J.:—The trial Judge, Hyndman, J., rested his judgment herein upon the application of the doctrine expressed in the maxim *volenti non fit injuria*.

Assuming, for argument's sake, such a defence would have been applicable if the accident had happened the next day after the respondent had entered upon his new employment, relying upon the reasonable expectation of his being supported in his effort to improve the dangerous condition then existent and to be rectified, I cannot see how it can be made applicable to the circumstances created by the gross neglect of appellant to supply the rails which the respondent so repeatedly urged upon its managers to be used in rendering the very spot in question safe.

The Court of Appeal, 53 D.L.R. 77, 15 Alta. L.R. 464, in my opinion, was quite right in reversing, for the reasons assigned by it, the judgment of Hyndman, J., on that ground, unless there was pressed upon it, and shewn to be well founded, the ground of contributory negligence on the part of respondent which is now urged upon us.

Although a casual expression by Hyndman, J., is quoted by counsel for appellant as indicating that, in the said Judge's opinion, the defence of contributory negligence was established, I cannot read it as an express finding upon the conflicting evidence that appears or think that, if he so intended to find, he would have so passed over what he found on the facts and let the matter rest there, and then turned to elaborate the ground upon which he does rest his judgment.

And the absence of any reference thereto in the able and fully considered opinion of the Court below, 53 D.L.R. 77, 15 Alta. L.R. 464, seems to indicate that no such defence had been pressed on that Court.

The evidence on the point, I repeat, is most conflicting. And in one view presented is reduced to such a narrow point, which does not seem by any means to render it safe for us to act upon, under the foregoing circumstances.

Indeed, it amounts to no more than a possible suspicion that when the speeder car approached the point in question it might have been wiser for respondent to have indicated to the man operating a reduction in the rate of speed.

I do not think, in face of the foregoing history of the alleged defence, and the conflict of evidence, as well as the fact that the motorman knew the road as well as respondent, that we would be justified in allowing the appeal on that ground, and, therefore, I think the appeal should be dismissed with costs.

DUFF, J.:—This appeal involves a controversy touching the application of the maxim *volenti non fit injuria*. Long ago Bowen, L.J., called attention in a well known judgment to this—that the maxim is *volenti non fit injuria* not *scienti non fit injuria*. I make this observation because I should like it to be quite plain that some sentences in the judgment of Hyndman, J., seemingly not quite consistent with this should not be accepted as an accurate exposition of the rule.

Duff, J.

I do not find it necessary to discuss the question whether, if we had been confronted with a case in which the essential elements were the request by the company to Mulcahy to undertake the work he did undertake in the circumstances known both to him and to his superiors, the Judge's finding of fact that the conduct of the parties properly interpreted evinced an intention that Mulcahy should bear the risk of the dangerous condition of that part of the railway where his duties were to lie could properly be set aside by the Court of Appeal 53 D.L.R. 77, 15 Alta. L.R. 464. I shall proceed upon the hypothesis that Mulcahy did undertake the risk but his agreement to undertake the risk must, as the Court of Appeal have held, be qualified by the condition necessarily implied that the company would do what they reasonably could to assist him in minimising the risk that must, I say, be taken to have been one of the terms upon which the risk was assumed and I think an essential term. It follows that the failure on the part of the company to fulfil this term disables them from relying upon Mulcahy's undertaking unless at all events they can establish that by their default Mulcahy was not prejudiced. The Court of Appeal have taken the view apparently that this was not shewn. Mr. Wilson has not satisfied me that that view is erroneous.

ANGLIN, J.:—The judgment of the Appellate Division, 53 D.L.R. 77, 15 Alta. L.R. 464, is challenged by counsel for the defendant company on two grounds. It is urged (a) that the plaintiff voluntarily incurred the risk of the defective condition

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of the railway which has been found to have been the cause of his injury; (b) that excessive speed of the car, or "speeder," on which he was travelling was the true cause of the accident and that he was so far responsible for it that he should either be deemed the author of his own wrong or at least guilty of contributory negligence.

As to the first defence, depending upon the applicability of the maxim *volenti non fit injuria*, I agree with the opinion delivered by Ives, J., in the Appellate Division, 53 D.L.R. 77, 15 Alta. L.R. 464, concurred in by Harvey, C.J., and Beck, J. The plaintiff did not agree to relieve the company from liability from accidents that might happen from an unnecessary prolongation of the risk arising from irremediably defective rails owing to its failure to comply with his reasonable and reiterated request that he should be sent a supply of good rails to replace them. No such implication is warranted either from his assumption or his retention of the post of road master of the section.

That the speeder was running at an excessive speed at the time of the injury was not found by Hyndman, J., who dismissed the action because he was "by no means satisfied" that the speeder did not "jump the rails without any explainable cause." But, assuming in the defendant's favour that the speed was too great, the evidence is not convincing either that the driver should be regarded as the plaintiff's *alter ego* so as to make him responsible for negligent driving, or that the plaintiff had such an opportunity of observing and controlling the speed immediately before the moment of the accident that a case of contributory negligence on his part is clearly made out. Notwithstanding the able argument presented by Mr. Wilson I am not satisfied that there is error in the judgment *a quo*.

Mignault, J.

MIGNAULT, J.:—I concur with Anglin, J.

Appeal dismissed.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 23, 1920.

RAILWAYS (§ IV A—91)—ACCIDENT AT CROSSING—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—DRIVER OF TEAM "NOT AS BRIGHT OR AS ACUTE AS AVERAGE MAN"—FINDING OF COURT.

In an accident at a crossing where the Court finds at the trial no contributory negligence on the part of a man "not as bright or acute as the average man," this finding will not be disturbed.

Statement.

APPEAL by defendant from the trial judgment in an action to recover damages for injuries received at a level railway crossing. Affirmed.

A. M. McIntyre, for appellant; *J. M. Stevenson*, for respondent.

The judgment of the Court was delivered by

Elwood, J.A.

ELWOOD, J.A.:—This was an action for damages sustained by the killing of the respondent's horses and destruction of his wagon and harness at a level railway crossing within the yard limits of the village of Warman, by an engine on the appellant's passenger train from the west.

At the time of the accident, the horses, with wagon attached thereto, were being driven by one Spooner, who was working for one Campbell, to whom the respondent had lent the said horses, wagon and harness. The evidence shews that, commencing from a point about 375 ft. west of the crossing in question, there were two long strings of box cars, one on each side of the line along which the passenger train in question was travelling. The trial Judge found that the whistle on said train was sounded at least a mile west of said crossing and was not again sounded, and that the bell on the engine was started about the time that said whistle was sounded and continued to ring until after the accident; that the train was running at a speed well up to 25 miles an hour. He further held that instructions in the appellant's time table, No. 14, compelled the appellant when going through the yard in question to be prepared to stop at once. These instructions are as follows:

> All trains must approach and pass through Humboldt, Warman and North Battleford Yards cautiously, expecting to find main track occupied or switches wrong, and prepared to stop at once.

Interlocking Rule No. 93 is in part as follows:

> All trains except first and second-class trains must, unless otherwise directed, approach and pass through yard limits prepared to stop, unless the main track is seen or known to be clear.

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The trial Judge held that the train was not in his opinion approaching cautiously or under control, or prepared to stop before the station would be reached. The trial Judge further held that, were it not for the instructions contained in time table No. 14, he would, under the law, have to find against the respondent's contention that the speed was excessive; but that the instructions in question create the standard of duty which the company itself recognises as a standard to which its employees should conform in the yard in question, and that, therefore, to omit to take these precautions was negligence, and that in his opinion the speed of the train, having regard to the method of approach, and to the fact that the whistle was not sounded, was excessive; that the excessive speed and failure to have the train under control and to be prepared to stop contributed to the cause of the accident.

It was urged that there was contributory negligence on the part of Spooner. The trial Judge finds, in effect, that Spooner looked to the west, which was the direction from which the train was approaching, about the time that he was crossing Railway St. From a plan put in evidence, I should take the south boundary of Railway St. to be 122 ft. 4 inches north of the point at which the accident took place. Apparently, at the time Spooner looked, he did not see any train approaching, nor could he have seen any on account of the box cars above referred to. If he had looked just as he approached the tracks, say, about 40 or 50 ft. from the tracks, he could have seen the train and avoided the accident. The trial Judge attributes Spooner's failure to look again somewhat to the fact that he had previously looked, and, as he expresses it, "also to the frailty from which he suffers." He says that "had the whistle been sounded as required at the 80 rod point, it is highly probable that it would have proved an effective warning." The frailty from which Spooner suffered, referred to by the trial Judge, was, I take it, from the evidence, that he was not so quick at perceiving things as ordinary people; that his mind was not particularly acute. Judgment was given for the respondent, and from that judgment this appeal is taken.

It was contended that the trial Judge was not justified in finding on the evidence that the whistle was not sounded at the 80 rod point. On behalf of the respondent a number of

witnesses were called who all were in a position to have heard the whistle, who swore that they did not hear it. They also swore that they did not hear the bell ring. On behalf of the appellant, the engineer, fireman, and one Shipley swore that the whistle did sound at a point about 900 ft. west of the crossing. At the time that Shipley says he heard it, he was some distance north of the railway and behind a livery barn. The engineer says that he sounded the whistle because it was his custom, and, as he puts it, "on account of the accident." The fireman says in his cross-examination, "I am reasonably positive I remember the signals were given at that time." The trial Judge, in spite of the evidence of the witnesses for the respondent, who swore that the bell was not rung, finds that the bell was rung; but the evidence in support of a finding that the bell was rung was very much stronger than the evidence in support of the contention that the whistle was sounded, and, in view of the doubt which might reasonably be cast upon the conclusiveness of the evidence given on the part of the appellant for the contention that the whistle was sounded, I would not be prepared to disturb the finding of the trial Judge where he finds that the whistle was not sounded.

It was urged that the trial Judge was not justified in holding that there was excessive speed on the part of the appellant's train, or that there was any obligation on the part of the appellant to approach the station cautiously, under control and prepared to stop. In effect, the trial Judge finds that the place where the accident took place was not a thickly populated part of the village, and I think that the evidence justifies such a finding. Under those circumstances there was no obligation on the part of the railway company to limit its rate of speed. See *Andreas* v. *C. P. R. Co.* (1905), 37 Can. S.C.R. 1.

Rule 93 of the Interlocking Rules does not apply to the train in question, because time table No. 14, above referred to, and the evidence shew that this was a first-class train.

I am also of the opinion that the special instructions quoted above, and part of time table No. 14, are solely instructions for the use of the company, they are not communicated to the public, and, according to my construction, they refer to two sets of circumstances: one, where the switch is set against the approaching

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train, and the other where, through either switching operations or otherwise, the track upon which the approaching train is running is occupied, either by a car or cars.

The only remaining question to consider is: Was there contributory negligence on the part of Spooner sufficient to deprive the respondent of his right to recover. It will be remembered that Spooner looked in the direction of the approaching train approximately 122 ft. from the crossing and saw no train. He then looked to the east. The trial Judge refers to his not being as bright or as acute mentally as the average man.

I am of the opinion, under the circumstances, that we should not hold that the respondent was guilty of contributory negligence.

I would therefore dismiss the appeal with costs.

Appeal dismissed.

IMP.

P. C.

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Judicial Committee of the Privy Council, Viscount Cave, Lord Moulton, Lord Phillimore. December 10, 1920.

COMPANIES (§ II—20)—REORGANISATION — INVALID RESOLUTION—MONEY PAID UNDER CLAIM WHICH WAS ULTRA VIRES—KNOWLEDGE OF DIRECTORS—LIABILITY OF RECIPIENTS.

The Courts have power to direct that moneys received from a company on a claim which is *ultra vires* shall be repaid with interest, but there is no fixed rule on this point. Where the directors were guilty of great delay in impeaching the claim, and have acted under what they must have known to have been an invalid resolution, the recipients will only be ordered to repay the money actually received.

[See (1917), 36 D.L.R. 564, and (1916), 31 D.L.R. 378.]

Statement.

APPEAL from the Court of Appeal of British Columbia in an action brought to set aside a trust deed and to recover certain secret profits alleged to have been made by the promotors of the company. The facts of the case are fully set out in the judgment delivered and in 36 D.L.R. 564, where the order of the Board which gave rise to the present appeal is reported.

The judgment of the Board was delivered by

Lord Moulton.

LORD MOULTON:—The matters for decision in the present appeal arise out of the order made by His Majesty in Council on August 8, 1917, 36 D.L.R. 564, [1917] A.C. 607, on an appeal from the Court of Appeal of British Columbia (1916), 31 D.L.R. 378, 23 B.C.R. 267, at 302, in an action brought by the Pacific Coast Coal Mines, Ltd., and others against John Arbuthnot and

others. Their Lordships by their decision advised the setting aside of the order made by the Court of Appeal in British Columbia and supported in part the judgment of the Judge of first instance (1916), 23 B.C.R. 267, in the case. Consequently they made an order restoring with variations the order made by him and giving liberty to apply to the Court of first instance to give effect to their judgment. This was done, and it was referred to the Registrar of the Court to make a report as to the sums due from or to the various parties concerned in the suit. Such report was made by the Registrar on April 24, 1918, and came before the Court of first instance for further consideration on June 13, 1918, when an order which forms the basis of the present dispute was made by the Court in respect of all the matters before it. Against this order certain of the defendants appealed to the Court of Appeal of British Columbia, and that Court by an order dated April 1, 1919, varied in substantial respects the order of the Court below. From this order, cross-appeals have been brought by the plaintiffs and defendants. These appeals have been consolidated and are now before the Board.

It will be seen, therefore, that their Lordships are concerned only with the question of what is the effect of the Order in Council of August 8, 1917. The rights of the parties were finally determined by that order. It is only the interpretation and proper mode of carrying out that order which is before their Lordships on the present occasion.

But although the rights of the parties have been finally determined by the Order in Council dated August 8, 1917, it will be necessary to give a short account of the matters out of which the litigation arose in order that the meaning and effect of that order may be properly understood.

The appellant company was incorporated under the Provincial Companies Acts on March 21, 1908, for the purpose of acquiring and working mining properties and selling the produce. No question now arises about the circumstances under which this promotion took place. It must be taken for the purposes of this appeal that no complaint can be made against any of the defendants in respect thereof in view of the fact that the charges against them relating to the promotion of the defendant company were

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formally withdrawn by the plaintiffs at the former hearing before this Board who directed them to pay the costs occasioned by their having put them forward in the litigation.

In the course of time dissensions arose within the company. Its shares had practically become the property of two groups of shareholders, which may be called respectively the British Columbia group and the New York group, and these dissensions threatened to lead to heavy litigation, which would certainly be very injurious to the future prosperity of the company as a whole. To avoid this, the two groups came to an agreement, which included among other things an arrangement that the New York group should buy out the British Columbia group so that the latter would cease to have any connection with the company.

The agreement between the parties was finally adjusted and entered into on February 11, 1911. It was not, however, a simple purchase of the shares for money, but was an elaborate agreement by which it was arranged that debentures should be issued by the company and that the members of the British Columbia group should receive debentures to the par value of their respective shares in return for the surrender of those shares to the company, and that such shares should be thereupon cancelled (an order of the Court to be obtained if necessary for the purpose), and that a consequential reduction of the appellant company's capital from $3,000,000 to $2,000,000 should be made. Inasmuch as no mere agreement between private shareholders could effect these purposes, provision was made in the agreement for an application to the Legislature of British Columbia for an Act to authorise the agreement, the reduction of capital, the surrender of the shares, and the issue of debentures as provided by it. The agreement also contained provisions in respect of other matters which are not material to the questions now before their Lordships.

The Provincial Legislature was then in session at Victoria, and on February 14 a petition for a private Act as above described was presented, and a Bill was accordingly introduced which became law on March 1, 1911. Shortly described, its effect was to validate, ratify and confirm the agreement itself and all its terms and to give to the company power to carry out its provisions—

Subject to the same being adopted by a resolution passed by 75 per cent. of the shareholders of the company present personally or by proxy at any

meeting of the shareholders of the said company called for that purpose and for the purpose of authorising the issue of the said debentures after the 14th day of February, 1911.

On February 20, 1911, pending the passing of the Act, a notice was given for a meeting of the shareholders for the above purpose on March 1, at 3.30 p.m. The Act had actually passed by the hour specified by the notice, and their Lordships on the previous occasion held that this issue of the notice in anticipation of the passing of the statute was competent to the directors. The meeting was held, and something like 98% of the shareholders were present either personally or by proxy. It unanimously adopted a resolution such as is provided for by the Act. But their Lordships held that the contents of the notice sent were utterly insufficient, and that there was an absence in it of most material infomation which should have been given to all the shareholders before they were asked to sanction such important modifications of the powers and constitution of the company, and that therefore the notice was bad. It followed, therefore, that the adoption of the agreement by the meeting was of no effect. It was not procured in accordance with the condition imposed by the Legislature. The agreement itself and all proceedings thereunder remained therefore *ultra vires* and incapable of ratification by the company. It was in order to obtain a declaration by the company. It was in order to obtain a declaration to this effect, and consequent relief, that the action was brought by certain of the shareholders of the company. The decision of the Judge of first instance was in favour of the plaintiffs, 23 B.C.R. 267, but this was reversed by the Court of Appeal, 31 D.L.R. 378, and was to a great extent restored by the order of August 8, 1917, 36 D.L.R. 564, [1917] A.C. 607.

In accordance with the said judgment their Lordships set aside the order of the Court of Appeal of British Columbia and restored the order of the Court of first instance of January 7, 1916, with certain modifications. The parts of the order so modified which are material to the questions now before their Lordships are as follows:—

1. This Court doth declare that the alleged agreement dated the 11th day of February, 1911, made between John Arbuthnot, James M. Savage, John C. McGavin, and the Vancouver Island Timber Company, Ltd., of the first part, and John P. Hartman and Charles Cook Michener of the second part; and the Pacific Coast Coal Mines, Ltd. (Non-Personal Liability), of the

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third part, and Ephraim Hodgson and David Scott Spencer of the fourth part, and Samuel Henry Reynolds of the fifth part, was never adopted by nor is the same binding upon the plaintiff company, and that the same and all proceedings taken to give it effect was and were as against the plaintiff company illegal, void, and *ultra vires* of the plaintiff company, and particularly that the debenture issue, the Trust Deed and the attempted cancellation of shares and reduction of capital based thereon were so likewise illegal, void, and *ultra vires* of and against the plaintiff company, and that the said Trust Deed and debentures secured thereby issued or held respectively by the defendants John Arbuthnot, James M. Savage, John C. McGavin, William J. Moran, Samuel H. Reynolds, Henry G. S. Heisterman, Evelyn O. I. Rant, Vancouver Island Timber Company, Ltd., the British American Trust Company, Ltd., and Henry E. Young, should be by them respectively delivered up to be cancelled, and doth order and decree the same accordingly; 2. And this Court doth further declare that all moneys paid on account of the said Trust Deed or debentures whether for principal, interest, or trustees' and inspectors' fees, or otherwise, shall be repaid to the plaintiff company by the defendants John Arbuthnot, James M. Savage, the British American Trust Company, Ltd., John C. McGavin, William J. Moran, Samuel H. Reynolds, Henry G. S. Heisterman, Evelyn O. I. Rant, and Henry E. Young respectively in so far as the said sum or sums have been respectively received by the said defendants, and if necessary that there be a reference to the Registrar of this Court to ascertain the dealings with said debentures and report thereon, and doth order and decree the same accordingly; 3. And this Court doth further declare that in the event of said defendants being unable for any reason whatever to deliver up to the plaintiff company for cancellation such Trust Deed or any of the said debentures or if for any reason any of the said debentures are not so delivered up, then and in that event or events, the said defendants John Arbuthnot, James M. Savage, C. C. Michener, William J. Moran, Luther D. Wishard, and Charles O. Kimball, jointly and severally indemnify the plaintiff company against same to its satisfaction, and in the event of the plaintiff company unreasonably withholding approval thereof, then, subject to the approval of a Judge of this Court for and in respect of the amount of any such debentures, and of said Trust Deed, and doth order and decree the same accordingly; 11. And this Court doth further declare that the defendants John Arbuthnot, James M. Savage, John C. McGavin, William J. Moran, Samuel H. Reynolds, Henry G. S. Heisterman, Evelyn O. I. Rant, and the British American Trust Company, Ltd., each of them be and they are hereby restrained from in anywise dealing with the said Trust Deed or the said debentures or any of them, other than by the delivery of same to the plaintiff company for cancellation, and doth order and decree the same accordingly; 15. And this Court doth further declare that in the event of any of the moneys paid by the plaintiff company on account of the said Trust Deed or debentures, whether for principal, interest, or trustees' and inspectors' fees or otherwise, not being repaid to the plaintiff company, then and in that event judgment may be entered against the said defendants John Arbuthnot, James M. Savage, C. C. Michener, Samuel H. Reynolds, William J. Moran, Charles O. Kimball, and Luther D. Wishard, jointly and severally;

Let all further directions and considerations, including subsequent costs and the question of interest on the amounts paid on account of said debentures or damages in lieu thereof, be reserved until after the Registrar has reported.

Before proceeding to deal with the effect of this order it is necessary to give some account of the proceedings of the company subsequently to the general meeting held in accordance with the notice of February 20, 1911.

On the day after the abortive meeting of the shareholders on March 1, 1911, above referred to, a directors' meeting was held and at that meeting the directors belonging to the British Columbia party, viz., the respondents Arbuthnot, Savage and Moran and the said Reynolds (since deceased) resigned office as directors. At a meeting on the following day their resignations were accepted and 4 directors belonging to the New York section were appointed in their place. The new Board of Directors proceeded to carry out the provisions of the resolution passed at the meeting of the shareholders. They affixed the seal of the company to the agreement, issued the debentures, and made all payments thereunder. It appears from the papers in the original appeal that the defendant Hartman (who had taken an active part in bringing about the arrangement) was one of the directors so appointed on March 4, and that he, Michener, Wishard and Robertson (who was a nominee of Michener and qualified by him) were appointed an executive committee with the power to exercise any and all of the powers of the Board of Directors. Wishard became president of the company and Kimball vice-president.

The order of the Judge of first instance purporting to carry into effect the order of His Majesty in Council of August 8, 1917, is dated June 13, 1918. As to much of the relief decreed there is no dispute, but the order of the Judge of first instance was varied in certain respects on appeal to the Court of Appeal in British Columbia, and it is from the order of the latter Court that the present appeal and cross-appeal are brought. These raise only four points for decision and these of a simple character. Hence it will be more convenient to deal clause by clause with the order of January 7, 1916, as modified by the Order in Council and the specific relief decreed thereunder by the Court of Appeal in British Columbia, taking in order the objections raised by the parties in respect to such relief and dealing with them as they arise.

Turning then to clause 1 of the order, their Lordships find that after declaring that the agreement, its adoption, and the subse-

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quent action thereon were *ultra vires* of the plaintiff company and were therefore void it gives the specific relief that the Trust Deed and the debentures secured thereby issued to the various defendants should be by them respectively delivered up to be cancelled. These debentures were made out to bearer, and the obvious object of the relief is to secure the company from the danger of having claims made upon them in future under these invalid documents.

Clause 3 of the order must be looked upon as supplementary to clause 1 and as completing the relief intended to be given thereby. It provides for the case where there is a failure to deliver up some of the debentures. In such case it directs that certain of the defendants (viz., those who were directors at the date of the passing of the Act) should be jointly and severally liable to indemnify the company against claims upon such outstanding debentures.

There is, and could be, no appeal against the relief given by clause 1 inasmuch as it follows precisely the former order of this Board, and, moreover, it is evident that the company is entitled to have these invalid debentures delivered up and cancelled in order to prevent claims not legally sustainable being made against the company in future upon them. The effect of clause 3 is obviously to render the parties there named liable to indemnify the company against any failure to obtain the relief given under clause 1 by reason of the defendants therein named not delivering up the debentures. But here a serious difficulty arises. It happens that 115 of the debentures formerly held by the defendant McGavin had been sold to one Jefferson, who brought an action upon them against the plaintiff company while this litigation was going on and recovered judgment for his full claim against the plaintiff company by reason that at the date when he so recovered judgment the appeal to their Lordships which led to the order of August 8, 1917, had not come on for hearing and the action of the plaintiff company against the present defendants stood dismissed by the Court of Appeal in British Columbia. The plaintiff company brought no appeal from the judgment so obtained by Jefferson and it still stands. A further difficulty arises in respect of these debentures. In the action thus brought by Jefferson in which he succeeded the company made the defendants named in clause

3 third parties, and claimed an indemnity from them substantially on the same grounds as in the present action, and in that action the defendants who had thus been made third parties obtained judgment against the company on this claim with costs, and such judgment still stands.

Under these circumstances the Judge of first instance by his order of June 13, 1918, directed that the defendant McGavin should pay the amount of the judgment, including costs, and that if he failed to do so before a date named the plaintiffs might enter judgment for the amount against the defendants named in the third clause. The Court of Appeal struck out this part of the order, and directed only that the defendants named in the 3rd clause should indemnify the plaintiffs against the judgment obtained by Jefferson. Against this decision of the Court of Appeal both parties appealed to the Board, the plaintiffs contending that the order of the Judge directing the defendants named in clause 3 to pay the amount of the judgment should be restored, and the defendants claiming that the direction as to indemnity given by the Court of Appeal should be omitted. In their Lordships' opinion the contention of the defendants is right. There are questions arising out of the neglect of the company to appeal against the Jefferson judgment, and out of the order made in the action in favour of third parties, which the defendants are entitled to have decided in a proceeding properly raised under the original order of indemnity, and these questions should not be decided against them at the present stage. Their Lordships think, therefore, that the direction of the Court of Appeal as to indemnity should be struck out, but there should be liberty to the plaintiffs to apply to enforce the declaration as to indemnity contained in the third clause so far as regards the Jefferson judgment.

The other points raised on this appeal relate to the relief granted by clauses 2 and 15 of the order of January 7, 1916, as modified by the Order in Council. They relate chiefly to the relief granted in respect of the moneys paid by the company on the coupons of the debentures that had matured prior to September, 1914, the date at which the company wholly ceased to pay on them. This raises a very serious question of law which their Lordships will presently deal with. But before doing so it will be convenient to dispose of a question of fact raised as to the coupons,

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amounting to $36,090, which fell due in September, 1912. These coupons, to the amount of $36,000, were met by an allied company, the Canadian Securities Corp., who purported to purchase them at their face value and charge the plaintiff company in account with the sums so paid, the balance of $90 being paid by the plaintiff company. On taking the account under clause 2 the Judge included the above sum of $36,000 as having been in effect paid by the plaintiff company, but this decision was reversed by the Court of Appeal. The plaintiffs have appealed on this point. Their Lordships are of opinion that although the evidence leaves a considerable amount of obscurity as to the transactions with regard to this coupon, it is substantially established that it was in fact paid by the company by being included in a promissory note on which they are liable, and that accordingly no distinction should be drawn between this coupon and those paid in cash by the company. On this point, therefore, they think the plaintiffs' appeal should be allowed.

Their Lordships now turn to the main questions in dispute in the case, namely, the proper interpretation of the relief directed by clauses 2 and 15 of the order of January 7, 1916.

Taking first clause 2, they find that the language is quite plain and definite. It simply directs that moneys received from the company: "On account of the said Trust Deed or debentures, whether for principal or interest, or trustees' and inspectors' fees or otherwise, shall be repaid by [here naming certain of the defendants] in so far as the said sum or sums have been respectively received by the said defendants."

The defendants there named are the Trust Company and those to whom the debentures were originally issued either directly or through the Vancouver Island Timber Co., Ltd., who received them purely as trustees for four of the other defendants named and who handed them over to their *cestuis que trustent* without ever having had any beneficial interest in them. So clear is the language that no dispute would, their Lordships think, have arisen upon the meaning and effect of this clause had it not been that in the order of January 7, 1916, there was a reservation of the question of interest, and on further consideration the Judge of first instance charged the whole of the repayments directed under this clause with 5% interest from the date of the original payment

by the company. The Court of Appeal in British Columbia has disallowed this interest and their Lordships have to consider which view is the correct one.

Their Lordships are of opinion that the persons directed to make the repayments are charged solely as recipients and in no other character. The peculiarity of this case is that the parties directly guilty of the *ultra vires* acts complained of are substantially the persons bringing the action and seeking to profit by the relief granted. The insufficiency of the notice to the shareholders of the meeting on March 1 rendered that meeting and the resolution passed at it of no legal effect. But had it rested there it would have been merely a nullity. It was the putting that resolution into force and acting upon it that constituted the *ultra vires* acts of the company and all these were done by the directors who belonged to the New York section. The directors, Arbuthnot, Savage, Reynolds and Moran, resigned at the meeting of the Board held on March 2, 1911, and their places were taken by directors belonging to the other party. It was these latter who affixed the seal of the company to the agreement, who issued the debentures and made all the payments on the coupons. Looking at it from the point of view of their legal duty they ought to have taken no action upon the resolution of the meeting until after they had issued a proper notice to the shareholders and held a meeting capable of passing a valid resolution. Seeing the consensus of opinion as to the desirability of the agreement which existed among both the groups that were the principal holders of the shares, it is quite possible that the agreement would have been approved of at such meeting and no question of *ultra vires* could have arisen.

Now it is to be observed that no relief is directed against the persons actually participating in these *ultra vires* acts excepting those who actually received money from the company under the debentures. Take, for example, the defendant Hartman. The papers of the original case shew that he took an active part in the arrangement of the agreement and in the acts of the company on and after March 2, 1911, that is to say, in the sealing of the agreement by the company, the issue of the debentures and the payment of the coupons. He was before the Court as a defendant in the action and yet no specific relief except in the matter of costs

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was directed against him. The consideration of these things, coupled with the language of clause 2, leads their Lordships to the opinion that the defendants there mentioned are treated merely as recipients of money received by them from the company without any legal claim to it existing by reason of the invalidity of the original resolution and of all subsequent steps taken in virtue of it, and that the relief is purely a repayment to the company of moneys so received as being money had and received by them to the use of the company which, therefore, they must repay. The receipt of the moneys must be taken to have been without any actual knowledge that the payments were *ultra vires* and in that sense the moneys were received innocently. It must be remembered that though fraud was charged in the action it was not proved, and there is no finding in the original Order in Council which fastens any charge of impropriety on the persons receiving the payments in respect of their so receiving them.

Under all these circumstances their Lordships are of opinion that the decision of the Court of Appeal of British Columbia discharging the direction of the Judge of first instance as to interest being chargeable on these repayments was correct. There is no doubt that the Courts have power to direct that moneys received from a company under a claim which is invalid by reason that the claim was *ultra vires* should be repaid with interest, but there is no fixed rule that such should be the case. The directors of the company have been guilty of great delay in impeaching the validity of the debentures and of continuing to act under what they must be taken to have known to be an invalid resolution.

Those who were actually guilty of the issue of the debentures and maintaining their credit by payment of the coupons are not made liable under the order, and their Lordships are of opinion that it would be unfair to require the recipients under clause 2 to do anything other than repay the money actually received as they would have been ordered to do in a common law action. On the question of interest, therefore, the plaintiffs' appeal fails.

There remains the consideration of clause 15. The moneys it refers to are described in exactly the same language as is used in clause 2, except that in clause 2 they are specifically restricted to those that have been received respectively by the persons therein named, and it would be contrary to the sound principles of

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construction to hold that the words had any other or different meaning in this clause to that which they have in the earlier one. With regard to such moneys the relief directed by clause 15 is that the defendants therein named should jointly and severally be liable to make up to the company any failure in the performance of clause 2, and as their Lordships have already interpreted the relief directed by clause 2, there is no need further to discuss clause 15. If suffices to say that if and so far as the company do not obtain the repayments directed by clause 2, they can recover the deficiency in the manner directed by clause 15.

But there is no such restriction in clause 15, therefore with regard to the further question raised by the defendants' cross-appeal on clause 15, namely, that the liability imposed by the clause is limited to the moneys ordered to be repaid under the second clause, their Lordships agree with the construction put upon the clause by both Courts in British Columbia and hold that this part of the cross-appeal is unfounded.

Their Lordships are therefore of opinion that the judgment of the Court of Appeal of British Columbia should be varied in respect of the sum of $36,000 paid under coupon No. 3 of the debentures and the specific order as to the Jefferson judgment in the manner above directed, and that as both appeals have partly succeeded and partly failed, there should be no order as to costs, and they will humbly advise His Majesty accordingly.

Judgment accordingly.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 21, 1920.

MORTGAGE (§ VI A—70)—LAND TITLES ACT (ALTA.)—FORECLOSURE—EXTINGUISHMENT OF DEBT—EXPRESS APPLICATION TO PURCHASE—EXECUTION FOR BALANCE.

The Land Titles Act (Alta.), sec. 62*b*, as amended by 9 Geo. V. 1919, ch. 37, provides that an order for foreclosure whether made by a Judge or by the registrar shall operate as a full satisfaction of the debt secured by the mortgage. An order made upon an express application to be permitted to purchase for an agreed amount and for a vesting order and for leave to issue execution for the balance due, and where this is clearly intended to be granted by the order made is not within the above amendment.

[*Security Trust Co. Ltd.* v. *Sayre and Gilfoy* (1919), 49 D.L.R. 187, affirmed by an equally divided Court. See Annotation, Foreclosing Mortgage Made Under Torrens System, 14 D.L.R. 301.]

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Davies, C.J.

APPEAL by defendants from a judgment of the Appellate Division of the Supreme Court of Alberta (1919), 49 D.L.R. 187, 15 Alta. L.R. 17, reversing the judgment of Stuart, J., which allowed an appeal from an order of the Master in Chambers at Calgary. Affirmed, the Court being equally divided.

A. H. Clarke, K.C., for appellants.

H. P. O. Savary, K.C., for respondents.

DAVIES, C.J.:—For the reasons given by Harvey, C.J., of the Appellate Division of Alberta (1919), 49 D.L.R. 187, 15 Alta. L.R. 17, in delivering the judgment of that Court now in appeal in this action, and also for the reasons stated by my brother Idington, I am of the opinion that this appeal should be dismissed.

Personally I should have preferred that the Master's order in question herein should have been set aside altogether and a proceeding *de novo* directed. But, as I think the ends of justice can be fully worked out between the parties under the order as construed by the Appellate Division and the disposition they have made of the action, with which construction and disposition I am quite satisfied, I will not press this view, more especially as it relates largely to a matter of procedure and practice.

As to the limitation of time of two weeks, stated in Harvey, C.J.'s reasons, within which the defendants might file a demand for an offer of the land for sale by tender, that limitation must, of course, be construed as running from the day of the judgment of this Court and, I think, under the circumstances, might well be extended to four weeks.

As this Court is equally divided in opinion as to allowing or dismissing the appeal, there will be no costs here.

Idington, J.

IDINGTON, J.:—The Master's order in question herein cannot, in my opinion, be treated as an order of foreclosure.

It is, by its terms, though very inaptly using the word "foreclosure" clearly intended to be a vesting order carrying out the sale to the mortgagee, in like manner as if to a stranger, and permitting thereupon the mortgagee to proceed upon the covenant to realise the balance due after confirmation of said sale.

Who has ever seen a foreclosure decree so framed? I venture to think that no one can produce such a precedent in a foreclosure proceeding.

The mortgagee has always had the right in such proceedings to abandon his foreclosure and proceed upon the covenant if ready and able to return to the mortgagor his property upon payment of the amount due.

Hence the legislation of the Alberta Legislature of 9 Geo. V., 1919, ch. 37, must, by the express language using the word "foreclosure" be confined to the plain ordinary meaning that is well understood by those conversant with it as a legal term.

I am sorry if anyone has been misled by reference to a dictionary instead of the masters of the English law on whom I relied, and cited in the case of *Mutual Life Ass'ce Co.* v. *Douglas* (1918), 44 D.L.R. 115, 57 Can. S.C.R. 243.

The amending statute I cite clearly obliterates that option of a mortgagee after a final order of foreclosure and possibly effects a needed reform in our law.

But the Legislature does not touch, or pretend to touch, the undoubted power of the Court, according to long standing jurisprudence, well expressed by that eminent Judge, Lord Hatherly, in the case of *Tennant* v. *Trenchard* (1869), L.R. 4 Ch. 537, at 547, to sanction a sale to a trustee, which a mortgagee is, in conducting a sale under a mortgage. Hence the exercise of that power in question herein, cannot properly be held to have been interfered with by the enactment above referred to. Such a sale as made in the due exercise of such power cannot mean a foreclosure.

The things covered by the term "foreclosure" extending over the whole, and a sale possibly only of a part, are entirely different.

If the Legislature intended to destroy the power of a Court to sell to the mortgagee for part of the debt the land mortgaged, it should have said so. I am not concerned in that regard as to what is done. There may be good reasons for its doing so. Indeed, conceivably good reasons therefor might exist in one country and yet doing so be imprudent in another.

I am unable, for the foregoing reasons, to maintain a reversal of the judgment appealed from.

I should have preferred, partly in accord with McCarthy, J.'s opinion, 49 D.L.R. 187, 15 Alta. L.R. 17, to have seen the whole order set aside and a proceeding *de novo* directed, within the

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undoubted rights of the Court, to sell to a mortgagee. But for us to interfere therewith would savour too much of dictating in mere matters of procedure.

I think the appeal should be dismissed with costs.

DUFF, J., would allow the appeal.

ANGLIN, J.:—The question presented by this appeal is whether, in proceedings instituted to enforce a mortgage of property in that Province, the law of Alberta enables its Courts to order the sale of the mortgaged land to the mortgagee as absolute and irredeemable purchaser for a price less than the amount of his claim and at the same time he be at liberty to issue an execution against the mortgagor for the amount by which the mortgage debt exceeds such purchase-price. Such an order was made by the Master in Chambers in this action on May 28, 1919.

The circumstances out of which the question above stated arises are fully stated in the judgment of Stuart, J., holding, on appeal from the Master, that such an order cannot be made; that the Master's order was a foreclosure within sec. 62*b* of the Land Titles Act, 1906, Alta. Stats., ch. 24, as amended by 9 Geo. V., 1919, ch. 37; that the mortgage debt was thereby extinguished; and that the provision of the order permitting the issue of execution must therefore be set aside and vacated—with the result that the mortgagee would retain the property, but his mortgage debt would be wholly extinguished. This judgment was reversed in the Appellate Division, 49 D.L.R. 187, 15 Alta. L.R. 17, Harvey, C.J., and Simmons and McCarthy, JJ., dissenting, and the Master's order was restored, but with a provision for the taking of tenders for the purchase of the property and confirming the sale to the mortgagee if no higher tender than the price at which he was allowed to purchase under the Master's order should be received and directing that, if a higher tender should be received and accepted and payment made in accordance therewith, the mortgagee should transfer the land to the person making such tender and should give credit for the amount thereof on his mortgage claim.

We are informed by Stuart, J., that the practice followed by the Master has grown up and "been in vogue for some time" as the result of an amendment to sec. 62 of the Land Titles Act, 6 Geo. V., ch. 3, sec. 15 (4), made in 1916, adding there to the following, as sub-sec. (2):—

(2) Where any action or proceeding has before the date of the passing of this sub-section been taken or shall thereafter be taken in any Court either under the provisions of this section or to enforce the observance of the covenants, agreements, stipulations or conditions contained in any agreement for the sale of any land, and personal judgment has been or shall be obtained therein, no execution shall issue thereon until sale of the land mortgaged or encumbered or agreed to be sold has been had or foreclosure ordered and levy shall then be made only for the amount of the judgment or mortgage debt remaining unsatisfied with costs.

It is not surprising that such a statutory provision should have led to some anomalies in practice. Just what is meant by "the amount of the judgment or mortgage debt remaining unsatisfied" after foreclosure has been ordered it is a little difficult for the legal mind to appreciate. Sec. 62 was repealed in 1919, 9 Geo. V., ch. 37, sec. 1, and the following substituted:—

62. Proceedings for recovery of money secured by a mortgage or encumbrance, or to enforce any provision thereof, or sale, redemption on foreclosure proceedings with respect to mortgaged or encumbered land may be taken in any Court of competent jurisdiction in accordance with the existing practice and procedure thereof.

(2) No execution to enforce a judgment upon the personal covenant contained in a mortgage, encumbrance or agreement of sale on or of land or on any security thereof shall issue or be proceeded with until sale of land, and levy shall then only be made for the amount of the said moneys remaining unpaid after the due application of the purchase moneys received at the said sale.

. . . . .

And the following section was also added, by sec. 4, as sec. 62*b*:

62*b*. The effect of an order for foreclosure of a mortgage or encumbrance heretofore or hereafter made by any Court or Judge or by any Registrar shall be to vest the title of the land affected thereby in the mortgagee or encumbrancee free from all right and equity of redemption on the part of the owner, mortgagor or encumbrancer or any person claiming through or under him subsequently to the mortgage or encumbrance, and shall from and after the date of the passing of this section operate as full satisfaction of the debt secured by such mortgage or encumbrance. Such mortgagee or encumbrancee shall be deemed a transferee of the land and become the owner thereof and be entitled to receive a certificate of title for the same,

obviously, as Harvey, C.J., points out, to meet the decision of this Court in *Mutual Life Assce. Co.* v. *Douglas*, 44 D.L.R. 115, 57 Can. S.C.R. 243.

These amendments became effective on May 17, 1919, eleven days before the order of the Master in Chambers, which is attacked, was made.

It is of the essence of a completed foreclosure that the mortgagee cannot thereafter proceed to enforce the mortgagor's

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personal liability for the mortgage debt without opening the foreclosure, but that, so long as he is in a position to reconvey the mortgaged property on payment of his claim he may so proceed, thereby, however, automatically opening the foreclosure and affording the mortgagee an opportunity to redeem as of right; and Courts of equity have maintained jurisdiction to grant the mortgagor a corresponding right, where special circumstances warrant such a course, on terms which would protect the mortgagee. "Foreclosure" under the Alberta Land Titles Act was subject to these incidents prior to 1919. *Mutual Life Ass'ce Co.* v. *Douglas*, 44 D.L.R. 115, 57 Can. S.C.R. 243. Under the amendment of that year, 9-10 Geo. V., ch. 37, however, they are done away with and "foreclosure" in Alberta now completely extinguishes the mortgage debt and all rights of the mortgagor in the pledge. The order of the Master in Chambers in this case, on the contrary, purports in express terms to keep alive and enforce recovery of the greater part of the mortgage debt and at the same time to vest the mortgaged property in the mortgagee as absolute owner in satisfaction not of his entire claim but of less than one-third of it. I agree with Harvey, C.J., and Simmons, J., that such an order was not, and was not intended to operate as, a "foreclosure" as that term must now be understood in Alberta and that it therefore did not operate to extinguish the personal liability of the mortgagor (see 49 D.L.R. 187). Neither was it meant to have effect as a foreclosure as understood in English equity jurisprudence. Moreover, if the provision of the order directing a sale to the mortgagee as an irredeemable purchaser at $6,500, and that directing the issue of execution for the balance of the mortgage debt are so incompatible one with the other that both cannot stand, the proper course to rectify the error committed in making such an order is, with respect, not to strike out one of its provisions and allow the other to stand. Inasmuch as the order approving of the sale to the mortgagee at the price fixed was sought and accepted only on the footing that it should contain the additional provision for the recovery of the balance of the mortgage debt and the Master never intended to make an order in any other terms or on any other condition—never intended that the mortgagee's claim should be extinguished except as to the $6,500 for which he had offered to take the land in satisfaction—the order should be vacated as a whole unless it

can be sustained as a whole. The mortgagor cannot insist on that part of it standing which suits his purposes minus the accompanying provision without which it was neither sought nor granted and would not have been taken. *G.T.P.R. Co.* v. *Fort William Landowners*, 13 Can. Ry. Cas. 187, [1912] A.C. 224, at 229. If not entitled to maintain the order as it stands the respondent asks that it should be set aside in *toto;* and to that relief it is entitled.

But is the order as made sustainable? There are no doubt authorities for the proposition that the Court will, under special circumstances, sanction the mortgagee becoming the purchaser of the mortgaged premises at a Court sale. In addition to *Tennant* v. *Trenchard* L.R. 4 Ch. 537, at 547, and *Hutton* v. *Justin* (1901), 2 O.L.R. 713, cited by the respondent, reference may be had to *The Wilsons* (1841), 1 W. Rob. 172, and *Ex parte Marsh* (1815), 1 Madd. 148, cited in Fisher's Law of Mortgages, Can. ed., 1910, p. 1006, par. 2020. When the mortgagee is allowed to bid the conduct of the sale is usually transferred to some other interested party. *Domville* v. *Berrington* (1837), 2 Y. & C. 723. *Gowland* v. *Garbutt* (1867), 13 Gr. 578, at p. 580, cited by Mr. Clarke, is also an instance where this was done. But in Ireland a contrary course has sometimes been taken and the mortgagee allowed to bid, though retaining the conduct of the sale, where the property was clearly insufficient to pay the debt. *Steele* v. *Devonport* (1847), 11 Ir. Eq. R. 339; *Spaight* v. *Patierson* (1846), 9 Ir. Eq. R. 149. These cases may be readily understood when it is borne in mind that foreclosure is the primary remedy which the law gives to the mortgagee, the right to a sale being statutory and the conduct of the sale discretionary. *Hewitt* v. *Nanson* (1859), 28 L.J. (Ch.) 49. Where a sale is ordered and the mortgagor is not financially good for any possible deficiency it is only reasonable to permit the mortgagee to protect himself as far as possible by giving him leave to bid at the sale, and, if necessary, to become a purchaser. But no case is reported, so far as I have been able to discover, where a mortgagee has been allowed to acquire an absolute title to the land as a purchaser and thereafter to maintain an action on the personal covenant of his mortgagor for the amount by which his mortgage claim exceeded the price at which he purchased. A passage in the judgment of Moss, J.A., in *Hutton* v. *Justin*, 2 O.L.R., at p. 716, may, however, be referred to.

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While the mortgagor's covenant for payment of the mortgage debt may be absolute at law, in equity the right to enforce it is subject to the condition that the mortgagee shall not be disabled through any act of his own, Ashburner on Mortgages, 2nd ed., p. 683, not authorised by the mortgagor from restoring the estate. *Palmer* v. *Hendrie* (1860), 27 Beav. 349, at p. 351, 54 E.R. 397; *Kinnaird* v. *Trollope* (1888), 39 Ch. D. 636, at pp. 641-2. A mortgagee asserting absolute ownership of the mortgaged property cannot sue on the mortgagor's covenant. In equity, speaking generally, the rights of payment and redemption are reciprocal.

Even where the mortgagee claims to have acquired, in his character as such, absolute ownership of the property under a title paramount, he cannot enforce the mortgagor's covenant except on the terms that he should submit to redemption. An excellent illustration of this proposition is afforded by *Parkinson* v. *Higgins* (1875), 37 U.C.Q.B. 308, where it was held on demurrer that a mortgagee, who had purchased at a Court sale, which would have conferred on a stranger so purchasing a paramount and absolute title, "could not sue for the mortgage money, while asserting his right to the property mortgaged wholly independent of any title derived from the mortgagor, and without any right to redeem," and *Parkinson* v. *Higgins* (1876), 40 U.C.Q.B. 274, where the same mortgagee on pleading by way of equitable replication that he had acquired title to the property solely to protect his interests and that he had offered and was always willing to submit to redemption on payment of the mortgage moneys and the sum he had been obliged to expend to save the property from sale to a stranger, who would acquire paramount title, was held entitled to maintain his action on the mortgagor's covenant.

In my opinion the doctrines of equity in regard to mortgages preclude the making of an order which purports *uno flatu* to vest the mortgaged property in the mortgagee as purchaser free from all equity of redemption and to enforce the personal liability of the mortgagor for some part of the mortgage debt. A mortgagee cannot have both the mortgaged property and the mortgage money.

I find nothing in the Alberta statutory law which warrants ascribing to the Legislature the intention of making such a substantial further inroad upon the system of mortgage law which has grown up under the fostering care of the Chancery Courts,

as the order of the Master in Chambers implies. Moreover, that order seems to involve an evasion of sub-sec. 2 of sec. 62 and probably also of sec. 62*b* of the Land Titles Act. For relief from whatever hardship is entailed by the undoubted deprivation of their contractual rights effected by the former subsection mortgagees must look to the Legislature, not to the Courts.

The appeal, in my opinion, should also succeed on the ground that there has not been a sale of the land within the meaning of sub-sec. 2 of sec. 62 of the Land Titles Act, and that the mortgagee is therefore prohibited by that sub-section from issuing execution under his judgment on the covenant. Sale in English law generally imports an exchange of some article of property for money. *Coats* v. *Inland Revenue Commissioners*, [1897] 1 Q.B. 778, at p. 783; Benjamin on Sale, 5th ed., at pp. 2, 3. Here the transaction is not of that character. It is an exchange or barter of the mortgaged property for the release or extinguishment by the mortgagee of a portion of the debt owed him by the mortgagor. That, in my opinion, is not a "sale" within the meaning of that word as used in sub-sec. 2 of sec. 62. It is there used in its general meaning in English law. Moreover, I am satisfied that the sale contemplated by the statute is a sale to a stranger not to the mortgagee.

For these reasons I would allow this appeal and set aside the order of the Master in Chambers. The land titles register must be rectified so as to restore the title to the position in which it stood before the Master's order was made, and the certificate of title issued to the respondent mortgagee must be delivered up to the registrar and cancelled.

The respondents were obliged to appeal from the order of Stuart, J., which cut off all remedy on the mortgagor's covenant. They may well therefore be entitled to add all their costs down to and exclusive of the judgment of the Appellate Division to the mortgage debt. But I think the appellant, in view of the respondents' denial of his right to redeem, *Kinnaird* v. *Trollope* (1889), 42 Ch. D. 610, at p. 619; *Hall* v. *Heward* (1886), 32 Ch. D. 430, is entitled to his costs of the appeal to this Court which he was obliged to bring in order to have the order of the Master in Chambers, upheld by the Appellate Division, set aside. These latter costs should be set off against and deducted from the mortgage debt.

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Brodeur, J.

BRODEUR, J.:—The question involved in this appeal is largely a question of practice and procedure in a mortgage action. Stuart, J., whose judgment the appellants seek to restore, declares himself that the practice which was followed by the Master has been in vogue for some time in order to work out in some form the results which should follow upon the Moratorium Act, 6 Geo. V. (Alta.), 1916, ch. 6, and that practice seemed to have been approved tacitly, if not formally, by judicial authority. Some questions of principle might incidentally be raised for the solution of this question of procedure or practice.

Although we have an appellate jurisdiction, this Court does not exercise it in matters relating to the practice and procedure of the Courts below, except under special circumstances.

There is nothing which has been disclosed in this case which would justify us in my mind to interfere with the judgment appealed from. I am satisfied that under the order as framed by the Appellate Division, 49 D.L.R. 187, 15 Alta. L.R. 17, the rights of the mortgagor will be duly safeguarded.

The appeal should be dismissed with costs.

Mignault, J.

MIGNAULT, J.:—The facts of this case are fully explained in the judgment of the Court below, 49 D.L.R. 187, 15 Alta. L.R. 17, and need not be repeated here. The question chiefly discussed in these judgments was whether the Master's order was such an order for foreclosure as would, under the amendment to the Land Titles Act, assented to on April 17, 1919, and which became operative a month later, 9 Geo. V., 1919 (Alta.), ch. 37, sec. 4, deprive the respondent of its right to recover the balance of its claim, after deducting the sum for which the mortgaged property was sold to the respondent.

The material portion of the Master's order, granted by him after hearing all the parties, and after proof by affidavit that the value of the mortgaged property did not exceed $6,500, is as follows:—

It is ordered that the sale of the lands and premises mentioned in the statements of claim in the above actions to the plaintiffs for the price or sum of $6,500.00 be and the same is hereby approved and confirmed:

It is further ordered that the payment into Court by the plaintiffs of the said sum of $6,500.00, the purchase price of the said lands, be and the same is hereby dispensed with:

It is further ordered that the above named defendants, and each of them, and all those claiming by, through or under the said defendants or either of

them, do hereby stand absolutely and irrevocably barred and foreclosed of and from all right, title or equity of redemption in and to the said mortgage lands in the pleadings mentioned, and hereinafter more particularly set forth:

And it is further ordered that the said lands and premises, being: Lots Twenty-four (24) and Twenty-five (25) in Block Fifty-six (56), according to a plan of part of the City of Calgary of record in the Land Titles Office for the South Alberta Land Registration District as Plan "A" Calgary be vested in the plaintiffs: The Security Trust Company, Limited, or the City of Calgary, in the Province of Alberta, and William Murray Connacher, of the City of Calgary, aforesaid, for an estate in fee simple, subject to the reservations contained in the existing Certificate of Title, and that the Registrar of Land Titles for the South Alberta Land Registration District do upon production of this order or a certified copy hereof cancel the existing Certificate of Title and issue a new Certificate of Title in the name of the said The Security Trust Company Limited and William Murray Connacher, free and clear of all encumbrances subsequent to and inclusive of the plaintiff's mortgage sued on herein;

And it appearing and having been proved from said affidavits filed that there is due and owing to the plaintiffs on account of the mortgage which forms the subject matter of the above actions the sum of $20,564.31, which amount exceeds the sum of $6,500, the amount for which the said lands have been purchased by the plaintiff, by the sum of $14,064.31.

It is further ordered that the plaintiffs have leave and liberty is hereby given to the plaintiffs to issue execution against the defendants for the said sum of $14,064.31, being the balance of their claim, and that judgment be entered accordingly for the said sum of $14,064.31 with interest and costs.

The amendment, 9 Geo. V., 1919, ch. 37, sec. 4, referred to in the judgment below is in the following terms: (See *ante*, p. 467).

I cannot look on the Master's order in this case as being purely and simply "an order for foreclosure." It is much more than that. It provides for the sale of the mortgaged property to the respondent for $6,500, dispenses the respondent from paying the purchase-price into Court, for its mortgage debt exceeded $20,000, forecloses the appellant of all right, title or equity of redemption in and to the mortgaged lands, and gives leave to the respondent to issue execution against the appellant for the balance of its claim. The trial Judge ordered that the part of the Master's order permitting execution to issue be struck out and replaced by an order preventing execution. He thus applied sec. 62*b* to the order, as if this order had been an order for foreclosure pure and simple, with the effect that the respondent, which never intended to take the property in satisfaction of its claim, is now held to have done so.

With all possible deference, I cannot think that the trial Judge should have disregarded, nay more, have struck out the provisions

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of the Master's order which prevented it from being an order for foreclosure pure and simple to which sec. 62*b* would apply.

Harvey, C.J., 49 D.L.R. 187, 15 Alta. L.R. 17, shews what the purpose of the amendment was. The Legislature was moved to adopt it by reason of the decision of this Court in *Mutual Life Ass'ce Co.* v. *Dougias*, 44 D.L.R. 115, 57 Can. S.C.R. 243. The Appellate Division of Alberta had held that a mortgagee who took a final order of foreclosure, lost his rights on the covenant and that the debt was extinguished. This Court, on the contrary, decided that the mortgagee could sue on the covenant, notwithstanding the foreclosure, provided he was in position to reconvey the mortgaged property. Harvey, C.J., says (49 D.L.R., at 191): "It seems abundantly clear that it was intended to declare the law for this Province to be henceforth what the Provincial Court had held it to be, and what the Supreme Court of Canada declared it was not."

I certainly cannot say that Harvey, C.J., has wrongly stated the intention of the 1919 amendment. But, on the construction of the amendment itself, my opinion is that it would, to say the least, be a misdescription to call the Master's order, with its provisions for a sale to the respondent and for the latter s right to issue execution for the balance of its claim, a final order for foreclosure within the meaning of sec. 62*b*, notwithstanding that the appellant is in fact declared foreclosed of all right, title or equity of redemption. Subject to what I will say, as to the point raised by my brother Anglin, the effect of a sale of the mortgaged property under sub-sec. 2 of sec. 62 would be to deprive the mortgagor of all right in the property, and he would still be liable for the moneys remaining unpaid after due application of the purchase-price. Here the property was declared to be sold to the appellant and leave was granted him to issue execution for the balance of his claim, and looking at the whole order, I am of opinion that it is not the order for foreclosure contemplated by the amendment.

I now come to the point raised by my brother Anglin, that the mortgagee, even under the special legislation of Alberta, cannot be authorised to purchase the property, and, while retaining it, to issue execution against the mortgagor for the balance of the mortgage debt, after deducting the price for which he has purchased the mortgaged property. For that reason, my brother

concludes that the Master's order should be entirely set aside as containing contradictory and irreconcilable provisions.

After due consideration I think the point well taken, for it is an undoubted rule of equity that the mortgagee cannot have both the mortgaged property and the mortgage debt. While no doubt the mortgagee, in a proper case and with sufficient safeguards, may be allowed to bid at a Court sale of the mortgaged property, 21 Hals. p. 257, para. 458, note(e); Fisher, Law of Mortgages, 1910, Can. Notes. ed., para. 2020, I can find no authority for the proposition that after buying in the property himself, he can, while retaining it, sue for the balance of the mortgage debt. There is authority to the contrary, in the judgment of Hagarty, C.J., in *Parkinson* v. *Higgins*, 37 U.C.Q.B. 308, at p. 318, cited by my brother Anglin, where the Chief Justice says: "On the whole, my conclusion is, that the mortgagee cannot sue for his mortgage money, while in the same breath he asserts that the estate is wholly his own, and that he holds it by title paramount, and wholly independent of any title derived from the mortgagor."

The new legislation of Alberta does not, reasonably construed, contradict this statement of the law. On the contrary, sec. 62*b* shews that the mortgagee cannot sue on the covenant when he has obtained an order for foreclosure against the mortgagor, and this provision would be easily evaded if the mortgagee who has bought the property even with the leave of the Court could retain it and sue for the balance of the mortgage debt. In the absence of any authority I would not now say that he can do so.

I would allow the appeal and set aside the Master's order, with costs as stated in the opinion of my brother Anglin.

Appeal dismissed, by an equally divided Court.

PROULX v. RIVEST.

QUE.
C. R.

Quebec Court of Review, Demers, Panneton and Lorimier, JJ. February 28, 1920.

HUSBAND AND WIFE (§ II A—50)—SEPARATION AGREEMENT—PARTIES DOMICILED IN ONTARIO—EFFECT ON SUBSEQUENTLY ACQUIRED PROPERTY IN QUEBEC.

A separation agreement, which is equivalent to a separation from bed and board and a separation as to property, made between a husband and wife domiciled in Ontario at the time of making such agreement, takes away any right which the wife may have had in her husband's property under her contract of marriage, and especially in property acquired by the husband after such separation.

[See Annotation on Property Rights between Husband and Wife, etc., 13 D.L.R. 824.]

QUE.
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PROULX
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Statement.

THE judgment of the Superior Court of the District of Ottawa, which is set aside, was pronounced by Chauvin, J., on March 8, 1919.

The plaintiff brought a petitory action claiming to be the owner of real property situate in the city of Hull, Province of Quebec. She stated the following facts:—

That on September 8, 1913, Urgel Martin acquired from Alfred Bernier a property situated in the city of Hull, in the Province of Quebec, by deed passed before F. A. Labelle, notary; that the said Martin died in the village of Eastview, county of Carleton, Province of Ontario; on or about January 5, 1918, and that by his will, December 18, 1917, he left the plaintiff, his niece, the sole heir of all his property; that the said Martin and the said defendant were married at Ottawa, Province of Ontario, where they had transferred their domicile, and where they have since lived; that they had previously made a contract of marriage, on July 30, 1904, in the city of Hull, Province of Quebec; that under the said contract the defendant claims to be the owner of the said real property; that prior to acquiring the said real property, which was devised to the plaintiff, the said Martin and the said defendant made a legal agreement, dated December 28, 1910, by which they were separated as to bed and board and as to property; that the said agreement, made at their place of domicile, in Ontario, is equivalent to a separation from bed and board and a separation as to goods pronounced by the Court, and makes both parties separate as to property, and that the said agreement, made in accordance with the law of Ontario, to which the parties were subject, caused the defendant to lose all the rights which might result from the said contract of marriage; that the defendant's contract of marriage conferred on her no title to the said real property, since the said Martin acquired it subsequently to the separation from bed and board and as to goods entered into between them on December 28, 1910, and that the defendant has actually no title or right to the said real property, owned by the plaintiff.

The defendant inscribes in law against this defence and says that there is no legal connection between the parties, and that the allegations in the declaration (statement of claim) do not justify, in law, the prayer of the petition: (a) because the provisions

of the said contract of marriage are irrevocable and the said agreement entered into between them to annul the condition of such contract of marriage is illegal and void; (b) because the change of domicile of the husband and wife at the date of the said agreement, made in the Province of Ontario, has not the effect of making a contract of marriage, governed by our laws, subject to modifications which might exist outside the Province; (c) because the said agreement is absolutely void as being contrary to public order; (d) because it appears by the action of the plaintiff that the defendant is universal legatee of her husband by a *donatio mortis causa* contained in a contract of marriage and that the defendant could not legally renounce this inheritance before it commenced; (e) because the will that the plaintiff sets up could not confer on her rights which would have precedence over an *institution contractuelle** of the defendant; (f) that the defendant's rights have been recognised as valid by the formalities of registration.

The Superior Court maintained the inscription in law.

J. A. Parent, K.C., for appellant.

H. A. Fortier, K.C., for defendant.

The judgment of the Superior Court is set aside for the following reasons:

Considering that the declaration alleges, in substance, that, under the law of Ontario, the proper domicile of the married couple, the latter made a deed which is equivalent to a separation from bed and board, and a separation as to property; that the declaration also alleges that the real property in question in this case was acquired in the Province of Quebec since such separation.

In view of article 6 of the Civil Code of Quebec;

Considering that there is error in the judgment appealed from, and, proceeding to render the judgment which the Court of first instance ought to have rendered:

Maintains the said appeal, reverses the judgment appealed from and sets aside the defendant's inscription in law with costs.

Appeal allowed.

*An irrevocable conveyance in marriage contract of the whole or part of a succession in favour of the spouses or of one of them and of the children to be born of the marriage.

SASK.

C. A.

BRODER v. RINK, and McRADU.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 23, 1920.

SPECIFIC PERFORMANCE (§ I A—12)—SALE OF LAND—DEFAULT IN PAYMENT —TAX SALE—LAND VESTED IN PLAINTIFF'S WIFE—INABILITY TO CONVEY.

It is established law that in order to succeed in an action for specific performance of an agreement for the sale of land, a vendor must satisfy the Court that he is able and willing to convey the property sold on receipt of the purchase price.

[*Lebel* v. *Dobbie* (1919), 15 Alta. L.R. 126, distinguished; *Landes* v. *Kusch* (1915), 24 D.L.R. 136, 8 S.L.R. 32; *Mutual Life Ass'ce Co.* v. *Douglas* (1918), 44 D.L.R. 115, 57 Can. S.C.R. 243; *Security Trust Co.* v. *Sayre and Gilfoy* (1920), 56 D.L.R. *ante* p. 463, referred to.]

[Statement. APPEAL by plaintiff from the trial judgment in an action for specific performance of an agreement for the purchase of land. Affirmed.

F. W. Turnbull, for appellant.

J. E. Doerr, for respondent Chiricac McRadu.

E. S. Williams, for respondent Toma McRadu.

W. H. McEwen, for respondent Rink.

The judgment of the Court was delivered by

Lamont, J.A. LAMONT, J.A.:—This is an action for specific performance. By an agreement in writing bearing date May 16, 1912, the plaintiff agreed to sell to Toader Pahomi Lots 5 and 6 in Block 29, Broder's Annex, Regina, for $1,500, payable in instalments. By an agreement in writing bearing date August 20, 1912, the said Pahomi agreed to sell to the defendants the said lots for $2,450, payable $100 cash, and the balance in instalments. On December 20 of the same year, Pahomi, in consideration of $2,350, released and quitted claim to the plaintiff, who was still the registered owner of the lots, all his right, title and interest therein. On January 19, 1914, the defendant Toma McRadu paid the plaintiff the sum of $519.48 on account of the purchase price of the lots. The defendants failed to pay the taxes which in their agreement of sale with Pahomi they had agreed to pay, and in November, 1916, the lots were offered for sale for taxes. The plaintiff redeemed Lot 5. As to Lot 6, which had a house thereon, the trial Judge found as a fact that it had been purchased by the plaintiff at the tax sale in the name of his wife. The evidence amply supports the finding of the trial Judge. In March, 1917, the plaintiff brought this action for the balance of the purchase-money due under the agreement of August 20, 1912, between Pahomi and the defendants.

In his statement of claim the plaintiff alleges as follows: "The plaintiff is the registered owner of the said land and has been and is now ready and willing to carry out said contract."

After this action was brought, but before trial, which did not take place until June, 1920, the plaintiff instructed his solicitors to have the tax sale of Lot 6 confirmed by the Court in the name of his wife. This was done, and in October, 1919, the plaintiff's wife became the registered owner of the lot. Subsequently she sold and transferred the same to a third party.

In their pleadings the defendants deny the readiness and willingness of the plaintiff to convey. The trial Judge gave judgment in favour of the defendants on two grounds: (1) that it had not been satisfactorily established that Pahomi had given the plaintiff a legal assignment of his rights under the agreement, and that, in the absence of such assignment, the plaintiff could not succeed without making Pahomi a party to the action; and (2) that the plaintiff having bought Lot 6 at the tax sale, and having subsequently put it out of his power to convey the lot to the defendants, was not entitled to collect from them the purchase price. From that judgment the plaintiff now appeals.

In the view I take of this case, it is only necessary for me to deal with the second of the above grounds.

I think it is established law that in order to succeed in an action for specific performance of an agreement for the sale of land a vendor must, in general, allege in his pleadings and establish to the satisfaction of the Court that he is able and willing to convey the property sold on receipt of the purchase price. *Landes* v. *Kusch* (1915), 24 D.L.R. 136, 8 S.L.R. 32.

To this general rule counsel for the plaintiff contends there is an exception, and that is, where the property has been lost through the default of the purchaser and without default on the part of the vendor, and he cited the recent case of *Lebel* v. *Dobbie* (1919), 15 Alta. L.R. 126. In that case, the plaintiff sold two lots in the town of Pincher Creek to the defendant under an agreement of sale, which provided that the defendant would pay the taxes. He failed to do so, with the result that the lots were forfeited for non-payment of taxes and the town became the registered owner thereof. The vendor sued for the balance of the purchase price. The defendant resisted payment on the ground that, as the

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plaintiff could not make title, he could not recover the purchase money. The Court, however, held that the plaintiff was entitled to succeed as the defendant could not set up the result of his own default as a defence.

Whether or not that case was correctly decided, it is not necessary here to consider. I do not suggest that it was not, for I have not considered whether the failure of a purchaser to pay the taxes carries with it the results therein set out, or whether it exposes him merely to an action for damages for breach of covenant and the other remedies expressly provided for in the agreement of sale. As Mr. Doerr pointed out in his able argument, there is a clear distinction between the *Lebel* case, *supra*, and the present case. In the *Lebel* case, the failure of the purchaser to pay the taxes resulted in the title passing out of the hands of the vendor and into the hands of the town, while in the present case, the failure of the defendants to pay the taxes had no such result. After the tax sale in question the plaintiff was still the owner of both lots, as the trial Judge has found, and he could have made title to the defendants had he so desired. In fact, in his statement of claim he alleges both his ability and willingness to do so.

Another argument advanced by counsel for the plaintiff was, that the plaintiff, in buying Lot 6 at the tax sale, stood in the same position as a second mortgagee buying the mortgaged property at a sale held under the first mortgage. The taxes, he claimed, were a first encumbrance, and plaintiff's claim as an unpaid vendor was analogous to that of a subsequent encumbrancer, and he cited Falconbridge's Law of Mortgages, 1919, at p. 675, where the author says:

> A subsequent encumbrancer, whether his mortgage is in the ordinary form or by way of trust for sale, may in the absence of fraud purchase from the first mortgagee, and the subsequent encumbrancer so purchasing will acquire as absolute a title to the lands as a stranger would, and where a second mortgagee purchases under the power of sale contained in the first mortgage, he is notwithstanding such purchase entitled to collect, by virtue of the covenant contained in the second mortgage, the principal and interest due under the second mortgage.

In my opinion there is no analogy between a vendor buying in his property at a tax sale and a second mortgagee buying mortgaged property at a sale held under a first mortgage. A second mortgagee is under no contractual obligation to reconvey

the mortgaged premises to the vendor upon payment of the second mortgage, while a vendor is under a contractual obligation to convey the property sold to the purchaser upon payment of the purchase price. A much closer analogy would seem to me to exist between a vendor buying in at a tax sale the land he had contracted to sell and a first mortgagee buying in the mortgaged premises. It seems now to be settled that a mortgagee may buy the mortgaged property at a tax sale just as a stranger may. *Miller* v. *McCuaig* (1890), 6 Man. L.R. 539; *Kelly* v. *Macklem* (1867), 14 Gr. 29.

But if a mortgagee acquires title to the mortgaged premises under a sale for taxes, he cannot hold the land under his tax title, and, at the same time, recover the mortgage moneys under the mortgagor's covenant to pay. He cannot have both the land and the mortgage moneys. A mortgagee acquiring title to the mortgaged premises under a tax sale, would seem to be able to take either of two positions; he may hold the land as absolute owner under his paramount tax title, in which case he cannot recover on his mortgage; or he may, although he has the title, hold the land for the benefit of the mortgagor, and may proceed against such mortgagor for the mortgage moneys, so long as he is in a position to restore the mortgaged premises upon payment of the mortgage. *Mutual Life Ass'ce Co.* v. *Douglas* (1918), 44 D.L.R. 115, 57 Can. S.C.R. 243.

If the mortgagee, after acquiring title, parts with the mortgaged premises so as to be unable to restore the same, he cannot recover on the mortgage. This seems to me to have been clearly laid down by Anglin, J., in *Security Trust Co. Ltd.* v. *Sayre and Gilfoy* (1920), 56 D.L.R. *ante*, p. 463 at 470, where he says:

> While the mortgagor's covenant for payment of the mortgage debt may be absolute at law, in equity the right to enforce it is subject to the condition that the mortgagee shall not be disabled through any act of his own (Ashburner on Mortgages, 2nd ed., 683) not authorised by the mortgagor from restoring the estate. *Palmer* v. *Hendrie* (1859), 27 Beav. 349, at p. 351, 54 E.R. 136; *Kinnaird* v. *Trollope* (1888), 39 Ch.D. 636, at pp. 641-2. A mortgagee asserting absolute ownership of the mortgaged property cannot sue on the mortgagor's covenant. In equity, speaking generally, the rights of payment and redemption are reciprocal. Even where the mortgagee claims to have acquired, in his character as such, absolute ownership of the property under a title paramount, he cannot enforce the mortgagor's covenant except on the terms that he should submit to redemption. An excellent illustration of this proposition is afforded by *Parkinson* v. *Higgins* (1875), 37 U.C.Q.B. 308,

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where it was held on demurrer that a mortgagee, who had purchased at a Court sale, which would have conferred on a stranger so purchasing a paramount and absolute title, "could not sue for the mortgage money, while asserting his right to the property mortgaged wholly independent of any title derived from the mortgagor, and without any right to redeem," and *Parkinson* v. *Higgins* (1876), 40 U.C.Q.B. 274, where the same mortgagee on pleading by way of equitable replication that he had acquired title to the property solely to protect his interests and that he had offered and was always willing to submit to redemption on payment of the mortgage moneys and the sum he had been obliged to expend to save the property from sale to a stranger, who would acquire paramount title, was held entitled to maintain his action on the mortgagor's covenant.

If a mortgagee purchasing at a tax sale cannot sue for the mortgage moneys without submitting to redemption, I am of opinion that a vendor acquiring title at a tax sale to land which he has contracted to sell, must be ready and willing to convey the land to the purchaser in exchange for the purchase price.

As the plaintiff in this case has, since he brought this action, parted with Lot 6, and is not now able to restore it, he cannot recover any of the purchase money secured by the agreement of sale.

The appeal, in my opinion, should be dismissed with costs.

Appeal dismissed.

B. C.

C. A.

ATTORNEY-GENERAL v. SAANICH.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. January 4, 1921.

TRESPASS (§ I C—17)—ACTION FOR DAMAGES—LEAVE AND LICENSE FOUND—ACTION DISMISSED.

When an action has been brought for trespass and damages, and it is clear upon the evidence at the trial that there was leave and license which was never revoked, the trial Judge's finding dismissing the action will not be disturbed.

[*Wood* v. *Leadbitter* (1845), 13 M. & W. 383, 153 E.R. 351; *Lodge Holes Colliery* v. *Wednesbury*, [1908] A.C. 323; *Ruddy* v. *Toronto Eastern R. Co.* (1917), 33 D.L.R. 193, 38 O.L.R. 556, 21 Can. Ry. Cas. 377, referred to.]

Statement.

APPEAL by the plaintiff from the judgment of Morrison, J., in an action for trespass. Affirmed.

E. C. Mayers, for appellant; *H. B. Robertson*, for respondent.

Macdonald, C.J.A.

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

Martin, J.A.

MARTIN, J.A., (dissenting) would allow the appeal.

Galliher, J.A.

GALLIHER, J.A.:—I would dismiss the appeal.

McPHILLIPS, J.A.:—In my opinion this appeal must fail. The trial Judge has not given any reasons indicating the grounds upon which he dismissed the action, save the following:

> At the trial I formed the impression that had an engineer been requested to go over the ground in question, and report as to the exact boundaries and the extent of the work done and where, in all probability this action would never have been brought. I postponed delivering my judgment in the hope that the parties would get together. I have now been urged to hand down judgment. The action is dismissed.
>
> (Sgd.) Aulay Morrison, J.

It is evident though upon the facts as adduced at the trial that the Judge was satisfied that there had been misunderstanding of the exact boundaries of the highway and that this had given rise to the litigation. However, be that as it may, the evidence shews (and the evidence is that of the Provincial Land Surveyor called by the appellant Watt (Merston)) that the alleged trespass was indeed of a trifling nature considering all the facts and circumstances, one tree only was cut—wholly on the land of the plaintiff—the other tree being partly on the highway and partly on the land of the appellant Watt. All the other trees cut were admittedly upon the highway. Then as to the tree wholly upon the land of the appellant Watt, it was really a windfall, so that it was not in fact the cutting down of a tree but the cutting up of a tree already down. Then as to the tree partly upon the highway and partly upon the land of the appellant Watt—the tree was in diameter about five feet—as to four feet thereof, it was upon the highway, one foot only being upon the land of the appellant Watt, and it was leaning over the highway. Now the tree cutting was done under the authority of the respondent by one Verdier, and in the doing of the work Verdier and the appellant Watt came together, and according to Verdier, Watt admitted that the tree partly on his land should rightly be deemed as upon the highway, which was certainly reasonable all things considered.

Then as to the tree which was a windfall, or as it is called by Verdier "the long tree stub," wholly upon the land of the appellant Watt, Verdier said he had the permission of Watt to cut it up. It would appear that only three trees cut upon the highway fell upon the land of the appellant Watt, and according to Verdier there was permission to do this from Watt. In consideration for this, Verdier was to cut some wood for him which he did, namely,

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20 ricks of wood. Verdier denied that in falling the trees he broke down the appellant Watt's fence. His statement is that he took down the fence before falling the trees, and after falling the trees put the fence up again in as good a condition as it was before. When the evidence is well weighed it is reasonable to come to the conclusion that there was leave and license—never revoked—(*Wood* v. *Leadbitter* (1845), 13 M. & W. 383, 153 E.R. 351), to do all the appellant Watt complains of and brings his action for. It is true that Watt denies this but the trial Judge had evidence before him upon which he could reasonably so find, and he had an advantage we have not of observing the demeanour of the witnesses. There is the highest authority for not disturbing a judgment upon the facts. (*Coghlan* v. *Cumberland*, [1898] 1 Ch. 704; *Lodge Holes Colliery* v. *Wednesbury*, [1908] A.C. 323 at 326; *Union Bank* v. *McHugh* (1911), 44 Can. S.C.R. 473 at 492; *Ruddy* v. *Toronto Eastern R. Co.* (1917), 33 D.L.R. 193, 38 O.L.R. 556, 21 Can. Ry. Cas. 377; *Foley Bros.* v. *McIlwee* (1919), 44 D.L.R. 5.)

But apart from the facts, the law would not support any action against the respondent for the cutting down of the trees upon the highway. The fee in the highway is in the Crown (the cases in England and other jurisdictions, where the trees upon the highway and the soil under the highway is the property of the adjacent owners: *Turner* v. *Ringwood Highway Board* (1870), L.R. 9 Eq. 418; *Goodtitle ex dimiss. Chester* v. *Akler* (1757), 1 Burr. 133, 97 E.R. 231, are inapplicable), and the Crown expressly disclaims any right of recovery of any damages consequent upon the cutting down of the trees, and I fail to see that any cause of action has been established in the appellant Watt for the cutting down of the trees upon the highway adjoining or abutting upon his land. The respondent is by statute entitled to the possession of the highway, it is in public use and the respondent the road authority in the exercise of its corporate powers was entitled to be in control thereof, and was exercising its duty in all that it did, was ensuring the stability of the highway and providing for the safety of the travelling public.

Many points of law were dealt with by the counsel from both sides in very elaborate arguments, which I, with deference, do not consider require detailed attention, especially in view of the way

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I look at the facts of the case, but in coming to my conclusion in the present case, I do not wish it to be understood that an injunction might not, in a proper case, be obtainable in a properly constituted action to restrain the interference with ornamental trees upon the highway or trees of historic or other value not obstructing the highway or endangering the public thereon, but that is not this case. It follows that my opinion is that the judgment should be affirmed and the appeal dismissed.

McPhillips, J.A.

EBERTS, J.A., would dismiss the appeal.

Eberts, J.A.

Appeal dismissed.

CAN.

S. C.

ISMAN v. SINNOTT.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 21, 1920.

MORTGAGE (§ VI A—70)—FORECLOSURE OF FIRST MORTGAGE—MORTGAGEE OF FIRST AND THIRD—SALE OF LAND—RIGHT TO RECOVER UNDER COVENANT IN THIRD MORTGAGE.

A mortgagee who has foreclosed and subsequently sold the property covered by a first mortgage cannot sue on the covenant for payment in the first mortgage, but is not deprived of his right as mortgagee of a third mortgage to proceed under the covenant for payment in the third mortgage, and a mortgagor of other property given as collateral is not entitled to its discharge until the debt actually secured by it has been paid.

[*Isman* v. *Sinnott* (1919), 49 D.L.R. 238, affirmed with a variation.]

Statement.

APPEAL by plaintiff from a judgment of the Saskatchewan Court of Appeal (1919), 49 D.L.R. 238, 12 S.L.R. 445, reversing the judgment of Brown, C.J.K.B., in an action for a declaration that plaintiff be discharged from further liability under certain mortgages. Affirmed with a variation.

A. Lemieux, K.C., and *V. R. Smith*, for appellant.

C. Locke, for respondent.

Davies, C.J.

DAVIES, C.J.:—I concur with my brother Anglin.

Idington, J.

IDINGTON, J. (dissenting in part):—The appellant bought, on April 18, 1914, property in Kamsack, Saskatchewan, for $60,000, which consideration was made up largely of other properties taken in part exchange—with which we are not concerned.

Eight thousand, one hundred and fifty dollars of the consideration was made up of two mortgages, a first for $7,000, and a third for $2,150, made by one Yandt on other property.

But to secure the due payment thereof to the extent of $8,150, the appellant was to give a mortgage on the property he was

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buying from respondent, payable according to or corresponding with the respective due dates of said two mortgages.

Said mortgages were duly assigned to respondent and the provincial collateral mortgage of $8,150 was duly given. In course of time Yandt made default and respondent took proceedings upon the first of said mortgages for sale and purchase. Said proceedings ended in a final order of foreclosure which vested the property in respondent and had as an incidental, necessary result, according to the system of land titles in force, the barring of the charge upon the land which had been created by the third mortgage.

The respondent thereafter sold the property thus vested in him for less than the amount which was found to be due under and by virtue of the said first mortgage.

All these proceedings were brought under the notice of appellant and he was expressly given the opportunity of redeeming said mortgage on payment of the sum due and which his collateral mortgage to respondent stood as a guarantee for, but he did nothing either towards making such payment or objecting to the said sale of the property.

Later on he conceived the happy thought that he was released entirely by virtue of said purchase and sale from all liability in respect of either mortgage and instituted this suit to have it declared; that the said first and third mortgages had been fully paid and satisfied, and that the said collateral mortgage he had given to secure the due payment was duly paid and satisfied, and for an order directing the respondent to discharge the latter.

The appellant succeeded at the trial by reason of Brown, C.J.K.B., 12 S.L.R. 115, holding erroneously, as I respectfully submit, that the later sale of the foreclosed property by respondent discharged the mortgagor's covenant.

The Court of Appeal set that judgment aside and dismissed the action, 49 D.L.R. 238, 12 S.L.R. 445.

I so fully agree with the main reasoning of the Judges in that Court upon which they reach that result, that I need not repeat the same here, or trouble explaining minor differences I entertain as to one or two expressions therein that in no way affect the result reached.

The historical development of the equitable doctrines upon which our judgment in *Mutual Life Ass'ce Co.* v. *Douglas* (1918),

44 D.L.R. 115, 57 Can. S.C.R. 243, was founded, in no way justifies such contentions as relied upon by appellant herein.

And whatever possible difficulties might have arisen upon a like case in England where the doctrine of tacking prevails, or even in Ontario, or where by reason of the procedure in the Master's office requiring, and often getting, proof made of subsequent encumbrances, there is no room for doubt or difficulty under the system prevailing in Saskatchewan as explained by appellant's counsel and assented to by respondent's.

In other words, under the old system of pursuing the remedy of forfeiture, the respondent might have been induced to offer proof not only of the amount due under his first mortgage but also that under his subsequent mortgage and thereby given arguable ground for the contention that he was claiming foreclosure of both mortgages and when he got his final order of foreclosure stood bound by the usual rule relative thereto.

It is, however, to be observed that the mortgage under the Land Titles Act, 8 Geo. V., 1917 (2nd sess. Sask.), ch. 18, is only a charge on the land and does not vest, as in England and Ontario, any title in the land and that each is independent of the other and dependent upon the terms of said Act.

I have examined all the cases cited in the appellant's factum on this branch of the argument, in the hope of finding something analogous to that thus presented to have been dealt with by the Courts either in England or Ontario calling for the application of the principles relied upon, but only to meet with disappointments.

The case of *Walker* v. *Jones* (1866), L.R. 1 P.C. 50, presents a series of complicated facts which in the ultimate result might have developed such a case as presented herein, or somewhat resembling the same. But all that was involved therein to be decided was the validity of an interim injunction. The Court was particularly careful to avoid determining anything involved, or likely to be, in the possible ultimate result.

The case of *Dyson* v. *Morris* (1842), 1 Hare 413, 66 E.R. 1094, is, so far as it goes, helpful to respondent rather than appellant.

The case of *Rudge* v. *Richens* (1873), L.R. 8 C.P. 358, effectually disposes of the contention sometimes set up that a party cannot sell part of his security under a power of sale and proceed for the balance, as is also as helpful in principle to respondent as appellant.

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All the other cases relied upon in this connection are each in the last analysis, but the application of the elementary principle that after foreclosure the mortgagor followed upon his covenant or something analogous thereto is entitled to say to the mortgagee, "Give me back my property and here is your money," and default that claim he is no longer liable.

The appellant seeks to apply that to a case of two different mortgages never consolidated or used jointly in the foreclosure proceedings and having no connection either with each other or with securing the same debt but in the ultimate result as a necessity of getting a final order conformable with the Land Titles Act, wipes out the charge made by the third mortgage.

If the argument is good for anything then on the issue of that order and its registration and without waiting for a sale by the mortgagee, the mortgagor is discharged from liability on his covenant in the later mortgage.

That is not the true application of the old well-known principle relied upon, but an extension of it by a metaphysical process of reasoning for which there is no precedent.

There are precedents cited by the respondent which shew how little foundation there is for extending the principle in that way.

See, especially, the case of *Worthington* v. *Abbott*, [1910] 1 Ch. 588.

The statute in Alberta which was in question in the *Douglas* case, 44 D.L.R. 115, 57 Can. S.C.R. 243, preserved by the use of the word "foreclosure" much of the law incidental thereto, when used in the way it is therein.

And in the mortgage therein in question the parties specifically contracted for observance of Ontario law so far as possible.

At the close of the argument herein I had the impression that possibly the appellant was entitled to relief to the extent of such effect as might be given to the ordinary application of the principles of foreclosure in respect of that part of the indebtedness covered by the first mortgage.

An examination of the pleadings and facts including the nature of the transactions upon which the collateral mortgage was founded renders that impossible.

No such case is made by the appellant's pleading.

And without presuming to express any definite opinion I would suggest that the equitable doctrine that "he who seeks equity in a Court of equity must do equity," might be found a rather formidable obstacle in appellant's way for even such measure of relief.

I think the appeal should be dismissed with costs.

Idington, J.

DUFF, J., would dismiss the appeal.

Duff, J.

ANGLIN, J.:—I was at first inclined to the view that, inasmuch as the defendant had by his own acts in foreclosing the first mortgage and subsequently selling the Redvers Hotel property put it out of his power, on payment of the third mortgage, to reconvey that property to the mortgagor, subject to the first and second mortgages, he had relinquished his right to recover on the mortgagor's covenant in the third mortgage and that that mortgage as well as the first should therefore be deemed satisfied, and paid for the purpose of entitling the mortgagor to the discharge of the collateral mortgage on the Kamsack Hotel, which he claims. But on further consideration, I think that position cannot be maintained.

Anglin, J.

As Mr. Locke pointed out in his admirable argument after the foreclosure of the first mortgage all that the mortgagor could claim on payment of the amount of the third mortgage would have been a release of his covenant in that mortgage. By the foreclosure brought about by the mortgagor's own default any equitable interest of the respondent as third mortgagee as well as the mortgagor's own interest in the land had been foreclosed. There was nothing left to a reconveyance of which the mortgagor would be entitled on payment of the amount of the third mortgage. But that foreclosure did not extinguish the mortgagor's liability on his covenant in the third mortgage any more than it did his liability on his covenant in the first mortgage. It was the subsequent sale that prevented the mortgagee from reconveying the mortgaged property to the mortgagor on payment of the amount due on the first mortgage and thus precluded recovery on the covenant in that mortgage. If it did not actually extinguish the debt, that was practically the result. But it was not the sale that prevented the mortgagor from obtaining anything which, but for it, he might have required the mortgagee to transfer to him on

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payment of the third mortgage. Any right he had to a reconveyance had already been effectually barred by the foreclosure of the first mortgage.

The theory on which an action by the mortgagee on the covenant is restrained after foreclosure and sale under the mortgage in which the covenant is contained proceeds is therefore not applicable. That theory I had occasion to consider fully in the recent case of *Securities Trust Co. Ltd.* v. *Sayre and Gilfoy, ante*, p. 463, the distinction between the effect of foreclosure of the first mortgage followed by sale on the mortgagor's liability on his covenant in that mortgage and its effect on his liability on the covenant in the third mortgage is no doubt subtle; yet I think it is substantial. The mortgagor's position under the third mortgage was of course affected by the foreclosure. But it was not the foreclosure which had the practical effect of extinguishing his liability on the covenant under the first mortgage. It was the subsequent sale; and that, as already pointed out, had no effect whatever on the mortgagor's rights or position under the third mortgage.

Moreover, the proviso for redemption of the Kamsack Hotel is that the mortgagor is to be entitled to a discharge of it on payment of the two mortgages on the Redvers Hotel to which it is collateral. Whatever may be said as to the debt under the first mortgage by reason of the plaintiff having taken the property in satisfaction thereof, there is no ground for maintaining that the third mortgage has been paid.

However, I incline to the view that, having foreclosed the first mortgage on the Redvers Hotel and sold that property thereunder, the mortgagee took it in satisfaction of the entire debt due on that mortgage, that the amount thereof must therefore be deemed to have been fully paid and satisfied and that the mortgagor is entitled on the accounting with the mortgagee to credit for that amount and not merely for what was realised by the mortgagee on the sale. On the third mortgage covenant, however, the mortgagee is still entitled to recover the sum actually due and owing in respect to the debt by it secured and on payment of that amount the plaintiff will be entitled to a discharge of the Kamsack Hotel property from the collateral second mortgage upon it.

In lieu of a judgment dismissing the plaintiff's action, therefore, judgment should in my opinion be entered declaring that,

on payment to the defendant of the amount due under the third mortgage on the Redvers Hotel property, the mortgage held by him on the Kamsack Hotel property will be satisfied and the plaintiff will be entitled to a discharge of it.

Brodeur, J.

BRODEUR, J.:—I would agree with the Court of Appeal, 49 D.L.R. 238, 12 S.L.R. 445, that the foreclosure proceedings on a first mortgage would not prevent the mortgagee if he is the creditor of a third mortgage to claim on the covenant on this third mortgage if even he has bought the property on those foreclosure proceedings and has since disposed of it.

But at the same time there is no doubt that if the appellant could not succeed with regard to the third mortgage his indebtedness has disappeared as far as the first mortgage is concerned and he should succeed to the extent of the latter. This point, however, does not seem to have been strongly pressed in the Courts below, though it has been mentioned.

The action should not be dismissed *in toto*, but a judgment should be entered declaring that on payment of the third mortgage the plaintiff will be entitled to a discharge of the mortgage held by the defendant on the Kamsack Hotel property.

There should be no costs on this appeal.

Mignault, J.

MIGNAULT, J.:—By the agreement of sale of certain hotel premises between the respondent (vendor) and the appellant (purchaser), what was termed a collateral mortgage on the hotel property was given by the appellant to the respondent, it being stipulated that this mortgage should be discharged when a first and third mortgage on another hotel property for $7,000 and $2,150 respectively, due to the appellant by one Yandt, and transferred by him to the respondent in part-payment of the price, should be fully paid by Yandt.

Yandt not having paid either mortgage, the respondent took foreclosure proceedings against him on the first mortgage after having vainly tried to bring the property to sale under a power of sale, and obtained a final order of foreclosure, subsequent to which he sold the property for $4,000.

The appellant now claims that he is entitled to a discharge of the collateral mortgage under the above-mentioned stipulation of the agreement of sale.

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The first objection to the appellant's contention is that Yandt has not fully paid the first and third mortgages due by him to the appellant and by the latter transferred to the respondent, and therefore the appellant is not entitled to a discharge of the collateral mortgage.

The second objection is that granting that the respondent could not sue Yandt on the covenant in the first mortgage without offering to reconvey him the mortgaged property, which he is not in a position to do, his inability to reconvey does not stand in his way should he sue on the personal covenant contained in the third mortgage, for Yandt having lost his whole equitable right in the property by the final order of foreclosure on the first mortgage, cannot demand reconveyance as a condition of an action on the covenant in the third mortgage.

I, therefore, think the appeal fails, and for the reasons fully stated by my brother Anglin, I agree in his disposal of the matter.

Affirmed with a variation.

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C. C.

KAMLOOPS DISTRICT CREAMERY ASSOCIATION v. PERRY.

British Columbia County Court, Swanson, Co. Ct. J. January 17, 1921.

GOOD WILL (§III—10)—SALE OF BUSINESS—GOODWILL INCLUDED—SOLICITATION OF CUSTOMERS BY VENDOR—INJUNCTION TO PREVENT—DAMAGES.

After a man has sold out his business, including good will, he cannot solicit his old customers to the detriment of the buyer, and should he do so, the buyer may obtain an injunction enjoining the seller from further solicitation, and also damages for injuries suffered.

[*Trego* v. *Hunt*, [1896] A.C. 7, referred to.]

Statement.

ACTION for damages caused by defendant soliciting his former customers of a business sold by him to the plaintiff and for an injunction enjoining him from any further solicitation.

Paul McD. Kerr, for plaintiffs; *R. M. Chalmers*, for defendant.

Swanson, Co. Ct. J.

SWANSON, Co. Ct. J.:—I have read with care the evidence and the very lucid and able arguments submitted in writing by the counsel herein.

Firstly. Let me say I am clearly of the opinion that parol evidence was properly admitted to shew what was the complete and final bargain between the parties. Admittedly the memo, Ex. 1, is a most fragmentary affair and is not a record of the full and complete agreement. It is a mere informal memorandum and may

be supplemented by parol evidence (see ruling of Full Court, *Embree* v. *McKee* (1908), 14 B.C.R. 45, also Phipson on Evidence, 5th ed., at p. 546).

Secondly. It is argued that the alleged oral agreement that defendant should not again re-engage in business as a dairyman is illegal, as being contrary to public policy in undue restraint of trade. This position is clearly established. Peculiarly enough both counsel have jumped to the conclusion that the evidence for the plaintiff is to the effect that defendant obligated himself not to re-engage in business at or in Kamloops. That may have been intended by Van der Wall, but if his bald statement is to be taken at face value Perry can never again at Kamloops or elsewhere re-engage in business as a dairyman. There is no limitation as to either time or space in Van der Wall's evidence. He says:

I said to Mr. Perry of course it is understood that you will not open up in the milk business again. (Mr. Chalmers objects to evidence, objection over-ruled). I can't say P.'s exact words, but from what he said it was practically foolish for me to ask such a question. He told me how tired he was of business and had tried to get out of it. He said in effect that he would not start up again.

Clearly such an agreement even if clearly proved could not stand any of the tests applied to covenants in restraint of trade. It may, however, be a mere academic consideration on my part as I entirely accept Perry's evidence on this branch of the case that he did not in fact make any such agreement with Dr. George or Van der Wall or any one else, that he would not re-engage in business as a dairyman either at Kamloops or elsewhere.

Thirdly. It is equally clear that Perry did in fact sell the goodwill of his business as a dairyman, which he sold out to plaintiffs. He sold the "route," with the horse, harness, wagon, runner, bottles and cases for $200. He sold the business to the plaintiffs. This covers the goodwill whether express or implied. In this case the "goodwill" was expressly sold. It was called "route," which clearly covers "goodwill." I have read with much care and interest the judgments of the Law Lords in *Trego* v. *Hunt*, [1896] A.C. 7, also the other authorities quoted in 27 Hals., *tit.* Goodwill p. 590, paras. 1126 *et seq.*; also Leake on Contracts, 6th ed. 527-532. Perry out of his own mouth makes it clear that "route" means, in effect, "goodwill." He says:

"Route" is part of the business. Route is the destination around town—delivering to your customers. I do not agree with Mr. Van der Wall's defini-

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tion of route. (Van der Wall had said: "He (Perry) used the term route which means amongst dairymen goodwill.") Route, I say, is the whole value of the business, because otherwise you would have no one to trade with except of course such new customers as you might pick up. I had been about 7 years in business before I transferred it to plaintiffs. *Route really then is the business relationship with these customers.*

It is surprising how Perry has so closely paraphrased the language of eminent English Judges who have dealt with "goodwill." Lord Herschell in *Trego* v. *Hunt*, [1896] A.C. 7 at 16, criticises the famous saying of Lord Eldon: "That the goodwill which has been the subject of the sale is nothing more than the probability that the old customers will resort to the old place." He also quotes at p. 17 Sir George Jessell in *Ginesi* v. *Cooper* (1880), 14 Ch.D. 596, at 600:

> Attracting customers to the business is a matter connected with the carrying of it on. It is the *formation of that connection which has made the value of the thing*, which the late firm sold, and they really had nothing else to sell in the shape of goodwill . . . Is it to be supposed that they did not sell that personal connection when they sold the trade or business and the goodwill thereof?

Lord Herschell then adds at pp. 17-18:

> The present Master of the Rolls took much the same view as to what constitutes the goodwill of a business. I cannot myself doubt that they were right. It is the *connection* thus formed together with the circumstances whether of habit or otherwise which tend to make it permanent, that constitutes the goodwill of a business. It is this which constitutes the difference between a business just started which has no goodwill attached to it, and one which has acquired a goodwill. The former trader has to seek out his customers from among the community as best he can.

Another of Perry's phrases is " 'route' means the list of customers." Lord Macnaghten, at p. 24, after referring to Lord Eldon's definition goes on to say: "Often it happens that the goodwill is the *very sap and life of the business*, without which *the business would yield little or no fruit.*" (Perry's language is almost as expressive as that of the great Law Lord, "Route, I say, is the *whole value of the business, because otherwise you would have no one to trade with.*") Lord Macnaghten then adds, "It is the *whole advantage whatever it may* be of the *reputation* and *connection* of the firm, which may have been built up by years of honest work, or gained by lavish expenditure of money." (Perry says he was 7 years in building up the dairy business which he sold to plaintiffs.)

Fourthly. It is equally clear that Perry did solicit his former customers after sale of his business to plaintiffs. The authorities, including *Trego* v. *Hunt*, clearly shew that in doing so Perry is committing a wrong against the plaintiffs and will have to pay reasonable damages and be enjoined from further solicitation of such customers. Lord Macnaghten, [1896] A.C. at pp. 24-25, in his usual pithy and epigrammatic way, puts the case, which is entirely applicable to the facts of the case before me:

> Trade he undoubtedly may and in the very same line of business, if he has not bound himself by *special stipulation*, and if there is no evidence of the understanding of the parties beyond that which is to be found in all cases, he is free to carry on business wherever he chooses. *But, then, how far may he go?* He may do everything that a stranger to the business in ordinary course would be in a position to do. He may set up where he will. He may push his wares as much as he pleases. He may thus interfere with the custom of his neighbours as a stranger and an outsider might do; but he must *not*, I think, avail himself of *his special knowledge of the old customers to regain without consideration that which he has parted with for value.* He must not make his approaches from the vantage-ground of his former position, *moving under cover of a connection which is no longer his. He may not sell the custom and steal away the customers.* That at all events is opposed to the common understanding of mankind and the rudiments of commercial morality and is not . . . to be excused by any maxim of public policy. . . . The principle on which *Labouchere* v. *Dawson* (1872), L.R. 13 Eq. 322, rests has been presented in various ways. A man may not derogate from his own grant; the vendor is not at liberty to destroy or depreciate the thing which he has sold; there is an implied covenant on the sale of goodwill that the vendor does not solicit the custom which he has parted with; it would be a fraud on the contract to do so. These, as it seems to me, are only different turns and glimpses of a proposition which I take to be elementary. It is not right to profess and to purport to sell that which you do not mean the purchaser to have; it is not an honest thing to pocket the price, and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own.

The most recent pronouncement on the subject of goodwill and covenants in restraint of trade is by the Court of Appeal in *Attwood* v. *Lamont*, [1920] 3 K.B. 571.

In the case at Bar Perry sold out to plaintiffs in January and solicited his old customers in the following September and October. He says he thinks he would have been entitled both morally and commercially (if indeed there is any line of demarcation between the two) to solicit these customers the next day after he sold out to plaintiffs.

I will not use the strong language which Lord Macnaghten has used above, but content myself with saying that the defendant cannot legally nor I think morally take such a position.

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The proof of his solicitation is quite clear. Naturally it follows that substantial damage has been done to the plaintiffs. There was evidence that many of plaintiffs' customers were becoming dissatisfied with the quality of the milk they were supplying them, and in due course many of them might, in any event, have left plaintiffs. But defendant has accelerated their departure from the plaintiffs' custom and must be held responsible for his wrongful actions. It is difficult to estimate the damage—Van der Wall says it exceeded in amount $250. Defendant's counsel minimises it and says there is no clear proof of any damage whatever suffered by plaintiffs. With this I cannot agree. I assess the plaintiffs' damages at $75. It is also the practice in such cases to grant an injunctior The defendant, his servants, agents and workmen will be enjoined from any further solicitation of the defendant's former customers of the business sold by him to the plaintiffs. There will be judgment for plaintiffs for $75 and costs.

Judgment accordingly.

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ROBINS v. FORBES.

Saskatchewan King's Bench, McKay, J. January 26, 1921.

TAXES (§ VI—220)—INCOME WAR TAX ACT, 7-8 GEO. V. 1917, CH. 28—DEMAND REQUIRED BY SEC. 8—FAILURE TO RECEIVE LETTER—LIABILITY.

A conviction for failure to make a return of income required, under sec. 8 of the Income War Tax Act, 7-8 Geo. V. 1917, ch. 28, cannot be sustained unless the demand required, under sec. 8 of the Act, is received by the person to whom it is addressed.

Statement. APPEAL by way of stated case from an order of Heffernan, J.P., dismissing the information or complaint of the appellant against the respondent. Affirmed.

A. Ross, K.C., for appellant; *J. F. Bryant*, for defendant.

McKay, J. MCKAY, J.:—The information charged that the said W. A. Forbes, at Grand Coulee, in the Province of Saskatchewan, on November 15, 1920, failed to make a return of his income for the year 1918, required of him to be given pursuant to sec. 8 of the Income War Tax Act, 7-8 Geo. V. 1917, ch. 28, and amendments thereto relating, such return having been theretofore demanded by registered letter mailed on March 2, 1920.

The questions submitted are as follows:—

(a) That it having been proved that the Commissioner of Taxation did, on the 2nd day of March, 1920, by registered letter addressed to W. A. Forbes at Grand Coulee, in the Province of Saskatchewan, and being the Post-office at which the said W. A. Forbes does receive his mail, demand from the said W. A. Forbes a return of his income for the year 1918, and that the said W. A. Forbes had not, on the 15th day of November, 1920, complied with the said demand or furnished any return of income for the year 1918, should I have convicted the said accused for his said offence, as provided by sec. 8 of the Income War Tax Act, 7-8 Geo. V. 1917, ch. 28, and amendments thereto?

(b) If it should be held that it is necessary that the demand under sec. 8 of the Income War Tax Act, 1917, and amendments thereto must, in order to constitute an offence under the said Act, be received by the person to whom it is addressed, then, inasmuch as it appeared that the said demand was addressed to the said W. A. Forbes on the 2nd day of March, 1920, at Grand Coulee aforesaid, and was actually received by the Postmaster at Grand Coulee aforesaid, and was by the Postmaster delivered to a person who had on other occasions received mail matter addressed to the said W. A. Forbes, whether such delivery of such demand was a sufficient compliance with the Act, and should I have convicted the said W. A. Forbes for the offence set out in the said information and complaint?

The stated case then proceeds as follows:—

The grounds upon which I based my judgment in dismissing the said information and complaint were as follows:—(a) That I was of the opinion that under the provisions of sec. 8 of the Income War Tax Act, 1917, and amendments thereto, in order to find the accused guilty of an offence it was necessary it should appear that the notice of the demand for a return under such section should actually come to the notice of the person to whom such notice was addressed, and inasmuch as it appeared that the letter in question had not been actually delivered to the defendant, as the defendant, who was apparently a respectable citizen, stated that he had never seen the notice, I was of the opinion that he could not be convicted for failure to make a return under the provisions of the said Act.

The stated case has also this paragraph:—

(f) The said W. A. Forbes denied that the said registered letter had ever been delivered to him by the said Olles.

The said Olles is the person to whom the Postmaster at Grand Coulee delivered said registered letter, as referred to in question (b) submitted.

As to question (a): sec. 8, sub-sec. (1) of the Income War Tax Act, 7-8 Geo. V. 1917, ch. 28, as amended by sec. 11 of 10-11 Geo. V. 1920 (Can.), ch. 49, under which the information was laid reads as follows:—

8. (1) If the Minister, in order to enable him to make an assessment or for any other purpose, desires any information or additional information or a return from any person who has not made a return, or a complete return, he may by registered letter demand from such person such information, additional information or return, and such person shall deliver to the Minister such

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information, additional information or return within 30 days from the date of mailing of such registered letter. For the purpose of any proceedings taken under this Act, the facts necessary to establish compliance on the part of the Minister with the provisions of this section as well as default hereunder shall be sufficiently proved in any Court of law by the affidavit of the Commissioner of Taxation or any other responsible officer of the Department of Finance. Such affidavit shall have attached thereto as an exhibit a copy or duplicate of the said letter.

Under this section, in my opinion, the mailing of the registered letter is not the demand until it is received by the person to whom it is addressed, or there is presumptive evidence that he received it, and this presumption arises when the letter is mailed addressed to the address of the person, and there is no evidence that it has not been received by the addressee. Consequently, even after it is proved that the letter of demand has been duly registered addressed to the person from whom the information is required, and that such person has not delivered to the Minister such information within the 30 days, it is still open to such person to shew that he did not receive the said letter. In other words, proof of mailing of the registered letter to such person is only *primâ facie* evidence that he received such letter.

Taking this question by itself, in my opinion, the proper answer is "Yes," as the presumption is the respondent would receive the registered letter addressed to him at his proper post office. But I think this question must be taken in connection with the above quoted fact: "(f) the said W. A. Forbes denied that the said registered letter had ever been delivered to him by the said Olles," and what Heffernan, J.P., says were the grounds upon which he based his judgment.

I gather from what Heffernan, J.P., says that he believed the respondent Forbes when he denied that the letter was ever delivered to him, and as such denial rebuts the presumption that he received the letter, the Justice of the Peace was right in dismissing the information, and the answer to the question, bearing in mind that the respondent did not receive the letter, is "No."

As to question (b): Delivery of the registered letter to the person who had on other occasions received mail matter addressed to the respondent would be presumptive evidence that he received it, but this presumption is rebutted by the evidence of the respondent who denies receipt of the letter and was believed by Heffernan, J.P. Such delivery was not a sufficient compliance with the

Act, when the respondent denied receipt of the letter and was believed by the Justice of the Peace, and the Justice of the Peace was right in not convicting him. The answer, therefore, to both questions submitted in this question (b) is "No" to each.

Judgment accordingly.

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REX v. OLKHOVIK.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 23, 1920.

NEW TRIAL (§ III B—15)—INSANITY ALLEGED—CHARGE TO JURY—EVIDENCE —VERDICT SUSTAINED.

In a trial for murder the question of insanity on the evidence adduced is one for the jury to determine, and the Judge having put this question very clearly before them their verdict will not be disturbed.

[See Annotation, Instruction to Jury in Criminal Case, 1 D.L.R. 103.]

THIS is an application by way of appeal for a new trial, on the ground that the verdict in this case was against the weight of evidence. Leave to make the application has been given by the trial Judge. The prisoner was tried and convicted on a charge of murder by Bigelow, J., with a jury at Yorkton on October 29, 1920. Statement.

The appeal is based on the sole ground that on the evidence the accused should have been acquitted on account of insanity. Application refused.

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

J. F. Frame, K.C., for the accused.

The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—I would gather from the evidence that the prisoner is, and has been for a number of years, "insane" in the more popular sense of the word. He had at least once been confined in an asylum for the insane, and was subject to periodical mental disturbances during the occurrence of which, according to the expert testimony, he would not be responsible for his actions. The evidence of Dr. McNeill, who is the medical superintendent of the Provincial Hospital for the Insane at Battleford, taken with the other evidence on the question, clearly establishes that fact. On the other hand, Dr. McNeill was satisfied from his examination of the prisoner, that, at the time of the examination, he was quite sane. The question for the jury on this evidence was, whether or not the prisoner was insane at the time of the Haultain, C.J.S.

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commission of the offence. On this point there is very little evidence. Dr. McNeill was not able to express an opinion on this point on the facts placed before him, and evidence of Dr. Tram, in view of the very advanced opinions expressed by him as to the relation of crime to insanity, cannot be considered very conclusive. The question was therefore left very open, and was put very clearly before the jury by the trial Judge when he said, in the last sentences of his charge:

I ask you especially to find this, whether he (the prisoner) was insane at the time of the commission of the offence and to declare it in your verdict, and if your verdict is one of insanity, then to declare in your verdict that your verdict is one of not guilty on account of insanity.

Under all the circumstances of the case, I do not think that the verdict should be disturbed. The application for a new trial must therefore be refused.

There was also a motion for leave to appeal from the refusal of the trial Judge to reserve certain questions for the opinion of the Court of Appeal.

The questions are:

Was there non-direction or misdirection on the part of the trial Judge? 1. Because the said Judge should have directed the said jury, that in the event of them finding the said Egnat Olkhovik to be sane, that they should then have considered whether or not what he did amounted to manslaughter. 2. That the agent for the Attorney-General in addressing the said jury told them that if the accused knew right from wrong, he was guilty of murder, and the said trial Judge did not direct the said jury to consider only whether or not he knew right from wrong, with reference to the action for which he was on trial. 3. That the said Judge erred in directing the said jury that if they found the said Egnat Olkhovik knew right from wrong, that he was guilty of murder. 4. That the said Judge erred in not directing the jury that as part of their verdict, if they found the said Egnat Olkhovik to be insane, that he would be kept in strict custody in such place or in such manner as to the said Court seems fit, and until the pleasure of the Lieutenant-Governor-in-Council.

As to the first point:

There was nothing in the evidence to necessitate any reference to manslaughter or to a possible verdict of manslaughter. On the facts of the case, as related in the evidence, the jury were properly directed that the prisoner was either guilty of murder or not guilty on account of insanity.

As to the second and third points:

The statement of the Crown prosecutor on a question of law, even if made (and there is no evidence that the alleged statement

was made), cannot be material. The law on this point was clearly and correctly explained by the trial Judge in his charge. Twice in the course of his charge he read the sec. of the Cr. Code (sec. 19), which defines insanity, and expressly pointed out that the prisoner could not be excused on the broad ground of insanity, but that he must be shewn to be labouring under disease of the mind to such an extent as to render him incapable of appreciating the nature and quality of the act he was committing and of knowing that such an act was wrong. The charge on this point was, in my opinion, both complete and correct.

As to the fourth point:

It is not quite clear to me what this question means.

I take it, however, as meaning that the jury should have been told what the result of a verdict of not guilty on account of insanity would be. It should be unnecessary to say that the result of their verdict is not a matter for the consideration of the jury at all. *Application refused.*

OUIMET v. NATIONAL BEN FRANKLIN FIRE INSURANCE Co.

Quebec Court of Review, Demers, Panneton, and de Lorimier, JJ. June 12, 1920.

INSURANCE (§ IX—450)—OF AUTOMOBILE AGAINST THEFT—KEYS OF GARAGE GIVEN FOR PURPOSE OF HAVING CAR WASHED—CAR STOLEN AND WRECKED—LIABILITY OF COMPANY.

An insurance company which has insured an automobile against theft is liable to the owner, who has given the keys of his garage, in good faith, for the purpose of having his car washed, to a person working on another machine, who uses the car for his own personal purposes whereby the car is wrecked.

Statement.

THE plaintiff sued the defendant for the recovery of $1,200, alleging the following facts in support of his action:—On May 9, 1917, the defendant issued in his favour a policy of automobile insurance, by which it insured against damages caused by fire, transportation or theft, to the amount of $1,200, an automobile valued at $1,550. On September 4, 1917, the automobile covered by this policy was stolen. The plaintiff immediately informed the defendant of it, giving notice through its agents. The defendant, after proper demand made, refused to pay the plaintiff the amount of his loss.

The defendant contests the present action by saying that, if there was theft, which it denies, it was committed by an employee of the plaintiff.

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The judgment of the Superior Court, rendered by Mercier, J., which is affirmed, is as follows:—

Considering that it follows from the evidence adduced in this case that the defendant undertook, on May 9, 1917, to indemnify the plaintiff, under a special policy of insurance, against the theft of an automobile which he then had in his possession, and of which he was then the sole owner, and that such policy shall take effect if he shall be deprived or dispossessed of it during the term of the said policy; that it is in evidence that on September 4, 1917, when the said policy was in full force, the automobile in question was stolen by a man named J. P. Desrosiers, and which he fraudulently made use of, and without any right took on that evening and converted to his personal use, and drove it during the night of September 4 and 5, 1917, and after a disastrous accident which happened while he was in fraudulent possession of it, he abandoned it on the Point-au-Trembles road, in a complete and entirely destroyed condition, at which spot it had been found the next day and the wreckage sent to same garage at the defendant's request; that it is proved that the said Desrosiers was at the time of the theft in question, in the employ of a physician named Dupont and no way in the employ of the plaintiff, and that the fact of the latter having, in good faith, agreed that the said Desrosiers might wash his car, and of having given him his keys for such purpose, under the circumstances in which it occurred, should not, in a legal sense, be considered as constituting the said Desrosiers the employee of the plaintiff as the defendant claims, but rather as a fact which was accidental, a passing and transitory fact, which could not relieve the defendant from its liability to the plaintiff, the terms of the policy, in the opinion of the Court, not being able, moreover, to cover such a case in the way of benefiting the defendant; considering, also that it is proved that the said Desrosiers had never followed up the proposition that he had made, on that evening, to the defendant to wash his car, a proposition at bottom fraudulent and springing from an afterthought, which he could not then disabuse the plaintiff's mind of, as the latter at the time, believed the said Desrosiers to be acting honestly, that in fact, it is proved that, instead of carrying out his obligation to the plaintiff, the said Desrosiers, who had probably thought out the idea during the afternoon, took the automobile the same evening and converted it to his personal use with the unhappy results shewn by the evidence; that the actions and doings of Desrosiers subsequent to his fraudulently obtaining the plaintiff's keys, shew that he had no intention of washing the plaintiff's car, but rather of stealing it from him which agrees with the plea of "guilty" which he pleaded to the charge of theft laid against him by the plaintiff, and for which theft, as proved by documentary evidence, he was sentenced to two years in the penitentiary; that the act of the said Desrosiers is covered by the policy as well as would be that of an unknown thief who had broken in, with violence, on the night of September 4, 1917, to the plaintiff's garage, and thus made use of, after breaking the padlocks on the bolts, and taken away the said automobile, the only difference consisting purely and simply in the fact that the said Desrosiers had used subterfuge to the plaintiff and, by encroaching on his fairness, fraudulently obtained while in the employ of Dr. Dupont and not in that of the plaintiff, easier access and less noisy entrance to and into the latter's garage; that in law the means used by the said Desrosiers to accomplish his purposes could not cause the plaintiff to lose the benefit of

his insurance policy, and that, under the circumstances disclosed by the evidence, the plaintiff's action, the essential allegations of which are established, is well founded in fact and in law; that, on the other hand, the plea of the defendant is ill founded in fact and in law; and lastly, the wording and the meaning of sec. 347 of the Cr. Code; consequently, maintains the action of the plaintiff; sets aside the plea of the defendant and orders the latter to pay to the plaintiff the said sum of $1,200, with interest from the day of the, issue of the writ and the costs.

Perron, Taschereau, Rinfret, Vallée and *Genest*, for plaintiff.

Weldon and *Harris*, for defendant.

DE LORIMIER, J.:—The paragraph which interests us, in the insurance policy, reads as follows:—

Perils insured against (c) theft, robbery or pilferage, excepting by any person or persons in the assured's household or in the assured's service or employment whether the theft, robbery or pilferage occur during the hours of such service or employment or not, and excepting also the wrongful conversion or secretion by a mortgagor or vendor in possession under mortgage, conditional sale or lease agreement, and excepting in any case other than in case of total loss of the automobile described herein, the theft, robbery or pilferage of tools and repair equipment.

The question to decide is whether Desrosiers committed a theft.

The Criminal Code, R.S.C., 1906, ch. 146, sec. 347, defines this offence as follows:—

Theft or stealing is the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person, anything capable of being stolen with intent:—(a) to deprive the owner, or any person having any special property or interest therein, temporarily or absolutely of such thing or of such property or interest.

We find that Desrosiers stole the machine in order to convert it, at the very least, to his own use, with the fraudulent intention of temporarily depriving the owner of the thing.

Why did he make an offer to the plaintiff to wash the car if it was not to take it away more easily and to convert it to his own use? It may be remarked that Desrosiers did not wash it. He knew that if he could get hold of the key of the garage it would be easy to take the car out without arousing suspicions and so attain his end.

His fraudulent intention of making a temporary use of it, at least, is drawn from these and other facts.

Now, was Desrosiers in the plaintiff's employ? We think not. He was Dr. Dupont's chauffeur. He was not paid by the plaintiff. The latter did not undertake to pay him anything for the service

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which he wished to render. Moreover, he did not render any service. What he wanted was to carry off the machine without any one noticing him.

It is claimed that the car was not a total loss. We think that, practically, it was. Besides, paragraph (c) which I have just quoted, does not mean that the company is only liable for the whole automobile when there is a total loss, but means that the company is only liable for the loss of the tools when there is a total loss of the automobile.

It is appropriate to remark that if there had been a doubt as to the interpretation which we give to the contract of insurance, it would be interpreted against the insurer who made it.

For these reasons, and those given by the Judge of the Court of first instance, we decide that the plaintiff has made out his case and that the judgment *a quo* should be affirmed.

Appeal dismissed.

N. S.

S. C.

PURDY v. THOMPSON.

Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., and Chisholm, J. November 20, 1920.

NEW TRIAL (§ III B—15)—VERDICT OF JURY—JUDGE'S CHARGE TO JURY—FAIRNESS OF VERDICT—NO INJUSTICE—FAILURE OF APPEAL.

An appeal and motion for new trial will be dismissed, where the evidence of the trial shews that the jury's verdict has done no injustice to the defendant, and the plaintiff has expressed his willingness to abide by the verdict.

Statement.

APPEAL from the judgment in favour of plaintiff in an action claiming a balance alleged to be due on a lumbering contract, damages for breach of covenant and other relief.

E. T. Parker, for appellant; *C. G. Black*, for respondent.

Harris, C.J.

HARRIS, C.J.:—An examination of the evidence in this case has convinced me that the verdict of the jury has done no injustice to the defendant. Even assuming the whole of the lumber to come within the designation of scantling—an assumption that is most favourable to the defendant, and one that probably does some injustice to the plaintiff—and having in mind that defendant could recover only small damages on his counterclaim, I find that defendant would still owe the plaintiff at least the amount found by the verdict. The plaintiff has expressed his willingness to accept the verdict and apparently the only result of a new trial would be to increase the amount recovered by the plaintiff while

it would appreciably add to the costs of the litigation. Under these circumstances I do not think we should allow any amendment to the notice of appeal, and I think the appeal and the motion for a new trial should be dismissed with costs.

RUSSELL, J.:—The plaintiff acquired a right to lumber on property of one Matheson and contracted, in writing, to saw the logs to be taken from the land and deliver the lumber to the defendant. He cut a number of the trees and was about to have them sawed when the defendants objected to the sawyer he had selected. They eventually took the matter out of the plaintiff's hands and sawed most of the logs cut by plaintiff. The rest they sold. The action is for the price of the lumber at a figure reduced from the contract price because, I suppose, of the fact that plaintiff did not saw the logs himself. The defendants counterclaim for their advances and other things as shewn by a statement produced at the trial, but which is not in the printed case, and which I have not succeeded in procuring. The contents may, however, be safely inferred from the evidence and from the admissions of counsel at the argument.

The jury found for the plaintiff and the verdict was for $200. There was no complaint of misdirection, but the defendants applied for an amendment to add this to the grounds for a new trial. It needs no argument to shew that the charge was erroneous. The Judge left it to the jury to construe the written agreement, told them they might take into consideration or not, just as they wished, a charge of $20 made by the defendants in their counterclaim, and finally informed the jury that he did not understand the case at all; which, however, he qualified by saying that if he were understanding the case after the plaintiff had presented it to him, he "should have thought it was madness to have brought such an action." I refer to this observation because it shews that the plaintiff has, seemingly, more cause to complain of the charge than the defendant.

Fortunately, the jury did not accept the views of the Judge. Without assistance from the Court they seem to have acquired a reasonably clear conception of the merits of the case, and if their verdict does no injustice to the defendants I do not think it would be proper to amend the notice of appeal to add a ground which does not appear in the notice.

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The agreement required the plaintiff to deliver to the defendants the season's cut of the lumber on the land referred to, the minimum cut to be 75,000 superficial ft. at $15.85 per thousand for merchantable spruce deal, and $13.85 for scantling which, was the lowest priced lumber to be delivered, except that, for deal ends, only two-thirds of the largest price should be paid. I place this construction on the agreement although it is susceptible of another construction, but nothing turns on any difference between one construction or the other of the document referred to. Defendants claim that the plaintiff did not live up to his contract, and as already stated they took the work off his hands and sawed the logs themselves at an expense of $4 a thousand. No question was put to the jury or decided by the Judge as to their right to do this, nor was the jury instructed on the question whether the plaintiff's proper claim was for the fair value of the logs as taken by the defendants, or for the contract price of the lumber to be delivered less the expense of sawing and the incidental expenses incurred by the defendants. But the plaintiff seems content to abide by the defendants' mode of stating their counterclaim. It appears from the evidence of the defendant Wood, that 104,517 superficial ft. were produced from the logs sawed by defendants. The defendants' survey stated the quantity as 106,580. I take the lower figure because the question immediately before us is whether the jury's verdict may possibly involve an injustice to the defendants. Allowing the lowest price per thousand, $13.35, less the cost of sawing at $4 per thousand, which was paid by the defendants, the plaintiff would be entitled to $977.23. I take this to be the minimum amount that he could justly claim, as the reduction from the amount recoverable suggested by defendants on account of deal ends for which only two-thirds of the price of the spruce deals was to be paid must be more than balanced by the injustice done the plaintiff in crediting him only with the price of scantling when it is certain that a large or at least a considerable part of the whole quantity must have been spruce deals worth $15.85 a thousand.

Against this sum of $977.23 must be set off the amount of the defendants' advances. The plaintiff allows these at $755.12. The defendants claim that this set-off should be $769.90. One of the items included in this set-off is $38.40, being the amount of

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an order from plaintiff to pay Mayne. But defendant Wood admits that no such order was given. The deduction of this amount reduces the set-off to $731.50. This includes $200 paid by defendants to Matheson for the plaintiff on account of the lease of the land. The jury has found for the plaintiff for $200. The balance shewn by the foregoing computations would be $245.73.

It was not shewn that the defendants suffered any substantial damage from the plaintiff's breach of his contract and it was shewn that the defendants had sold to one Hudson a quantity of logs left on the land, 150 or 155 in number, for $8 which the purchaser seems to have regarded as a very good bargain.

Inasmuch as the verdict of the jury has not given the plaintiff a larger sum than he is entitled to, I see no reason why a new trial should be ordered or why the notice of appeal should be amended. I think that notwithstanding the want of adequate instructions to the jury substantial justice has been done in the case, or at least that no injustice has been done to the defendants.

The appeal should, therefore, in my opinion, be dismissed with costs.

Ritchie, E.J.
Chisholm, J.

RITCHIE, E.J., and CHISHOLM, J., concurred with HARRIS, C.J.

Appeal and motion for new trial dismissed.

SMITH v. BEITZ.

SASK.
C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 23, 1920.

LANDLORD AND TENANT (§ III E—115)—ABANDONMENT BY TENANT—RE-ENTRY BY LANDLORD—EVICTION—QUESTION OF TITLE AT TIME OF EVICTION—PARAMOUNT TITLE NECESSARY—7 GEO. V. 1917, CH. 31.

Unless the evictor can prove his title at the time when the eviction takes place, he is liable in damages to the party evicted, even though the latter has abandoned the premises, believing the former to have a paramount title.

Statement.

APPEAL by plaintiff from the trial judgment in an action for damages for wrongful eviction. Reversed.

P. H. Gordon, for appellant; *E. J. Brooksmith*, for respondent.

The judgment of the Court was delivered by

Newlands, J.A.

NEWLANDS, J.A.:—On March 22, 1918, one Roswell B. Raleigh, by agreement of sale, purchased from the defendant the S.E. ¼-5-9-10-W-2nd meridian for $5,600, paying $700 cash, and the

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balance over an extended period. The agreement provided that the purchaser should immediately after the execution of the agreement have the right of possession of the said premises. Raleigh had also under contract for purchase the S.W. ¼-4-9-10-W-2nd meridian, known as "the Needham quarter." By lease dated October 12, 1918, Raleigh leased both quarters to the plaintiff for the term of 3 years, at the yearly rental of one-half the crop of grain grown thereon. There are the usual covenants for proper tillage and particularly in each year to summerfallow 50 acres or more. The lessor to furnish one-half of the seed and pay half the threshing and twine bills. On the Beitz quarter some fall ploughing was required, and after November 1, the plaintiff was in actual possession of this quarter doing this ploughing and also taking off feed. No fall work had to be done on the Needham quarter, and on it over 50 acres would have to be summerfallowed in due course of good husbandry in 1919. The Beitz quarter could be, as it was, cropped in 1919, but only a small portion of the Needham quarter. The following facts were found by the trial Judge:—

Raleigh made default in his agreement with Beitz. When he got the proceeds of the crop he left the district, leaving as it was put "his debts behind him," and the services of the police failed to locate him.

In April, without taking any proceeding, the defendant Beitz entered into possession of his quarter, excluding the plaintiff and cropped it. The crop was a poor one. On 31st March, 1919, Beitz commenced action against Raleigh for payment and in default possession and cancellation. Smith, the tenant, was not made a party defendant until the 31st May, 1919, when he was added as a party defendant by the order *nisi*. This order is in the usual form, save that the proviso for possession is omitted, and it merely provides for cancellation and foreclosure on default. Final order was made on 21st September, 1919. The affidavit on which this was made is not sufficient and does not disclose that the defendant was in possession and had received that year's crop. No application has, however, been made to set aside the order, and it was made on notice to the defendants, according to its tenor.

When Smith discovered the defendant in possession he took legal counsel as to his position, and was advised that if he went on with the Needham quarter and did the necessary summerfallowing he stood to lose the benefit thereof, as, before he could crop it, the vendor could obtain cancellation order. He went to Needham and proposed a new lease, and on this being refused, abandoned any claim to the Needham quarter. Needham went into possession and made 110 acres of summerfallow and cropped 35 acres thereon. In this the plaintiff acquiesced and suggests no claim in reference thereto. But Smith's solicitors by letter of 22nd April, 1919, demanded of Beitz possession of the Beitz quarter and notified him that he would be held responsible for any damage, if refused. This action was commenced on 12th August, 1919,

claiming possession and damages. At the trial the claim to possession was abandoned. Evidence was adduced on the part of the plaintiff that had he had possession of this quarter in 1919 to crop it, that notwithstanding that Raleigh made default in furnishing seed, he, the plaintiff, would have had a clear profit of $900 or over from the crop. In this estimate no deduction was made for any work which under the lease he should do on the Needham quarter, nor is consideration taken of the condition in which the Beitz would be left, or for future operations. The $900, even leaving out these matters, is too high. In my opinion $500 would be quite high enough, and I do not think that had the plaintiff kept both quarters in 1919 he would have had any profit. The onus is on the plaintiff and there is no evidence to shew that he would.

Upon these facts the trial Judge held:—

In my opinion the stand taken by the plaintiff that he can insist on taking the Beitz quarter and let the Needham quarter go, is not tenable. He cannot take the benefits under the lease and disclaim the burdens. If there was a wrongful determination of his tenancy, the damage should be assessed as on a determination thereof, and on that basis he has not proved any damage. I base my judgment on the ground that the stand which the plaintiff took in reference to the Needham quarter was a repudiation of the tenancy. He had a right to repudiate owing to the failure of his landlord's title and the breach of the agreement to supply seed. And I think this repudiation must go to the whole agreement.

I do not think that the trial Judge has correctly stated the law applicable to this case, nor do I think the facts would justify him in so holding if he had correctly stated the law. He has found that it was only after defendant had taken possession of the south-east quarter of five, that plaintiff abandoned the south-east quarter of four. So that plaintiff's right of action, if any, arose before he took any action which might terminate the lease. Though plaintiff's abandonment of the south-east of four would not terminate the lease, the defendant's action in ousting him from the south-east of five would not have that effect as to that quarter, if he had a paramount title.

I am of opinion that defendant cannot take advantage of plaintiff's subsequent action, but that it was a matter between plaintiff and his lessor, Raleigh. The abandonment of the premises by the tenant does not terminate the lease.

In 18 Hals., p. 480, para. 960, it is stated:—

The mere abandonment of the premises by the tenant does not affect his liability to pay rent. If, however, the landlord subsequently enters and uses the premises for his own purposes this is equivalent to an eviction and he cannot recover rent subsequently accruing due.

Defendant's entry under a paramount title would be an eviction, but, unless the evictor could prove his title, he would be liable to damages.

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Defendant had no right to terminate the agreement of sale between himself and Raleigh by entry upon the land. 7 Geo. V., 1917 (1st sess. Sask.), ch. 31, provides:—

> Notwithstanding any term or provision to the contrary contained in any contract or agreement for the sale of land in Saskatchewan now or hereafter entered into, all proceedings by a vendor to determine or put an end to or rescind or cancel the same shall be had and taken by proceedings in a Court of competent jurisdiction.

Such action was commenced by defendant on March 31, 1919, and was only terminated by final order on September 21, 1919. Until the final order Raleigh was, under the terms of the agreement of sale, entitled to possession, and the plaintiff as his lessee would also be entitled to possession, no order for possession having been made in the order *nisi*.

I am, therefore, of the opinion that defendant had not at the time he evicted plaintiff by entering into possession, a paramount title, and therefore plaintiff has a right to maintain this action.

The trial Judge has found the damages for this eviction from defendant's quarter-section to be $500. I do not think that he has the right to bring the other quarter in the lease, which did not belong to defendant, into consideration in assessing the damages.

The appeal should, therefore, be allowed, and judgment entered for plaintiff for $500 and costs.

Appeal allowed.

ONT.

S. C.

DOBBIN v. NIEBERGALL.

Ontario Supreme Court, Orde, J. November 15, 1920.

VENDOR AND PURCHASER (§ I E—28)—SALE OF TIMBER LIMITS—DEFAULT IN PAYMENTS—RESCISSION OF CONTRACT—RE-SALE—SUIT FOR RETURN OF DEPOSIT—QUESTION OF EQUITABLE RELIEF.

A money-deposit made upon a contract of sale of land is ordered to be returned to the purchaser only when he seeks specific performance, and is ready and willing to carry out the contract, and when it would be inequitable to allow the vendor to retain both the land and the money.

[*Walsh* v. *Willaughan* (1918), 42 D.L.R. 581, 42 O.L.R. 455, followed. See Annotations, When Remedy of Specific Performance Applies, 1 D.L.R. 354; Purchaser's Right to Return of Purchase Money on Vendor's Inability to give Title, 14 D.L.R. 351.]

Statement.

ACTION to recover moneys paid by the plaintiff as purchaser under an agreement for the sale of a timber-limit, and for damages for an alleged breach of the agreement by the defendant.

C. M. Garvey, for plaintiff.

ORDE, J.:—The defendant, although he had appeared and had delivered a statement of defence, did not appear at the trial.

On the 1st December, 1919, the plaintiff and the defendant entered into an agreement under seal whereby the defendant agreed to sell to the plaintiff the license for a certain timber-berth in the district of Algoma, for $19,000, of which $500 was paid upon the execution of the agreement, and the balance was to be paid as follows: $6,500 without interest on or before the 5th January, 1920, and the remaining $12,000 in four instalments of varying amount, with interest, on the 5th January, 1921, 5th September, 1921, 5th January, 1922, and 5th September, 1922, secured by 4 promissory notes to be dated the 5th January, 1920, and to bear interest at 6½ per cent. per annum from that date. The agreement does not say when the 4 promissory notes were to be delivered, but its whole tenor makes it clear that it was intended that they should be delivered on or before the 5th January, 1920, along with the first payment of $6,500. The plaintiff was to have the immediate right to enter upon the lands for the purpose of inspection or of establishing camps, and was also entitled to commence active lumbering operations after payment of the $6,500 (and presumably the delivery of the 4 promissory notes). The defendant was to procure a transfer of the license (which was then incumbered) to the plaintiff, free from incumbrance, and the plaintiff was to assign it to the defendant as security for the payment of the 4 promissory notes. There are other provisions which have no bearing upon the issues here, except the following:—

"Time shall be considered as the very essence of this agreement, and if the payments hereunder are not made promptly at the times and in the manner above set out the party of the first part (the defendant) shall be at liberty to enter on the said lands and lease or sell the same free from any claim or demand whatsoever of the party of the second part (the plaintiff), and any moneys paid by the party of the second part under this agreement shall be forfeited by the party of the second part as liquidated damages for breach of contract and not as a penalty. Provided and it is expressly understood and agreed that, should the party of the second part not make the payment of $6,500 on the 5th day of January, 1920, as herein set out, he shall not be at liberty to commence cutting on the said lands."

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DOBBIN v. NIEBERGALL.

Orde, J.

The $500 was paid upon the execution of the agreement, and upon the strength of it the plaintiff entered into an agreement to sell the timber-limit to certain other persons for $25,000, of which a substantial sum was to be paid by the 31st December, 1919. Some time prior to that date, one of those to whom the plaintiff had contracted to sell told the plaintiff that he had seen this limit advertised for sale in "The Canadian Lumberman," a trade journal. There was no evidence that the defendant was in any way responsible for this advertisement, and it is possible that its appearance was due to some mistake. It resulted, however, in the plaintiff granting to his sub-purchasers an extension of time for two weeks; and, as he was evidently depending upon the payment from them to enable him to pay the $6,500 to the defendant on the 5th January, 1920, he applied to the defendant to extend the time for payment from the 5th January to the 19th January, at the same time asking for an explanation of the advertisement. To this the defendant replied that he knew nothing about the advertisement and that the plaintiff could have found out about it by telegraphing to those who had published it. The defendant then said that if the plaintiff would send him a certified cheque for $1,000 or telegraph the money to one of the banks at Sault Ste. Marie, by the 12th January, 1920, he would extend the time for closing the deal until the 19th January. He also notifies the plaintiff that other people are negotiating for the limit and that if the plaintiff does not "take up the deal" the others wish to do so, and concludes his letter with these words: "So if I don't hear from you by Monday night" (i.e., the 12th January) "I will close the deal with them."

The plaintiff was unable to pay the $1,000, but wrote to the defendant telling him that his sub-purchasers had found that the advertisement was a mistake, and that they were willing to go on with the deal.

On the 15th January, 1920, the defendant acknowledged the receipt of the plaintiff's letter and told him that it was too late, as he, the defendant, had accepted another offer by which he was paid in full. He explained that he was ill and "did not want to take another chance by giving you 2 weeks' option and then to be thrown down again"—not an unreasonable stand to take in view of the fact that up to that time he had received only $500 on account of a $19,000 sale. The plaintiff swore that he subsequently

offered to the purchaser from the defendant first $25,000, and then $29,000, and that the offers were refused, and that the limit was afterwards offered to the persons to whom he, the plaintiff, had agreed to sell, for $32,000.

The plaintiff now claims the return of the $500 which he paid and $11,000 damages for the alleged breach of contract.

The plaintiff relies upon *Kilmer* v. *British Columbia Orchard Lands Limited*, [1913] A.C. 319, 10 D.L.R. 172, *Steedman* v. *Drinkle*, [1916] 1 A.C. 275, 25 D.L.R. 420, and *Brickles* v. *Snell*, [1916] 2 A.C. 599, 30 D.L.R. 31, as establishing his right to a refund of the deposit of $500 paid upon the execution of the contract. But the judgment of the Appellate Division in *Walsh* v. *Willaughan* (1918), 42 O.L.R. 455, 42 D.L.R. 581, establishes that the return of the deposit is ordered only in cases where the plaintiff seeks specific performance and is ready and willing to carry out his contract and the circumstances are such that it would be inequitable to allow the vendor to retain the land and the money. The repayment in such cases is decreed as a form of equitable relief against forfeiture. In the present case specific performance is not sought —perhaps because it could not be granted, as the defendant has resold the timber-limit. The present case is substantially on all fours with *Walsh* v. *Willaughan*, and it would not be useful to repeat the reasoning of that judgment here.

There is one feature of the present case which, however, requires some comment. The plaintiff's request for an extension of the time fixed for paying the $6,500 was granted conditionally, that is, the defendant gave the plaintiff a further week within which to pay $1,000, and if that sum was paid within that week then the plaintiff was to have an additional week in which to pay the remaining $5,500, but the defendant expressly stipulated that "if I don't hear from you by Monday I will close with them," that is, with the other prospective purchasers.

It is now suggested that the extension of time under these conditions constitutes an absolute waiver of the provision that time should be of the essence of the contract, on the authority of *Kilmer* v. *British Columbia Orchard Lands Limited* and *Steedman* v. *Drinkle*, and it must be confessed that there is language in the judgment in *Steedman* v. *Drinkle* which might indicate that a mere extension of time without qualification might amount to a

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waiver of the right to insist upon time as of the essence of the contract. Whether that is a principle which the Judicial Committee really intended to lay down must remain to be seen, but I cannot believe that it was intended to decide that every extension, however qualified, should constitute such a waiver. In the present case the plaintiff was notified in effect that if the $1,000 was not paid within the extended period of one week the contract would be at an end, and the defendant would consider himself at liberty to resell. This, in my judgment, constituted both a renewed stipulation that time would be of the essence of the agreement for the extended period, and also a notice of the defendant's intention to avail himself of his right to resell. The $1,000 was not paid, and the defendant resold. In these circumstances, I am of the opinion that the contract went off because of the plaintiff's own default, and that he cannot recover his deposit.

The claim for damages can, of course, have no foundation, there being no breach of contract by the defendant. It is immaterial at what price the defendant resold. There was in fact no evidence as to the price the defendant obtained on the resale. His statement of defence alleges that he resold for $18,500.

The action will be dismissed; but, as the defendant did not appear at the trial, the dismissal will be without costs.

Action dismissed.

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NATIONAL TRUST Co. v. GILBART.

Saskatchewan Court of Appeal, Newlands, Lamont and Elwood, JJ.A. December 23, 1920.

COMPANIES (§ VI F—346)—SALE OF COMPANY PROPERTY—MONEY TAKEN BY DIRECTORS PERSONALLY—NO AUTHORITY FROM COMPANY—COMPANY ASSETS—RIGHTS OF ASSIGNEE.

The sale-price of certain lots being admittedly an asset of a company, it does not cease to be an asset even if each director individually takes a portion for his own use, when he or they have not received authority from the company to do so, and, on an assignment being made by the company, the property in the money never having passed out of the company, the assignee is entitled to sue for its return.

Statement.

APPEAL by defendant from the trial judgment in an action to recover the purchase price of certain lots which the defendants had divided among themselves. Varied.

T. D. Brown, K.C., and *A. E. Bence*, for appellants.

C. E. Gregory, K.C., for respondent.

NEWLANDS, J.A.:—The three defendants were the only members of the Saskatoon Trading Co. They were also the directors of the company. The company owned two lots of land which it sold. The proceeds, after paying for the land, were divided by the three defendants amongst themselves. No dividend was declared, they simply divided amongst themselves certain assets of the company. They could not, in my opinion, make title to this property in that way, therefore the amount each one took out of the assets of the company would still be the property of the company, and each of the defendants would hold the amount he obtained in that way in trust for the company. The company has since become insolvent and has made an assignment for the benefit of creditors, and the assignee brings this action to recover the amount of the assets so disposed of. Newlands, J.A.

I think the assignee has the right to recover. The defendants, having no legal title to the assets of the company which they divided amongst themselves, have no right to retain the same, and must hand the same over to the assignee in order that it may pay the debts of the company. Having had the use of this money for some time, they should pay interest on the same at the legal rate. As the Chief Justice has held that J. W. Gilbart was induced to become a member of the company under the idea that he was only entering into a land deal, he acted innocently under a mistake in law, and should, therefore, be only held liable for the amount he received, and not jointly with the other defendants for the full amount.

The trial Judge found the amount which each of the defendants received, and gave judgment against them jointly for the whole amount. This judgment should be amended as to the appellant J. W. Gilbart to a judgment against him for the amount he received, with interest.

The appeal should, therefore, be allowed as above specified, with costs.

LAMONT, J.A.:—Prior to November 24, 1911, the Saskatoon Trading Co., Limited, consisted of three persons, the defendant B. B. Gilbart, the defendant Paul, and one Wiley. On said date Wiley transferred his shares in the company to the other two shareholders thereof, who shortly afterwards sold 50 of the shares —which was one-fifth of the company's capital stock—to J. W. Lamont, J.A.

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Gilbart for $5,000 cash. Before J. W. Gilbart joined the company, it had purchased under an agreement of sale certain lots in Saskatoon for $25,000, with the intention of erecting thereon store premises for the purposes of its business. The value of the property was believed to be increasing, and it was for the purpose of participating in this increased value that J. W. Gilbart joined the company. By an agreement, bearing date July 25, 1912, the defendants Paul and J. W. Gilbart transferred to B. B. Gilbart their shares, but they were to remain shareholders and directors in the company with one qualifying share each. The consideration for the transfer was, that B. B. Gilbart should assume all the liabilities of the company except the sum of $6,000 then due to the bank for money advanced to enable the company to purchase the said lots. In addition, J. W. Gilbart was to receive one-fifth and Paul two-fifths of the profits expected to be derived from the sale of the said lots. The agreement also contained the following clause:—

> And further as there appears by the said stock sheets to be a deficit, or shortage between the inventory price of the said goods effects and assets of the Company, and the total liabilities of the said Company, the said J. E. Paul agrees to pay to the said B. B. Gilbart the sum of Twenty-one Hundred and Three 38/100 Dollars being two-fifths part of the said difference on or before December 31st, 1913, with interest at 8 per centum per annum, such payment to be made out of proceeds of the real property held by all the parties hereto, when the same shall by consent be disposed of, and the said J. W. Gilbart agrees to pay to the said B. B. Gilbart Six Hundred and Nine 34/100 Dollars being one-fifth part of the said difference on or before December 31st, 1913, with interest at 8 per centum per annum, such payment to be made out of the proceeds of the real property held by all parties hereto, when the same shall by consent be disposed of.

In December, 1912, the Saskatoon Trading Co. sold the said lots for $71,500, and after certain payments had been made to the bank, which held the title as security, the balance on being received was divided among the three defendants, and J. W. Gilbart admits that he received on account of his one-fifth interest the sum of $11,500. B. B. Gilbart omitted to pay the debts of the trading company. He carried on the business until 1915, when the company made an assignment for the benefit of its creditors to the plaintiffs, who have received creditors' claims amounting to over $30,000. The plaintiffs brought this action to recover the purchase money of the said lots which the defendants divided among themselves. J. W. Gilbart disputed the plaintiffs' right to recover.

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The Chief Justice, before whom the action was tried, held that the transfer of the said lots from the company to the defendants as individuals was a voluntary gift which had the immediate effect of making the company insolvent. He also held that the act of the defendants as directors, in transferring the lots to themselves, was fraudulent as against the creditors, and he gave judgment against the defendants, jointly and severally, for $47,500. From this judgment the defendant J. W. Gilbart appeals.

After a careful perusal of the evidence, I am unable to reach the conclusion that J. W. Gilbart was guilty of any fraud. He appears to me to have acted throughout with an honest belief that he was entitled to the share of the purchase money of the lots which he received, and also with an honest belief that his brother B. B. Gilbart would pay the debts of the company.

On behalf of appellant it was argued that the plaintiffs as assignees for creditors had no standing to maintain the action, because the right of action did not pass from the company to the plaintiffs by the assignment.

In my opinion the plaintiffs' right to bring the action cannot successfully be questioned. The sums which each shareholder received out of the purchase price of the lots were not received as dividends declared by the company on its stock. The moneys were part of the assets of the company which each shareholder took without any sanction on the part of the company. There appears in the appeal book what purports to be minutes of meeting held by the directors. It reads as follows:—

Meeting of Directors in Store, April 29, 1912.

On account of J. E. Paul, B. B. Gilbart and J. W. Gilbart having to personally guarantee amount borrowed from The Union Bank to pay balance on lots 24, 25 & 26, block 16, Plan C.E., it is resolved that as soon as a deed is issued for said lots to The Saskatoon Trading Co. that a transfer be made from the said Saskatoon Trading Co. to the said J. E. Paul, B. B. Gilbart and J. W. Gilbart of said Lots 24, 25 & 26, Block 16, Plan C.E.

In compliance with this resolution, transfers under the seal of the company, attested by B. B. Gilbart, were executed in January, 1913. These transfers, however, were never used. In January, 1915, the company executed a transfer to the London & Saskatchewan Investment Co. Ltd., for whom Martin & Hargraves had purchased the lots in December, 1912, and in his examination for discovery the appellant, on being asked in reference to a

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statement sent out by the company in August, 1914, which shewed these lots as an asset of the company at that time, gave this testimony:—

Q. So far as there were still payments to get from Martin & Hargreaves such payments unpaid would still constitute an asset of the Saskatoon, Trading Co.? A. Yes, in that way, yes.

The appellant, therefore, having recognised the purchase money of the lots to be an asset of the company after the transfers were executed, cannot now claim that the transfers ever became operative. The company itself sold and transferred the lots and received the purchase money. That money was admittedly an asset of the company. Each director, with the concurrence of the others, individually took a portion of that asset and put it in his pocket. This left the company in an insolvent condition. Not being authorised by the company so to do, the money was still an asset of the company. The property in the money never passed out of the company. It still belongs to it, and the assignees are therefore entitled to demand its return.

As counsel for the plaintiffs stated that his clients would be satisfied to have J. W. Gilbart return the $11,500, which he admittedly received, the judgment against him should be reduced to that amount.

The judgment should, therefore, be varied by reducing the judgment against J. W. Gilbart to $11,500. Although the appellant succeeds in having the judgment substantially reduced, I would not allow any costs of the appeal, because the entire appeal was fought out on the ground that the plaintiffs were not entitled to bring the action, on which point the appeal fails.

Elwood, J.A.

ELWOOD, J.A.:—I concur.

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Ontario Supreme Court, Middleton, J. December 28, 1920.

INTOXICATING LIQUORS (§ III H—90)—ONTARIO TEMPERANCE ACT, 6 GEO. V. 1916, CH. 50, SEC. 70 (2)—INSPECTOR—SEARCH OF YACHT WITHOUT WARRANT—LACK OF BELIEF THAT LIQUOR STORED—TRESPASS—LIABILITY.

Section 70 (2) of the Ontario Temperance Act, 6 Geo. V. 1916, ch. 50, authorises a Government inspector to search a private yacht without a warrant, only if he believes that intoxicating liquor is kept there in contravention of the Act. If he does not believe at the time of making the search that liquor is kept there in contravention of the Act, he commits a trespass for which he is liable in damages.

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ACTION for damages for trespass in searching a private yacht for intoxicating liquors.

D. L. McCarthy, K.C., for plaintiff; *J. H. Rodd*, for defendant.

MIDDLETON, J.—The plaintiff, O. E. Fleming, one of His Majesty's counsel, is the owner of 64 shares in the registered yacht Kittiwaki, a cruiser of some 15 tons, used by him exclusively for the pleasure of himself and his family.

Mr. Fleming is a member of the Royal Canadian Yacht Club and the holder of an Admiralty license authorising him to fly the blue ensign of His Majesty's fleet on this boat.

September 17, 1920, the plaintiff's sons were entertaining a party of friends, ladies and gentlemen, upon the yacht, with their father's full consent and approval. The yacht left the Government dock at Windsor, where it was moored, and ran up the river and came to anchor in Lake St. Clair. During this run the boat wore the blue ensign and the R.C.Y.C. flag, and when it came to anchor these were taken in and proper lights displayed.

Supper was being served in the cabin when the defendant, himself armed, accompanied by two armed men, boarded the boat, and, after asking the name of the owner, which was at once given, proceeded to search the boat for intoxicating liquor, finding none.

It appears that the defendant is an inspector appointed by the Ontario Government for the purpose of enforcing the provisions of the Ontario Temperance Act, 6 Geo. V. 1916, ch. 50, and that he assumed that that Act authorised his action.

He says that he saw the boat leaving Windsor, and followed it all the way up the river and into the lake, but did not come up to it until it came to anchor. He did not notice the flags that it was flying, and at first thought it was another boat he had been watching. When he boarded the boat and was told it was Mr. Fleming's yacht, he did not doubt the fact, for he recognised young Mr. Fleming. He admits that he then had no suspicion that the boat was carrying liquor or in any way engaged in illicit liquor traffic, yet he searched it so as to convince his men of his impartiality. He searched all boats on the river, quite irrespective of any suspicion he might have as to a particular boat carrying liquor. He had no warrant.

Mr. Fleming wrote the defendant complaining of this action, asking for an explanation and apology. The defendant made no

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written reply, but, meeting Mr. Fleming in the street, in an offensive manner attempted to justify his conduct. The writ was then issued.

By his defence the defendant does not set up any justification for his conduct, but denies the fact of the trespass.

There was no material conflict of evidence. The two men accompanying the defendant displayed revolvers, one had two, the other one only. The defendant had one, and says he did not draw it. He had it in a holster on his left shoulder, where he could get it instantly. Young Mr. Fleming thought he had it in his right hand in his coat-pocket.

The right to obtain a search-warrant and to make search under such warrant is given in wide terms by the Act, sec. 67; but the officer must, before obtaining the warrant, satisfy the magistrate "that there is reasonable ground for belief that . . . liquor is being kept for sale or disposal or otherwise contrary to the provisions of this Act:" sec. 67, as amended by sec. 23 of the amending Act, 7 Geo. V. 1917, ch. 50.

The statute also gives to the officers of the law the right to enter at any time a place of public entertainment or a place wherein liquors are reputed to be sold "for the purpose of preventing or detecting the contravention of any of the provisions of this Act," sec. 66 (1).

Section 70 deals with the right to seize liquor in transit, and provides (sub-sec. 2): "Any inspector . . . if he believes that liquor intended for sale or to be kept for sale or otherwise in contravention of this Act, is contained in any vehicle on a public highway or elsewhere, or is concealed upon the land of any person, may enter and search such vehicle . . . and remove any liquor found there."

The defendant, though he has not pleaded any justification for his conduct, points to this section as authorising what he did. The section could apply only if the defendant believed that liquor intended for sale or to be kept for sale or otherwise in contravention of the Act, was on the boat; and, secondly, if the boat could be regarded as a "vehicle on a public highway or elsewhere."

Here the defendant did not believe that there was any liquor upon this boat intended for sale or to be kept for sale or otherwise

in contravention of the Act—at first, while he was mistaken as to the identity of the boat, he may have had some vague suspicion, but what the statute requires is not suspicion but belief, the acceptance of the thing as true, founded upon reasonable evidence. Here even suspicion was gone before the searching took place.

Then a boat is not a "vehicle," much less a "vehicle on a public highway or elsewhere." The Oxford dictionary defines a vehicle as "a conveyance of any kind used on land." The Century as "any carriage moving on land." In an election trial "The Minnie M" was held not to be a vehicle or conveyance within the Election Act: *In re Sault Ste. Marie Provincial Election*; *Galvin and Coyne* cases (1905), 10 O.L.R. 356.

In any view of this case, the defendant had not the right to do what he did, and his action was trespass, committed in a way that was of necessity most offensive, for it implied an accusation of a most serious character. It meant that an officer of the law had reason to suppose and did believe that Mr. Fleming was permitting his boat to be used for rum-running.

When apology was demanded, none was forthcoming but on the contrary an assertion of right.

Though there was nothing upon the record to justify such a course, counsel for the defendant asked Mr. Fleming whether as a matter of fact his boat was carrying liquor; and, after Mr. Fleming's denial, he cross-examined his son and one of the guests upon the boat upon the same topic.

Had the defendant taken the position that he had made a mistake, but had acted in good faith, I should have thought nominal damages a sufficient vindication of the plaintiff's right; but, when the whole course of the transaction indicates a spirit of defiance and an intention to give offence, even in the conduct of the trial, I feel that punitive damages should be awarded.

The Ontario Temperance Act is an extremely drastic piece of legislation, and, like all sumptuary laws of this kind, it is apt to provoke hostility on the part of those most affected by its provisions, and so produce a spirit of lawlessness most detrimental to the well-being of the community, and for this reason it is of the utmost importance that those charged with the administration of the law should themselves be discreet and, above all, law-

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abiding. This Act has curtailed what had theretofore been regarded by many as being the right of the individual, and it is the duty of all to yield obedience to its principles, but it has not abolished all the rights of property, and affords no justification or excuse for the lawless and ill-advised conduct of this defendant. Unless the Courts can be relied upon to afford a remedy, those who commit trespass by force and with arms may meet with armed resistance, and most serious results may follow.

I have concluded to award $500 and full costs.

Judgment accordingly.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. February 12, 1921.

1. CERTIORARI (§ II—24)—INTOXICATING LIQUOR KEPT FOR EXPORT PURPOSES UNDER PERMIT—SALE MADE LOCALLY BY CLERK—LACK OF KNOWLEDGE OF FIRM—FORFEITURE OF LIQUOR—APPEAL.

The Supreme Court of Alberta, Appellate Division, is entitled upon *certiorari* to look at the evidence given before the convicting magistrate to ascertain whether or not it is sufficient to sustain the conviction and if it is not to quash the conviction.

[*Rex* v. *Emery* (1916), 33 D.L.R. 556, 27 Can. Cr. Cas. 116, 10 Alta. L.R. 139, followed.]

2. EVIDENCE (§ II B—113)—OF STOOL-PIGEON—OFFENCE UNDER MANITOBA LIQUOR ACT—PRESUMPTION OF INNOCENCE—REASONABLE DOUBT.

The uncorroborated evidence of a stool-pigeon who by deception induces the committing of an offence under the Manitoba Liquor Act is not sufficient on which to base a conviction in view of the presumption of innocence and the necessity of excluding all reasonable doubt.

3. INTOXICATING LIQUORS (§ III A—55)—"UNLAWFUL KEEPING FOR SALE"—CONSTRUCTION.

"Unlawful keeping for sale," or keeping for unlawful sale, refers to some habitual or continuing purpose and cannot be proved by proving one illegal sale (*per* Stuart, J.).

[*Jayes* v. *Harris* (1908), 99 L.T. 56, referred to.]

4. INTOXICATING LIQUORS (§ III H—90)—EXPORT COMPANY—LOCAL SALE IN BREACH OF LIQUOR ACT—PRESUMPTION AS TO LIQUOR IN WAREHOUSE.

A company keeping liquor for export trade under the permit of the Attorney-General, may properly be prosecuted for a breach of the Liquor Act, in respect of a single local sale, but it does not necessarily follow that all of the liquor in the company's warehouse, or even part of it, is kept for other than export purposes.

[*Rex* v. *Covert* (1916), 34 D.L.R. 662, 28 Can. Cr. Cas. 25, 10 Alta. L.R. 349, followed; *Rex* v. *Bulmer* (1920), 55 D.L.R. 113, applied; *Gold Seal Ltd.* v. *Dominion Express Co.* (1920), 53 D.L.R. 547, 23 Can. Cr. Cas. 234, 15 Alta. L.R. 377; *Attorney-General of Manitoba* v. *Manitoba License Holders Ass'n.*, [1902] A.C. 73, referred to. See also *Rex* v. *Nat. Bell Liquors* (1920), 54 D.L.R. 704.]

Statement.

APPEAL by the Crown from the judgment of Hyndman, J., quashing a conviction for unlawfully keeping for sale a quantity of liquor contrary to the Alberta Liquor Act, and an order of the magistrate for the destruction of a quantity of liquor. Affirmed.

The judgment appealed from is as follows:—Two motions are before me made on behalf of the above named applicants, The Nat Bell Liquors Co., Ltd. The first a motion by way of *certiorari* to quash a certain conviction made by George B. McLeod, Police Magistrate in and for the Province of Alberta, on November 21,

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1920, against the applicants, for that they on October 1 and 2, 1920, at Edmonton in the said Province, did unlawfully keep for sale a quantity of liquor, contrary to the Liquor Act, 6 Geo. V., 1916 (Alta.), ch. 4, and amendments thereto, for which offence they were fined the sum of $200, and costs $5.50. The second, a similar motion to quash a certain order made by the same magistrate against the said applicants on November 4, 1920, whereby having regard to the conviction before him on October 21, 1920, of the Nat Bell Liquors Ltd. having unlawfully kept liquor for sale contrary to the provisions of the Liquor Act the said magistrate did declare the said liquor and the vessels in which same is kept to be forfeited to His Majesty to be sold or otherwise disposed of as the Attorney-General may direct.

The grounds of objection raised in the first motion are as follows:

(1) The Liquor Act is *ultra vires* of the Provincial Legislature. (2) The Liquor Act is not a law made exclusively by the Provincial Legislature (within the meaning of sec. 92 of the B.N.A. Act) inasmuch as the Liquor Act was enacted by the Legislature pursuant to sec. 24 of the Direct Legislation Act, 4 Geo. V. 1913 (Alta., 1st sess.) ch. 3, without amendment and without debate having been previously submitted to be voted on and decided in the affirmative by the electors under the said Direct Legislation Act, which last mentioned Act is *ultra vires* of the Provincial Legislature. (3) The provisions of the Liquor Act respecting keeping liquor for sale are not intended to apply and do not apply to liquor kept in stock for export, or in premises coming within the meaning of the Liquor Export Act, 8 Geo. V. 1918 (Alta.) ch. 8, and amendments [see 10 Geo. V. 1920 (Alta.) ch. 7]. (4) If the accused were guilty of any offence at all it was an offence within the Liquor Export Act, and not within the Liquor Act. (5) The information and summons herein charge two offences and the conviction is for two offences. (6) There was no evidence to support the conviction. (7) If there was any contravention of any provision of the Liquor Export Act, it was by a servant or employee of the accused, and contrary to explicit instructions of the accused. (8) The evidence conclusively proved that the liquor in question was kept by the accused for export—and was not kept for sale within the meaning of the Liquor Act. (9) If any *primâ facie*, or presumptive case was made of the offence charged the same was completely rebutted by the evidence adduced on behalf of the defendant, and the magistrate was bound by such evidence. (10) Proof of one sale of one case of liquor by an employee of the accused is not *primâ facie* or any proof of keeping liquor for sale contrary to the provisions of the Liquor Act—by the accused—and more especially when the accused is shewn to keep liquor on his premises lawfully (*i.e.*, not in contravention of the Liquor Act) for export.

The grounds raised in the second motion are:—

(1) The Liquor Act is *ultra vires* of the Provincial Legislature. (2) The Liquor Act is not a law made exclusively by the Provincial Legislature (within the meaning of sec. 92 of the B.N.A. Act) inasmuch as the Liquor Act was

enacted by the Legislature pursuant to sec. 24 of the Direct Legislation Act without amendment and without debate having been previously submitted to be voted on and decided in the affirmative by the electors under the said Direct Legislation Act, which last mentioned Act is *ultra vires* of the Provincial Legislature. (3) The provisions of the Liquor Act respecting keeping liquor for sale are not intended to apply and do not apply to liquor kept in stock for export, or in premises coming within the meaning of the Liquor Export Act and amendments. (4) If the Nat Bell Liquors Ltd. were ever convicted of keeping liquor for sale such conviction is bad in law. (5) The provisions of the Liquor Act respecting forfeiture and sale of liquor are *ultra vires* of the Provincial Legislature, and are in excess of the powers of Provincial Legislature under clause 15 of sec. 92 of the B.N.A. Act. (6) That in purporting to adjudicate on the question of forfeiture and sale of the liquor in question the magistrate was exercising the functions of a Judge of a Superior Court claiming unlimited jurisdiction as to value of property or amount involved, and he was not appointed a Judge by the Governor-General pursuant to sec. 96 of the B.N.A. Act. (7) Proceedings for forfeiture of liquor to His Majesty, to be sold or otherwise disposed of as the Attorney-General may direct, can only be instituted by the Attorney-General, who must be a party to the proceedings as plaintiff or complainant. (8) The provisions of sec. 80 of the Liquor Act [amendment, 7 Geo. V. 1917 (Alta.) ch. 22, sec. 15], do not apply to the circumstances in evidence herein. (9) The Magistrate exceeded his jurisdiction, if any, under sec. 79 of the Liquor Act, as the procedure and conditions therein laid down were not complied with. (a) The information (Ex. 1 to the affidavit of Nathan Bell) on which the magistrate issued the search warrant (Ex. 2 to said affidavit) does not disclose any *belief* in the informant that the liquor referred to was being kept for sale or disposal contrary to the Act. (b) The warrant to search does not shew that the magistrate had been satisfied by information on oath of an officer that there was reasonable ground for such belief, but on the contrary purports to be issued on the ground "that there is reason to suspect" that intoxicating liquors are being kept for sale contrary to the Liquor Act. (c) The occupant of the premises was not arrested, and it is only "the person so arrested" who may be proceeded against under said sec. 79. (d) It does not appear that the provisions of sec. 80, sub-sec. 7, Liquor Act, were complied with. (e) The "conviction" referred to in sub-sec. 4 of said sec. 79 is a conviction on a charge laid in pursuance of and subsequent to the proceedings authorised by sub-secs. 1, 2, 3, and 4. The conviction in respect of which the magistrate declared the liquor in question forfeited was not a "conviction of the occupant of such house or place" within the meaning of said sec. 79. (10) And on grounds disclosed in the affidavits of Nathan Bell and Charles Courselles McCaul. (10a) That the warrant to enter and search for liquor was granted by an officer (to wit: Inspector Piper) of the Alberta Police Force, who was disqualified by interest to act as a magistrate under sec. 79 of the Liquor Act—that such warrant does not shew on its face any jurisdiction in the said magistrate to grant the same. (11) That the order of the magistrate does not disclose on its face any jurisdiction to declare the liquor and vessels therein specified to be forefeited to his Majesty, since it does not appear that the liquor and vessels specified therein were then under seizure by an officer, or on what premises the same had been seized, or who was the owner or claimed

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to be the owner. (12) That there was no proof before the magistrate that the liquor and vessels specified in the said order were the same liquor in respect of which the conviction recited therein was made. (13) That there was no evidence to justify the forfeiture of the liquors and vessels specified in the order complained of. (14) That this is a proper case for the exercise of the jurisdiction of this honourable Court to relieve against forfeiture; and the applicant (in the alternative) prays to be relieved against the forfeiture of its goods.

The case is undoubtedly one of very great importance and interest from two standpoints.

Firstly, the defendants are exporters of liquor operating under a charter of the Dominion of Canada and holding a permit from the department of the Attorney-General under the provisions of the Liquor Export Act.

It is suggested that the police officials in their endeavours to enforce observance of the Liquor Act are confronted with difficulties originating in or from wholesale houses such as that of the applicants; and whilst there can be no justifiable interference with their operations so long as they observe the law applicable to them, nevertheless, if under the cloak or guise of "exporters" they in fact illicitly sell locally the work of the authorities must obviously be very greatly increased, and, undoubtedly, if such violations are in fact being committed by companies of this character there is every justification for a rigorous application of the penal provisions of the law.

Secondly, the importance of the proceedings to the defendants is also very serious, not only by reason of the conviction itself, but in addition because of the value of the goods forfeited, amounting it is said to a figure in the neighbourhood of $50,000.

In view, therefore, of the peculiar gravity of the matter, I felt it right not to curtail arguments of counsel even where I had already formed opinion one way or the other on any of the points raised and so very learned, elaborate, and interesting arguments were presented, extending over a period of almost 4 days.

I do not propose to deal with the objections in the order in which they appear in the notices of motion, nor, for the reasons hereafter mentioned, do I propose to deal with some of them at all.

I will first devote myself to the facts of the case considering and keeping in view the objections:—

(a) That there was no evidence to support the conviction. (b) If there was any contravention of any provision of the Liquor Export Act, it was

by a servant or employee of the accused, and contrary to explicit instructions of the accused. (c) The evidence conclusively proved that the liquor in question was kept by the accused for export—and was not kept for sale within the meaning of the Liquor Act. (d) If any *primâ facie* or presumptive case was made of the offence charged the same was completely rebutted by the evidence adduced on behalf of the defendant, and the magistrate was bound by such evidence.

In *Rex* v. *Covert* (1916), 34 D.L.R. 662, 28 Can. Cr. Cas. 25, 10 Alta. L.R. 349, a decision of our appellate division, Beck, J., after an exhaustive review of the authorities, lays down the law in the following language (34 D.L.R., at 673):—

We are bound to presume the accused was innocent until proved guilty. He gave all the available evidence and that evidence if true explained away the inference or presumption against him. It will be objected of course that the magistrate may have disbelieved entirely the evidence on behalf of the accused and that it was open to him to do so; but in my opinion it cannot be said without limitation that a Judge can refuse to accept evidence. I think he cannot if the following conditions are fulfilled: (1) that the statements of the witness are not in themselves improbable or unreasonable; (2) that there is no contradiction of them; (3) that the credibility of the witness has not been attacked by evidence against his character; (4) that nothing appears in the course of his evidence or of the evidence of any other witness tending to throw discredit upon him; and (5) that there is nothing in his demeanour while in Court during the trial to suggest untruthfulness. To permit a trial Judge to refuse to accept evidence given under all these conditions would be to permit him to determine the dispute arbitrarily and in disregard of the evidence, which is surely not the spirit of our system of jurisprudence.

The correctness of the proposition which I have laid down is fairly established by the principles laid down in the cases of *Browne* v. *Dunn* (1894), 6 R. 67, lengthy extracts from which appear in *Rex* v. *Minchin* (1914), 15 D.L.R. 792, 22 Can. Cr. Cas. 254, 7 Alta. L.R. 148 at 155; and in *Peters* v. *Perras* (1909), 42 Can. S.C.R. 244, a fuller report of the reasons for judgment appearing in *Park* v. *Schneider* (1912), 6 D.L.R. 451 at 454, 5 Alta. L.R. 423.

Where evidence is reported to an appellate tribunal, especially where, as here, it appears that the evidence was taken by a stenographer, that tribunal has not, of course, the advantage of observing the demeanour of the witness when giving his evidence; but in the first place if his demeanour has been the sole ground upon which the trial Judge has rejected the witness's evidence, it is reasonable to expect that at least some indication of it will appear in the material reported to the appellate tribunal, for instance, in the reasons for the decision, if reasons are given, in the form the witness's answers take, or even in the form of the questions put to him (though care should be taken to satisfy one's self that questions imputing misconduct are not put unfairly and without some foundation) or in observations by the trial Judge during the course of the case. All this is of special force in a criminal case in which, it is unnecessary to repeat, the accused ought not to be convicted, unless upon the whole case it is shewn that he is guilty beyond a reasonable doubt.

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This decision is of course binding upon me, and it is therefore necessary to consider and analyse the evidence with a view of ascertaining whether the facts are such as bring the case within the rules in the judgment just quoted.

I will, therefore, first examine the evidence to discover whether a *primâ facie* or presumptive case only was made out against the defendant company, and if such is the fact then whether the testimony adduced by the defence fulfils or falls within the requirements and conditions just indicated in order to successfully rebut such *primâ facie* or presumptive case.

The evidence taken before the magistrate was very lengthy, covering nearly 200 typewritten pages, that of the Crown alone, apart from rebuttal, occupying over 70 pages. It will, therefore, be convenient to set forth the material evidence disclosed for the prosecution leaving out nothing which can be of any value in determining what knowledge, if any, the defendants had of the sale upon which the charge is founded.

As I see it the facts are as follows:—

The defendants are proprietors of a business known as the Nat Bell Liquors Ltd., incorporated by Dominion charter, export liquor dealers, complying with all the formalities and conditions of the Liquor Export Act and amendments, and holding a permit or license from the department of the Attorney-General as required by that Act. Their place of business is in a building situated on the corner of Jasper and Namayo Avenues in this city. They have, during most of this year, carried on a very large export liquor business. They have never been convicted of selling liquor locally although very careful and continuous inspection and watch has been kept upon their premises by the provincial and city police officials, and there is no evidence apart from this particular case that they ever at any time sold liquor except as exporters, which business was entirely legitimate.

The company is controlled by Nat Bell and W. Sugarman, its officers and directors.

In the front portion of the building is an office and behind the office, a wooden partition separating them, is a warehouse or portion of the premises in which the goods are kept and stored.

About September 29, 1920, one Delmar Hodgkins, an inspector of the provincial police, met one Sergeant Gillam of the city police,

and Martin Bolsing, a detective specially and temporarily employed. With a view to finding out whether or not the defendant company was engaged in unlawfully selling liquor Hodgkins advanced to Gillam the sum of $45 to be given to Bolsing with the object of enabling him to purchase liquor from the defendants if he could induce them to sell to him. The money was "marked" by Hodgkins and this feature of the case I will refer to later. As a result of this arrangement on Wednesday September 29 Bolsing called at the premises of the defendant company, but nothing was done on the occasion beyond inquiring of the warehouseman, one Gordon Angel, whether one "Sam" (a person not in any way connected with the business) was in, and no mention at all was made of purchasing liquor. On the following days, Thursday and Friday, he again called at the place and he saw this same man, Angel, there. The following questions and answers in Bolsing's evidence reveal what was said and done:—

Q. What did you say to the clerk? A. We went over to the seat in the south-east corner of the office and sat down and I said, "How's chances for a bottle?" and he said "No," and I said, "What?" and he said "No." I said "Can I get a case?" and he said "Yes," and I said, "What do you charge?" and he said, "Some at forty and some at forty-five." I said I wanted good stuff, not rotten stuff, and he said, "The stuff at forty-five is good—Canadian Club." He said, "What do you work at?" and I said, "I am a carpenter by trade and will be working in the Gem Theatre to-morrow." Q. You are speaking of what day? A. October first. Q. I am speaking of the 30th? A. Oh, yes, it would be the 30th September. Thursday the 30th, Friday the first and Saturday the second. Q. You were in on the 29th, Wednesday, and asked for some whisky. On Thursday you went in and had this talk. You told him that you would be working at the Gem Theatre? A. Yes. I said, "I will come in to-morrow and give you the money," and walked out again. The next day at 4.30 in the afternoon— Q. Friday the first? A. Yes. I went in there again and met the same man. There was Nat Bell there and that man over there. Q. Mr. Sugarman? A. Yes. Q. Do you know him personally? A. No.

Q. There was Nat Bell, Mr. Sugarman, and who else? A. The same girl was there. Magistrate. Which same girl? A. The day previously the same girl was there. Mr. Woods. The day previously a girl clerk and Angel were there and this day Nat Bell and Sugarman and the girl and Angel the same clerk were. What happened after that? A. I got in touch with the clerk.

Mr. Friedman. What clerk? A. Angel. Mr. Woods. Who spoke to you first? A. Nat Bell spoke. He said, "Who do you want to see," and I said, "The clerk," and he said, "Gordon?" He came out and I said, "I have decided to take a case of whisky called Canadian Club." I said, "Can you deliver it," and he said, "Yes," and asked where I lived. Q. Where did this conversation take place? A. By the doorway leading from the office into

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the warehouse. I asked him— Q. Just a moment. Where were Bell and Sugarman at the time the conversation took place? A. They were at the desk. Q. Which desk. There are two desks here? A. What is this? A Voice. Filing cabinet. Mr. Woods. And desk is in front of the filing cabinet. (Marked C.). Mr. Woods. Did you see any desks? A. Yes, two. Q. And the door into the warehouse is shown on that plan? A. Yes. Q. It was in that neighbourhood you were talking to Angel? A. Yes. Q. And Nat Bell and Sugarman were talking to one another? A. Yes. Q. What were they doing? A. There was money (?) on the desk and stuff. Q. And the conversation with Angel took place about the door? A. Yes. Q. Could they hear the conversation? A. I don't think they heard it. Q. What happened after you told Angel that you had decided to take a case of Canadian Club at $45? A. I pulled out a roll of bills and gave them (him) two twenties and a five. Q. Do you remember the bank these bills were on? A. I couldn't tell you. Q. They were two twenties and a five? A. Yes, I handed to Gordon Angel. Q. What did he do with them? A. I said, "What are you going to give me?" Immediately he walked to the desk and said "Here is $45 more." Q. To whom? A. Angel and Sugarman at the desk. Q. He put the money on the desk? A. Yes. Q. What happened then? A. He turned right round and comes back and we went into the warehouse together. Q. Did you see what was done with the money that was put on the desk? A. Not right then till I came back. I saw Sugarman with a pocketbook (?) in his hand and he shoved some bills in with it. Q. Did you see Sugarman take these bills and put them in the pocketbook? A. No, I could not. Q. The bills were not on the desk when you came out? A. Yes. Q. Oh! And Sugarman was putting the wallet in his pocket with some bills? A. Yes. Q. You went into the warehouse? A. Yes, and he showed me some cases of whisky. Q. What is in this warehouse part? A. Nearly full of cases piled up to the ceiling. Q. How big is the warehouse part? A. Fully as long as this but not so wide. Q. This room is about how long? (Paces). Fifty by twenty-five. You think the warehouse part fully as long and not so wide? A. Yes. Q. And the cases were piled up to the ceiling? A. Yes. Q. With cases? A. Yes, and bottles on the shelves. Q. He showed you various kinds of liquor? A. Yes. Q. What sort? A. Different kinds. Scotch, Rye and this Canadian Club which I decided to take. . . . Mr. Woods. What took place that day? Anything else? A. That was about all. I walked out again.

The evidence discloses that there was a large number of cases of goods in stock piled almost up to the ceiling, and on shelves, and there were some casks on the floor. On Saturday, September [October] 2, about 10 A.M., Bolsing returned again. There were present in the building only Angel and the stenographer. Neither Bell nor Sugarman was there. He walked through the office to the warehouse where he met Angel, the girl as usual being in the office, and what happened that day appears from the following questions and answers:—

Q. You saw Angel in the warehouse part? A. Yes. I asked him, "When can you deliver that whisky?" and he said, "I can't deliver it at

all. Can you take six bottles now and six bottles at night?" He took the case off the pile. Q. The same Canadian Club whisky? A. Yes. Q. Was it any particular case he pointed out? A. I can't say. One of the cases there. He took it off the pile and took a nail puller, breaks the case open, and takes out six bottles. Q. Out of a case containing twelve bottles? A. Yes. He got some wrapping paper and wrapped these in. Q. What sort of wrapping paper? A. Ordinary grey paper. Q. Not newspaper? A. No. Q. What did he do? A. Made one parcel and it looked rather big and I said, "You had better unpack these things and take the straw off," and he did that. He threw the straw into an empty box. Magistrate. No other straw covering in that box? A. No. He tied a string round them and I said, "How shall I go out?" and he said, "The back door," "and I will go out and see," and he went out and looked and said, "Beat it." Mr. Woods. Did he unlock the door? A. Yes. It is barred. Q. There is a door leading to the lane at the back? A. Yes. Q. And he took the bar down and said what? A. Beat it. Q. He looked down the lane before you went out? A. Yes. Q. And he said it was all right for you to go—"Beat it?" A. Yes. Q. Did you beat it? A. Yes. Q. What did he do? A. Shut the door. Q. What did you do with the liquor? A. Took it to 9531 101st Ave. Q. What did you do afterwards? A. Sergt. Gillam came down to the house and I handed it over to him in the grip.

Bolsing returned again about 2 o'clock in the afternoon and met Angel and he thinks the stenographer was also there but no other persons. In the warehouse he received from Angel the other six bottles already made up in a parcel. They then went together to the back door opening in the lane in the rear of the premises. Angel first looked out and then said to Bolsing: "All right, go that way"; meaning east. Bolsing went out and almost immediately in the lane met Hodgkins and Gillam. They took the parcel from him and went to the door whilst Angel was in the act of closing it and pushed their way in. On entering they found Angel, and, Bolsing thinks, the stenographer was also there. Bell and Sugarman were not there but were at once telephoned for. Hodgkins made a hurried view of the premises. Then, under the authority of the search-warrant, they seized the whole of the stock of goods in the warehouse and brought this prosecution.

In his testimony Bolsing stated he had not known the warehouseman, Angel, before he went there on the first occasion related, but that he was acquainted with Bell for some years. At p. 28 of the cross-examination Bolsing swears that the conversation on his second visit was carried on in a whisper and that the young lady in the office did not overhear it. On the following day, Friday, he says Bell and Sugarman and the young lady were all in the office, that Bell asked him whom he wanted, and called Angel from the

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warehouse; that Bolsing and Angel were standing in the doorway between the office and the warehouse and he there gave Angel $45 in bills; that Bell and Sugarman and the stenographer were at or moving about their desks some 15 ft. away. Whilst he was talking to Angel in a whisper the typewriter was going and he says Bell and Sugarman *could not hear what was said*. The plan of the premises and the relative positions of the parties make it quite clear that Bolsing's evidence in this respect is correct, namely, that Bell and Sugarman did not overhear nor could they be easily seen owing to a pillar obstructing the view. Bolsing whilst admitting he had not known Angel until this transaction but knew Bell for some years, had never made any attempt to purchase liquor from the latter. He admits on p. 35 of his evidence that neither Bell nor Sugarman saw him give the money to Angel. Apart then from the incident of Angel throwing $45 on Sugarman's desk with the expression: "Here is some more for you," it is clear that the evidence of Bolsing does not disclose any proof whatsoever of knowledge by Bell and Sugarman of what he and Angel were doing and any possible case against them in respect to knowledge must rest purely and entirely on suspicion. Now, if there was any, even the smallest evidence to shew that Bell or Sugarman had any personal knowledge of the negotiations in progress between these two men for the purchase and sale of liquor I think undoubtedly the receipt of $45 in the manner indicated ought to be held to be sufficient intimation to them of a sale. Coupled with any such knowledge I think the receipt of the $45 ought to be held as fixing defendants with personal knowledge, but the mere handing over of this money under the circumstances as related, and nothing more, in my opinion is not sufficient proof. Had it been shewn that Angel had previously made sales with or without their consent or even contrary to orders, that, I think, would be a fair ground for the deduction that they were put on notice on this occasion; but as matters stood up to the moment of the receipt of the alleged $45, it should not in my opinion fairly or justly be imputed to them that they had knowledge of a sale or contemplated one.

If then the correct conclusion from the whole of the Crown's evidence is that there was no legal proof of personal knowledge or complicity on the part of Bell and Sugarman or either of them the case for the Crown must be held to be purely presumptive. Con-

sequently, they were entitled to offer evidence in rebuttal of that presumption denying knowledge of such sale, and should their material statements by way of defence be not in themselves improbable or unreasonable and there was no contradiction of them and their credibility has not been attacked by evidence against character, and nothing appears in their evidence tending to throw discredit upon them, and their demeanour does not suggest untruthfulness, then, on authority of the case above cited, the magistrate had no right to make the conviction.

Being of the opinion, then, that a mere presumptive or *primâ facie* case was established it is necessary to inquire further and ascertain whether the material parts of the Crown's evidence have been denied and such denials supported by testimony of a reasonable and probable nature; that the credibility of the witnesses has not been attacked by character evidence, and that nothing appears which can properly be held to throw discredit upon them, and nothing in the demeanour of the witnesses tends to suggest untruthfulness.

Now, it is clear there is no contradiction of the sale by Angel to Bolsing; no witness denies that. Angel himself admits it but says in effect that he sold this case of whiskey without the knowledge or authority of his principals and against their general instructions and put the money in his own pocket; that neither Bell nor Sugarman knew anything whatever about it. He maintains throughout that no liquor was ever permitted to go out of the warehouse except for export purposes. The principals both stoutly deny any knowledge of the transaction whatsoever. They admit seeing Bolsing in the building but deny they had any knowledge whatsoever of his dealings with Angel; that they overheard and saw nothing which took place between them. This latter fact is admitted by Bolsing himself, and all the surrounding circumstances appearing in the evidence for the prosecution tend to confirm that fact.

Every action and movement made by the two guilty parties would give the impression that what they did was intended to be and in fact was in secret and without the knowledge of other parties. These circumstances must surely be taken into account as corroborative of the flat denials of Sugarman and Bell.

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The magistrate in his summing-up says: "I consider the evidence of the defendant's witnesses evasive and points were at variance." Just what particular part or parts of the evidence the magistrate had in mind does not appear and I think he should have given reasons for this conclusion. It certainly does appear that there was considerable heat displayed in regard to the knowledge by Sugarman of Angel's account of his disposition of the $45, but in the absence of proof that Bell and Sugarman were aware of the source of this money when it is alleged by Bolsing they received it, I do not think it important that Sugarman and Bell were somewhat at variance with regard to it. The cross-examination of Sugarman was largely with respect to the "time" he acquired knowledge of Angel's story as to what he had done with this money; but after all, the circumstances concerning this controversy are vague and uncertain and I can quite understand, visualising the situation that afternoon while the seizure was being made, there would be a good deal of heat displayed on one side and the other and plenty of room for misunderstandings.

A good deal was said by Mr. Woods about the failure of Bell to at least immediately disclose to the police the story of Angel that he had taken this $45 home with him on the Friday evening and had lent it, along with other money, to Rosenberg (which the latter confirms), and perhaps there is much force in the argument; but a close analysis reveals another side to the case which ought to be considered not altogether unreasonable, depending largely on the state of mind of Bell at the time. If he believed that the communication of Angel's statement to the police would immediately result in their retiring from the seizure and prosecution then it would have been proper to have revealed it, but, on the other hand, if he had in his mind the certainty of prosecution in any event it is not unreasonable that he should decide to hold this evidence in reserve for use at the trial.

The remainder of the evidence of Sugarman and Bell, to my mind, is not what can properly be characterised as improbable or unreasonable. The fact of discrepancies or inconsistencies or contradictions in regard to matters immaterial is only what one finds and expects to find in almost every trial of any importance, but on the main facts in issue I fail to see anything properly understood which should be held as of an unreasonable or improbable nature.

In effect Bell and Sugarman both affirm that: (1) They had no knowledge whatever of, or the negotiations leading up to, the sale in question; (2) That definite orders had been given to their employees, including Angel, who also admits it, that no local sales were to be made; (3) That they never made any local sales nor did they know of any since the beginning of operations of this company.

Taking it as a whole, I fail to find anything which can properly be held to be a disproof of these statements and can appreciate no valid reason why such denials should be refused acceptance by the magistrate. Any opposite opinion or conclusion would necessarily be based on suspicion only, which of course is not legal proof.

The evidence of the witnesses other than Bell and Sugarman, for example that of Angel, might be said to be not entirely satisfactory in some respects, or creditable rather, but touching the important fact, that is, knowledge on the part of the proprietors, I do not see why this evidence should be considered destructive of their testimony. None of them attempt to prove knowledge and practically all negative it. I fail to conceive of anything more which could have been expected from the defence under the circumstances.

Examining carefully the case for the Crown, apart altogether from the defence, I think it would have been right and proper for the magistrate to have drawn the conclusion that Sugarman and Bell knew nothing about it; the secrecy displayed by the guilty parties and their actions throughout pointing to that conclusion. If the magistrate was not disposed so to regard the Crown's evidence then I think the bare denials on oath that they knew nothing about it and that their instructions were always to the contrary, and that they had never made any local sales, if nothing more, would be sufficient not only to justify but demand an acquittal. These denials were made and although other matters were gone into it seems to me that whilst there may be certain differences and even contradictions in the testimony for the defence they were, in my opinion, on matters of an immaterial nature and should not tend to throw discredit on the interested parties on a fair consideration of the whole case.

It is true, as Mr. Woods pointed out, that Angel's position with the company at the time of trial was not very clear as to

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whether or not he had been discharged, seeing he had assisted in making an inventory of the stock on the day of the seizure and again on October 12 he helped in checking the goods taken by the police. Undoubtedly if the parties knew all the facts of the case it wasn't a point in their favour that they did not definitely discharge him, but it seems to me it is not to be overlooked also that this man had been in their employ quite a long time, that the case was still pending, that their minds were perhaps not directed so much to such points as to the approaching trial and at any rate looking at it from its darkest side it ought not to be held at all conclusive of guilt on their part simply because they had not up to that date finally disposed of him by handing him his discharge; it was a possible ground for suspicion only. I have no doubt this feature possibly appealed strongly to the magistrate, who looked upon it as a reason for his apparent unfavourable regard for the evidence of the defence. If it had been shewn that there was something further between them, for instance an understanding to reward Angel in some manner or something tending to shew the use of influence upon him to testify as he did, there certainly would be much in the point, but there is no evidence of anything of that nature; if there had been I think an astute cross-examiner would have revealed it. Angel's story and confession of wrongdoing is, I think, entirely consistent with the whole transaction as related by the witness Bolsing and is not improbable. If the company was in the "bootlegging" business and willing that Angel should sell to Bolsing and they did not suspect the latter as a spy or stool-pigeon, I think it would be the most natural thing in the world to find some definite act on the part of either of the heads of the business directly connecting them with the transaction. Had there been a well understood scheme, in collusion with Angel, to sell locally, leaving with purchasers the impression that they were personally quite ignorant of such breaches of the law, it would seem to me that the handing over of the $45 in the manner alleged by Bolsing would never have taken place; that act would have entirely undone their scheme. Angel would surely have waited until he was rid of his customer. If, on the other hand, they were openly violating the law, I am at a loss to understand the necessity for such secrecy and private meetings between them as well as the handling and delivery of the goods which latter was at times during the absence of Bell and Sugarman from the premises.

Mr. Woods laid stress on the fact of the stenographer hearing part of the conversation of Thursday between Bolsing and Angel, which must have indicated to her that Bolsing was trying to induce Angel to sell him liquor, inasmuch as she remembered Angel say: "No, I will not sell you anything even if you were my own father." It is argued that as a loyal and trusted employee of the company she should have communicated this to her employers. While she might well have done so, much must depend on just what her exact position was as between her and her employers, her opinion of Angel and generally how seriously she regarded the incident. At any rate she denies ever having mentioned anything about it, and there being no disproof of her statement I am at a loss to conceive upon what principle her failure to inform them can be held to affect the defendants or render them responsible for her knowledge although uncommunicated to them. Undoubtedly, if she had in fact informed them, then the case would assume a very different complexion, but her uncontradicted testimony must stand, and therefore her acquaintance with the conversation mentioned can have no real effect on the issue.

Looking at the whole case I am of opinion that the evidence of the defence meets as squarely and satisfactorily as can reasonably be expected the presumption raised against the defendants by the evidence for the Crown and that it fulfils the requirements set forth in the judgment in *Rex* v. *Covert*, 34 D.L.R. 662, 28 Can. Cr. Cas. 25, 10 Alta. L.R. 349, and that consequently the magistrate should have accepted such denials and explanations.

It must not be overlooked that the charge is not one of selling, but of *unlawfully keeping for sale*, and even if my conclusion is erroneous and the magistrate was legally entitled to find that a sale was made for which the defendants were liable, then a further question must be considered, namely, whether, because of this one sale the company being primarily at least an exporting company should under the circumstances be rendered liable for *unlawfully keeping for sale*, contrary to the Liquor Act?

As pointed out in the earlier part of my remarks it was shewn that the defendants have been engaged in the business of liquor exporters on a large scale. As such there is no law to prohibit them doing so, provided they comply with the Liquor Export Act. It is beyond question that a genuine exporting business was at any

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rate their primary object. It cannot be described as a concern posing as an exporting warehouse, in name only, with the real object of employing it as a device, cover, or subterfuge for illicit local traffic. Apart from this one instance of a sale on the premises, assuming for argument sake it was deliberate, there is absolutely no proof that they ever at any time sold or agreed to sell liquor in contravention of the law. Granting this one sale only was made, can it be successfully maintained that they thus robbed themselves of and forfeited their right to continue their business as exporters and consequently deprived of any lawful right to keep liquor for export? There is no doubt that, if in contravention of the Liquor Act they did make a sale locally, they would be rendered liable to conviction for a breach of the latter Act, but it seems to me, considering all the circumstances, the transaction not being an ordinary one but the result of a well-devised deliberate scheme through the agency of what is known as a "stool-pigeon" and common informer to entrap the defendant and successful only after several visits and attempts; the magnitude of the company's operations; and the absolute want of evidence shewing anything more than a single sale, it would not be justifiable to hold that it must necessarily follow that they are not still keeping liquor for export purposes.

Assuming that the liquor is kept for export purposes, then it would seem to me that the decision in *Rex* v. *Bulmer* (1920), 55 D.L.R. 113, must apply. In that case Harvey, C.J., used the following language at pp. 114 and 115:—

> It is quite apparent that anyone authorised under the latter Act [Liquor Export Act] to have liquor in a warehouse complying with the prescribed conditions could not be guilty of an offence under sec. 24 of the Liquor Act, though he would come within its prohibition, and the absolute prohibition of sec. 24 must necessarily have been qualified to that extent at least. . . . Having regard to the fact that in accordance with the foregoing decision one may lawfully import and export liquors and may therefore lawfully have liquor in his possession for that purpose, though such act is directly within the prohibition of sec. 24. I am of opinion that sec. 24 should be deemed to have no application when it is once established that the liquor is kept *bonâ fide* for export purposes as is the case here. It is apparent from what I have said that the mere excuse that liquor is kept for export business would be no answer to a charge under sec. 24, since it would depend on the evidence whether the defence is *bonâ fide* or not, but when the magistrate is satisfied of that fact then a defence is established to a charge under sec. 24 and resort should be had to the Liquor Export Act for the prosecution of any alleged offence.

It will be noted in the remarks of Harvey, C.J., that the liquor must be "kept *bonâ fide*" for export. The magistrate evidently assumed that the proof of one sale in violation of the Liquor Act was conclusive evidence that it was not *bonâ fide* kept for export. My opinion however is that the magistrate had no justification for arriving at that conclusion in view of the undisputed fact, that it has been carrying on very extensive operations under the permit of the Attorney-General and there is no proof of any other sale than the one in question. Whilst they might properly be prosecuted for a breach of the Liquor Act because of a single sale it does not necessarily follow, and I do not think it should be held that it follows, that all of the liquor, or even a part of it is kept for other than export purposes. Doubtless had a number of breaches been proven the case would present a different appearance and the magistrate might be warranted in holding that the goods were not kept for export, but on the facts of this case that conclusion in my opinion cannot properly be arrived at and the decision in *Rex* v. *Bulmer*, 55 D.L.R. 113, must apply.

In view of what I have said, therefore it necessarily follows that the conviction and the order declaring the forfeiture of the goods in question must be quashed. It is consequently unnecessary that I should deal with all the other objections raised in the notice of motion, but I deem it proper that I should state my opinion as to ground number 2 of the objections, namely: (a) The Liquor Act is *ultra vires* of the Provincial Legislature; (b) The Liquor Act is not a law made exclusively by the Provincial Legislature, etc.

In *Gold Seal Ltd.* v. *Dominion Express Co.* (1920), 53 D.L.R. 547, 33 Can. Cr. Cas. 234, 15 Alta. L.R. 377, I stated that I was of opinion that the Liquor Act is valid and within the powers of the Provincial Legislature, but gave no reasons. I am still of that opinion notwithstanding the very able argument made by Mr. McCaul.

It seems to me unnecessary to do more than refer to the decision of the Judicial Committee of the Privy Council in *Att'y-Gen'l of Manitoba* v. *Manitoba License Holders Ass'n*, [1902] A.C. 73, which settles beyond question that our Liquor Act, as originally enacted, was within the powers of the Provincial Legislature. It

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was then substantially the same as the Manitoba Act which was considered by the Judicial Committee. Lord Macnaghten, delivering the judgment of the Board, at p. 79, said:—

> This Board held that a Provincial Legislature has jurisdiction to restrict the sale within the Province of intoxicating liquors so long as its legislation does not conflict with any legislative provision which may be competently made by the Parliament of Canada, and which may be in force within the Province or any district thereof. . . . The Liquor Act proceeds upon a recital that "it is expedient to suppress the liquor traffic in Manitoba by prohibiting Provincial transactions in liquor." That is the declared object of the Legislature set out at the commencement of the Act. Towards the end of the Act there occurs this section: "119. While this Act is intended to prohibit and shall prohibit transactions in liquor which take place wholly within the Province of Manitoba, except under a license or as otherwise especially provided by this Act, and restrict t' consumption of liquor within the limits of the Province of Manitoba, it shall not affect and is not intended to affect *bonâ fide* transactions in liquor between a person in the Province of Manitoba and a person in another Province or in a foreign country, and the provisions of this Act shall be construed accordingly." Now that provision is as much part of the Act as any other section contained in it. It must have its full effect in exempting from the operation of the Act all *bonâ fide* transactions in liquor which come within its terms. It is not necessary to go through the provisions of the Act. It is enough to say that they are extremely stringent—more stringent probably than anything that is to be found in any legislation of a similar kind. Unless the Act becomes a dead letter, it must interfere with the revenue of the Dominion, with licensed trades in the Province of Manitoba, and indirectly at least with business operations beyond the limits of the Province. That seems clear. And that was substantially the ground on which the Court of King's Bench declared the Act unconstitutional. But all objections on that score are in their Lordships' opinion removed by the judgment of this Board in the case of *Att'y-Gen'l for Ontario* v. *Att'y-Gen'l for the Dominion*, [1896] A.C. 348. Having attentively considered the very able and elaborate judgments, . . . their Lordships are not satisfied that the Legislature of Manitoba has transgressed the limits of its jurisdiction in passing the Liquor Act.

As originally passed the Alberta Liquor Act contained sec .72, corresponding in exact terms to sec. 119 of the Manitoba Act. That section has since been repealed, 8 Geo. V., 1918, ch. 4, sec. 55, and it is argued that the necessary result is that the Manitoba decision can no longer be held binding or applicable. I do not agree with this contention. The Liquor Act even without the inclusion of sec. 72 is in spirit clearly applicable only to local consumption and trade and can I think be applied and administered without in any way trenching on Dominion jurisdiction or on inter-provincial trade, but if there is any doubt in that regard, whilst I do not think that the Liquor Export Act ought to read as

a part and parcel of the Liquor Act, yet judicial notice must be taken thereof, and thus it becomes apparent that the Liquor Act was intended to prohibit only transactions in liquor taking place wholly within the Province and not affecting or intending to affect *bonâ fide* transactions between persons in this Province and in other Provinces or foreign countries.

As to the objection that the Act is not a law made exclusively by the Provincial Legislature, inasmuch as it was enacted by the Legislature pursuant to sec. 24 of the Direct Legislation Act "without amendment and without debate," having been previously submitted to be voted on and decided in the affirmative by the electors under the said Direct Legislation Act, which last mentioned Act is *ultra vires* of the Provincial Legislature, I do not agree.

In *Re The Initiative and Referendum Act*, 48 D.L.R. 18, [1919] A.C. 935, it was decided by the Judicial Committee that the Initiative and Referendum Act of the Province of Manitoba was *ultra vires*. It was held to be contrary to sec. 92 of the B.N.A. Act on the ground that it purported to alter the position of the Lieutenant-Governor. Lord Haldane, delivering judgment, said, 48 D.L.R., at 24:—

> Their Lordships are of opinion that the language of the Act cannot be construed otherwise than as intended seriously to affect the position of the Lieutenant-Governor as an integral part of the Legislature, and to detract from rights which are important in the legal theory of that position. For if the Act is valid it compels him to submit a proposed law to a body of voters totally distinct from the Legislature of which he is the constitutional head, and renders him powerless to prevent its becoming an actual law if approved by a majority of these voters. It was argued that the words already referred to, which appear in sec. 7, preserve his powers of veto and disallowance. Their Lordships are unable to assent to this contention. The only powers preserved are those which relate to Acts of the Legislative Assembly, as distinguished from bills, and the powers of veto and disallowance referred to can only be those of the Governor-General under sec. 90 of the Act of 1867, and not the powers of the Lieutenant-Governor, which are at an end when a bill has become an Act. Section 11 of the Initiative and Referendum Act is not less difficult to reconcile with the rights of the Lieutenant-Governor. It provides that when a proposal of repeal of some law has been approved by the majority of the electors voting, that law is automatically to be deemed repealed at the end of 30 days after the Clerk of the Executive Council shall have published in the *Manitoba Gazette* a statement of the result of the vote. Thus the Lieutenant-Governor appears to be wholly excluded from the new legislative authority. These considerations are sufficient to establish the *ultra vires* character of the Act. The offending provisions are in their Lord-

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ships' view so interwoven into the scheme that they are not severable. The Colonial Laws Validity Act of 1865, therefore, which was invoked in the course of the argument, does not assist the appellants.

It is clear therefore that the *ratio decidendi* in that case was the interference by the local Legislature with the office of Lieutenant-Governor. The position in this Province is entirely different. The functions of the Lieutenant-Governor are not in any way affected. Although a vote is taken on the proposed bill in Alberta under the provisions of the Referendum Act it is in my opinion a plebiscite merely. Before such a proposed measure becomes law it must be presented and pass through the stages common to all other bills in the properly constituted Legislature and must finally receive the assent of the Lieutenant-Governor. This Act having passed through all these necessary stages and formalities I do not think it is open to shew that the legislators had abdicated their functions or to inquire into the reasons why they voted for the measure and the bill having received the royal assent in my opinion became validly enacted.

Whilst I have grave reason to doubt the validity of the seizure of the liquor, objection to which has been raised, due to the irregularities appearing in the information and search warrant, in view of the fact that I hold the conviction bad for the reasons mentioned I do not deem it necessary to further consider the effect of this and the other grounds set up in the notices of motion.

The conviction will therefore be quashed as well as the order declaring the forfeiture of the liquor.

I think it a proper case in which costs ought not to be given against the magistrate and he should be accorded the usual order for protection against proceedings due to said conviction and order of forfeiture.

(Supplementary):—Realising that the Crown's application for the retention of the goods is not because of their value to the Crown but only to ensure punishment of the defendants in case the judgment quashing the conviction should be reversed on appeal—any other intention being entirely incompatible with the dignity of the Crown, which is of course inconceivable—and realising also, that the closing up of the business for 5 or 6 weeks and their deprivation of the goods in question since October 2 until the present time must obviously already have resulted in a

very considerable loss to the defendants in any event, and considering also the nature of the facts upon which the conviction was made, I think it a proper case in which to order that the goods in question be returned and delivered to the defendants forthwith, and I do so order accordingly, the law to take its course in case of allowance of the appeal. I hereby also grant leave to the Crown to appeal from my decision quashing the conviction and order of forfeiture, but subject of course to the order above mentioned with respect to return of the goods in its possession.

S. B. Woods, K.C., and *W. R. Howson*, for appellant.

C. C. McCaul, K.C., and *H. Friedman*, for respondent.

Harvey, C.J.

HARVEY, C.J. (dissenting):—The defendants, during the year 1920, were carrying on a liquor export business in the city of Edmonton. On October 2, 1920, upon a sworn information of a sergeant of the city police that he suspected that liquor was being kept for sale by the defendants contrary to the Liquor Act, 6 Geo. V., 1916 (Alta.), ch. 4, a warrant was issued to seize and under the warrant all the liquors on the premises were seized. Subsequently an information for unlawfully keeping liquor for sale was sworn and after a trial before Police Magistrate McLeod a conviction was made on October 21 and a fine of $200 and costs imposed. Subsequently, on application an order of forfeiture was made on November 4 forfeiting so much of the liquors as consisted of whisky in cases and the remainder was returned to the defendants. Upon application by way of *certiorari* to Hyndman, J., see *ante*, p. 523), both the conviction and the order of forfeiture were quashed and all of the liquor was ordered to be restored.

This is an appeal from both the quashing of the conviction and the quashing of the order of forfeiture. The order of forfeiture must necessarily fall if the conviction cannot be supported, though the sustaining of the conviction does not necessarily sustain the order of forfeiture. It is, therefore, necessary to consider the question of the conviction first.

Before the decision of this Division in *Rex* v. *Emery* (1916), 33 D.L.R. 556, 27 Can. Cr. Cas. 116, 10 Alta. L.R. 139, it had been held by my brother Hyndman, in *Rex* v. *Pudwell* (1916), 26 Can. Cr. Cas. 47, and by me in *Rex* v. *Carter* (1916), 28 D.L.R. 606, 26 Can. Cr. Cas. 51, 9 Alta. L.R. 481, that on an application to quash by way of *certiorari* the absence of evidence to support a conviction valid on its face could not be considered as a ground for

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quashing it. It was held, however, in *Rex* v. *Emery*, that a conviction regular on its face should be quashed when there is no evidence to sustain it. The ground upon which the conviction in this case was quashed was the absence of proper evidence to support it, having regard to the presumptions and the evidence for the defence, no objection being taken to the regularity of the conviction on its face.

It is perfectly clear that on *certiorari* the Court or Judge has no right to weigh the evidence, and when counsel advances the argument that a witness is disinterested and there is therefore no reason to doubt his evidence or that a witness's evidence should be believed because it is against his own interest, he is mistaking his tribunal. Such arguments can have no weight here, but it is to be assumed that in the trial Court they received due consideration.

Nor is it within our province to consider the wisdom or justice of either the law which it is sought to enforce or the methods by which it is sought to enforce it. The legal aspect only of these is for our consideration and we have no duty or right to deal with legislative or executive functions whatever our personal opinions may be. The main evidence in this case is that of a man who deliberately sought to bring about a breach of the law by purchasing liquor contrary to law. That circumstance was one which it was perfectly proper and indeed necessary for the magistrate to keep in mind in estimating the value of his evidence, but if the magistrate believed his evidence we cannot question its correctness. There is evidence that the informer went into the defendants' premises where he met an employee to whom he was a stranger and asked for Sam, a nephew of Nat Bell, one of the chief officers. He was told he was not in. On the next day, in company with another man named Jim on whom he could smell liquor, he went in again and Jim told the employee Angel that the informer wanted to see him, and then, the latter, says: "We went over to the seat in the south-east corner of the office and sat down, and I said: "How's chances for a bottle?" and he said, "No"; and I said, "What?" and he said, "No." I said, "Can I get a case?" and he said, "Yes," and I said, "What do you charge?" and he said, "Some at forty and some at forty-five." I said I wanted good stuff, not rotten stuff, and he said, "The stuff at

forty-five is good—Canadian Club." He said, "What do you work at?" and I said, "I am a carpenter by trade and will be working in the Gem Theatre to-morrow."

He says that he returned the next day by appointment and when he went in Bell, who was present, asked him whom he wished to see and he said: "The clerk," and when Angel came he told him he had decided to take a case of "Canadian Club," and he paid him $45 in marked bills. He says that Angel at once took the money over to the desk where Bell and the other chief officer Sugarman were and put the money on the desk and said, "Here is $45 more," and then came back and took him into the warehouse where the liquor was and shewed him the cases of the various kinds of whisky: Scotch, Rye and Canadian Club. The next day he went back and then walked through at once to the warehouse and asked Angel when he would deliver the liquor, and he said he couldn't deliver it and asked him to take half of it then, and the rest later. Angel took down a case and opened it and wrapped up 6 bottles and gave to the informer, and then let him out the back door opening on the lane after looking to see that the way was clear. The next day he went back and got the other 6 bottles which were already wrapped up. He was let out the same way and met the police officers, no doubt by previous arrangement.

Angel confirms the informer except as to the manner of the sale as to which he says he at first refused and was finally persuaded by the informer's importunity. He also says that it was against orders, and that he proposed to cover it up by putting through a fictitious shipment at wholesale prices and himself retaining the difference.

A sale is thus clearly established, but the charge is one of having for sale, no doubt because only upon a conviction for such offence could an order of forfeiture be made. The statute makes the employer *primâ facie* liable for the act of the employee, but it is clear that on this charge there is no room for the application of that statutory presumption, for there is nothing whatever to suggest that Angel kept the liquor for sale or for any purpose. The keeping was by the employer only.

The case, therefore, does not rest on any such statutory presumption. The statutory effect of sec. 54 does apply, and it provides that where evidence of having in possession has been given

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the accused must prove that he did not commit the offence. Much argument was advanced to shew that the principle of *Rex* v. *Covert*, 34 D.L.R. 662, 28 Can. Cr. Cas. 25, 10 Alta. L.R. 349, applied, and that it was the legal duty of the magistrate to accept the denials of the defendants as proving their innocence. In a later case, *Rex* v. *Morin* (1917), 38 D.L.R. 617, 28 Can. Cr. Cas. 414, 12 Alta. L.R. 101, this Division pointed out that the principle of *Rex* v. *Covert* has a very limited application and it is quite clear from that decision that it can have no application here. The case does not rest on any statutory presumption alone, although that exists, and what I said, in giving the reasons for judgment of the majority of the Court in *Rex* v. *Morin* (38 D.L.R., at 620), applies:

> It is apparent that this is much more than the presumption of guilt which the statute raises from the bare fact of the liquor being found in accused's possession and the principle of *Rex* v. *Covert*, which considers the evidence for the defence merely for the purpose of deciding whether it rebuts the statutory presumption of guilt, does not apply. There being this evidence not only of what the statute declares to be *primâ facie* proof but also of circumstances of a suspicious character pointing to the guilt of the accused, I know of no principle upon which a Court on *certiorari* proceedings would be justified in quashing the conviction.

I have referred to some of the evidence for the purpose of shewing that there is substantive evidence of guilt altogether apart from any statutory presumption. I doubt whether a sale by an employee without the knowledge of his employer could be said to be any evidence of a keeping for sale by the employer, but a sale of the employee with the knowledge of the employer is quite clearly, I think, evidence of not merely a sale but a keeping for sale by the employer.

Counsel for the defence strongly contended that the evidence shewed that money transactions did not take place at the warehouse. Such being the case the payment of money at the warehouse to the employer under the circumstances would seem to call for some explanation which might possibly relieve it of its quality of evidence of guilt. It is not explained; it is denied, and the magistrate says he is not willing to accept the evidence of denial. Whatever our view might be, we must accept that. In the *Morin* case, 38 D.L.R. 617, 28 Can. Cr. Cas. 414, 12 Alta. L.R. 101, we pointed out that the magistrate had a right to look critically upon the evidence of an interested party. In this case he expressly states that he does not believe the evidence for the defence about the

sale and that he is satisfied that both Bell and Sugarman knew that the informer came on the premises for the express purpose of buying liquor.

In view of the statutory presumption and the evidence I have referred to I do not see how it can possibly be said that there is no evidence from which a reasonable man could come to that conclusion and no matter how much it is denied if the denials are not believed the conclusion must in my opinion for the purposes of this case be accepted. That they kept it for illegal sale is almost a necessary corollary of its being sold illegally with their knowledge.

The fact that they kept it for legal sale though a strong circumstance in favour of innocence is not a complete answer to the charge that it was kept also even if only incidentally for illegal sale. If they were ready to sell it illegally as well as legally it was, I think, unquestionably kept for illegal sale.

For the reasons I have stated there was in my opinion evidence upon which the magistrate could convict.

Other grounds of objection, however, are raised. It is urged that the Liquor Act is *ultra vires* of the Provincial Legislature. The Judge appealed from (Hyndman, J., *ante* p. 523) has considered this objection and decided it against the defendants. I agree with the views expressed by him. I also had occasion to consider the point last year in *Gold Seal Ltd.* v. *Dominion Express Co.* (1920), 53 D.L.R. 547, 33 Can. Cr. Cas. 234, 15 Alta. L.R. 377, and I have nothing to add to what was said there.

It is also urged that the Act is invalid as being passed by virtue of the machinery provided by the Direct Legislation Act, 4 Geo. V. 1913, (1st sess. Alta.), ch. 3.

On this also I agree with the views expressed in the judgment appealed from and do not desire to add anything.

It is also contended that as the premises were within the contemplation of the Liquor Export Act, 8 Geo. V., 1918, ch. 8 and amendments, 10 Geo. V., 1920, ch. 7, the defendants if guilty of anything must be guilty of a breach of that Act and it is argued that the decision of this Division in *Rex* v. *Bulmer* (1920), 55 D.L.R. 113, applies. I confess myself quite at a loss to appreciate this argument. In that case the defendant was charged with having liquor in a place other than a dwelling house. It was admitted that he had it *bonâ fide* for export purposes and the Liquor Export

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Act authorises the keeping of liquor for export in places other than a dwelling house. It was held that therefore he could not be convicted of the offence charged since there was statutory authority for keeping the liquor in a place other than a dwelling house of which he was convicted and that if the place in which he was keeping it did not comply with the Liquor Export Act his offence was of committing a breach of that Act. But to suggest that a person who is carrying on an authorised export business shall thereby have immunity for any breach of the Liquor Act seems entirely unreasonable. The Liquor Export Act furnished certain exceptions from prohibitions in absolute terms of the Liquor Act. When these exceptions apply the prohibitions are to be qualified to that extent, when they do not it furnished no excuse. It certainly contains no permission to keep liquor for unlawful sale, *i.e.*, a sale within the Province, though it does contain permission to keep it for lawful sale, *i.e.*, for sale without the Province.

All the other grounds of exception to the conviction have relation directly or incidentally to the evidence and have been directly or indirectly considered in the earlier part of this judgment.

For the reasons stated, I think the conviction is not open to question on *certiorari*.

It becomes necessary now to consider the validity of the order of forfeiture which is, no doubt, considered by the defendants of even greater consequence than the conviction, since the liquor forfeited, consisting of more than a thousand cases of whisky, is necessarily of very considerable value.

The statutory provisions relating to forfeiture are to be found in sec. 79 which was not contained in the original Act but with several other sections was enacted a year later, 7 Geo. V., 1917, ch. 22. It provides that "a magistrate, if satisfied by information on the oath of an officer, that there is reasonable ground for belief that liquor is being kept for sale or disposal contrary to this Act, etc.," may grant a warrant to search for the liquor. Sub-section 4 of the section provides, 7 Geo. V., 1917, ch. 22, that any liquor found by the officer which in his opinion is unlawfully kept for sale or disposal contrary to the Act may be seized with the vessels containing it and removed, and

> Upon conviction of the occupant of such house or place or any other person for keeping liquor for sale therein contrary to law, the magistrate

dealing with the case may, in and by the said conviction or by a separate and subsequent order, declare the liquor and vessels or any part thereof to be forfeited to His Majesty, to be sold or otherwise disposed of as the Attorney-General may direct.

It seems reasonably clear that the only liquor that the magistrate is given authority to declare forfeited is such liquor as is kept for illegal sale. This was the view of all the members of the Court in *McNeil* v. *McGillivray* (1907), 42 N.S.R. 133, with reference to statutory provisions somewhat similar. This does not mean that no liquor can be declared forfeited which by the evidence on which the conviction rests is not shewn to be kept for illegal sale, for evidence establishing that any liquor is kept for illegal sale is sufficient for the conviction, and the Act distinctly authorises the order of forfeiture by a subsequent order. In the order of forfeiture the liquor must be definitely specified but this is not required in the record of conviction. The liquor forfeited is no doubt the liquor which the convicted person kept for illegal sale, and the conviction would be of course in respect of all such liquor, but as evidence for the conviction it would not be necessary to prove the particulars of the liquor though it would be as evidence for the order of forfeiture.

In the present case, on the evidence upon which the conviction was founded, the magistrate decided that all the whisky, in cases in stock at the time of sale, was kept for illegal sale. To ascertain what that was for specification in the order of forfeiture required evidence not theretofore furnished. That appears, however, to have been provided, not by sworn testimony but by agreement, and the order of forfeiture sets out a specific description of the liquor and cases.

For the defence it is contended that there is no legal evidence that anything more was kept for illegal sale than the case actually sold or at the most the Canadian Club whisky since that was all the informer thought of buying. The answer made is that the evidence shews that he could have bought any case of any of the kinds of whisky, and that therefore it was all kept for illegal sale. The question is, is it a fair inference that the defendants kept all for sale from the fact that a subordinate employee was willing to sell any of it? If that stood alone it would appear to me that it would probably not be a fair inference but there is coupled with that the fact of the frequent appearance of the informer who had

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no legitimate business on the premises, his being seen and spoken to by the persons in authority and the payment of money to them under circumstances suggesting that it came from him and could only be for an illegal sale, this raising at least a suspicion that those in authority understood what the employee was doing and thus at least tacitly authorised his acts which then became theirs.

The question is not whether I would draw the inference which the magistrate has drawn but whether it is one which no reasonable person would be justified in drawing. I am unable to say that it is such an unreasonable inference. But it is contended that a Provincial Legislature has no constitutional authority to direct forfeiture, that it is not a "penalty" within the meaning of para. 15 of sec. 92 of the B.N.A. Act. This objection was carefully considered by the Court *en banc* of Nova Scotia in *King* v. *Gardner* (1892), 25 N.S.R. 48, and they unanimously decided against it on reasons which appear to me entirely sufficient. It may be noted too that the Dominion Parliament in the Canada Temperance Act, R.S.C. 1906, ch. 152, sec. 137, authorises forfeiture" in addition to any *other* penalty or punishment."

Another contention of the defendants is that the effect of these provisions is to make a magistrate a Judge within the meaning of sec. 96 of the B.N.A. Act who can be appointed only by the Government of Canada. He is of course not a County or District Court Judge, but it is said that he is in reality a Superior Court Judge, but the fact that these proceedings are available to question his judgment shews that not to be the case. If we can question his decision by way of *certiorari* it is because he is not a Superior Court Judge.

The fact is that the value of the property forfeited in this case is large, but that cannot affect the principle and the case of *King* v. *Gardner*, 25 N.S.R. 48, gives numbers of instances in which Justices of the Peace were exercising a jurisdiction involving forfeiture of property prior to Confederation. It is clear therefore that this is conferring no new jurisdiction which might have the effect of making magistrates anything different from what they were recognised to be when the B.N.A. Act was passed. See *Re Small Debts Recovery Act* (1917), 37 D.L.R. 170, 12 Alta. L.R. 32.

A number of other objections are taken to the search-warrant and the information on which it was based. While on the argument

not satisfied of the sufficiency of them if taken at the proper time, I am of opinion that it is too late to take them for the first time on *certiorari* for the reasons given by this Division in *Rex* v. *Tey Shing* (1920), 51 D.L.R. 173, 32 Can. Cr. Cas. 315, 15 Alta. L.R. 185. The agreement entered into with the Crown after the seizure and after advising with their own counsel, not to take any objection technical or otherwise to the non-removal of the goods and "that the officers of the law shall be deemed to be in charge of the liquors so seized," also, would perhaps preclude them from taking the objections at any time.

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I think I have dealt substantively or incidentally with all the objections and as stated none of them can in my opinion be sustained.

In the result I would allow both appeals with costs and set aside the orders quashing the conviction and the order of forfeiture, both of which I would confirm.

Stuart, J.

STUART, J.:—In 1916 the Legislature of Alberta passed a statute (6 Geo. V., ch. 4) which prohibited the sale and the keeping or keeping for sale of intoxicating liquors within the Province except by certain specified persons and under certain specified conditions. Certain sections exempt from the prohibitory provisions of the Act, brewers and distillers licensed by the Federal Government, and wholesale dealers provided their sales are to persons outside the Province and their keeping of liquor is for the purpose of such sales.

Druggists are permitted to sell in limited quantities on doctors' prescriptions, and Government vendors are provided for who may sell to druggists, physicians and, under strict limitations, for scientific and mechanical purposes.

Violation of the Act is punishable by summary conviction before a Justice of the Peace.

If the Justice refuses to convict the prosecution may appeal to a District Judge who may hear the evidence *de novo* if he pleases. This takes the place of the appeal which lay to quarter sessions in older days in Eastern Canada and still lies in England in most cases. If the District Judge also refuses to convict the Act gives an appeal to the Appellate Division of the Supreme Court of the Province.

On the other hand, if a Justice of the Peace enters a conviction his judgment is final and conclusive in every case except where the accused is a druggist or a Government vendor. No person of any

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class other than these two is given any right to a rehearing of his case if a Justice of the Peace convicts him although the prosecution is given a right to two re-hearings.

The Court of course has nothing to do with the policy of legislation or with the question whether it is fair and just or otherwise, but in view of the observation made at the opening of the argument of this appeal by counsel for the prosecution that the Act is an exceedingly difficult one to enforce perhaps one may venture the observations that the dice seem to be fairly well loaded in favour of the State as against the individual in the provisions as to appeals to which I have referred and in certain other provisions which cast the burden of proof of innocence upon the accused, and that no one should be much surprised if the historic function and power of Superior Courts to superintend and examine with care the proceedings of inferior tribunals by the ancient method of *certiorari* are being resorted to with frequency by individuals who are convicted under the Act by a Justice of the Peace and who are given no right whatever to an ordinary appeal. And indeed I think I may go further and say that while we cannot presume (and it would be great presumption) to criticise the Acts of the Legislature, still when summary convictions under legislation of this character are brought before us by *certiorari* there is undoubtedly an obligation upon us to scrutinise with peculiar, if not meticulous, care the proceedings before the Justice of the Peace in order to see that his final and conclusive decision upon the facts has been reached upon proper legal principles and that to the advantage in the prosecution which the State has in the wisdom of its Legislature taken to itself as against the individual there is not added an error in the application of fundamental principles of justice by the magistrate.

I am aware that it may be asked why the Court should be so careful to protect "boot-leggers," but this of course is a mere prejudgment of the case because it was just the purpose of the enquiry before the magistrate to discover the fact whether the accused was or was not engaged in the business which is popularly so described. Although I may observe that the following questions addressed on cross-examination by counsel for the prosecution to one of the managers of the accused company, viz:—

Q. And you have never under any circumstances sold liquor to anybody in this Province? A. No. Q. Don't you think there are a whole lot of people in Edmonton who know whether that statement is true or not? A. I can't tell you. Q. When they see that in the paper—that Nat Bell has sworn to that—what do you think they will think? A. I really cannot tell you,

would appear to have had no other possible purpose than to suggest to the Court that there did exist a widespread popular opinion that the accused was an illegal liquor dealer and approach very closely to the action of Crown counsel in *Rex* v. *Harry Sing* (unreported), which recently caused a new trial to be ordered by this Court.

The accused company was incorporated by letters patent of the Dominion of Canada on December 26, 1917, with power among other things "to carry on the business of import and export dealers in beers, ales, porter, wines of all kinds, spirituous liquors and liquors of all kinds."

The company had its head office in Saskatoon, in the Province of Saskatchewan, but had branch offices at other places, including Swift Current, Saskatchewan, and Edmonton, Alberta. Like other companies of greater dignity and much respectability it was engaged in the business of selling liquor to persons through mail orders or otherwise outside of the Province where the liquor was kept and sending it to the purchasers by legally permissible methods.

In 1918 the Legislature of Alberta passed an Act, 8 Geo. V., 1918 (Alta.), ch. 8, dealing specially with the methods of business of such wholesale dealers and by that Act provided that they must register their warehouses with the Attorney-General; that they must have warehouses of a certain description and must send in monthly returns of the stock of liquors which they had in hand and of the disposition made of it.

Under this statute the accused company was conducting its wholesale liquor business. It had never been convicted, nor, so far as appears, prosecuted, for a violation of the Liquor Act of 1916.

Towards the end of September, 1920, the Alberta Provincial Police, which is the arm of the Executive Government and engaged in the duty of enforcing the Liquor Act by the detection and prosecution of persons violating it, prepared a plan whereby they

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might discover whether or not the accused company was violating the Act. Three or four detectives were assigned to the task and one of them, one Bolsing, proceeded by arrangement to the warehouse of the company, approached, not the managing officials of the company, but the warehouseman, one Angel, and asked him to sell him a case of whisky which, after negotiation and discussion extending over 2 or 3 days Angel did. An information was then laid against the company by one of the detectives and the company was summoned, upon a charge, not of selling liquor, but of "unlawfully keeping liquor for sale."

The charge was tried before a police magistrate, Mr. Macleod, who is not a lawyer by profession. He convicted the company and fined it $200 and costs.

Under sec. 79 of the Act a search-warrant had also been issued under which the whole stock of liquor of the company was seized and after the conviction a large part of this liquor, that is, generally speaking all the whisky kept in dozen bottle cases, amounting in value to $50,000 more or less, was by a separate order confiscated to the Crown.

The fact of the selling was admitted by Angel but he declared that he had done it contrary to specific orders and for purposes of his own which would make his act one of fraud and possibly of theft.

Bolsing, the person who acted as the spy and had made the purchase, told of one fact upon the existence of which the whole case practically turned. He said that although he and Angel had engaged mostly in whispered conversations about the matter Angel had in his presence taken the money paid for the liquor, viz., $45 in bank bills and had placed it on a desk in front of Bell and Sugarman, the managers of the defendant company, and had said, "Here is $45 more." It was essential that knowledge should in some way either directly or constructively be brought home to Bell or Sugarman and it was upon this evidence as to the money that the prosecution principally relied for that purpose.

I do not propose to do more than refer again as I did on a previous occasion to the peculiar situation of the law by which the Crown through its officers may ask a man to commit a breach of the law, indeed actually persuade him to do it, and then complain against him in a Criminal Court for having done so and have him

fined. There seems to be no law forbidding this method of detecting crime and it may be necessary that it should be permissible.

But, however that may be, it is still the case that the detective is an interested witness (see Wigmore on Evidence, vol. 2, para. 969, vol. 3, para. 2060), although he is not considered an accomplice: *Rex* v. *Despard* (1803), 28 How. St. Tr. 346 at 489.

It is nevertheless the case that being an interested witness his evidence should be received with caution. Erle, J., in charging the jury in *Reg.* v. *Dowling* (1848), 3 Cox C.C. 509, at p. 516, told them that they would

> do well to receive his (a spy's) evidence with caution seeing that it was probable on the face of it and borne out so far as it could be by the other circumstances of the case.

He meant of course that as the spy's evidence was probable, *i.e.*, not improbable on the face of it and was borne out by other circumstances the jury would do well to receive it, *but with caution.*

Now Bolsing, the spy, is found on the evidence to have told some untruths to the magistrate.

Firstly, he told defendants' counsel that he had met the other two detectives in the lane on Saturday accidentally. He answered "Yes" to a question if he had done so, although in the following questions he admitted that it was arranged that they would be there. In his other answers he used excellent English and it is very unlikely that he misunderstood the question.

Secondly, to Mr. Woods in telling of his Friday interview with Angel about the whisky he said, "I said 'Can you deliver it?' and he said, 'Yes' *and asked where I lived.*" But repeatedly to Mr. Friedman on cross-examination he said that Angel at this interview had not asked for his address.

Thirdly, he said he had never been convicted of an offence, whereas the fact was that he had been convicted of going into a brewery with other men where neither he nor they had a right to be and sitting and drinking the brewer's beer, *i.e.*, he had been convicted of theft. He had not been punished it is true, owing to the lenient view the magistrate took of the occurrence, but I cannot believe that a person employed as a police detective was not aware of the fact that he had been so convicted.

And there is some evasiveness easily discernible in other answers which he gave.

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After reading the reasons the Justice gave for convicting I cannot discover that he kept in mind as he should have kept in mind his duty to receive a spy's evidence with caution or that he even remembered the untruths in the spy's evidence to which I have referred. He was not merely standing in the place of a jury. He was also a Judge with the duty of applying in his own mind sound legal principles in the consideration and the weighing of evidence. He seems, however, plainly to have been under the impression that he was bound to accept the evidence of Bolsing merely because he did not believe all the evidence for the defence and because he found therein some contradictions and evasions and he apparently forgot similarly to scrutinise the evidence of Bolsing, to discover its contradictions and untruths and evident evasions as well as to remember that it was the evidence of a party interested and should be received with caution, while the evidence of the only really disinterested witness, Rosenberg, was rejected because it seemed on an extremely slight ground improbable.

It is not acting at all on appeal on the facts to say that the magistrate misdirected himself in his duty as a judicial officer in failing to take into account the true character of the evidence of the prosecution on a crucial point. Particularly is this so when the magistrate knew that his decision against the accused was without appeal and would have tremendous consequences with respect to property, while a decision the other way would be subject to review at the instance of the prosecution by two appeals. It was so easy for Bolsing to add the one circumstance to his story which was necessary to make his work as a detective successful, that this quite evident failure on the part of the magistrate would be almost if not quite sufficient of itself in my opinion to justify the quashing of the conviction.

What I have said has no relation whatever to the questions discussed in *Rex* v. *Covert*, 34 D.L.R. 662, 28 Can. Cr. Cas. 25, 10 Alta. L.R. 349, and similar cases, and I make no reference to them.

But in addition to the question of evidence of the knowledge of the sale by the managers of the defendants there is another aspect of the case of even graver importance.

The charge laid against the company was not for selling liquor unlawfully, which it might well have been, but of unlawfully

keeping liquor for sale. The perfectly obvious purpose of laying the charge which was laid was for the purpose of securing a seizure and forfeiture of the liquor.

Now what was the true and essential allegation made against the accused? They were legally entitled to have liquor in their possession and there was no statutory presumption against them therefore on account of that possession. They were entitled to have it in possession for a certain lawful purpose. But it was possible that there might exist an unlawful purpose. The essential charge against them therefore was the existence of this unlawful purpose or intent not the mere physical fact of possessing. It was this purpose or intent that had to be proved.

My opinion is that the expression "unlawful keeping for sale," or keeping for unlawful sale refers to some habitual or continuing purpose.

In this case it was proposed to prove this habitual or continuing purpose by proof of one illegal sale. In my opinion this was not sufficient. In the case of *Jayes* v. *Harris* (1908), 99 L.T. 56, a person was charged with unlawfully using his licensed premises for betting. It was proved that a single bet had been made on the premises in which bet the accused was himself directly concerned. The Court, consisting of Lord Alverstone, C.J., and Darling and Sutton, JJ., quashed the conviction saying, "there is only evidence of one user . . . There is no evidence that the appellant was keeping and using his house for the purpose of betting" (see p. 57).

In this case it is, of course, said that the Justice could properly infer from the fact of one illegal sale that all the liquor was being kept for the purpose of illegal sale, and that therefore we cannot on *certiorari* interfere. But there is more than that in the matter. This is a case of an inference from the circumstance of one illegal sale. It is not sufficient in my opinion to say, that the inference of a continuing illegal purpose may be drawn from that circumstance. According to the well-known principle applicable to circumstantial evidence the Judge of fact must be able to say, "That circumstance is logically inconsistent with the *absence* of the continuing illegal purpose." In my opinion a Judge of fact could not possibly take that view in the present case. If the use of the little word "more" by Bolsing is adverted to I must reply that that is too slight a cord upon which to hang anything, and in

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addition to the interest of the witness using the expression and the obvious advantage of adding it, even the word itself is open to other interpretations.

If I had been engaged with a jury on the trial of this case I should undoubtedly have withdrawn it from their consideration on this latter ground at least.

I am not unmindful of the fact that the quashing of this conviction will be thought a damper upon the praiseworthy energy and activity of the police in endeavouring to enforce the Liquor Act, but I must repeat that it was quite open to the prosecution to lay a charge of illegal selling only and to get first at least one conviction upon that charge. That the charge of unlawful keeping for sale was laid upon which alone a forfeiture could be declared and that a spy was used suggests too readily to my mind that there was a determination to secure in substance a conviction for offences which were merely suspected, but which could not be proven and to destroy summarily and finally the whole business and property of the accused.

I would, therefore, dismiss the appeals. In the view I have taken it is unnecessary to discuss the legality of the forfeiture proceedings, but my opinion at the close of the argument was fairly clear that these were illegal in any case and could not be supported.

The respondent should have its costs of the appeal.

Whether there might not still be a *procedendo* issued, a dismissal by the magistrate, and an appeal by the prosecution to a District Court Judge with, in case of dismissal, a further appeal under the Act to this Court I shall do no more than suggest.

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BECK, J.:—This is an appeal from the decision of Hyndman, J., *ante* p. 523. There were before him two motions by way of *certiorari*; the one to quash a conviction made on October 21, 1920, for that the company did on October 1 and 2, 1920, at Edmonton, "unlawfully *keep for sale* a quantity of liquor, contrary to the Liquor Act"; the other to quash an order made by the same magistrate on November 4, 1920, whereby having recited that he had "on October 21, 1920, duly convicted Nat Bell Liquors Ltd. of having unlawfully kept liquor for sale contrary to the provisions of the Liquor Act then in force in the Province" did "declare the said liquor and the vessels in which the same is kept, to wit" (here are

listed 1,455 cases of whisky), "be forfeited to His Majesty to be sold or otherwise disposed of as the Attorney-General may direct."

Hyndman, J., *ante* p. 523, quashed both the conviction and the forfeiting order.

I think every objection which could reasonably be taken to the conviction or the order was taken before the Judge of first instance and before this appellate division. As my conclusion is that the decision of Hyndman, J., *ante* p. 523, should be affirmed in both instances I think it useless to set forth all the grounds of objection taken and content myself with discussing only some of those which are in my opinion fatal to the conviction and the order in question.

I still retain the opinion which I expressed in the *Gold Seal Ltd.* v. *Dominion Express Co.*, 53 D.L.R. 547, 33 Can. Cr. Cas. 234, 15 Alta. L.R. 377, that the Liquor Act, 6 Geo. V., 1916, ch. 4 (and amendments), in its present form is invalid because *ultra vires* of a Provincial Legislature inasmuch as (1) it deals with the liquor question as a question of morals independent of time or place and consequently invades the domain of criminal law reserved exclusively to the jurisdiction of the Dominion Parliament; and (2) it so deals with it as to encroach upon the same exclusive jurisdiction in attempting to regulate trade and commerce.

To what I said in the *Gold Seal* case (53 D.L.R. 547), I desire to add an observation. It was not my intention to hold that the Liquor Act, 6 Geo. V., 1916 (Alta.), ch. 4, was *ultra vires* merely because it had been passed in pursuance of the Direct Legislation Act, which itself is in my opinion unconstitutional; but only to put forward the fact, that the Liquor Act, having been brought into being by the method laid down by the Direct Legislation Act, was one of the circumstances tending to shew that the Liquor Act dealt with the question of liquor as a question of morals independent of time and place and therefore in the sense of a criminal law.

I propose, however, to discuss the merits of the case before us on the assumption of the general validity of the Liquor Act; that is to say, the ground that the evidence does not justify either the conviction or the order of forfeiture.

This appellate division held in *Rex* v. *Emery*, 33 D.L.R. 556, 27 Can. Cr. Cas. 116, 10 Alta. L.R. 139, that the Court is entitled, upon *certiorari*—at least in cases where *certiorari* is not taken away—to look at the evidence given before the convicting magis-

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trate to ascertain whether or not it is sufficient to sustain the conviction and if it is not to quash the conviction. That case discussed and explained—within limits—the important cases of *Reg.* v. *Bolton* (1841), 1 Q.B. 66, 113 E.R. 1054; *Colonial Bank of Australasia* v. *Willan* (1874), L.R. 5 P.C. 417; and *The King* v. *Mahony*, [1910] 2 I.R. 695. This view seems now to be that adopted in all the Provinces of Canada. I have not on the present occasion examined any other English decisions than those just mentioned; but I take occasion to endeavour to make clearer why the latter-day English decisions are of no authority upon this question, which, as I have said, seems at the present day to have become settled throughout Canada beyond reversal. I note some decisions of most of the other Provinces.

Manitoba: *Rex* v. *Hoffman* (1917), 38 D.L.R. 289, 28 Can. Cr. Cas. 355, 28 Man. L.R. 7; *Rex ex rel Hammond* v. *Cappan* (1920), 51 D.L.R. 672, 32 Can. Cr. Cas. 267, 30 Man. L.R. 316.

New Brunswick: *Rex* v. *Allingham, Ex parte Keefe* (1913); 12 D.L.R. 9, 21 Can. Cr. Cas. 268, 41 N.B.R. 558; *Rex* v. *Vroom*; *Ex parte McDonald* (1919), 45 D.L.R. 494, 31 Can. Cr. Cas. 316 (and annotation), 46 N.B.R. 214.

Nova Scotia: *Regina* v. *McDonald* (1886), 19 N.S.R. 336.

Ontario: *Regina* v. *Coulson* (1896), 27 O.R. 59; *Rex* v. *Borin* (1913), 15 D.L.R. 737, 29 O.L.R. 584, 22 Can. Cr. Cas. 248; *Rex* v. *Thompson* (1917), 28 Can. Cr. Cas. 271, 39 O.L.R. 108.

Quebec: *Lacasse* v. *Fortier* (1917), 30 Can. Cr. Cas. 87; *McBrien* v. *Recorder's Court* (1919), 31 Can. Cr. Cas. 352.

Saskatchewan: *Rex* v. *McPherson* (No. 2) (1915), 26 D.L.R. 503, 25 Can. Cr. Cas. 62, 8 S.L.R. 412.

Canada: *In re Trepanier* (1885), 12 Can. S.C.R. 111, at 129.

In Paley on Convictions, 8th ed., at pp. 145 *et seq.*, it is said:—

> *When the evidence and the information were set forth in the conviction,* it was held, that the evidence must go to establish the identical offence which formed the subject of the information. It was not, therefore, sufficient that there appeared to be evidence of another offence of the same kind and subject to the same penalty. . . As to the degree and sufficiency of the evidence, and the credit due to the witnesses, the magistrates alone are the judges. In this respect they are placed in the situation of a jury; and, therefore, whatever the King's Bench Division, upon an inspection of the proceedings, would deem sufficient to be left to a jury on a trial, when the evidence was set out on the face of the conviction, was considered by them adequate to sustain the conclusion drawn by the convicting magistrates (p. 147).

The following case shews, however, that the Court would so far take notice of the sufficiency of evidence, upon which the conviction was framed, as to set that aside, if they thought the evidence too slight to warrant it (p. 149).

The general form of conviction . . now . . omits all statement of the evidence and at once proceeds to the adjudication. *The Court, therefore, now can form a judgment upon the evidence only when the facts are brought before it by affidavit or on a case stated for its opinion* (citing *Reg* v. *Bolton*, discussed at length in Paley, Part III., chs. IV. and V.) [see p. 156].

The passage last cited and italicised cannot, as I have already said in *Rex* v. *Emery*, 33 D.L.R. 556, 27 Can. Cr. Cas. 116, 10 Alta. L.R. 139, be accepted as applicable under our procedure as embodied in the Cr. Code, under which the depositions are returned with the conviction attached and which the Code expressly authorises the Court to examine. Doubtless one of the reasons why the Code established this practice was the recognition of the fact that in a new country like this it is found necessary to appoint Justices of the Peace many of whom have little or no education. See also annotation to *Rex* v. *Vroom*, 31 Can. Cr. Cas. at pp. 322-325 (also reported 45 D.L.R. 494, 46 N.B.R. 214). The result is that, so far as relates to the question whether the Court on *certiorari* can look at the evidence to see whether it is sufficient to justify a conviction, the Canadian Courts are in the same position as the former Court of King's Bench in England when the evidence was set out on the face of the conviction and that *Reg.* v. *Bolton*, and subsequent English cases based upon it, so far as that question is concerned, are not applicable under our Canadian procedure.

The right and duty therefore of this Court to consider the evidence upon which a conviction is made and, if it is found to be insufficient to quash the conviction, is then at least equal to the right and duty of the Court to set aside a verdict in a criminal case upon a case reserved if it appears that the evidence is insufficient to support the conviction. The cases therefore on which upon a reserved case the Court has set aside a conviction for insufficiency of evidence are therefore authorities applicable to cases arising on *certiorari*. *Reg.* v. *Davidson* (1892), 8 Man. L.R. 325; *R.* v. *Kolotyla* (1911), 21 Man. L.R. 197. But as I shall endeavour to shew the power of the Court to set aside a conviction on *certiorari* is much greater than its power upon a reserved case.

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An instance in which the English Court of Criminal Appeal held that the Crown had failed to sustain the onus which lay upon the prosecution is *Rex* v. *Jackson* (1914), 10 Cr. App. Cas. 28. In that case the prisoner Reynolds was convicted of theft. The facts were that the prosecutor Watson went in to a public house and all three prisoners were there. The prisoner Jackson put her arms round Watson and took the money and Watson gave all three prisoners in charge to a constable outside the public house. On the way to the police station Reynolds said to Watson, touching his (Reynolds') pocket, "You will find thirty shillings in there;" and Watson did find that sum there. The only other evidence against Reynolds was Jackson's evidence that Reynolds said: "Give him his money back."

The Court of Criminal Appeal held that there was not sufficient evidence to justify the conviction of Reynolds.

See also *Rex* v. *Clay* (1909), 3 Cr. App. Cas. 92; *Rex* v. *Lewis* (1910), 4 Cr. App. Cas. 96; *Rex*. v. *Pearson* (1910), 4 Cr. App. Cas. 40; *Rex*. v. *Batty* (1912), 7 Cr. App. Cas. 286.

But there is another aspect of the question, as to what are the powers and duties of the Court when considering a case brought before it by *certiorari*, which it was not necessary to consider in the case of *Rex* v. *Emery*, 33 D.L.R. 556, 27 Can. Cr. Cas. 116, 10 Alta. L.R. 139, but which this Court did consider in the case of *Rex* v. *Covert*, 34 D.L.R. 662, 28 Can. Cr. Cas. 25, 10 Alta. L.R. 349. Some misunderstanding of the meaning and effect of that decision and the principles upon which it was decided seems to be abroad. I shall endeavour to make these things clearer.

To anyone who will make a careful investigation of the question, it seems to me that it will be evident that the old English Court of King's Bench had as of inherent right a supreme power of supervising and revising the proceedings of all inferior tribunals. That power was not restricted to the consideration of the question whether the inferior tribunal acted with or without jurisdiction or whether, jurisdiction being admitted, there was sufficient evidence to justify the tribunal having regard to the facts and the law in coming to the decision it arrived at; but entitled the Court not only to examine the proceedings but to enquire into the circumstances surrounding the case in order to satisfy itself that the course of justice had not in any way been impeded and that

upon the whole justice had been done; and if not to quash the proceedings or to make the proper order. It was upon this ground that the Court would set aside convictions obtained for instance by fraud, or by doubtful courses, or under circumstances raising a suspicion of bias or prejudice in the convicting magistrate.

That inherent power of the old Court of King's Bench has been inherited by this Court which possesses it in all its plenitude. In the course of time admittedly the Court laid down by decision certain rules of practice indicating in what classes of cases it would or would not interfere. But the Court did not thus reduce its jurisdiction; nor so restrict its exercise as to prevent it, should new conditions arise, modifying the rules of practice it had laid down and applying the principles upon which the exercise of its jurisdiction was based in new ways as new conditions arose. The rule of practice that the Court would not interfere with the decision of the magistrate upon the facts was laid down under a system of jurisprudence which, in all criminal, quasi-criminal and penal proceedings, maintained a presumption of innocence in the accused and placed upon the prosecution the burden of proving his guilt beyond a reasonable doubt; but the Liquor Act has changed, has indeed almost reversed, those principles of jurisprudence and has made statutory presumptions of the guilt against the accused and thrown the burden of proof of innocence upon him. In such a case the reason for the rule of practice to which I have referred has gone and the Court must revert to the overriding principle and adopt a rule of practice which will ensure that justice shall be done. The Liquor Act itself evidently contemplates that an accused can, notwithstanding its drastic provisions adverse to the accused, exculpate himself. There is no appeal from the decision of the magistrate. There is no remedy except by way of *certiorari*. Is the Court having the jurisdiction, the power and the duty to see that justice is done to refuse to exercise its jurisdiction merely because of a rule of practice laid down under a system of jurisprudence which one may thankfully believe still remains in force in England but which has in this jurisdiction been destroyed in its application to the subject of intoxicating liquors?

Chancellor Boyd, in *Reg.* v. *Hughes* (1898), 29 O.R. 179, at 182, said:—

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It may be that where a conviction is good on its face and there is an appeal to the General Sessions, the Court will not go into the facts; but it is a serious thing, and a doubtful thing to say that the Court will not do so, even though the conviction be good on its face, whereas in this case there is no such appeal. It would be giving a great opening for injustice on the part of the magistrate.

And see *Reg.* v. *Davy* (1900), 4 Can. Cr. Cas. 28, at 33; *Ex parte Daley* (1888), 27 N.B.R. 129, *per* Wetmore, J. See also 4 Encyclopedia Pleading and Practice, at pp. 274-5. The protection given in England in such cases as this is much greater, for the accused may have a jury. Paley on Convictions, 8th ed., p. 124.

The case of *Rex* v. *Covert*, 34 D.L.R. 662, 28 Can. Cr. Cas. 25, 10 Alta. L.R. 349, was intended as an assertion of the jurisdiction of the Court to maintain, in cases where *certiorari* was not taken away, that untrammeled power to supervise and review the proceedings of magistrates unrestricted by rules of practice laid down under other conditions and to lay down new rules of practice as occasion might arise. The rule of practice there laid down, as applicable to cases arising under such statutes as the Liquor Act is, I think, a just and salutary one and one which ought to be maintained.

On the general question of the unrestricted jurisdiction of the Court on the supervision of the proceedings of magistrates and others, see my observation in *Rex* v. *Hartfield* (1920), 55 D.L.R. 524; Stephen's History Criminal Law, vol. 1., pp. 95 *et seq.;* Bacon's Abridgment, vol. 2, *Certiorari*, pp. 9 *et seq.;* Hawkins' Pleas of the Crown, vol. 2, pp. 399 *et seq.;* Blackstone's Commentaries, Lewis' ed., vol. IV., p. 320, note (13); *Rex* v. *Bass* (1793), 5 Term. Rep. 251, 101 E.R. 141; *Rex* v. *Harman* (1738), Andr. 343, 95 E.R. 427; *Groenwelt* v. *Burwell* (1701), 1 Salk. 144, 91 E.R. 134; The case of *Cardiffe Bridge* (1701), 1 Salk. 146, 91 E.R. 135; *Cross* v. *Smith* (1702), 1 Salk. 148, 91 E.R. 137; *Blewitt* v. *Shropshire* (1866), 14 L.T. 598; note on p. 1042 to *Rex* v. *Moreley* (1760), 2 Burr. 1041, 97 E.R. 696.

Rex v. *Covert*, 34 D.L.R. 662, 28 Can. Cr. Cas. 25, 10 Alta. L.R. 349, was directed solely to the case where the case for the prosecution was established presumptively only—by virtue either of a statutory presumption or a natural inference so that the evidence for the accused amounted not to a contradiction but an explanation of the inculpating facts. In that case it was said, *per* Beck, J., (see 34 D.L.R., at pp. 673-675):—

He [the accused] gave all the available evidence and that evidence if true explained away the inference or presumption against him. It will be objected of course that the magistrate may have disbelieved entirely the evidence on behalf of the accused and that it was open to him to do so; but in my opinion it cannot be said without limitation that a Judge [*a fortiori*, a magistrate] can refuse to accept evidence. I think he cannot, if the following conditions are fulfilled:

(1) That the statements of the witness are not in themselves improbable or unreasonable; (2) That there is no contradiction of them; (3) That the credibility of the witness has not been attacked by evidence against his character; (4) That nothing appears in the course of his evidence or of the evidence of any other witness tending to throw discredit upon him, and (5) That there is nothing in his demeanour while in Court during the trial to suggest untruthfulness.

To permit a trial Judge [*a fortiori*, a magistrate] to refuse to accept evidence given under all these conditions would be to permit him to determine the dispute arbitrarily and in disregard of the evidence, which is surely not the spirit of our system of jurisprudence. . . . Where evidence is reported to an appellate [or supervising] tribunal, especially where as here it appears that the evidence was taken by a stenographer, that tribunal has not of course the advantage of observing the demeanour of the witness when giving his evidence; but, in the first place, if his demeanour has been the sole ground upon which the trial Judge [magistrate] has rejected the witness's evidence, it is reasonable to expect that at least some indication of it will appear in the material reported to the appellate tribunal, for instance, in the reasons for the decision (if reasons are given) in the form the witness's answers take, or even in the form of the questions put to him (though care should be taken to satisfy one's self that the questions imputing misconduct are not put unfairly and without some foundation) or in observations by the trial Judge [magistrate] during the course of the case.

All this is of special force in a criminal case in which, it is unnecessary to repeat, the accused ought not to be convicted unless upon the whole case it is shewn that he is guilty beyond a reasonable doubt.

A most important recent decision emphasising at once this rule and the regard which the Court is bound to give to a defence by way of confession and avoidance is *Rex* v. *Schama* (1914), 11 Cr. App. Cas. 45 (which I adverted to in *Rex* v. *O'Neil* (1916), 25 Can. Cr. Cas. 323, 9 Alta. L.R. 365 at p. 401) where the English Court of Criminal Appeal said, in a case where the accused was shewn to have recent possession of goods recently stolen, he was entitled to be acquitted if he gave a *reasonable* explanation of his possession which *might* be true, *though the jury were not convinced that it was true.*

See, also, *Rex* v. *Styche*, a New Zealand case, reported in (1901), 20 N.Z.L.R. 744 (also referred to in *R.* v. *O'Neil*), and *Rex* v. *Allandale* (1905), 25 N.Z.L.R. 507; *Rex* v. *Jenkins* (1908), 14 Can. Cr. Cas. 221.

This Court then in my opinion has the right and the duty in the exercise of its inherent plenary jurisdiction in supervising the proceedings of inferior tribunals to examine the entire proceedings

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certified to it and to deal finally with the case according to right and justice as indicated in the words of the old writ of *certiorari: Coram nobia terminari volumus, et non alibi.* (Hawkins' Pleas of the Crown, vol. 2, at p. 411, sec. 59.)

I come now to a consideration of the facts disclosed in the evidence. In applying to it the principles of law I have set forth it is not in my opinion necessary to confine one's self to the evidence put in on behalf of the Crown; but even on the narrower rule contended for by the prosecution one is entitled to look at least at such evidence given on behalf of the defendant as is not questioned. Confining myself for the present within these limits, the following facts appear:—

The company—incorporated by Dominion Charter—was carrying on a liquor export business in premises in the city of Edmonton, approved of by the Attorney-General, from January, 1920, until October 2, 1920, the date on which the seizure in question in this matter was made, with the exception of the months of June and July when all liquor export houses were closed owing to the provisions of the Liquor Export Act of 10 Geo. V., 1920, ch. 7, which this Court held to be *ultra vires*. The company's stock-in-trade of liquors was worth about $100,000; the average monthly exports of the company represented $15,000 a month.

The company made regular monthly returns to the Attorney-General and its premises and documents were regularly inspected in accordance with the provisions of the Liquor Export Act. The right of inspection extended to "all books, papers, vouchers, receipts, bills of lading, stock sheets and other documents" (sec. 5).

Something like 12 other liquor export houses were doing business in Edmonton. All were carefully and continuously watched by a considerable squad of police acting under the direction of an inspector of the Alberta Provincial Police whose special business it was to see to the enforcement of the liquor laws, and who saw each month the returns made to the Department of the Attorney-General. That the authorities exercised with regard to this company at least their powers of inspection of the premises and documents with great attention and scrutinised the returns is evident from their prosecution of the company for making a false return, though it was admitted that the falsity consisted in the omission entirely by mistake of two cases of goods. *Rex v. Nat Bell Liquor Co.*, 53 D.L.R. 482, 54 D.L.R. 704.

As far as the inspector was aware the offence with which the company is charged in the present case is the only one committed by the company with reference to selling liquor otherwise than for export. It is clear therefore that the only evidence available against the company to prove the offence charged was the evidence of Bolsing, a decoy or stool-pigeon engaged by the police authorities who was the *causa causans* of the act which is made the basis of the charge.

The company's stock-in-trade of liquors was kept in a building consisting of a front office facing upon the street and a warehouse extending to the lane.

In this building there were two permanent employees of the company. Miss Dudley, a stenographer and typist, and Angel, the warehouseman. Sugarman and Bell are the active officers of the company. One of them was generally in his office for some time each business day; sometimes both were there. The method in which the company's business is done is that there is an "uptown office" where all mail-orders for liquor with the accompanying money, money orders, drafts, etc., are received and from which the banking business is done; the orders for liquor were taken to the warehouse building, the orders filled, checked and shipped by Angel, Miss Dudley giving him the various orders for liquor and doing the clerical work.

Now the evidence is quite clear that Angel induced by the stool-pigeon Bolsing made one sale of a case of whisky. He swears that he did so. Bolsing says in substance:—He went to the warehouse for the first time on Wednesday, September 29; saw Angel who up to that time was a stranger to him; asked him if Sam, a nephew of Bell's, was there and being told "No," went out. He returned the next day, Thursday, September 30, about 4 o'clock; he again saw Angel; the stenographer (Miss Dudley) was there; he and Angel sat down on a bench 8 or 10 ft. away from Miss Dudley's desk and had a conversation in a whisper which, he swears, she did not hear; the substance of the conversation was Bolsing said: "How's chances for a bottle?" Angel said, "No." Bolsing said: "What?" Angel said, "No." Bolsing said: "Can I get a case?" Angel said: "What do you work at?" Bolsing said: "I am a carpenter and will be working at the Gem Theatre to-morrow." Angel agreed to let him have a case.

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Bolsing said: "What do you charge?" Angel said: "Some at forty and some at forty-five." Bolsing said: "I want good stuff—not rotten stuff." Angel said: "The stuff at forty-five is good—Canadian whisky." Bolsing said: "I will come in to-morrow and give you the money;" then he walked out.

Bolsing returned on Friday, October 1, about 4.30. Bell and Sugarman were there on this occasion, as well as Angel and Miss Dudley. Bell said: "Who do you want to see?" Bolsing said: "The clerk." Bell said: "Gordon" (Angel)? Angel came to the door between the office and wareroom. Bolsing said: "I have decided to take a case of whisky, called Canadian Club," and gave Angel $45. This conversation was also in a whisper, the typewriter was going and neither Bell, Sugarman nor Miss Dudley could hear the conversation and Bolsing declines to say that any of them saw him give the money to Angel. Then comes the incident, as related by Bolsing, on which alone it is sought to fasten on Sugarman or Bell knowledge of an unlawful sale by Angel to Bolsing.

Bolsing says that: Immediately he (Angel) walked to the desk and said "Here is $45 more."

Q. To who? A. Angel and Sugarman at the desk. Q. He put the money on the desk? A. Yes. Q. What happened then? A. He turned right around and comes back and we went into the warehouse together. Q. Did you see what was done with the money that was put on the desk? A. Not right then till I came back. I saw Sugarman with a pocket-book in his hand and he shoved some bills in with it. Q. Did you see Sugarman take these bills and put them in the pocket-book? A. No I could not. Q. The bills were not on the desk when you came out? A. Yes. Q. Oh; and Sugarman was putting the wallet in his pocket with some bills? A. Yes.

Cross-examination:—

Q. You told him that you wanted to see what kind of stuff I am getting? A. Yes and he walked to the desk and hands the money. Q. And you turned round to see what he was doing? A. Yes. Q. And you saw him put the money on the desk? A. Yes. Q. What money did he put there? A. The same money. Q. You saw it in his hands the whole of that time? A. Yes. Q. Did he have any conversation when he did that? A. Yes. He said: "Here is $45 more." Q. To whom did he say that? A. Nat Bell and Sugarman were there. Q. Sitting down? A. Yes. Q. Sugarman still sitting in the same position? A. Yes. Q. And Nat Bell—where was he sitting—facing him? A. Yes. Q. Towards the warehouse? A. More towards the door. Q. Did Bell see you give the money to Angel? A. I didn't tell you that.

Re-examination:—

Q. You remember when Angel took this money for the bottles to where Sugarman and Bell were? A. Yes. Q. Did he say that in his ordinary tone of voice? A. Yes.

So far, I think I have stated nothing which does not appear in the evidence for the Crown; perhaps there are some facts taken from the evidence for the defence for the purpose of filling out the story but facts about which there is no dispute.

Section 54 of the Liquor Act says in effect that if a person charged with an offence under the Act is proved by *primâ facie* evidence to have any liquor in respect of which he is being prosecuted in his possession, charge or control, such person shall be obliged to prove that he did not commit the offence with which he is charged.

In face of this extraordinary presumption—to use the mildest adjective that occurs to me—it would seem that practically no evidence was needed on behalf of the Crown and that the Crown had gone to an unnecessary length in attempting to prove the defendant company guilty. Once, however, that it was proved—and it was proved by the Crown—that the company was carrying on a regular liquor export business, then I think that the presumption arose in its favour that its stock of liquor was kept for legitimate purposes and the force of the statutory presumption raised by sec. 54—which has no element of a natural inference—was spent.

Section 50 of the Act would appear to make the company *primâ facie* liable for the act of its employee Angel—that is, on a statutory presumption. Apart from the single incident sworn to by Bolsing of the handing over of the $45 I should say that on the whole evidence for the Crown this latter presumption ought also to have been taken to have been met and that it was clear that no offence of *keeping liquor for sale* established. How then does the evidence of Bolsing on this point affect the case at this point? He was a stool-pigeon; he was an accessory; by deception he induced the committing of the offence, if it was committed; he was uncorroborated. Had the charge been one not of keeping for sale, but even for the lesser offence of selling, it seems clear to me that had the case been before a Judge and a jury the Judge ought to have withdrawn the case from the jury, or at the very least to have pointed out to the jury the danger of convicting upon such

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evidence in view of the presumption of innocence and the necessity for excluding all reasonable doubt; and in the event of a verdict of guilty to have given leave to appeal on the weight of evidence under sec. 1021 of the Cr. Code, (See *Rex* v. *O'Neil*, 25 Can. Cr. Cas. 323, 9 Alta. L.R. 365), in which event the verdict would undoubtedly have been set aside.

Bolsing's evidence as to the incident in question, even if believed, left open a hypothesis which was not unreasonable or improbable. No one who does not withdraw himself from the surroundings in which he would become acquainted with the methods of dealing in liquor but will know that while ordinarily the business of liquor exporting is a mail order business, it is not uncommon especially at certain seasons of the year for residents of one Province to give an order personally to a liquor exporter to send liquor to another Province. Such a transaction is undoubtedly legal—as legal as a shipment made in consequence of an order by mail. The charge being one for *keeping for sale* in my opinion the magistrate ought to have dismissed the charge at the conclusion of the evidence for the prosecution.

However, as this Court has already held, it is not in all cases confined to a consideration of the evidence for the prosecution, and as, in my opinion, the power and the duty of the Court is indeed wider than might be inferred from that decision, I refer briefly to the evidence for the defence.

The evidence of Bolsing, with regard to the incident referred to, is absolutely denied by Sugarman, Bell, Angel, and Miss Dudley, and the credibility generally of Bolsing is seriously impugned by reason of the evidence of his conviction for theft which he had denied; and if the evidence for the defence is substantially accepted the case established by the defence is, that the sale made by Angel was a single sale, induced by the persuasions of the stool-pigeon, Bolsing, made by Angel against the instructions of his employers, without their knowledge and for his own personal benefit; that there was no liquor *kept for sale* otherwise than as authorised by law. I think it is quite unnecessary to go further into the details of the evidence. Were the evidence such as to lead to the conclusion that this single sale was made by either Bell or Sugarman personally, in my opinion that would not have justified a finding that any liquor, even the case sold, was *kept for sale*, within

the Province, the proper inference being, I think, that the whole of the liquor was kept for export and that the sale of one case having been brought about by persuasion, what was in truth *kept for sale without the Province* had in fact been in a single instance sold within the Province. I think it could not be said that any interval of time intervened between the decision to sell what was not for sale in that way and the actual sale. The evidence of Bolsing is clear that what was bargained for between him and Angel was one case of Canadian Club Whisky; not more than one case nor whisky of any other kind; the price of one case was the only price discussed; Canadian Club Whisky was the only kind of whisky which formed the subject of the negotiations.

It is clear then, to my mind, that both the conviction and the order for forfeiture should be quashed. But I have some observations to add.

The entire stock of liquor of the company was seized under the search-warrant on October 2. A temporary lease was arranged from the company to the Attorney-General under which the stock was left on the premises until October 11. Then the entire stock was removed from the premises to a warehouse. The conviction was made on October 21; the forfeiting order on November 4. It was not until after the latter date as I understand it that the company was allowed to get possession of the liquor seized but not declared to be forfeited and for this long period of time the company's business was entirely stopped, and they suffered consequently and necessarily a very large pecuniary loss. The seizure of the entire stock of the company, and especially the retention of the whole, were acts which in view of the facts and circumstances all of which were fully known to the police authorities were in my opinion even if the conviction and forfeiture actually declared were to be affirmed a gross abuse of authority. A sense of injustice pervades the case throughout, and a pretence of unusual fairness in the argument before the magistrate on behalf of the Crown. Even to do more than to lay a charge of selling for local consumption of the particular case of liquor actually sold by Angel is something which those responsible for it should be left to satisfy the Court if called upon to do so that their acts were done in the honest and *bonâ fide* discharge of their duty

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and not from any improper motive. I would, therefore, refuse to make the usual order for protection of any of those concerned and I would give costs to the company against the informant. In the form of the appeal book and otherwise there is a plain intimation that the prosecution propose if they fail to succeed upon this appeal to appeal to a still higher Court—the appeal book is printed to conform to the requirement of the Judicial Committee of the Privy Council. Having regard to all the facts and circumstances of the case, but especially to the very large financial loss which the company has suffered by reason of the seizure of the whole of their stock and its retention for a long time, though but a portion of it was ultimately declared to be forfeited, a loss in respect of which there seems no ground for supposing the company will ever receive any compensation, I cannot believe that the Attorney-General of the Province, if he informs himself fully concerning the matter, will permit so gross an injustice as the company has been subjected to to be further magnified.

In the result I would, as I have said, quash the conviction and the order of forfeiture both with costs to be paid by the informant, thereby affirming the decision of Hyndman, J., and dismissing the appeal with costs, and I would give no order of protection to any one concerned. *Appeals dismissed.*

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British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. January 4, 1921.

NEW TRIAL (§ II—5)—INCONCLUSIVE VERDICT BY JURY—NO JUDGMENT ENTERED BY JUDGE—INTEREST OF PARTIES TO BE CONSIDERED IN GRANTING.

If a verdict is inconclusive the jury finding negligence on both sides, but not saying whose negligence is the proximate cause of the plaintiff's injury, and whose findings do not amount to a general verdict, the trial Judge should dismiss the action on the ground that the plaintiff has failed to get a verdict in his favour. The refusal of the trial Judge in such circumstances to direct judgment to be entered for one party or the other is ground for a new trial which may be ordered, although that is not what was asked for by either party.

[*Faulknor* v. *Clifford* (1897), 17 P.R. (Ont.) 363; *Stevens* v. *Grout* (1894), 16 P.R. (Ont.) 210; *McDermott* v. *Grout* (1894), 16 P.R. (Ont.) 215, referred to. See also 47 D.L.R. 65, 58 Can. S.C.R. 501.]

Statement.

APPEAL by defendant from the judgment of Hunter, C.J.B.C., in an action claiming damages for injuries, the result of a collision between a motor car and a train. New trial ordered.

E. P. Davis, K.C., and *Colquhoun*, for appellant.

A. H. MacNeill, K.C., for respondent.

MACDONALD, C.J.A.:—At the hearing of this appeal the preliminary objection was taken that the Court had no jurisdiction to entertain it. This objection was founded on the refusal of the trial Judge, Hunter, C.J.B.C., to direct judgment to be entered for one party or the other. The appellants (defendants) thereupon made a formal motion to him for judgment for the dismissal of the action. This was refused and the appeal is taken from the order thereupon made. The Court, my brothers Martin and McPhillips, dissenting, overruled the objection.

The verdict is inconclusive, the jury found negligence on both sides but did not say whose negligence was the proximate cause of plaintiff's injury. They could not agree upon the answers to all the questions submitted to them, nor did their findings amount to a general verdict. They brought in the following:—

> The jury find on the evidence submitted that the driver of the motor car was at fault in not stopping her car more quickly and also considers the company negligent in not having the most efficient tail-end equipment. We also consider that the brakeman should have been in such a position on the rear of the train that he could have applied the brakes himself by means of the cord instead of depending on the signal to the engineer. Evidence on the point as to the distance the train was from the automobile when it became apparent there was danger of a collision is so conflicting that the jury are unable to determine whether the train could have stopped in time to avoid the accident and recommend that the damages be borne by both parties to the action.

After the foreman had stated that there was no hope for an agreement upon the answers to the questions, the jury were discharged and apparently the above was accepted as their verdict.

Had both parties submitted to the order, it may be, though I have grave doubts of it, that the action could have again been brought on for trial without an order for a new trial. If I could say that the so-called verdict was in reality tantamount to a disagreement of the jury the proper course would be to permit the parties to bring the action on again for trial. But in view of the fact that the jury did agree to something, inconclusive and unsatisfactory though it be and which purports to be their verdict, precludes me from saying that the parties could have avoided a resort to this Court for relief. With respect, I think the request of Mr. MacNeill, counsel for the respondent, that the jury should

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be sent back with instructions to reconsider their finding, should have been acceded to, particularly their recommendation that the damages be borne by both parties. If that were intended to be part of their verdict, it meant that in the jury's opinion the plaintiff was entitled to succeed for half the amount of damage proven. Such a finding would amount inferentially to a declaration that it was the negligence of the defendant that caused the plaintiff's injury. On the other hand, it might be read as a declaration that Mrs. Gavin was as much to blame as the defendant's servants. In any view of the so-called verdict, it is on its face a compromise and cannot be allowed to stand.

Although we were not referred to them on the argument, I have looked at the cases of *Faulknor* v. *Clifford* (1897), 17 P.R. (Ont.) 363; *Stevens* v. *Grout* (1894), 16 P.R. (Ont.) 210 and *McDermott* v. *Grout* (1894), 16 P.R. (Ont.) 215, therein referred to, and which had to do with situations not unlike the present one, but those were cases clearly of disagreement in the full sense of the term, since there was no general verdict and some of the questions remained unanswered.

It was open to the trial Judge, Hunter, C.J.B.C., to have dismissed the action on the ground that the plaintiff had failed to get a verdict in his favour, and I think in the circumstances that that course ought to have been pursued, leaving it to the plaintiff to appeal to this Court for a new trial. Hunter, C.J.B.C., had no power to grant the appropriate relief, and the embarrassment that has arisen in this appeal because there was no judgment in the action would have been happily avoided.

The question of the costs of the appeal has given me some difficulty. The appellant did not ask for a new trial. We might dismiss his appeal, but to my mind that course would not be in the interests of justice. I think the obstacle to another trial should be removed, although that is not what was asked for by the appellant, nor by the respondent, who has made no motion at all to the Court. The order for a new trial is in the interest of both parties, if my view of the so-called verdict be the correct one.

Neither party has pursued the proper course to remove the obstacle to the determination of their rights and I would deprive both of them of the costs of the appeal. The circumstances set out above furnish good cause for this.

MARTIN, J.A., would order a new trial.

GALLIHER, J.A.:—I am agreeing with Macdonald, C.J.A., in the disposal of this appeal.

McPHILLIPS, J.A. (dissenting):—When this appeal was opened I was of the opinion that the case should be sent back to the trial Judge to have judgment entered upon the findings of the jury. However, the majority of the Court held otherwise and the appeal was proceeded with upon the basis that it would be open to the Court to dispose of the appeal as in all other cases where the appeal follows a final judgment, and that the Court could give the judgment the trial Judge should have given or otherwise dispose of the appeal in the exercise of the jurisdiction conferred on the Court of Appeal. See *McPhee* v. *E. & N.R. Co.* (1913), 16 D.L.R. 756, 49 Can. S.C.R. 43, *per* Duff, J., and *Winterbotham, Gurney & Co.* v. *Sibthorp and Cox*, [1918] 1 K.B. 625.

I further expressed myself at the time that if called upon then to say what judgment should be entered upon the findings of the jury—that judgment should be entered for the defendant. I am still of that opinion. This action has now been tried a second time and it is plain that no jury acting reasonably can find that the responsibility for the accident, *i.e.*, the injury to the motor, rests upon the defendant. Specific questions were submitted to the jury following the judgment of this Court affirmed by the Supreme Court of Canada, a new trial having been directed (see *Gavin* v. *Kettle Valley R. Co.* (1918), 43 D.L.R. 47, 23 Can. Ry. Cas. 379, 26 B.C.R. 30; reversed in part (1919), 47 D.L.R. 65, 58 Can. S.C.R. 501). The jury refrained from answering the questions *seriatim* but returned a somewhat general answer not fully covering the questions submitted, but not amounting to a general verdict. In any case, having made specific answers, these are to be looked at to determine what the jury have really found upon the facts. (See *Bank of Toronto* v. *Harrell* (1917), 39 D.L.R. 262, 55 Can. S.C.R. 512; *Newberry* v. *Bristol Tramway & Carriage Co* (1912), 29 T.L.R. 177, at p. 179, 107 L.T. 801.)

Now, the question is, what have the jury found? The questions put to them were as follows:—

1. Was the damage to the plaintiff's automobile caused by the negligence of the defendant? 2. If so, in what did such negligence consist? 3. Could the driver of the automobile, by the exercise of reasonable care, have avoided the accident? 4. If she might, in what respect was such driver negligent?

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5. If, after the employees of the defendant became aware or ought (if they had exercised reasonable care) to have become aware that the automobile (whether stationary or moving) was in danger of being injured could they have prevented such injury by the exercise of reasonable care? 6. If so, in what manner or by what means could they have prevented the accident? 7. Could the driver of the automobile after she became aware, or ought (if she had exercised reasonable care) to have become aware, that the automobile was in danger of being injured, have prevented such injury by the exercise of reasonable care and skill? 8. If so, how or by what means could she have prevented the accident? 9. Amount of damages?

The jury in answer to the questions said:—

The jury find on the evidence submitted that the driver of the motor car was at fault in not stopping her car more quickly, and also consider the company negligent in not having the most efficient tail-end equipment. We also consider that the brakeman should have been in such a position on the rear of the train that he could have applied the brakes himself by means of the cord instead of depending on the signal to the engineer. The evidence on the point as to the distance the train was from the automobile when it became apparent there was danger of a collision is so conflicting that the jury are unable to determine whether the train could have stopped in time to avoid the accident and recommend that the damages be equally borne by both parties to the action.

The jury have undoubtedly "told the Court what they meant by their verdict." See Cozens-Hardy, M.R., in *Newberry* v. *Bristol etc. Co.*, 29 T.L.R. at 179, and that unmistakably is that the driver of the motor car was negligent. It is true the jury find that the defendant was negligent, but in what way? In not having "the most efficient tail-end equipment" and that the brakeman should have been able to apply the brakes himself by means of the cord instead of by way of signal to the engineer. The Railway Act provides for the precautions to be taken when a train is moving backwards and no breach of any statutory condition has been established, and what the jury have said in this regard may be effectively met by referring to the language of Lord Sumner (then Hamilton, L.J.), in *Newberry* v. *Bristol T. & C. Co.*, 29 T.L.R. at 179:—

His Lordship [Lord Justice Hamilton] did not think that a jury could fix a defendant with liability for want of care without proof given or reason assigned, out of their own inner consciousness and on their own notions of the fitness of things.

In any case if there be any value attachable to these latter findings, they are findings of negligence against the defendant coupled with a finding of negligence against the plaintiff, that is that the case is one of joint negligence and in such a case the plaintiff cannot recover.

The essential finding, *i.e.*, the "ultimate negligence," was not found by the jury (see Anglin, J., *Gavin* v. *Kettle Valley R. Co.*, 47 D.L.R. 65, 58 Can. S.C.R. 501), against the defendant, the answer as made in my opinion is in favour of the defendant and should be so construed. Lord Moulton in *Richards* v. *Lothian*, [1913] A.C. 263, said, at p. 274: "This is an issue of fact in which the burden is upon the plaintiff and he has obtained no finding from the jury in support of it."

It is competent for the Court of Appeal to enter judgment for the defendant even against the findings of the jury or where there has been failure to make the requisite findings. (See *McPhee* v. *E. & N.R. Co.*, 16 D.L.R. 756, 49 Can. S.C.R. 43, *per* Duff, J.)

It is true the Court of Appeal must not "usurp the province of a jury." In *Paquin Ltd.* v. *Beauclerk*, [1906] A.C. 148 at 161, Lord Loreburn, L.C., said:—

> Obviously the Court of Appeal is not at liberty to usurp the province of a jury, yet if the evidence be such that only one conclusion can properly be drawn, I agree that the Court may enter judgment.

I was of the opinion upon the hearing of the appeal to this Court, following the first trial that it was a proper case in which to enter judgment for the defendant and I am still of that opinion (see *Gavin* v. *Kettle Valley R. Co.*, 43 D.L.R. 47, 23 Can. Ry. Cas. 379, 26 B.C.R. 30), but a new trial only was asked, but now it is submitted that judgment should be entered for the defendant. In the present case the Court of Appeal has all the facts before it, and it is not suggested that there are other relevant facts capable of proof should a new trial be directed. That being the situation, and this being an appeal following two trials had between the parties, with an appeal to the Supreme Court of Canada and two appeals to this Court, it occurs to me that the proper course, if it be a case "that only one conclusion can properly be drawn" (Lord Loreburn, L.C., in the *Paquin* case, [1906] A.C. 148 at 161; Duff, J., in *McPhee* case, 16 D.L.R. 756, 49 Can. S.C.R. 43), is that judgment should be entered for the defendant. It is clear to me that only one conclusion can properly be drawn and that is that the plaintiff is disentitled to recover upon the facts. Plaintiff, the driver of the motor car, was reckless and careless in approaching the railway crossing, but, notwithstanding this, damits seeing the railway train when she was at a distance from

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the crossing that well admitted of her stopping the motor car. Nevertheless she elects to proceed and becomes the author of the damage that ensues to the motor car consequent upon the inevitable collision as I view it, with the exercise upon the part of the servants of the railway company of every possible effort to obviate the collision. Now upon these facts is there any possibility of fixing liability upon the defendant? In my opinion there is not. I would refer to what Lord Sumner said in *B.C. Elec. R. Co.* v. *Loach* (1915), 23 D.L.R. 4, at p. 5, 20 Can. Ry. Cas. 309, [1916] 1 A.C. 719:—

> Clearly if the deceased had not got on to the line he would have suffered no harm, in spite of the excessive speed and the defective brake, and if he had kept his eyes about him he would have perceived the approach of the car, and would have kept out of mischief. If the matter stopped there, his administrator's action must have failed, for he would certainly have been guilty of contributory negligence. He would have owed his death to his own fault, and whether his negligence was the sole cause or the cause jointly with the railway company's negligence would not have mattered.

I would also refer (to save repetition) to my reasons for judgment in *Gavin* v. *Kettle Valley R. Co.*, 43 D.L.R. 47, 23 Can. Ry. Cas. 379, 26 B.C.R. 30. See also *M'Allester* v. *Glasgow Corporation*, [1917] Ct. of Sess. 430; *Fraser* v. *Edinburgh Street Tramways Co.* (1882), 10 R. (Ct. of Sess.) 264; *Macandrew* v. *Tillard*, [1909] Ct. of Sess. 78; *Fraser* v. *B.C. Electric R. Co.* (1919), 26 B.C.R. 536.

I am therefore of the opinion that the trial Judge should have entered judgment for the defendant upon the answers of the jury, but if I should be wrong in this, then upon the evidence "only one conclusion can properly be drawn" and that conclusion is, that the accident was consequent upon the negligence of the driver of the motor car and the servants of the defendant could not by the exercise of reasonable care, after becoming aware of the danger, have avoided the accident and this Court should enter judgment for the defendant.

I would therefore allow the appeal, the order of the trial Judge to be set aside and judgment entered for the defendant.

Eberts, J. A.

EBERTS, J.A., would order a new trial.

New trial ordered.

DICKENSON v. VILLAGE OF LIMERICK.

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Saskatchewan Court of Appeal, Haultain C.J.S., Lamont and Elwood, JJ.A. January 21, 1921.

EVIDENCE (§ II B—114)—FURTHER EVIDENCE AFTER JUDGMENT—WHEN ALLOWED—RULE 654 (SASK.).

A motion for leave to adduce further evidence under R. 654, after judgment has been given, will be refused where the proposed evidence is not of a matter which has occurred after the date of the decision, but is evidence which was discovered after the date of the decision as to a matter which was in existence before the date of the decision, and where the evidence is not conclusive.

[*Buscombe* v. *Windibank* (1919), 48 D.L.R. 301; *Smith* v. *Moats* (1920), 56 D.L.R. 415; *Auger* v. *Langas* (1920), 52 D.L.R. 626, 13 S.L.R. 333, considered.]

Statement.

MOTION by defendant (appellant) for leave to adduce further evidence under Rule 654 (Sask.) Motion refused.

W. H. McEwen, for appellant; *Gregory*, K.C., for respondent.

The judgment of the Court was delivered by

Elwood, J.A.

ELWOOD, J.A.:—This was an action brought by the respondent to recover from the defendant damages in consequence of grading done on one of the streets of the appellant, whereby water was caused to lie in a pool adjoining the respondent's premises, which water flowed into the basement of the respondent's premises and caused damage thereto. At the conclusion of the trial judgment was given for the respondent, and the appellant has appealed from this judgment.

The appellant now moves for leave to adduce further evidence under a part of R. 654. The part under which the application is made is as follows:—

> Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.

From the material before us it appears that, subsequently to the delivery of the judgment at the trial, the appellant removed the obstruction which caused the water to collect as aforesaid; that, subsequently to such removal, the respondent caused a barrel to be sunk in the basement of the building and a drain to be constructed therefrom to the west side of said basement; that water came from the west side of said basement into said barrel, and that the respondent from time to time has been compelled to pump out said basement. It being contended that the evidence proposed to be adduced shews that the damage complained of by the respondent in the action was not caused by the action of the

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appellant, but occurred through seepage from the west side of said basement. The water which the respondent claimed did the damage to his basement, and which the trial Judge found, came from the east side of said basement.

In support of the application now before us, the case of *Buscombe* v. *Windibank* (1919), 48 D.L.R. 301, was cited. That was a British Columbia case, and the application was similar to the one now before us and made under a rule similar to our rule. In this case examples are given of a number of things to which the rule would relate. Those examples, I apprehend, are not at all exhaustive, but they do, in my opinion, indicate the principle upon which the Court will act in receiving further evidence, "in any case as to matters which have occurred after the date of the decision." The examples given, in my opinion, are very much against the contention of the appellant for admission of the proposed evidence. The proposed evidence is not in my opinion of a matter which has occurred after the date of the decision, but is evidence coming into existence after the date of the decision as to a matter which was in existence before the date of the decision. If the contention of the appellant is correct, the seepage from the west side of the basement occurred before the date of the decision. The evidence of that fact came into existence—perhaps, more properly, was discovered—after the date of the decision. I am therefore of the opinion that the application under the above in part quoted R. 654 should be refused.

It was further contended that the evidence should be admitted on special grounds; that is, that it was evidence discovered after the date of the decision.

In *Smith* v. *Moats*, decided by this Court on December 23, 1920, and unreported as yet [56 D.L.R. 415], the case of *Auger* v. *Langas* (1920), 52 D.L.R. 626, 13 S.L.R. 333, was referred to. In the latter case this Court held that new evidence, where special leave was required, would not be admitted unless it appears that such evidence is conclusive.

I am of the opinion that the evidence sought to be admitted is not conclusive.

It would still be open for the Court to consider whether or not the damage was caused by the seepage from the east or from the west side; the quantity of seepage from either side, and

whether the amount of seepage from the west side might not have been caused by the loosening of the ground in consequence of the seepage from the east side.

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In my opinion, therefore, the application should be refused with costs. *Judgment accordingly.*

McKAY v. ST. JOSEPH'S HOSPITAL BOARD.

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Nova Scotia, Supreme Court, Harris, C.J., Russell, Longley Chisholm and Mellish JJ. January 21, 1921.

CONTRACTS (§ I E—65)—VERBAL—TO FINISH TRAINING AS A NURSE—PROBABLE TIME TWO YEARS—STATUTE OF FRAUDS—CONTRACT UNENFORCEABLE.

A verbal contract entered into between the plaintiff and the defendant whereby the plaintiff was to finish her training as a nurse in defendant's hospital, the period necessary to finish the training being about two years, is within the Statute of Frauds and unenforceable.

[See Annotation, Statute of Frauds, Oral Contract, 2 D.L.R. 636.]

APPEAL by defendant from the trial judgment in an action claiming damages for the alleged wrongful, unlawful and malicious dismissal of plaintiff as a nurse or nurse-in-training in the hospital controlled or operated by the defendant corporation. Reversed. Statement.

Neil McArthur, for appellant.

T. R. Robertson, K.C., and *W. R. Tobin*, for respondent.

The judgment of the Court was delivered by

MELLISH, J.:—This is an action for wrongful dismissal. The plaintiff, according to her own evidence, having had some training as a hospital nurse, entered into an agreement with the defendant to finish her training in defendant's hospital at Glace Bay, and for that purpose entered on her duties August 1, 1918. In addition to training, it was a further term of the agreement that she should receive $5 a month in cash for her services. The period necessary to finish her training and for which she was taken on, according to her evidence, was 2 years. There was no written agreement to satisfy the Statute of Frauds. She was discharged in March, 1919, and has accordingly brought this action. The jury has found in her favour $25 damages and an order for judgment was granted accordingly. Defendant's counsel, at the close of plaintiff's case, moved to have the action dismissed on the ground that by reason of the Statute of Frauds the action was not maintainable. Mellish, J.

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The Judge, however, allowed the trial to proceed with the result above stated. Defendant now moves to set the finding aside and for a new trial, or, alternatively, by way of appeal, that the action be dismissed.

I think defendant is entitled to succeed on the appeal and to have the action dismissed with costs, including the costs of the appeal.

The Statute of Frauds, I think, raises an insuperable defence and on that ground this decision is based.

With great diffidence I disagree with the trial Judge as to the facts. The Judge's charge to the jury contains the following language: "Something was said about its being a contract for two years, but the plaintiff said that was not the agreement and it is my recollection that Sister Ignatius also says that was not the agreement;" and, further on, . . . "both Sister Ignatius and the plaintiff agree that the plaintiff was not hired for a period of two years." If the evidence of the plaintiff and that of Sister Ignatius be closely looked at, nothing therein will be found, I think, to justify the conclusion that the defendant was not bound to complete the plaintiff's training. It is true that defendant's witness, Sister Ignatius, states that the plaintiff would have been at liberty to go before the expiration of her engagement if she so desired, but that circumstance cannot, I think, alter the nature of the defendant's obligation. This sister may have been very willing to part with the plaintiff under all the circumstances, but from the very nature of the employment it is, I think, inconceivable that the plaintiff should have the right to leave when she wished, and the rules of the hospital put in evidence would seem to negative any such right. On this point it may be worth considering the exact evidence of the plaintiff in rebuttal, which is relied on as supporting the Judge's direction to the jury:

"Did you engage to remain 2 years?" She said "No."

This, I think, is not evidence of anything that was said at the conversation when she was engaged, and is at most a denial that it could be inferred from what was said that such an arrangement was entered into or that she expressly agreed to stay for the full period of her engagement, or that there was any express agreement that she should remain for that precise period. In justice to the plaintiff and considering her previous testimony this I think is the

only reasonable view, and it is further, I think from any standpoint, the only possible view to take of this evidence. Now, from the previous evidence of the plaintiff and of Sister Ignatius, it is clear that there was no express agreement for two years. Plaintiff had previously stated, "She (*i.e.*, Sister Ignatius) asked me if I would like to come there to finish. I said: Yes, I was perfectly satisfied to finish my training;" and on cross-examination, in answer to the question, "What length of time were you to serve?" she said, "There was no particular time set;" and to the question, "You were to complete your course; what time would that be?" She said "Two years."

In view of this evidence we are not, I think, assisted by the plaintiff's statement that notwithstanding the facts therein disclosed she did not engage to remain 2 years. It is true she did not, if her previous evidence be considered, expressly engage to remain 2 years; according to Sister Ignatius the period was 28 months. Nothing apparently was said by either to the other about "two years." They were talking about the "finish" of plaintiff's course. Plaintiff says that would in fact take 2 years.

If this evidence in rebuttal is to be taken as a denial of what the plaintiff had previously said, I think it was clearly inadmissible and I can hardly see on what ground it was admissible in any view, more especially as the defendant's counsel had moved for judgment at the close of the plaintiff's case.

Further, whether plaintiff was bound to remain for the period of her engagement or not, I think the defendant engaged to train her for at least 2 years and to pay her $5 a month for that period, and on that ground alone I would allow the appeal as the engagement sued on was not in writing as required by the Statute of Frauds.

I think it unnecessary, in view of the foregoing, to deal with the question as to whether the verdict is against the weight of evidence. The charges against the plaintiff are serious and for that reason alone I would hesitate to set aside the findings of the jury in her favour if her action is clearly not maintainable on other grounds. *Appeal allowed.*

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WESTERN TRUST COMPANY, and WAH SING v. WAH SING and MOOSE JAW SECURITIES Ltd.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 23, 1920.

1. TRUSTS (§ V—76)—CREDITORS—PRIORITY OF TRUST MONEYS IN HANDS OF DECEASED—ESTABLISHING CLAIM.

A creditor claiming priority in respect of trust moneys in the hands of a deceased is entitled to succeed if he can establish that the property in the trust money was always in himself and did not pass to the deceased, and if the money can be traced into the hands of the executors in some specific asset, or if, in contemplation of equity, the money still belongs to him although it has been mixed with money belonging to the deceased, so that its specific identity is lost provided it can be traced into a specific fund or asset. If, however, through the operations of the deceased the identity of the trust fund is lost and the claimant has to look to the estate of the deceased generally for payment he is simply a creditor and must rank with the others.

2. PLEADING (§ 1 G—51)—APPLICATION TO DETERMINE PRIORITY OF TRUST CLAIMS—ORIGINATING SUMMONS DIRECTED—UNCONDITIONAL APPEARANCE ENTERED—RIGHT TO RAISE OBJECTION AS TO RIGHT TO TRY MATTERS INVOLVED IN AN ORIGINATING SUMMONS.

After consenting to represent the trust creditors on an application to be made to the Court for the purpose of having a point in question determined, and having entered an unconditional appearance to an originating summons directed by the Court to be issued, such representative is not in a position to raise an objection that the matters involved cannot be disposed of in such originating summons.

[*In re Mussetter* (1908), 1 S.L.R. 369, distinguished.]

Statement. APPEAL by the executors and by trust creditors from a judgment dismissing an application for the purpose of obtaining a direction of the Court as to whether claims of trust creditors should be treated as preferred and upholding an objection that the matter involved in the application could not be disposed of in an originating summons.

W. G. Ross, for appellant Western Trust Co.

C. H. J. Burrows, for appellant Wah Sing.

W. H. B. Spotton, for respondent Moose Jaw Securities, Ltd.

The judgment of the Court was delivered by

Lamont, J.A. LAMONT, J.A.:—The plaintiffs are the executors of the last will and testament of the late J. E. Caldwell, who died on October 31, 1918. On advertising for creditors, claims amounting to over half a million dollars were filed. A number of creditors filed claims for moneys had and received by the deceased in trust for them, and they claimed to be entitled to rank on the estate of the deceased in priority to the general creditors. The executors being desirous of obtaining the direction of the Court as to whether the claims filed in respect of trust funds should be treated as preferred

claims, applied to the Chief Justice of the King's Bench, who directed that a notice be served on all creditors known to the executors informing them that application was being made for an order appointing a representative of each class of creditors; that is, for those claiming as "trust creditors" and those who did not claim as such, and that all creditors would be bound by any order determining their rights made upon a subsequent application at which the representative of their class was present personally or by counsel. The notices were served, and the application came on for hearing on May 11, 1920, before MacDonald, J., in Chambers, who appointed one Wah Sing to represent the trust creditors, and the Moose Jaw Securities, Limited, to represent the non-trust creditors, and gave the executors liberty to issue an originating summons directed to those two representatives for the purpose of obtaining a direction from the Court as to whether the claims of the trust creditors should be treated as preferred. Both representatives were present by their counsel and consented to the order being made, and when served with the originating summons entered an unconditional appearance thereto. The summons came on for hearing on July 2, 1920, before Taylor, J., when, for the first time, the Moose Jaw Securities, Ltd., took the objection that the matter involved in the application could not be disposed of on an originating summons, there being questions of fact to be tried, and counsel cited as authority therefor *In re Mussetter* (1908), 1 S.L.R. 369. The trial Judge upheld the objection and dismissed the application. From his decision both the executors and Wah Sing now appeal.

In my opinion the trial Judge erred in dismissing the summons, and that for two reasons: (1) After consenting to represent the non-trust creditors on the application to be made to the Court for the purpose of having the point in question determined, and having entered an unconditional appearance to the summons, the Moose Jaw Securities, Limited, were not, in my opinion, in a position to raise the objection, and their objection should have been overruled. (2) In my opinion *In re Mussetter*, 1 S.L.R. 369, has no application to this case. In that case, Wetmore, C.J., was not satisfied that the amount claimed was correct, and he followed *In re Powers, Lindsell* v. *Phillips* (1885), 30 Ch. D. 291, in which case Lindley, L.J., at 296, said:—

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A summons is not the proper way of trying a disputed debt where the dispute turns on questions of fact, but where there is no dispute of fact the validity of the debt can be decided just as well on a summons as in an action.

In the case at Bar, there is no dispute as to the amount claimed by the respective creditors or of the liability of the deceased therefor. It is simply a question of law as to whether certain creditors are entitled to priority.

It was further argued that the Court could not give the direction asked for in the summons because priority could not be given to the "trust creditors" as a class, but only to those members thereof as individual claimants who were able to satisfactorily establish facts shewing a right to priority, and that each case must be governed by the circumstances of that particular case. This, without doubt, is true, but it is not in my opinion a sufficient reason for refusing to the executors the direction they require, as far as the same can be given.

In *In re Birkbeck Permanent Benefit Bldg. Soc'y*, [1912] 2 Ch. 183, the liquidator took out a summons for the determination by the Court of the respective priorities of the outside creditors, shareholders and depositors of the society, and obtained an order appointing certain persons to represent each class. In that case, as here, the Court could not pass finally on the individual claims of those asserting priority in respect of trust claims, but no suggestion was made that for that reason the Court should not give the direction asked for in the summons. The matter reached the House of Lords under the name of *Sinclair* v. *Brougham*, [1914] A.C. 398, where, at 460, the direction given will be found. I am therefore of opinion that the executors were entitled to the direction asked for.

We have now to consider if the possession of trust funds by the deceased is sufficient to entitle those designated "trust creditors" to rank on the deceased's estate in priority to the general creditors. The term "trust creditors," while very convenient, is really a misnomer, because the only ground upon which the members of that class can establish a right over the general creditors is that they were not creditors at all; that is, that, as regards the trust moneys on which their respective claims are based, the relation between them respectively and the deceased was not that of debtor and creditor. Once it is established that

the relation between the deceased and a person claiming in regard to moneys which were in the deceased's hands was that of debtor and creditor, such person is only one of the general creditors. To be entitled to priority, a claimant must establish that the property in the trust moneys never passed to the deceased, but was at all times in himself, and that it was sufficiently ear-marked to be identified as part of the assets in the executor's hands.

As far back as 1815, Lord Ellenborough, C.J., in *Taylor* v. *Plumer*, 3 M. & S. 562, 105 E.R. 721, held that where a draft for money was entrusted to a broker to buy exchange bills for his principal, and the broker received the money and misapplied it by purchasing American stock and bullion, intending to abscond, but was taken before he quitted England and thereupon surrendered to the principal the securities for the American stock and bullion, who sold the whole and received the proceeds, the principal was entitled to withhold the proceeds from the assignee of the broker, who became bankrupt on the day on which he so received and misapplied the money.

In *Ex parte Cook; In re Strachan* (1876), 4 Ch. D. 123, Bramwell, J.A., pointed out that in *Taylor* v. *Plumer*, *supra*, the principal was entitled to claim the proceeds of the American stock and bullion, because (4 Ch. D. at p. 128), "it was handed to him in a fiduciary character, so as not to create the mere relation of debtor and creditor between him and his principal."

In *Sinclair* v. *Brougham*, [1914] A.C. 398, Viscount Haldane, L.C., called attention to the fact that at common law the right to follow money was not confined to cases where there was a fiduciary relationship, although the existence of that relationship was the ground upon which the right to follow was often based. The question at common law was, had the property passed, and if it had not and no relation of debtor and creditor had intervened, the money could be followed and recovered notwithstanding its normal character as currency, provided it could be ear-marked or traced into assets acquired with it. He also pointed out that equity exercising a concurrent jurisdiction, based upon trust, gave a further remedy where the money could not be specifically identified. At pp. 420, 421, the Lord Chancellor said:—

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But while the common law gave the remedy I have stated, it gave no remedy when the money had been paid by the wrong-doer into his account with his banker, who simply owed him a debt, so that no money was or could be, in the contemplation of a Court of law, ear-marked. Here equity, which had so far exercised a concurrent jurisdiction based upon trust, gave a further remedy. The Court of Chancery could and would declare, even as against the general creditors of the wrong-doer, that there was what it called a charge on the banker's debt to the person whose money had been paid into the latter's bank account in favour of the person whose money it really was. And, as Jessel, M.R., pointed out in *Hallett's* case (1880), 13 Ch. D. 696, this equity was not confined to cases of trust in the strict sense, but applied at all events to every case where there was a fiduciary relationship. It was, as I think, merely an additional right, which could be enforced by the Court of Chancery in the exercise of its auxiliary jurisdiction, wherever money was held to belong in equity to the plaintiff. If so, subject to certain qualifications which I shall presently make, I see no reason why the remedy explained by Jessel, M.R., in *Hallett's* case, of declaring a charge on the investment in a debt due from bankers on balance, or on any mass of money or securities with which the plaintiff's money had been mixed, should not apply in the case of a transaction that is *ultra vires*. The property was never converted into a debt, in equity at all events, and there has been throughout a resulting trust, not of an active character, but sufficient, in my opinion, to bring the transaction within the general principle.

It will therefore be seen that a claimant in respect of trust moneys in the hands of the deceased will be entitled to succeed provided he establishes that the property in the trust money was always in himself and did not pass to the deceased, and the money can be traced into the hands of the executors in some specific asset. He is also entitled to succeed if, in contemplation of equity the money still belongs to him, although it has been mixed with money belonging to the deceased or other persons, so that its specific identity is lost, provided it can be traced into a specific fund or asset with sufficient certainty to enable a Court to hold that the trust money, along with other moneys, is represented by the asset in question. In such a case the trust claimant would be given a lien on the asset. *In re Hallett's Estate; Knatchbull* v. *Hallett*, 13 Ch. D. 696.

It is not, strictly speaking, a case of one claimant gaining priority over another on the estate of the deceased. It is permitting the successful claimant to take out of the hands of the executors an asset or a part thereof, which, in contemplation of equity, never formed part of the deceased's estate, but which was always the property of the claimant. If, however, through the operations of the deceased, the identity of the trust fund is lost

and the claimant thereof has to look to the estate of the deceased generally for payment, he is simply a creditor and must rank with the others.

In *Sinclair* v. *Brougham*, [1914] A.C. 398, the direction given to the liquidator by the House of Lords was, that, subject to the payment of all proper costs, charges and expenses, and subject to any application which might be made by any individual depositor or shareholder with a view of tracing his own money into any particular asset, the liquidator ought to proceed, in distributing the assets of the society between the depositors and unadvanced shareholders, on the principle of determining them *pari passu* in proportion to the amounts properly credited to them respectively in the books of the society. In my opinion a similar direction should be given here.

The appeal, therefore, should be allowed, and the executors directed that, subject to the payment of all proper costs, charges and expenses, and subject to any application that may be made by any individual trust creditor with a view of tracing his own money into any particular asset, they should distribute the assets among the members of both classes of creditors without any priority whatever. If any such application be made the parties may have a reference to inquire into the assets.

As this appeal was rendered necessary by the unwarranted objection taken by the Moose Jaw Securities, Ltd., on behalf of the non-trust creditors, the costs of the appeal will be borne by the non-trust creditors. *Appeal allowed.*

McDONALD v. RUDDERHAM.

N. S.
S. C.

Nova Scotia Supreme Court, Harris, C.J., Longley and Chisholm, JJ. January 11, 1921.

ADVERSE POSSESSION (§ I F—25)—CO-OWNERS OR CO-PARCENERS—ACTUAL POSSESSION OF WHOLE OF ESTATE BY ONE—RIGHT TO PARTITION BARRED BY.

Under sec. 14 of the Statute of Limitations, R.S.N.S. 1900, ch. 167, actual and exclusive possession of the whole of an estate by one of the co-owners, co-parceners, joint tenants or tenants in common, is regarded as adverse against the others and such actual possession for the period fixed by the Act, secs. 18 and 19, is an absolute bar to any right to partition. The disability of coverture was removed by the Married Woman's Property Act, 60 Vict. 1897 (N.S.), ch. 37, and an acknowledgment made after the passing of that Act would be barred by a sufficient subsequent possession.

[Review of authorities and statutes.]

N. S.

S. C.

MCDONALD v. RUDDERHAM.

Harris, C.J.

APPEAL by defendant from the trial judgment in an action claiming the partition of land. Varied.

W. A. Henry, K.C., and *J. A. McDonald*, for appellant.

D. D. McKenzie, K.C., for respondent.

HARRIS, C.J.:—Nancy Campbell McDonald was in possession of a lot of 100 acres at Leitche's Creek, C.B., and she died in 1858 leaving surviving her husband Philip McDonald and 6 children. The husband died in 1872. The children were: Mary, born 1843, died intestate and unmarried 1870; William J., born 1844, died intestate and unmarried 1887; Donald A., born 1846, died 1891; Eliza, born 1848, died 1917; Harriet C., born March 11, 1852, still living; Annie C., born 1854, died 1918.

Eliza many years ago conveyed her interest in the property to her brothers William J. and Donald A. and they occupied the homestead up to the time of their respective deaths and one of them built a new house on the property.

The defendant Kate McDonald Rudderham is the widow of Donald A. McDonald, who died in 1891, and after her first husband's death she married Thomas Rudderham in 1907.

Donald A. McDonald left a will by which he left all his interest in the lands in question to his widow Kate McDonald and his two daughters, Annie and Winnifred McDonald, and the widow continued in possession.

Harriet C. is the only one of the three plaintiffs now living. When about 20 years of age, in June 1872, she went to the United States and there married H. Jacques in 1878. He died in 1879. She married S. N. Telf in 1882 and he died in 1902, and she married D. B. Clarke in 1905. She visited the homestead at Leitche's Creek only once and that was in 1885. She, however, visited Nova Scotia before the action was brought on three occasions, 1885, 1896, and 1899.

Annie C. left Nova Scotia in 1872, when 18 years of age, and visited the Province again in 1887, being then unmarried, and she was also in Nova Scotia once or twice after 1887. She married D. Howe in 1897 and never after visited Nova Scotia. She died in 1918.

Proceedings were begun in October, 1915, for partition and the plaintiffs were Eliza McDonald, Harriet C. Clarke and Annie C. Howe, and the defendants are Kate McDonald Rudderham and her two daughters Annie and Winnifred McDonald.

There was a previous trial before Russell, J., who made an order for partition, but on appeal this judgment was set aside and a new trial ordered.

The case was tried a second time before Ritchie, E.J., who made an order for partition and there is an appeal from this order.

The defence relied upon is the Statute of Limitations, R.S.N.S. 1900, ch. 167, and the following are the provisions referred to:—

9. No person shall make an entry or distress, or bring an action to recover any land or rent, but within 20 years next after the time at which the right to make such entry or distress or to bring such action first accrued to some person through whom he claims, or if such right did not accrue to any person through whom he claims, then within 20 years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same.

14. Where any one, or more, of several persons entitled to any land or rent as co-parceners, joint tenants, or tenants in common, have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last mentioned person or persons, or any of them.

18. If at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent first accrues as aforesaid, such person is under any of the disabilities hereinafter mentioned (that is to say), infancy coverture, idiocy, lunacy, unsoundness of mind, or absence from the Province, then such person or the persons claiming through him may, notwithstanding the period of 20 years hereinbefore limited has expired, make an entry, or distress, or bring an action to recover such land or rent at any time within 10 years next after the time at which the person to whom such right first accrued as aforesaid ceased to be under any such disability, or died (whichever first happened).

19. No entry, distress or action shall be made or brought by any person who, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, first accrued, was under any of the disabilities in the next preceding section mentioned, or by any person claiming through him, but within 40 years next after the time at which such right first accrued; although the person under disability at such time has remained under one or more of such disabilities during the whole term of such 40 years, or although the term of 10 years from the time at which he ceased to be under any such disability, or died, has not expired.

21. At the determination of the period limited by this chapter (ch. 167) to any person for making an entry, or distress, or bringing any action, the right and title of such person to the land or rent for the recovery whereof such entry, distress, or action respectively might have been made or brought within such period, shall be extinguished.

It should be stated with regard to the plaintiff Eliza McDonald that she had no interest in the property having conveyed her

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rights to her brothers William J. and Donald A. She died after the action was brought and as I understand it is not claimed that she had any interest in the matter and no claim is asserted on her behalf or on behalf of her representatives.

With regard to the plaintiff Annie C. Howe, the evidence shews that she was in Nova Scotia in 1887 and was then unmarried and the statute evidently began to run against her at that time, and at the end of 20 years in 1907 her claim was barred. She died in 1918, but as far back as August, 1895, she had written the defendant Kate McDonald Rudderham that she did not want any part of the land and no claim is now made on her behalf.

The two plaintiffs Eliza McDonald and Annie C. Howe are therefore out of the case, and the whole question is as to whether or not the Statute of Limitations bars the claim of the plaintiff Harriet C. Clarke.

The contention on behalf of the defendant as to Harriet C. Clarke's claim being barred by the statute was put in two ways: (a) That the Married Woman's Property Act (Amendment), 60 Vict. 1897 (N.S.), ch. 37, sec. 2, removed her disability as to coverture and the statute therefore began to run against her on her visit to Nova Scotia in 1899 and her claim became barred 10 years thereafter, or in 1909, under the provisions of sec. 18; and (b) That she left Nova Scotia first in 1872, and assuming her to be always after under disabilities her claim would be barred at the end of 40 years, or in 1912, under the provisions of sec. 19.

There is a contention on behalf of the plaintiff which I will deal with later—that the possession of the defendant and those through whom she claims was not sufficient to prevent plaintiff from setting up her claim to a share of the property; and there are the two legal questions and I deal with them on the assumption that the acts of possession of the defendant and her predecessors in title are sufficient to bar the plaintiff's claim.

With regard to (a) I quote ch. 37 of 60 Vict. 1897, which amended R.S.N.S. 1884, ch. 94, 5th Series, by adding the following section:—

100. A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing or being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant or be made a party to any action or other

legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

In *Lowe* v. *Fox* (1885), 15 Q.B.D. 667, the action was for assault and false imprisonment and under the Statute of Limitations, 21 Jac. 1, ch. 16, sec. 7, it was provided that:—

> If any person . . . that is entitled to any such action . . . shall be at the time of any such cause of action given or accrued . . . feme covert . . . that then such person shall be at liberty to bring the same actions so as they take the same within such times as are limited after becoming discovert.

The action was brought more than 4 years after the cause of action arose but within 4 years after the passing of the Married Women's Property Act, 45-46 Vict. 1882, ch. 75, and it was held that the action was in time.

Lord Esher, M.R., and Bowen, L.J., both held expressly that upon the passing of the Married Women's Property Act the woman became discovert because she was then able to sue in her own name and Bowen, L.J., at p. 676, said: "By that statute she was released not indeed from her marriage or from coverture in every sense but from coverture in the sense which incapacitated her from suing."

In Lightwood on the Time Limit of Actions, 1909, p. 289, the author thus refers to the matter:—

> Since under the Married Women's Property Act, 1882, sec. 1 (2) a married woman is entitled to sue in her own name in respect of her separate property, it would seem that the disability of coverture is removed in cases where a married woman is entitled to land as her separate property. As to such property she is discovert for the purposes of the statute: *Weldon* v. *Neal* (1884), 51 L.T. 289; *Lowe* v. *Fox* (1885), 15 Q.B.D. 667, both decided on the Limitation Act, 1623; as to the right to sue as a *feme sole*; see *Weldon* v. *De Bathe* (1884), 14 Q.B.D. 339; *Symonds* v. *Hallett* (1883), 24 Ch. D. 346.
>
> See Banning on Limitation, 3rd ed., at 64; and also 19 Hals. p. 133.

I think the defendant's contention is correct and that the disability of coverture of the plaintiff Harriet C. Clarke was removed by the Act of 1897 and therefore the Statute of Limitations would begin to run against her when she came to Nova Scotia in 1899 and her claim would be barred in 1909.

With regard to (b) the answer seems self evident. The evidence is clear as to the date she left home and the provisions of sec. 19 seem to admit of only one meaning. So far therefore

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as the law is concerned it seems clear that the plaintiff's claim is barred, assuming that the acts of possession on behalf of the defendant and her predecessors are sufficient to bring the statute into operation.

Before dealing with the facts it is necessary to get a clear understanding as to the meaning and effect of sec. 14 of the Statute of Limitations.

In *Bentley* v. *Peppard* (1903), 33 Can. S.C.R. 444 at 446, Sedgewick, J., said [stating certain fundamental propositions]:—

5. At common law and notwithstanding the old limitation statutes, the actual and exclusive possession of a tenant or parcener could not work to the detriment of his co-tenant or co-parcener. His possession was theirs and could be invoked not only as against the alleged title of a trespasser, but in aid of their own. (But this principle has long since been changed by statute both in England and Nova Scotia.)

6. Since this change, therefore, exclusive possession by one of such co-owners is regarded as adverse against the others.

In *Boudroit* v. *Sampson* (1907), 41 N.S.R. 490 at 496-497, Drysdale, J., said:—

The law as to the effect of sec. 14, R.S., ch. 167, is, I take it, correctly stated in *Murphy* v. *Murphy* (1864), 15 Ir. C.L.R. 205, as follows: "We are of opinion that the section applies not merely to the case in which the joint tenant or tenant in common is in possession of the entirety of the whole farm or estate held jointly or in common, but that it applies equally to the case in which the joint tenant or tenant in common is in the exclusive possession of the entirety of any portion of the lands so held jointly or in common." This is recognised in our own Court in *Archibald* v. *Handley* (1899), 32 N.S.R. 1. There Meagher, J., after citing *Murphy* v. *Murphy*, states his conclusion as to the effect of this section in the following words, at p. 25 (32 N.S.R.): "If therefore the plaintiff and those under whom he claims were out of possession, and defendant or others were in possession of the whole area, or any given part of it for more than 20 years, the plaintiff's right to partition would be barred." I understand this statement to mean that the plaintiff would be barred as to that part in respect to which plaintiffs were out of possession and defendant in possession for more than 20 years, and it is obvious from the citation from *Murphy* v. *Murphy* made just previously by the Judge, that this is what was intended.

In *Archibald* v. *Handley*, 32 N.S.R. 1, Henry, J., at p. 3, said, in speaking of this statute:—

It is the lapse of time from the date of the first accruing of the right of action to the plaintiff, or to someone through whom he claims, and an actual, not necessarily adverse possession in the defendant, or those through whom he claims, that fulfils the condition of the statute.

Parke, B., in *Smith* v. *Lloyd* (1854), 9 Exch. 562 at 572, 156 E.R. 240, said:—

We are clearly of opinion that the statute (3 Will. IV. ch. 27), applies, not to cases of want of actual possession by the plaintiff, but to cases where he has been out of and another in possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute. We entirely concur in the judgment of Blackburne, C.J., in *M'Donnell* v. *M'Kinty* (1847), 10 Ir. L.R. 514, and the principle upon which it is founded.

This was approved and adopted by the Privy Council in *Trustees and Agency Co.* v. *Short* (1888), 13 App. Cas. 793.

See also Lightwood on Time Limit of Actions, at p. 32; *Ramsay* v. *Ramsay* (1900), 2 N.B.R. (Eq.) 179; 19 Halsbury, p. 130.

The law is well summed up in 19 Hals., p. 130, para. 247, in these words:—"If the person entitled to an undivided share in land is in exclusive possession of the whole land or of any part of it, whatever portion such part may bear to the whole, the title of his companions to their undivided shares in such parts will be extinguished by such possession."

The evidence shews that the plaintiff Harriet C. Clarke has been out of possession and the defendant and those through whom she claims have been in possession of the cultivated part of the property for such time as to bar the plaintiff's claim.

It was argued by counsel for the plaintiff that the former husband of the defendant Kate McDonald Rudderham recognised the rights of the other heirs by taking a deed from his sister Eliza of her interest in her mother's property and by writing to the plaintiff Harriet C. Clarke on March 30, 1879, a letter in which he asked his sister to give him a deed of her share.

So far as the taking of a deed from Eliza is concerned it certainly is not an acknowledgment of any other claim than hers and she conveyed whatever interest she had to Donald A. McDonald through whom the defendant claims.

With regard to the letter to Harriet C. Clarke it is only necessary to point out that assuming it to be a sufficient acknowledgment to bring the case within sec. 16 of the statute the only effect is to make it necessary to prove possession for a sufficiently long time after the date of that letter in 1879 to bar her claim and here that has been amply proved.

It was also argued that an admission made by the defendant on the witness stand that she had written plaintiff Clarke shortly after 1891 that she could come and take her interest in the land

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if she wanted it, was an acknowledgment of her title sufficient to prevent defendant from setting up the statute. That letter was written in reply to a letter of plaintiff Clarke asking for part of the land.

There is also evidence that defendant about 1895 had a piece of the land set off for the plaintiff Clarke and Mrs. Clarke claims that she leased that strip to one Donald McKenzie for one year only for five dollars. Mrs. Clarke repudiates the notion that this strip was accepted by her as her share. It is however all she got any possession of then or at any time and defendant makes no claim to this strip. The letter of defendant to plaintiff in 1891 was not acted upon by Mrs. Clarke in any other way than by the leasing of this strip which was set off to her; and if I am right as to the effect of the Married Women's Property Act, then in 1899 the statute began to run against plaintiff and her claim became barred in 1909.

There was another claim on behalf of the plaintiff which was that because the defendant Kate McDonald Rudderham claimed under the will of her late husband which gave her a life interest and the remainder to her two daughters, she was precluded from claiming that she had a title by possession. I think this is a fallacy. There is, of course, authority—and many cases were cited by counsel—to the effect that one in possession as a life tenant cannot set up that possession as against those interested in remainder. The reason, of course, is obvious. The remaindermen could never sustain an action against the life tenant because it would always be a good answer that the life tenant was in possession as such, and so from this the obvious rule has grown up that the possession of a life tenant as between her and the remaindermen, must be taken to be by reason of that right and cannot be construed as being adverse to the remaindermen. That is all the authorities say and they do not support the contention set up by plaintiff. Kate McDonald Rudderham as against the plaintiff can set up her own title or the plaintiff's want of title whether the will gives her a life tenancy or the fee.

In 19 Hals., p. 158, para. 322, the law is stated to be: "If a series of trespassers, adverse to one another and to the rightful owner, take and keep possession of land in succession for various periods, each less than, but exceeding on the whole, 12 years,

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the rightful owner is barred. In such a case the person in possession at the expiration of the period of 12 years, although he does not necessarily acquire a title by the statute, may succeed in holding the property, not by reason of the validity of his own title, but by reason of the infirmity of the title of anyone else to eject him."

The action fails in my opinion as to the lands actually occupied by the defendant and previously by her husband which, as I understand the evidence, covers the five and a third acres between the shore and the woods—less any part thereof included in the lot set off to the plaintiff by Jackson.

The acts of possession relied upon as to the woodlands are not such as to bar plaintiff's title and so far as I can see the doctrine of constructive possession does not apply and therefore as to these woodlands and the portion of the five and a third acres included in the land set off by Jackson there must be partition.

The order for partition directed an inquiry as to the rents and profits of the property since the death of Nancy McDonald and Philip McDonald. The object of this must have been to make someone liable for them, but as I understand the authorities, there is no one liable in this case in respect to the lands of which partition is decreed, and this portion of the order should, I think, be omitted. I refer on this point to *Harmony Pulp Co.* v. *DeLong* (1913), 12 D.L.R. 409; *Henderson* v. *Eason* (1851), 17 Q.B. 701, 117 E.R. 1451.

The result is that the appeal is allowed as to the property of which plaintiff had possession (as before specified) and the decree as to partition stands as to the balance. The defendant will have the costs of the appeal, and there will be no costs to either party of the trial. The costs of the partition will be borne as provided by the order below.

LONGLEY, J., concurred. Longley, J.

CHISHOLM, J.:—I have some doubt as to whether the plaintiff should be excluded from sharing in the cultivated land (other than the portion at one time set aside for her). Subject to this I agree with the conclusions arrived at. Chisholm, J.

Judgment varied.

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SHAW v. MASSON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 23, 1920.

APPEAL (§ III F—98)—TIME FOR—EXTENSION—MISTAKE ON PART OF SOLICITORS—DELAY IN SERVING NOTICE—REFUSAL OF APPLICATION.

An application on the part of the plaintiff for an order extending the time for giving notice of appeal from an order setting aside a default judgment, and allowing defendants to come in and defend on terms, will not be granted where, owing to a mistake on the part of the solicitors that the notice of appeal could be served within 30 days, such notice was served 15 days too late without any authority, and where the result of allowing the application would be to deprive the defendants on technical grounds of defending the action on the merits.

Statement. APPLICATION by plaintiff for an order extending the time for giving notice of appeal. Refused.

H. E. Sampson, K.C., for appellant.

P. H. Gordon, for respondent.

The judgment of the Court was delivered by

Haultain, C.J.S. HAULTAIN, C.J.S.:—This is an application on the part of the plaintiff, "for an order extending the time for giving notice of appeal from the judgment of the Honourable Mr. Justice McKay, dated the 16th day of September, 1920, up to and including the 15th day of October, 1920, that the notice of appeal as served on said 15th day of October be a valid and sufficient notice of appeal or for such other order as may grant leave of appeal to the plaintiff herein that may seem meet to the Court of Appeal."

The order proposed to be appealed from was an order setting aside a default judgment entered against the defendants and allowing them to come in and defend on terms. The order is obviously an interlocutory order, and should have been appealed from within 15 days. It appears from the affidavits filed, that the plaintiff's solicitors, through no fault of theirs, were not aware that the application to McKay, J., had been disposed of until September 23, and were subsequently unable to obtain a copy of the reasons for decision given by that Judge until September 28, when they communicated with their principal in Toronto. On October 14 they received instructions from Toronto to appeal, and notice of appeal was served on the following day.

These facts, in my opinion, would have furnished substantial grounds for an application to extend the time for serving notice of appeal, but no such application was ever made, and the notice of appeal was served 15 days too late, without any authority.

It was suggested on the argument that the notice was served and the appeal proceeded with owing to a mistake on the part of the solicitors, who, for some reason, thought that the order appealed from was a final order, and that, consequently, notice of appeal could be served within 30 days.

A mistake of this sort should not, in my opinion, appeal very strongly to the indulgence of the Court, especially where the result of the proposed appeal, if successful, would be to deprive the defendants, largely upon technical grounds, of the right to come in and defend the action on the merits.

In any event I think that the application for extension of time should have been made, in the first instance, to a King's Bench Judge in accordance with R.S.C. 664. This was not done, and no reason is given in the material filed why it was not done. The application should be dismissed on that ground alone, but if, notwithstanding non-compliance with R. 664, an application of this sort can be made to this Court, I would dismiss the application on the ground that the plaintiff has not made out a reasonable claim for the indulgence he is asking for.

Application dismissed.

NUNNELLY v. ONSUM.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ February 4, 1921.

BROKERS (§ II A—7)—AGREEMENT BETWEEN REAL ESTATE AGENTS TO SPLIT COMMISSIONS—PROPERTY LISTED WITH ONE—PURCHASE BY THE OTHER FOR HIMSELF—LIABILITY FOR SHARE OF COMMISSION.

Where two real estate brokers living in different towns have entered into an agreement to split commissions on the sale of a property listed with one of them for sale, but for which he has not the exclusive agency, and it is understood between them that the property shall be sold at a certain price out of which the commission is to be taken, the brokers cannot be said to have entered into a partnership, but if one of them buys the property himself at a reduced price, without informing the other, he is liable in damages for a breach of trust, the amount of damage to be a reasonable amount based on the principle recognised in *Inchbald* v. *Western Neilgherry Coffee Co.* (1864), 17 C.B. (N.S.) 733, 144 E.R. 293.

[See Annotation, Real Estate Agent's Commission, 4 D.L.R. 531.]

Statement.

APPEAL by defendant from the trial judgment in an action for damages for breach of contract. Damages reduced.

H. R. Milner, K.C., for appellant.

Frank Ford, K.C., for respondent.

Harvey, C.J.

HARVEY, C.J.:—I am not prepared to dissent from the conclusion of the other members of the Court, though I am not satis-

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fied that when damages have been caused through a breach of trust by reason of a relation of confidence existing between the parties the usual rule for the ascertainment of damages must necessarily be applied. No doubt $600 is more than the damages the plaintiff really suffered as being more than he would probably have received and it may be that one should not press too strongly the confidential relationship in this case. If the defendant had notified the plaintiff that he could not find a purchaser and that he had induced the vendor to lower his price below that originally demanded and intended buying himself at that price it may be that the plaintiff could have had no redress unless possibly by himself bidding against the defendant.

I consequently concur in the result.

Stuart J.

STUART, J.:—This is an appeal by the defendant from a judgment of Mahaffy, Dist. Ct. J.

The plaintiff and the defendant are both real estate agents, but the plaintiff carries on business in Calgary and the defendant at Innisfail. They had made an arrangement with each other that if one secured a listing from an intending vendor and sent the listing to the other and if the latter secured a purchaser they would divide the commission equally between them. There was no obligation on either to send to the other all his listings or any particular listing. With respect to any particular listing it was apparently at the option of the one obtaining it to decide whether he should handle it alone or send it on to the other. In fact, however, a number of listings had been so exchanged and deals had been put through and the commission divided on the basis mentioned.

Prior to 1919, one Polley held, as executor of his father's estate, a mortgage on three unoccupied quarters of a certain section of land near Innisfail. The mortgagor had fallen in arrears and Polley was proceeding to obtain title through a foreclosure action in which Taylor Moffat & Co., solicitors of Calgary, were acting, but the work was apparently being attended to by Mr. Whetham, a member of that firm. In July, 1918, Nunnelly and Onsum were passing together through the neighbourhood where this land was. Onsum pointed it out to Nunnelly saying that he could not find out who the owner was but that one Polley had a mortgage on it. He asked Nunnelly to try and get a listing of it.

Nunnelly did find Polley and asked for a listing. Polley explained by letter that he could not yet place it for sale as he had not secured title. Both parties, however, had their eyes on the place and during 1919 letters passed between them which shew that Onsum was urging Nunnelly to secure the listing and at the same time keeping a lookout for possible purchasers and reporting the situation to Nunnelly.

Ultimately, on January 21, 1920, Polley wrote from Vancouver to Nunnelly saying that he had secured title and would take $4,800 net for the land, that is $10 an acre, which he said would just clear his claim. He refused to give Nunnelly either an option or an exclusive listing, saying in a letter of February 6 that he would give all a fair chance and that he believed that all Nunnelly wanted was a "fair field and no favours." Nunnelly had earnestly requested an option and had actually drawn one up and sent it to Polley offering to pay $50 for it.

Back in December, 1919, Nunnelly had suggested to Polley that $9 an acre net would be a fair price "for a quick sale," but he added in a postscript: "If you would rather do so you can put on a price out of which you will give me a dollar per acre commission, but I think it will be more satisfactory to both of us to make it a price net to you as I shall be freer to deal if I get an offer without having to communicate with you."

Polley, however, adhered to his stand that he wanted $4,800 net. In a letter of February 27, 1920, he asked for $1,000 at least in cash and offered to give 5 years for the balance with interest at 8%.

On February 13, 1920, Onsum had written a letter to Nunnelly about the land, in which he said: "Try and get his (Polley's) lowest cash payment down so that we will know where we are. Get his lowest cash payment down and best terms on the balance, a net price or with, say $2 an acre commission, and as soon as I hear from you will get after my clients. I have a client that will go in with me and we will take it our self (*sic*)."

On February 19, before Nunnelly had got final terms from Polley, Onsum wrote to Nunnelly saying: "I will offer it at $12.50 an acre, make $2.50 an acre commission and we split 50-50 on same."

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Nunnelly made no immediate reply to this, but on March 1, having learned Polley's terms, he wrote to Onsum stating what they were. He made no direct reference to the proposal to offer the land at $12.50 an acre, but said: "You had better get busy on this as he (Polley) is coming back here himself shortly and will no doubt try to rustle a buyer himself and save commission. The $1,000 cash has to be net to him."

On March 18 Onsum wrote to Nunnelly suggesting a trade of other property of other clients for the Polley property and asking Nunnelly to submit the proposal to Polley and in this letter he again said: "I have added $2.50 an acre commission," *i.e.*, he was putting the Polley property into the proposal of exchange at $12.50 an acre.

Nunnelly replied on the 19th saying that he would speak to Polley about it but that he was sure Polley would refuse. Again he made no direct reference to the $12.50 an acre.

On March 24 Onsum wrote a long letter to Nunnelly referring first to other deals and then proceeding to discuss the Polley matter. He referred to the fourth quarter of the section as to which Nunnelly understood that Polley also had a mortgage but he (Onsum) stated that he was informed that the title was clear in another person or had been a few months previously. There had been discussions about getting this quarter also into the deal, so that possible purchasers might have a wider choice if they wanted to buy only a half section or three-quarters.

In the letter Onsum said: "But Polley may have the vendor's agreement for sale on the land (the fourth quarter) you need not mention this to Mr. Polley that I have written you as to this as he may call your listing off." He then again referred to the price of $12.50 an acre.

In view of what he did so shortly afterwards it seems to me that this request of Onsum to Nunnelly not to mention Onsum's letter in conversations he might have with Polley acquires some significance. It is open, at least, to the interpretation that at that stage Onsum was beginning to have some reason for not wanting Polley to be informed that he (Onsum) and Nunnelly were acting together in the matter, although this is not of course necessarily so.

Then 12 days after this letter of March 24, that is, on April 5, Onsum addressed a letter to Mr. Whetham, Polley's solicitor,

offering him $4,500 for the 480 acres and stating terms. Within a short time Polley, entirely through Whetham, made a sale of the land to Onsum's wife at $4,650. Of course neither Whetham nor Polley had any reason to know that Onsum and Nunnelly were jointly interested in the sale of the land. That the request above referred to in the letter of March 24 was made for the purpose of preventing this knowledge may not be actually certain but one can hardly resist a strong suspicion that such was the purpose of the request.

Nunnelly apparently did not hear of what had happened until about May 14. On that day he wrote to Onsum saying: "I understand that you have sold the land referred to above and am very glad to hear it. Also that you got it at a less price than that quoted by me. I hear that you got Polley down to $4,650 net to him and, as we decided that we were to sell for $12.50 per acre, that means that we will make $1,350 or $675 each." And he asked for a cheque for this sum. Onsum replied jauntily enough: "I did not sell the land. I purchased it myself." And then after cordially enquiring "how is business with you," he proceeded to discuss the future prospects of their joint enterprise.

In his statement of claim the plaintiff set forth the essential facts of the case and laid his claim in damages asking, however, only $600 so as to be within the jurisdiction of the District Court.

Mahaffy, Dist. Ct. J., after stating his opinion that there was a partnership between the parties both generally and as to this particular piece of land, said:—

> The defendant did not act in good faith when he went behind his partner's back and bought the land without notice to him. He shewed still further bad faith when he bought the land in his wife's name. I do not think the money which went to purchase this land belonged to Mrs. Onsum. It was in her name in the bank possibly but for very obvious reasons. The defendant will therefore be liable in damages.

He assessed the damages at $600 after expressing, naturally enough, some embarrassment in deciding upon what basis they should be ascertained. In effect he decided that, as against Onsum, the land should be held to be worth $12.50 largely because he had tried to sell it at that price and had stated to possible purchasers that it was worth that sum. He, in substance, treated it as a sale at the price which had been arranged between Onsum and Nunnelly as that at which it should be offered.

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I think the trial Judge was right in concluding that there was an agreement between the parties that Onsum should offer the land at $12.50 an acre. It is true Nunnelly never in any of his letters expressly assented to Onsum's proposals on this point, but he never dissented and undoubtedly Onsum must have understood that Nunnelly was assenting. If Onsum had mentioned any lower price Nunnelly might have dissented.

There is, therefore, no doubt that there was an agreement that Nunnelly should do the work of obtaining from Polley the listing, including price and terms of sale as well as the necessary permission to sell at whatever advance on the net price he was able to get, that Onsum should do his best to get a purchaser and try to get $12.50 an acre and that the profit of $2.50 an acre should be divided between them. It is probably correct in one sense to use the word partnership in describing this relationship between the parties, but certainly it must be looked upon as one of a very limited kind even having regard to their other previous dealings. They occupied offices in distant towns. Each no doubt had his own general expenses to bear with which the other had nothing to do. With respect to the particular transaction Nunnelly no doubt used stationery, envelopes, postage and possibly a stenographer's services, none of which would he have thought of charging up against the total profit on the deal. So Onsum no doubt had similar expenses which would no doubt on occasion include automobile hire as well. Perhaps if this latter reached a substantial sum he might have charged it up. This is of course uncertain.

But at any rate it would seem to me that the case is fairly near the border line between a relationship of mere contract and that of partnership where trust and confidence may be involved. It may, of course, be said that Onsum was the agent of Nunnelly because Nunnelly was the direct and immediate agent of Polley. But this also is not strictly true. It was Onsum who first pointed out the land to Nunnelly and put the latter in the way of obtaining the listing by giving him the name of the mortgagee who was foreclosing and so getting into a position to sell.

I think Onsum may very well have looked upon himself as being as much the principal of Nunnelly and upon Nunnelly as being his agent to obtain the listing as the reverse.

There is no doubt that Onsum by doing an act which forever made it impossible that Nunnelly should be able to get the possible but uncertain remuneration for his actual work in obtaining the listing or for any possible effort in himself securing a purchaser rendered himself liable as for a breach of contract upon the principle recognised in the case of *Inchbald* v. *Western Neilgherry Coffe Co.* (1864), 17 C.B. (N.S.) 733, 144 E.R. 293.

But whether the Court ought not to go further, and, owing to the existence of some relationship of trust and confidence, impose a heavier obligation upon Onsum and make him account in full for the anticipated profit of $2.50 an acre is the only real difficulty in the case. Nunnelly had really done all he had contracted or was expected to do in obtaining the listing. Onsum's duty to Nunnelly was thereupon to proceed to do his best to get a purchaser at $12.50 an acre. Instead of doing this he cut the project off and killed it by going directly to the vendor and buying himself or for his wife.

The trial Judge has treated the matter as if in these circumstances Onsum were estopped from denying that he or his wife had paid $12.50 an acre for the land.

At first blush it may look as if this were just. But upon examination it will, I think, be seen that this is open to considerable doubt. Nunnelly was not induced to alter his position to his disadvantage by some statement or act of Onsum's, which would be on the basis of an estoppel. By Onsum's act Nunnelly simply lost the uncertain chance that he or Onsum would be able to sell at $12.50 an acre.

Assuming Onsum's solvency and ability to pay the judgment it has made that certain for Nunnelly which had been very uncertain so that Onsum's act, undoubtedly wrongful, will have turned out to be as good a thing for Nunnelly as could possibly and in any case have ever happened in the matter.

It must be remembered that Nunnelly knew perfectly well that Polley was liable to sell elsewhere or through other agents at any moment. He pointed this out to Onsum, to whom he seems clearly to have looked as the one to procure a purchaser rather than himself, as a reason for urging Onsum to be active. Onsum also knew that other parties were liable to cut the whole matter off at any time. Any third person might buy any day. He may well have thought, with a conscience not as fine as it should be,

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"Why should not I buy as well as any third party?" Undoubtedly he should have spoken to Nunnelly about it before doing so. But we are not here to impose a penalty upon Onsum for his act of bad faith. The Court's duty is to award Nunnelly adequate recompense for the wrong he suffered upon proper legal principles.

Upon the whole I think the case above cited furnishes the true guide. There a company had been formed with the object of purchasing a coffee plantation in Madras. The company had secured a purchase agreement from the owner's agent. In order to raise the necessary funds the shares were to be sold. The directors agreed with the plaintiff, a member of the stock exchange, that he should sell the shares. They paid him £100 down and agreed to pay £400 when all the shares were sold. In February, 1863, the owner of the plantation repudiated his agent's act in entering into the contract. Rather than enter into litigation the directors wound up the company but never spoke to the plaintiff about the matter. The plaintiff, who learned of the trouble only in May, sued for £400. By consent a verdict was entered for that amount but the legal right to recover and the proper amount of the damages were left for the Court *en banc* to decide.

Several of the Judges criticised the directors for not speaking to the plaintiff. Willes, J., said (17 C.B. (N.S.), at 742):—

> The directors should then at once have called upon the plaintiff and arranged with him . . . Probably the plaintiff would then have estimated his chance of getting his £400 at less than he did before. . . . The result is that the plaintiff is entitled to receive the £400 less an allowance for the risk. It is extremely difficult to say what sum should represent that risk, but upon the whole I am disposed to agree with the rest of the Court that £250 will be a reasonable compensation.

Byles, J., said, at p. 742 (17 C.B. (N.S.)):—

> With their motives we have nothing to do. Be their reasons good or bad the plaintiff is entitled to a verdict. They have broken their contract and the plaintiff must be compensated for it. As to what the compensation should be I will only say that in the uncertainty in which we find ourselves all we can say is that the damages should be more than nominal and (*perhaps*) less than the £400. Considering all the circumstances acting as a jury we think we do right in saying that the proper measure is £250.

Keating, J., however, pointed out that the act of the directors in winding up the company was not wrongful or voluntary and concluded by saying (at p. 743): "We think the justice of the case will be met by awarding the plaintiff £250—each party paying their own costs of the rule."

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Now no doubt the wrong done by the defendant here was much more serious than any wrong done by those directors. But on the other hand Inchbald had the exclusive right of selling the shares. Here the chance of reward was much more slender because it was exposed to the daily possibility of the unfettered action of Polley and his other agents. Moreover, there can be no doubt that Onsum would have been entitled at a critical moment, in order not to lose a proposing purchaser but to close with him at once, to reduce the price within reasonable limits even without taking time to consult Nunnelly. Nunnelly had himself offered Polley to handle the matter at $1 an acre commission.

While, therefore, I think the trial Judge was right as to the liability I think he went slightly astray in not making a proper allowance for the risk of entire failure to which Nunnelly's project was continually exposed. Moreover, the fact that Onsum in pushing a sale declared the place to be worth $12.50 is not, I think, sufficient ground for finding that he would have given that sum for it himself or that it was really worth that much. If Onsum is to be charged on a basis of liability to account I think it should only be for what would have been a reasonable amount for him to accept above $10 an acre but under $12.50, without consulting Nunnelly. Or if it is looked upon as a claim for damages for breach of contract then I think the proper allowance for risk would lead to much the same result.

I would, therefore, allow the appeal and reduce the judgment to the sum of $350 and costs. As to the costs of the appeal there has been a partial success for both and, while this might not be a sufficient ground for depriving the appellant of all his costs, taking all the circumstances into consideration I think justice will be best served by allowing the appellant to tax the disbursement costs of his appeal book but giving no other costs of the appeal to either party.

BECK, J., concurs with Stuart, J.

Beck, J.

Appeal allowed: damages reduced.

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TREMBLAY v. HYMAN.

Exchequer Court of Canada, Quebec Admiralty District, Maclennan, D.L.J.A. May 21, 1920.

SHIPPING (§ I—1)—COLLISION IN HARBOUR—"INEVITABLE ACCIDENT"—BURDEN OF PROOF—REASONABLE CARE.

The owners of a vessel whose master has taken all the precautions that a man of prudence and skill, acting reasonably, would have taken, are not liable for damages resulting from inevitable accident due to the vessel breaking her moorings during a severe storm.

[*The "Marpesia"* (1872), L.R. 4 P.C. 212; *The "Merchant Prince,"* [1892] P. 179, referred to. See Annotations, Shipping, 11 D.L.R. 95, Collisions on High Seas, 34 D.L.R. 8.]

Statement.

ACTION *in personam* by the owners of the steam barge "A. Tremblay" claiming the sum of $5,819.36 for damages occasioned by the defendant's schooner "Beatrice S. Mack" colliding with the "A. Tremblay" whilst moored at Fox River wharf, in the Province of Quebec.

F. E. Meredith, K.C., and *A. R. Holden*, K.C., for plaintiffs.

E. Languedoc, K.C., for defendants.

Maclennan, D.L.J.A.

MACLENNAN, D. L. J. A.:—This is an action *in personam* by the owners of the steam barge "A. Tremblay" claiming the sum of $5,819.36 for damages occasioned by a collision with the defendants' schooner "Beatrice S. Mack" at Fox River wharf, in the Province of Quebec, on November 15, 1918, and for costs.

The plaintiffs allege in their statement of claim substantially: that between one and two o'clock on the morning of November 15, 1918, their steam barge "A. Tremblay," whilst on a voyage from Quebec to Gaspe and way ports, was lying moored alongside Fox River wharf where she had been all the day previous, that the defendants' sailing vessel "Beatrice S. Mack" was also moored to the wharf between the "A. Tremblay" and the outer end of the wharf, when suddenly, about 1.30 a.m., those on board the "A. Tremblay" heard the Master of the schooner call out that his moorings had been carried away, and shortly afterwards the schooner collided with the barge causing the latter great loss and damage; that those on board the schooner improperly neglected to take in due time proper measures for avoiding the collision which was entirely due to the defective and improper mooring and want of due care and skill on the part of the schooner's Master and crew, and plaintiffs claim for a declaration that they are entitled to damages and costs and such further relief as the nature of the case may require.

The defendants by their statement of defence admit that they were the owners of the schooner "Beatrice S. Mack" which, on November 14, 1918, was lying moored to the wharf at Fox River, her stern being towards the shore, and on the morning of that day plaintiffs' steam barge arrived at Fox River and moored at the same wharf close astern of the schooner with her bows towards the shore, the two vessels being stern to stern in close proximity to one another, and during the afternoon and evening of that day the wind and sea gradually arose until 9 p.m., when they reached the height of a heavy gale from the northeast, which further continued to increase in violence making it impossible for the schooner to leave her berth or put to sea; that every possible precaution was taken to make the schooner absolutely fast both by hawsers and ground tackle; that she was heavily anchored and attached to the wharf as securely as could possibly be done; in addition to her usual hawsers a wire cable and heavy manila hawsers were borrowed to secure her; that by two o'clock on the morning of November 15 the wind had reached hurricane force and the sea was running at such a height that it reached half way up the masts of the schooner and was continuously breaking over the wharf and the schooner, the storm being the worst within the memory of the inhabitants of the locality; that those on board the schooner used every possible effort which good seamanship and determination could devise or apply to see that the hawsers strained evenly and that the schooner kept her berth, but shortly after 2 a.m., the wharf moorings parted and the schooner started to drift towards the shore and in doing so her main boom came into contact with the stern of the "A. Tremblay," injured the planking thereof and carried away part of the railing surrounding the superstructure; that at the time the schooner had received and was receiving very severe injuries and was pounding heavily against the wharf and bottom and it was then resolved that the only chance for the safety of those on board was to slip her anchor chain and let her go ashore, which was done; after the collision, the "A. Tremblay" was found to be aground at her bows at low tide but got off under her own steam and proceeded to sea and was navigated without repairs, subsequently went ashore at Ile Rouge, and later on was in collision at or near Quebec, and the only damages caused by the contact between the schooner and the

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"A. Tremblay" is of little or no pecuniary consequence, and the damages resulting from the said contact or collision is due to *vis major* and the act of God and is in no respect or manner imputable to the defendants.

The plaintiffs by their reply deny the statement contained in the defence, except the admission that defendants were the owners of the schooner and that, early in the morning of November 15, 1918, she parted her wharf moorings and started to drift towards the shore.

The schooner "Beatrice S. Mack," 100 ft. long, 24 ft. wide, drawing 13 ft. aft and 8 ft. forward and having a crew of 6 all told, and of 99 tons net register, arrived at Fox River wharf, in the Province of Quebec, on the morning of November 13, 1918. As she approached the wharf a large anchor weighing about 1,200 pounds on a chain suitable for a 250-ton ship was put out and the schooner moored on the southwest side and near the outer end of the wharf running out about 900 ft. from the shore. The anchor was leading forward with 45 or 50 fathoms of chain. The schooner was moored to the wharf by two manila lines leading forward and one aft. Cargo was discharged during that and the following day. On the following morning, November 14, the plaintiffs' steam barge, 111 ft. long, 28 ft. wide, and having a registered tonnage of 147 tons, arrived and tied up to the same side of the wharf facing the shore and a short distance astern of the schooner. Between 4 and 5 p.m., on November 14 there were indications of bad weather ahead; the moorings of the plaintiffs' barge were doubled and the Master of the defendants' schooner borrowed a half-inch wire cable and two large manila hawsers two and three-quarters in diameter and having a circumference of seven and three-quarter inches. These two large hawsers were put out as "springs," one being attached from the foremast forward to the wharf, the other from the aftmast and attached to the wharf leading astern. When these and other additional lines were put out the defendants' schooner had 5 lines and the anchor leading forward and 4 lines leading aft. These lines were considered by the Master of the schooner, who had over 20 years' experience as a seaman, to be sufficient to securely hold the schooner in safety. The weather during the evening became very bad; there was another hawser on board one and a-quarter inches in

diameter and five inches in circumference which the Master tried to put out later, but was unable to do so owing to the sea coming over the wharf and the wind which was blowing hard from the northeast. As the night advanced the wind increased and the sea became more tempestuous until the storm reached its height near midnight. The wharf ran out to the northwest, the wind was from the northeast and the sea came against the wharf practically at right angles, went over it to a depth of 8 or 10 feet and then over the schooner, carrying away barrels on the wharf and anything that was loose on the schooner; some skylights on the schooner also were broken. During the night all possible attention was given to the lines on the schooner, slacking them when it was necessary, in order that they might all work together. About 2 a.m., on the morning of November 15 when the wind was blowing what several of the witnesses called *a gale*, a heavy sea, which some of the witnesses called *a tidal wave* and others *un raz de marée*, came over the wharf and schooner and the lines leading forward from the schooner to the wharf parted, the anchor dragged and the schooner began to drift astern, its main boom came into collision with the barge and began to beat violently against it. As the anchor was dragging and it was impossible to put to sea, the Master of the schooner thought it more prudent to let the anchor go and drift ashore in the hope of saving the lives of his crew. The schooner went ashore and became a total loss. The evidence shews that the storm was one of the worst which had occurred within the memory of the witnesses on the Gaspé coast. Several fishing boats and barges at Fox River and in the vicinity were driven ashore during the night.

In this case the plaintiffs' barge was moored to the wharf when the defendants' schooner broke loose from its moorings and collided with the barge. These facts are established by witnesses called on plaintiffs' behalf and constituted a *primâ facie* case against defendants, and the onus of proof was then shifted and the defendants were called upon to explain the cause of the collision and that it was due to inevitable accident. The defence of inevitable accident is well known in maritime law and the principles upon which it is applied are stated in the following cases:—

In *The "Europa,"* 14 Jurist 627, Dr. Lushington said, at page 629:—

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Inevitable accident is where one vessel, doing a lawful act, without any intention of harm, and using proper precaution to prevent danger, unfortunately happens to run into another vessel. . . . But it should be observed, that the caution which the law requires is not the utmost caution that can be used. The law is not so extravagant as to require that a man should possess that mind, and understanding, and firmness of purpose, as always to do what is right to the very letter. If it were so, it is obvious that the demands of the law would be seldom satisfied. It is sufficient that a reasonable precaution be taken, such as is usual and ordinary in similar cases—such as has been found, by long experience, in the ordinary course of things, to answer the end—the end being the safety of life and property.

In *The "Thomas Powell"* v. *The "Cuba"* (1866), 14 L.T. 603, Dr. Lushington said:—

To constitute an inevitable accident it was necessary that the occurrence should have taken place in such a manner as not to have been capable of being prevented by ordinary skill and ordinary diligence. We were not to expect extraordinary skill or extraordinary diligence, but that degree of skill and that degree of diligence which is generally to be found in persons who discharge their duty.

In *The "Uhla"* (1867), 19 L.T. 89, Dr. Lushington said at p. 90:—

Inevitable accident is that which a party charged with an offence could not possibly prevent by the exercise of ordinary care, caution and maritime skill. It is not enough to shew that the accident could not be prevented by the party at the very moment it occurred, but the question is, what previous measures have been adopted to render the occurrence of it less probable? . . . The caution which the law requires is not the utmost that can be used, it is sufficient that it be reasonable, such as is usual in ordinary and similar cases, such as has been found by long experience in the ordinary course of things to answer the end, that end being the safety of life and property. I bring your attention particularly to that, because we must not expect in vessels of this kind, that the master and crew should be possessed of such ordinary nautical skill that they would be quite certain to discover that which is the best to be done, and quite certain to do it; but we look at the general degree of intelligence, care, and caution which we find in people of the same description.

In *The "Marpesia"* (1872), L.R. 4 P.C. 212, Sir James Covile, in rendering the judgment of the Privy Council, said at pp. 219-220:—

In the case of *The "Bolina"* (1844), 3 Notes of Cases 208 at 210, Dr. Lushington says:—"With regard to inevitable accident, the *onus* lies on those who bring a complaint against a vessel, and who seek to be indemnified—on them is the *onus* of proving that the blame does attach upon the vessel proceeded against; the *onus* of proving ineitvable accident does not necessarily attach to that vessel; it is only necessary when you shew a *primâ facie* case of negligence and want of due seamanship." Again, in the case of *"The Virgil"* (1843), 2 Wm. Rob., p. 201 at 205, the same learned Judge gives the definition of inevitable accident:—"In my apprehension, an inevitable accident in point

of law is this: viz., that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution and maritime skill. If a vessel charged with having occasioned a collision should be sailing at the rate of 8 or 9 miles an hour, when she ought to have proceeded only at the speed of 3 or 4, it will be no valid excuse for the Master to aver that he could not prevent the accident at the moment it occurred, if he could have used measures of precaution that would have rendered the accident less probable." Here we have to satisfy ourselves that something was done or omitted to be done, which a person exercising ordinary care, caution and maritime skill, in the circumstances, either would not have done or would not have left undone, as the case may be.

In *The "William Lindsay"* (1873), L.R. 5 P.C., 338, Sir Montague E. Smith, in delivering the judgment of the Judicial Committee, said at p. 343:—

The master is bound to take all reasonable precautions to prevent his ship doing damage to others. It would be going too far to hold his owners to be responsible, because he may have omitted some possible precaution which the event suggests he might have resorted to. The true rule is that he must take all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avert danger in the circumstances in which he may happen to be placed.

In *The "Merchant Prince,"* [1892] P. 179., in the Court of Appeal, Lord Esher, M.R., at p. 187, said:—

The great object of the Judges in Admiralty cases has been to lay down a plain rule to govern the acts of sailors, and not to have niceties of argument about what they are to do; and the plain rule which they have laid down is this:—Unless you can get rid of it, it is negligence proved against you that you have run into a ship at anchor. . . . The only way for a man to get rid of that which circumstances prove against him as negligence is to shew that it occurred by an accident which was inevitable by him, that is an accident the cause of which was such that he could not by any act of his have avoided its result. He can only get rid of that proof against him by shewing inevitable accident, that is by shewing that the cause of the collision was a cause not produced by him, but a cause the result of which he could not avoid. Inevitable means unavoidable. Unavoidable means unavoidable by him.

Fry, L. J., p. 189, said:—

The burden rests on the defendants to shew inevitable accident. To sustain that the defendants must do one or other of two things. They must either shew what was the cause of the accident, and shew that the result of that cause was inevitable; or they must shew all the possible causes, one or other of which produced the effect, and must further shew with regard to every one of these possible causes that the result could not have been avoided. Unless they do one or other of these two things, it does not appear to me that they have shewn inevitable accident.

And at p. 190:

An inevitable accident is, according to the law laid down in the case of *The "Marpesia"* that which cannot be avoided by the exercise of ordinary care and caution and maritime skill.

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The "Merchant Prince" is now regarded as the leading English case on the defence of inevitable accident and has been followed in a number of cases in the Canadian Courts, some of which are referred to in Mayers Admiralty Law and Practice, pp. 146-147.

The immediate cause of the collision in this case was the irresistible force of the wind and waves, which caused the moorings of the schooner to break, and the question *which the Court has to decide is:*—Did the Master of the schooner, on the evening preceding, exercise ordinary care, caution and maritime skill when he tied up his schooner for the night with 5 lines and an anchor leading forward and 4 lines leading aft? Were these all the reasonable and ordinary precautions, in the circumstances of the case, which a Master in his position and for a vessel of the size of the defendants' schooner, should have taken to ensure her safety? As has been said by Dr. Lushington, the caution which the law requires is not the utmost caution which can be used, and we are not to expect extraordinary skill, but it is *sufficient if the caution and skill be reasonable and such as is usual in ordinary and similar cases.* The schooner was a small vessel of 99 tons and we must not expect in vessels of that kind that the Master and crew should be possessed of such extraordinary nautical skill that they would be quite certain to discover and apply what was the very best thing to be done. The true rule as laid down by the Privy Council is, that the *Master must take* all such precautions as a man of ordinary prudence and skill exercising reasonable foresight would use to avert danger in the circumstances in which he may happen to be placed, and his owners are not to be held responsible for what cannot be avoided by the exercise of ordinary care, caution and maritime skill. Until late in the afternoon before the accident the schooner was moored by the anchor and two lines leading forward and one line leading aft. These lines were 5 inches in circumference and about one inch and a half in diameter. When the additional lines were put out there were 5 lines and the anchor leading forward and 4 lines leading aft. The large lines, one forward and one aft, had a circumference of seven and three-quarter inches. A reference to standard engineering works of authors of repute shews that the breaking strain of the large lines was about 20 tons each, and the small lines 9 or 10 tons each, which shews that there must have been

a tremendous strain on the forward lines before they broke. The schooner was moored on the lee side of the wharf and the moorings only gave way when the tidal wave came over wharf and schooner to a depth of 8 or 10 feet. It is established that the storm was one of the worst on the Gaspé coast during the last 25 years. Other shipping at Fox River was driven ashore by the force of the storm. When the forward moorings of the schooner parted, it is proved that it was quite impossible for the schooner to have put to sea. The Master of the plaintiffs' barge had chosen the berth where he tied up immediately astern of the schooner and so close to the schooner that as soon as the schooner broke loose its boom came into contact with the barge. Plaintiffs' counsel suggested that another small anchor on board the schooner should have been used. That anchor was ready for use and had a chain attached to it, but it was quite impracticable to make any effective use of it when the moorings parted. The plaintiffs also suggested that another cable which the schooner had on board should have been put out when the weather got dirty, but it is proved that in the course of the night, when the sea became boisterous and the wind high, it was impossible for any one to go on the wharf and attach any additional ropes or cables to the posts on the wharf.

This case has to be considered in the light of the situation on the evening before the accident, and I have to decide if the Master of the schooner omitted to do something which a person exercising ordinary care, caution and maritime skill in the circumstances would not have left undone. The violent storm with the tidal wave which came on some hours later could not have been foreseen. The additional moorings in the circumstances were more than sufficient under ordinary circumstances, they were in fact extraordinary precautions against the possibility of a bad night, but unfortunately proved insufficient and, in my opinion, it would be going too far to hold the owners responsible because the Master had not the extraordinary foresight to take some additional measures which would have withstood the force of the wind and sea in one of the worst storms ever known on the coast.

Evidence was adduced at the trial as to the extent of the damages to the plaintiffs' barge and the cost of the repairs, but I refrain from expressing any opinion in this phase of the case, as

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I have come to the conclusion that reasonable care, caution and maritime skill were exercised and did not and could not prevent the accident, and that the defence of inevitable accident has been fully established.

In these circumstances, the loss must rest where it has fallen, and there will be judgment dismissing the action with costs.

Judgment accordingly.

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BERNSTEIN v. ERICKSON.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. January 4, 1921.

INSURANCE (§ V B—195)—CONTRACT WITH AGENT TO DIVIDE COMMISSION—ILLEGALITY—DEDUCTION FROM PREMIUM—RECOVERY OF BY COMPANY.

It is illegal, under sec. 83 of the Insurance Act, 7-8 Geo. V. 1917 (Can.), ch. 29, for an insurance agent to induce a person to make application for insurance by promising that he will share his commission with him and where the premium sued for forms part of such forbidden transaction it cannot be recovered.

Statement.

APPEAL by defendant from a County Court judgment in an action to recover the balance alleged to be due on an insurance policy. Reversed.

Edith L. Patterson, for appellant.

E. R. Sugarman, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—By sec. 83 of the Insurance Act, 7-8 Geo. V. 1917 (Can.), ch. 29, discrimination and rebating are forbidden. The statute (sec. 83) forbids any insurance agent to "assume to make any contract of insurance or agreement as to such contract, whether in respect of the premium to be paid or otherwise other than is plainly expressed in the policy issued," and it further declares, "nor shall any such company or any officer, agent, solicitor or representative thereof, pay, allow or give, or offer to pay, allow or give, directly or indirectly as an inducement to insure, any rebate of premium payable on the policy."

There are no special provisions in the policy with regard to transactions of the character in question in this action. The policy provides that it shall not come into force until the premium is paid, it provides a special form of receipt of premuim to be signed by designated officers and provides for payment at the head office unless specified otherwise.

The plaintiff, an insurance agent, induced the defendant to make application for insurance in the Confederation Life Insurance Co. on the promise that he would share his commission with the defendant. I quote the plaintiff's own words:—

> Q. Did you give him any other valuable thing, no matter of how slight value, in connection with this transaction, other than this policy you have mentioned? A. Yes, I told him I would give him a commission off some of my commission.

The defendant confirms this and says the plaintiff agreed to a rebate of $40 or $50 if he (defendant) would accept the policy. Some time after the policy was delivered, promissory notes were taken by the plaintiff for 3 sums of $35 each, totalling in all $105, but none was taken for the difference between this sum and the premium which was $150. The plaintiff in his evidence says that that sum was to have been paid in cash, but it never was paid, and on the evidence referred to I find that it was not to be paid. Respondent's counsel referred us to *Farmers' Mart, Ltd.* v. *Milne*, [1915] A.C. 106, at 113. What is discussed at that page is not in point here since here the premium sued for formed part of the forbidden transaction. The plaintiff cannot get on without invoking the contract which was that the premium should be $105 instead of $150.

I would therefore allow the appeal and dismiss the action.

MARTIN, J.A., would allow the appeal.

Martin, J.A.

GALLIHER, J.A.:—I think it is established by the evidence that as an inducement to the defendant to take out the insurance the plaintiff agreed to allow the defendant a part of his commission. This is prohibited by sec. 83, 7-8 Geo. V. 1917, ch. 29. Section 84 of the same Act imposes a penalty for so doing and it is a recurring penalty as it provides for a first and for a second and subsequent offences.

Galliher, J.A.

It is not a provision affecting revenue such as the Customs or Inland Revenue Acts, and I think we must therefore take it to be an Act for the protection of the public and if such, what is here set up in defence is prohibited by statute and consequently illegal.

Victorian Daylesford Syndicate Ltd. v. *Dott*, [1905] 2 Ch. D. 624. See also the remarks of their Lordships of the Privy Council in *Farmers' Mart, Ltd.* v. *Milne*, [1915] A.C. 106.

The appeal should be allowed.

B. C.

C. A.

BERNSTEIN v. ERICKSON.

McPhillips, J.A.

McPHILLIPS, J.A.:—This appeal is in small compass, and in my opinion must succeed.

The evidence as adduced at the trial fails to establish any liability upon the appellant to repay the moneys the respondent claims he paid to the Confederation Life Association, being the premium upon a policy of life insurance, no previous request, express or implied being shewn. The principle of law is dealt with by Cozens-Hardy, M.R., in *In re National Motor Mail-Coach Co. Ltd*; v. *Clinton's Claim*, [1908] 2 Ch. 515, at 523, where he says:—

In my opinion Swinfen Eady, J., was quite right when he said: "There is no foundation for any such general proposition. Indeed, the contrary is well settled. If A. voluntarily pays B's. debt, B. is under no obligation to repay A. There must be a previous request, express or implied, to raise such an obligation, and in this respect I can see no difference between the discharge of a statutory liability and the discharge of a contractual liability."

Further, even if there had been a sufficient request in law—payment of the premium was not proved—the mere procurement of the policy and even the delivery thereof by the company would not establish an enforceable contract against the company unless payment was made and evidenced by the issuance of the official receipt, the terms of the policy so provide, and the *onus probandi* was upon the respondent to prove this, which was not done. But apart from the non-establishment of any obligation upon the part of the appellant to repay the respondent, there is an insuperable difficulty in the way of the respondent in being entitled to sustain the judgment under appeal. The facts prove an illegal transaction. The Insurance Act, 7-8 Geo. V. 1917, ch. 29, sec. 83 (1), reads as follows:—

No such life insurance company shall make or permit any distinction or discrimination in favour of individuals between the insured of the same class and equal expectation of life in the amount of premiums charged, or in the dividends payable on the policy, nor shall any agent of any such company assume to make any contract of insurance, or agreement as to such contract, whether in respect of the premium to be paid or otherwise, other than as plainly expressed in the policy issued; nor shall any such company or any officer, agent, solicitor or representative thereof, pay, allow or give, or offer to pay, allow or give, directly or indirectly, as inducement to insure, any rebate of premium payable on the policy, or any special favour or advantage in the dividends or other benefits to accrue thereon, or any advantage by way of local or advisory directorship where actual service is not *bonâ fide* performed, or any paid employment or contract for services of any kind, or any inducement whatever intended to be in the nature of a rebate of premium; nor shall any person knowingly receive as such inducement any such rebate of premium or other such special favour, advantage, benefit, consideration or inducement;

nor shall any such company or any officer, agent, solicitor or representative thereof give, sell or purchase as such inducement, or in connection with such insurance, any stocks, bonds, or other securities of any insurance company or other corporation, association or partnership.

The evidence disclosed that the respondent, the agent, made a contract with the appellant to give him the benefit of a rebate of the premium: "Yes, I (the respondent) told him (the appellant) I would give him a commission off some of my commission."

It is clear upon the facts that an illegal transaction has been proved. To establish the amount that the respondent claimed from the appellant, it was necessary to give in evidence how the amount was made up. Therefore the Court is precluded from giving effect to the transaction, it being an illegal one.

I cannot accede to the contention of the counsel for the respondent that the judgment of Lord Dunedin in *Farmers' Mart, Ltd.* v. *Milne*, [1915] A.C. 106, would enable the respondent to escape from the situation the facts place him in, Lord Dunedin said, at pp. 113-114:—

> But . . . that does not quite end the matter, because it might be said that the persons who really are prejudiced in this way are the other creditors, and this is not a matter with which the defenders have anything to do. There again I think the matter has been settled by a long course of decisions. The test was laid down in the case of *Simpson* v. *Bloss* (1816), 7 Taunt. 246, 129 E.R. 99, and the head-note there expresses it perfectly correctly: "The test, whether a demand connected with an illegal transaction, is capable of being enforced at law, is, whether the plaintiff requires any aid from the illegal transaction to establish his case." The same thing was again said in the case of *Fivaz* v. *Nicholls* (1846), 2 C.B. 501, 135 E.R. 1042. Tindal, C.J., "I think that this case may be determined on the short ground that the plaintiff is unable to establish his claim as stated upon the record, without relying upon the illegal agreement originally entered into between himself and the defendant." It was repeated again in *Taylor* v. *Chester* (1869), L.R. 4 Q.B. 309, at p. 314, where Mellor, J., says, "The true test for determining whether or not the plaintiff and defendant were in *pari delicto*"—he is there referring to the words of Lord Mansfield in the leading case of *Holman* v. *Johnson* (1775), 1 Cowp. 341, 98 E.R. 1120—"is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party." And it was again applied in *Scott* v. *Brown etc. Co.*, [1892] 2 Q.B. 724.
>
> Now taking that test here, it seems to me to solve the whole matter. The pursuers have solved it for themselves, because they cannot get the accounting which they seek without getting it through the aid of that very clause which I have already said was illegal; they want that very clause to help them. . . . There are certain cases where an agreement is so divisible that it may be that . . . the plaintiff can enforce his demand

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without having recourse to the illegal part of the agreement; but here they cannot do so, because the only reason why they want this accounting is in order that when the money has been pooled they may be allowed to get twenty shillings in the pound, and that in these three transactions set forth.

The illegality of the contract was pleaded by the appellant, but even if it had not been it was the duty of the Court to deal with the illegality of its own motion. See *North Western Salt Co.* v. *Electrolytic etc., Co.*, [1913] 3 K.B. 422 (reversed, [1914] A.C. 461).

In my opinion the appeal should be allowed, and I wish to add my sense of indebtedness for the argument of Miss Patterson, the counsel for the appellant, being a brief but most cogent argument, which greatly assisted the Court.

Eberts, J.A.

EBERTS, J.A.:—Would allow the appeal.

Appeal allowed.

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HART v. BOUTILIER.

Supreme Court of Canada, Fitzpatrick, C.J., Davies, Idington, Duff and Anglin, JJ. December 11, 1916.

REFORMATION OF INSTRUMENTS (§ I—1)—DEED—WRONG DESCRIPTION OF PROPERTY—MUTUAL MISTAKE—RECTIFICATION—DELAY.

Where the Court is satisfied from the evidence, oral and documentary, that the true agreement between the parties was for the sale and purchase of the whole of the premises then occupied by the vendor, the Court will rectify the deed so as to carry out the true intention. The acceptance by the purchaser of a deed drawn a few days after the agreement has been made, by the vendor's solicitor, containing a description which would not convey to the purchaser's mind that he was only getting part of the premises which he has bought, does not estop him from seeking to establish his rights within a reasonable time after he has found out or should have found out his mistake. Nor will failure to examine the deed and discover the error for nearly four years after its receipt prevent the Court from granting relief where no dispute has arisen during that time as to the purchaser's right to occupy the whole premises.

Statement.

APPEAL by plaintiff from the judgment of the Supreme Court of Nova Scotia, (1916) 28 D.L.R. 791, 50 N.S.R. 211, in an action by a purchaser to have a deed rectified. Reversed.

E. P. Allison, K.C., for appellant.

T. S. Rogers, K.C., and *J. A. Knight*, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—This is an action brought in June, 1915, to amend a deed of sale passed in July, 1909, on the ground of misdescription of the property sold.

The facts are very fully discussed by the trial Judge, Harris, J., and by Russell, J., in the Court of Appeal (1916), 28 D.L.R. 791, 50 N.S.R. 211, and I must confess after a careful perusal of the

evidence that it is impossible for me to say that there was mutuality of mistake with respect to the boundaries of the property conveyed, or, in other words, that the property which was the subject matter of the contract of sale was not properly described in the deed.

On the one hand, the memorandum prepared by the respondent at the time the negotiations were first entered upon would seem to support the appellant's contentions and there is some corroboration in the fact that he apparently entered into possession, after the execution of the deed, of all of the larger portion of the property now claimed.

On the other hand, it is quite certain that the appellant received the title to the Holland lot to be submitted to his solicitor for the purpose of making the usual searches. It is equally certain that the solicitor drew the appellant's attention to the fact that in the north-easterly boundary line as described in that deed there was a "jog" which should not have been there if the description included both properties; and the most weighty circumstance, in my judgment, in support of respondent's position is the fact that the appellant himself prepared the plan (Ex. Wa) from the description given in the title to the Holland lot and attached it to the deed which he now seeks to have rectified. Buchanan, an independent witness, speaks of having seen this plan annexed to the deed twice at an interval of 4 years. If that evidence is accepted, and no attempt is made to discredit Buchanan, then the appellant must have known that he was not buying the Burton lot which he now claims. This evidence which in my opinion is most important does not seem to have received much, if any, consideration from the trial Judge, Harris, J. There is also the conversation detailed by the witness Peverell, which is certainly not consistent with appellant's contentions. There are other circumstances fully referred to in both Courts below which work for and against the contentions of both parties. On the whole I am of opinion that in so far as this Court is concerned we are not in a position to say the presumption that the decision appealed against is right has been overcome.

The most that can be said is that the parties to the deed were thinking of different areas and if the vendor intended to sell a less quantity for the stipulated price than the purchaser thought he was buying, then the contract is void. We should not make a new

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contract except we are absolutely certain that in so doing we are rectifying a mistake and giving effect to the clearly proved intention of the parties. They have chosen to make a solemn contract under seal and we must not substitute another for it except upon evidence which is reasonably free from doubt. Rectification can be granted only if the mistake is mutual and the evidence of the mutual mistake is clear and unambiguous. We must also bear in mind that if the error in the description is attributable to the appellant's own negligence rectification cannot be granted and he certainly, when he made the plan (Ex. Wa), and when he consulted his solicitor, had ample opportunity to ascertain how far the description given in the deed corresponded with the boundaries of the property on the ground.

As presented on this appeal, this is a case for rescission rather than for rectification. The mistake was not mutual, and if there was mistake on one side and *mala fides* on the other, which is the alternative suggestion—because the deed does not give effect to the true intention of the parties as previously expressed in the memorandum prepared by the respondent who now seeks to take advantage of the purchases—he should be put to election between rescission and rectification according to plaintiff's view. *Garrard* v. *Frankill* (1862), 30 Beav. 445, 54 E.R. 961.

I am to confirm.

Davies, J.

DAVIES, J.:—This is an appeal from the judgment of the Supreme Court of Nova Scotia, 28 D.L.R. 791, 50 N.S.R. 211, reversing a judgment given by the trial Judge, Harris, J., decreeing the reformation and rectification of a deed of certain lands at Bedford, N.S., given by the defendant to the plaintiff, by including therein a piece of land mutually intended to be embraced in it but which had been excluded by the description.

As to the law which governs in such cases and the character and extent of the evidence required in order to obtain such reformation and rectification, there does not seem to be much difference of opinion between the statements of it made by the trial Judge and those of the Judges in the Court of Appeal.

The trial Judge says:—

It will be seen that there is a flat contradiction between the parties as to the original agreement, and if there was nothing in the case except the evidence of two equally credible witnesses, that would, of course, settle the

difficulty I have to deal with, because the plaintiff's case must be made out by evidence that is clear and convincing, and upon testimony that is unexceptionable, both with regard to the agreement actually made and the mutuality of the mistake. *Provincial Fox Co.* v. *Tennant* (1915), 21 D.L.R. 236, 48 N.S.R. 559.

Russell, J., in the Court of Appeal, says, 28 D.L.R., at 792:—

It may or may not be correct to say that the mutual mistake must be proved as in a criminal case beyond any reasonable doubt. However that may be, I think the concensus of authority is to the effect that something more is required than such a mere preponderance of evidence as would suffice if it were not sought to impose upon the defendant a contract different from that which he on his part declared he intended to make and which is found in the document solemnly signed, sealed and delivered as the concluded act of the parties,

and winds up his judgment by saying that the plaintiff "has not proved by convincing evidence that the defendant ever intended to part with anything beyond the Holland lot."

Longley, J., 28 D.L.R., at 794, quoting with approval from a judgment of Barker, C.J., of New Brunswick, said: "The evidence should be so strong and convincing as to leave no reasonable doubt that the mistake has been made," and winds up by stating his own opinion that the evidence "must be clear and unmistakable, indubitable," while Chisholm, J., says: "I have great doubt, however, that in a case claiming the reformation of a deed, the evidence to establish the mutuality of the mistake, adduced by the plaintiff, is of so strong and convincing and, to adopt a term used in one of the cases, so almost irresistible a character as to sustain his claim."

While couched in different phrascology, the opinions of the Judges as to the evidence required in such cases as the present do not materially differ.

The difficulties arise, however, in the appreciation of the evidence given and in determining whether or not the plaintiff has brought himself within the rule, whether he has made out such a "clear convincing case upon testimony that is unexceptionable" as to leave no reasonable doubt in the mind of the Court alike as to the alleged mistake and as to its mutuality.

The decision of Harris, J., is to my mind very clear and convincing, but in deference to the opinions of the Judges of the Supreme Court who entertained a contrary view as to the proof given, I will state shortly my reasons for holding that the plaintiff has made out a satisfactory case entitling him to relief.

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The property in question is situated at Bedford, N.S., and the defendant had carried on there for some years a general store business which embraced baled hay and coal. The shop and dwelling fronted on the main Bedford Road and was at the S.W. corner of the land. Adjoining this building on the east or south-east was a building known as an "annex" which had some 10 or 12 years previously been used as a barn by the then occupant of the Boutilier property. On the eastern side of the annex or barn there was vacant ground spoken of in the evidence as a lane running back from the main road to a large barn built by Boutilier, the defendant, on the N.E. corner of the lot and within a few feet of the line dividing the church property from Boutilier's. The south-east side of this barn came up to the line of the adjoining premises on the east known as the Woodhill lot. From the corner of this barn a fence ran on the Woodhill line to the road so that this fence and the side of the barn formed the dividing line between the Boutilier property and the Woodhill lot. There was no fence or other visible line dividing this block of land on which the shop and dwelling house, the annex and the barn, were built, and which included the vacant land or lane to the south-east. It was bounded on the south by the main road; east by the Woodhill lot, so called; north by the church property, and west by the church lane or road.

The lane from the road to the barn had been used for some years by Boutilier for hauling coal and hay, in both of which he dealt, and from this barn where they were stored for sale.

The dispute relates to the "lane" or vacant land leading from the main road to the barn and to the land on which the barn stands.

The plaintiff contends: (1) that they were both part of the property he agreed to buy and Boutilier agreed to sell; (2) That the barn and lane leading up to it were part of "the premises occupied by Boutilier" and were used by him in his business for the hauling and storage of the coal and hay which he bought and sold, and that access to the lower part of the barn where the coal was stored could only be had from the main road along this lane to the barn door fronting on the lane; (3) that the access to the upper part of the barn which was used as a stable, coach-house and storehouse for hay was on its north-west side and that the defendant's horse and harness, express waggon and sleigh used in defend-

ant's business, were all kept in this barn. The barn itself was built, we are told, at a cost of about $600 and it and the land on which it stood was worth about $1,000; (4) That he bought out defendant's business as a going concern—his business, stock in trade and the premises he occupied. As to the price there is no dispute: for the lands and premises, $3,500; stock of goods, $1,200; horse, waggon, sleigh, etc., $325. (5 That within a few days after the verbal bargain was made the defendant brought to and left for him at his office in Halifax, a written agreement drawn up by himself in his own handwriting embodying the terms of the verbal agreement.

This document, it is true, was never executed, but it is most important as being in defendant's own handwriting and containing the description of what the defendant thought he was selling to the plaintiff. The defendant wrote it out and brought it to the plaintiff within a day or two of the making of the verbal agreement. It may, therefore, be said to be a contemporaneous written document specifying what defendant understood the terms of the verbal bargain were, and what premises were embraced in that bargain. What did it say? Its date is July 15, 1909. It gives the names of the parties, plaintiff and defendant, and goes on:—(See judgment of Duff, J., *post* 632).

Now there is not and cannot be any possible doubt as to what were "the dwelling house and shop and premises now occupied by the said Jas. N. Boutilier situated at Bedford, aforesaid."

The lane was unquestionably part of these premises. A strong fence stood on its north or north-east boundary dividing Boutilier's premises from those then occupied by the Woodhill family and connecting with the corner of the barn. It does not seem to me there could be any mistake that Boutilier occupied it and used it in his business for the access to his barn and for storing and disposing of his stock of coal there. Neither the Woodhill family nor anyone else, except Boutilier's employees and customers, used or pretended to use this lane. What I have said about the lane being at the time of the sale part of the "premises occupied by Boutilier" may be said with stronger force with respect to the barn. Boutilier stored his baled hay and his coal there, kept his horse, harness, express wagon and sleigh, all parts of his business

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plant, there, kept his cow there, had exclusive possession and right of possession of the whole barn. The only mode of access to the lower part of the barn was by the lane now in dispute.

So that if the written agreement can be said to describe with such reasonable accuracy as would express what such a man as Boutilier meant and what was understood by both parties to have been sold by the one and bought by the other the barn and the lane forming the access to it were included.

Of course, the defendant now contends that he only intended to sell such part of the premises he occupied as were embraced within the bounds of what he called the Holland lot, being that part of his premises he had purchased from one Holland, and that he did not intend to sell either the lane or the land on which the barn stood.

On this point there is a sharp conflict between the parties and as the trial Judge remarks if there was nothing else in the case except the conflicting evidence of two equally credible witnesses there could be only one result and the plaintiff must fail.

But the mere fact of there having been a conflict between the evidence of the contracting parties as to what property was mutually agreed to be sold, one affirming and the other denying that the description of the land in the deed sought to be reformed omitted a part of the land mutually agreed to be included in it, would not suffice to bar the plaintiff from the relief he sought.

If as in the case before us the trial Judge, Harris, J., felt himself compelled not to believe the defendant, and if, as he found, "all the other evidence documentary and otherwise pointed irresistibly and convincingly to the fact that the contract was as plaintiff contended" and was so mutually understood by the parties, the mere denial of the defendant of that fact should not prevail to prevent the reformation being granted.

Then apart from the contradiction of the plaintiff's statement of the contract, what do we find? First, the fact of the contemporaneous writing prepared in his own handwriting by the defendant and left by him at the plaintiff's office, in Halifax, within a day or two after the verbal contract.

The further fact that in his first examination defendant explicitly admitted that this written agreement "constituted the terms under which the sale was made every term" and though he

subsequently stated in his evidence that he intended to describe the Holland property and that it read "now under a mortgage held by Mrs. Holland the property on which Mrs. Holland had a mortgage" it seems to me very clear and plain that this is a mere subterfuge under which he sought to excuse his conduct.

As will be seen from the quotation I have made from the written agreement this reference to the Holland property had no reference whatever to the description or bounds of the property sold by way of limiting or with intent to limit that description or those bounds but simply referred to the purchase price being "subject to a mortgage for the sum of $1,200 held by one Annie Holland of Wallace," which "the purchaser shall assume and pay" and the balance of the purchase money as therein specified.

It seems absurd to say that such a reference could be held to qualify or minimise the extent of the property sold which is described in the agreement above this reference to the mortgage as "the dwelling house and shop and premises now occupied by the said Jas. N. Boutilier, situated at New Bedford, aforesaid." It does appear to me, as I have already remarked, that the true question to be determined and that on which the case must turn is whether the barn and the lane leading from the road to it were included and mutually intended to be included in the property agreed to be sold as being part of the premises then occupied by Boutilier.

That the barn was then occupied as a warehouse or storehouse for his coal and hay and a stable and coach-house by defendant, is conceded, also that the only access to the lower part of the barn was by this disputed lane which also afforded the only access to the doors of the "annex" on its south-east side.

That the shop, furniture and fixtures, stock in trade, horse, harness, express waggon and sleigh expressly mentioned as being sold to plaintiff were part in his shop and part in the barn in dispute is admitted and that the baled hay stored in the barn formed part of defendant's stock in trade sold to the plaintiff is not denied. The line fence connecting the south-east corner of the barn clearly shewed the premises then occupied by Boutilier and there was no other line upon the premises indicating, or which would lead an intending purchaser to doubt, whether the lane and the barn formed part of these occupied premises while there was every physical fact to indicate that they did form such part.

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Under these circumstances and others specifically mentioned by the trial Judge, and giving due and proper weight to the contemporaneous writing prepared by defendant, I should not have any hesitation in concluding that the plaintiff was entitled to the reformation asked.

The question remains whether the defendant has by his delay in bringing the action deprived himself of the right to get relief. Russell, J., 28 D.L.R. 791, with whom Graham, C.J., concurred, thought this delay presented a "very serious obstacle" in his way, but I gather that he based his conclusion upon the failure of the plaintiff to have established the affirmative of the issue with that degree of certainty required in such cases and that such was the opinion of the Court.

I think the explanation of the delay satisfactory. The plaintiff could quite reasonably from the description assume that the deed of conveyance drawn up by the defendant's solicitors embraced the lands he believed he had purchased. No one but a surveyor who had surveyed the lands in accordance with the courses laid down in the description, could tell or have reason to think they did not. No question ever arose during these years of delay of plaintiff's right to the possession of the barn and of the lane which he enjoyed, and it was not until he had received word from his manager on the spot that the defendant who had moved into the Woodhill property was using the lane to haul in his coal and he took active steps to have the line accurately run out. Plaintiff met defendant on the premises and they made some measurements with the view of locating the lines mentioned in the deed, and plaintiff says he then discovered for the first time that the description in his deed did not include the lane or the land on which the barn was built, but that it was a description copied from the Holland deed. He further says that he neither heard nor knew anything of the Holland deed at the time of the purchase, nor did he know until some time after that defendant owned the Woodhill property.

No delay or negligence can be imputed to plaintiff after he obtained knowledge of these facts and the delay antecedently to that time is, as I have said, reasonably accounted for.

On the main and substantial question, whether the evidence, oral and documentary, is so convincing and irresistible as to justify the judgment of the trial Judge in granting the relief prayed for, I have already expressed my opinion in the affirmative.

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As a matter of fact, the description in the plaintiff's deed as surveyed by the defendant's surveyor, which the trial Judge held as most accurate, gives plaintiff a small part of the south-west end of the barn leaving the rest to defendant. It is some evidence shewing that when Boutilier built his barn he did not have in mind the line of the Holland lot. It also seems inconceivable to me that selling to a stranger such a property as the one in question was, and a business carried on upon such property, with the stock in trade partly in the shop fronting on the road, and partly in the barn at the south-east corner of the lot, both shop with its "annex," and barn with its lane or passage leading to it, forming apparently one plot or premise, without anything to indicate that they were not, defendant did not in some way indicate that he was not selling the barn or the lane leading to it.

The contemporaneous writing satisfies me that he fully intended selling Hart the whole premises he then occupied and used as a shop, storehouse, dwelling house, annex, barn and lane leading to the barn, and without which the lower part of the barn would be useless and the acceptance by Hart of a deed drawn a few days later by the defendant's solicitor containing a description of a character which would not convey to his mind that he was only getting part of the premises he had bought, should not estop Hart from seeking to establish his rights within reasonable time after he found out or should have found out the mistake.

For these reasons I would allow the appeal, and restore the judgment of the trial Judge.

Idington, J.

IDINGTON, J.:—A perusal and consideration of the entire evidence herein leads me to the conclusion that for the reasons assigned by the trial Judge, Harris, J., his judgment should not have been disturbed and hence that the appeal should be allowed with costs here and in the Appellate Court below.

It seems to me that not only the respondent's own written though unsigned agreement, at the time, but also all the then surrounding facts and circumstances, fit into and support appellant's contention and tend to the discrediting of the respondent's version at the trial of what took place at the bargain.

Why, if a word of truth in what he says and is positively denied by the appellant relative to the use of the stable, there was nothing said in the writing which respondent himself drew up, is past my comprehension.

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The use for 5 years of a property worth a thousand dollars was not an idle trifle likely to be overlooked and when mooted fail to evoke any remark on the part of the appellant.

The respondent's story relative thereto is unsupported, under the circumstances improbable, and, if true, hardly likely to have escaped relation and provision for its execution before the time when respondent first started it.

The conduct of the parties and the outstanding features and nature of the transaction must in such cases often be relied upon as a better guide than what either may merely swear to.

I so fully agree with the reasoning of the trial Judge that I need not go into details.

Duff, J.

DUFF, J.:—The power of rectification must be used with great caution; and only after the Court has been satisfied by evidence which leaves no "fair and reasonable doubt" (*Fowler* v. *Fowler* (1859), 4 DeG. & J. 250, at 264, 45 E.R. 97), that the deed impeached does not embody the final intention of the parties. This evidence must make it clear that the alleged intention to which the plaintiff asks that the deed be made to conform, continued concurrently in the minds of all the parties down to the time of its execution; and the plaintiff must succeed in shewing also the precise form in which the instrument will express this intention.

It is germane to the question arising on this appeal to observe that the mere fact of denial by the defendant on oath that he had any intention other than that expressed in the deed is not in itself a sufficient ground for denying relief to the plaintiff. It is true (*Mortimer* v. *Shortall* (1842), 2 Dr. & Wal. 363) that the general rule of equity practice was for the Court to refuse to act upon "oath against oath"; but this rule has never been applied and has no application where you have documents and conduct clearly established corroborating the recollection of the witnesses; and it may be questioned whether the rule in its strictest interpretation can be any longer regarded as a universal one, since for the system under which issues of fact were decided by weighing dispositions of witnesses reduced to writing there has—now—been substituted, the system under which such questions are decided in the main upon *viva voce* testimony; and I think the following passage in the judgment of a Divisional Court delivered by Armour, C.J., in *Clarke* v. *Joselin* (1888), 16 O.R. 68, at 78, may be accepted as

laying down the rule upon which, under the existing procedure, Judges who have to pass upon the issues of fact raised by a suit for rectification, may well be guided:—

"It is not meant to be laid down that because one of the parties to the instrument chooses to deny that there is any mistake in it, the Court must stay its hand. No doubt the writing must stand as embodying the true agreement between the parties until it is shewn beyond reasonable doubt that it does not embody the true agreement between them. The Court must in such case, as in the case of any other disputed fact, consider all the circumstances surrounding the making of the instrument, and whether it accords with what would reasonably and probably have been the agreement of the parties, gauge the credibility of the witnesses, pay due regard to their interest in the subject matter, and weigh their testimony; and if, having done all this, the Court is satisfied beyond reasonable doubt that the instrument does not embody the true agreement between the parties, the Court ought to rectify it."

It is right to add, in view of an observation by one of the Judges in appeal in Nova Scotia, that it is not the practice to refuse relief because the party who asks it was himself the person who had the instrument drawn or indeed was the draughtsman of it. In such a case the plaintiff, it is true, comes to be relieved against the consequences of his own error; but that can be affirmed, as Sir John Leach said, in *Ball* v. *Storie* (1823), 1 Sim. & St. 210, at 219, 57 E.R., p. 84, of every party who comes to be relieved against an instrument which he has signed.

The dispute between the parties to the present litigation arose in this way: The respondent, Boutilier, was the owner of a property at Bedford, N.S., where he had carried on for some years the business of a general store including the sale of baled hay and coal, the building in which he kept his shop being, in part, also used as a dwelling house. The property consisted, in part, of a barn separated from the shop by a yard and a strip of land commonly spoken of as a "lane" running past the shop and giving the most usual access to the barn. The property had in part been purchased some years before from a Mrs. Holland, this part including neither the strip just mentioned nor the site of the barn. When the agreement which gives rise to the suit was entered into, the respondent was in occupation, for the purposes of his business, of not only the

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"Holland property" as he designated that purchased from Mrs. Holland, but of the barn and the lane as well. In July, 1909, the appellant entered into this agreement with the respondent which, as the appellant alleges, provided for the purchase of the property then in occupation by the respondent, including the sites of the barn and the lane, but which, as the respondent alleges, related only to the part he had purchased from Mrs. Holland. On July 15, the deed of conveyance was executed by the respondent.

The deed which had been prepared by the respondent but had been examined and passed by the appellant's solicitor, contained a description which embraces in fact only the Holland property; omitting, that is to say, those parts of the respondent's premises that are the subject of the present controversy, the lane and the site of the barn.

The respondent's main position is that he never at any time intended to convey or sell anything but the property purchased from Mrs. Holland, and that consequently whatever the appellant's intention may have been, and whatever the appellant supposed the respondent's intention to have been, the appellant must fail, because it was never in truth agreed between them that the property to which the appellant now lays claim should be sold.

Supplementally the respondent relies upon certain alleged acts of the appellant indicating that the appellant himself was contemplating only the purchase of the Holland property.

It is not disputed that there was in fact an oral agreement before the execution of the deed, the terms of which the deed was intended to embody; nor is it nor could it be disputed with the least plausibility that the decisive point in passing upon the case advanced by the respondent is whether this agreement did or did not, as understood by both parties, contemplate the sale of the whole of the property now claimed by the appellant; because there is no suggestion, as there could be none in the circumstances, that any change of plan or intention took place between the making of the oral agreement and the execution of the deed. The appellant's claim very largely rests upon a memorandum prepared by the respondent himself and reduced to writing by his own hand which, because of its importance, I quote in full:—

This agreement made in duplicate this 15th day of July, A.D. 1909, between Jas. N. Boutilier of Bedford in the County of Halifax, general dealer,

hereinafter called the vendor, of the one part, and Havelock McC. Hart, of Halifax in the County aforesaid, manufacturer, hereinafter called the purchaser, of the other part. Jas. N. Boutilier agrees to sell and H. McC. Hart agrees to buy the dwelling house & shop and premises now occupied by the said Jas. N. Boutilier, situated at Bedford aforesaid—for the price or sum of two thousand three hundred dollars, subject to a mortgage for the sum of twelve hundred dollars held by one P. Annie Holland of Wallace, N.S. It is further agreed between the parties hereto that the purchaser shall assume and pay the said mortgage & shall pay to the said Jas. N. Boutilier the sum of three hundred dollars upon the execution and delivery of a deed of the said property and the sum of two thousand dollars, balance of the said sum of two thousand three hundred dollars—in quarterly payments of one hundred to be paid in & every three months with interest on the balance due from time to times at the rate of six per centum per annum payable half yearly, the said sum of two thousand dollars to be secured by a mortgage of the said property to the said Jas. N. Boutilier. It is further agreed by and between the parties hereto that the said J. N. Boutilier shall sell and H. McC. Hart shall buy the stock in trade of the said J. N. Boutilier, in upon the said premises for the sum of twelve hundred dollars; for which said sum the said H. McC. Hart shall give to the said Jas. N. Boutilier promissory notes, payable in three payments, namely, $400 in 2 months, $400 in 4 months & last $400 in 6 months from this date July 15, 1909. further agreed all, shop furnitur & fixturs and, one horse & set harness one expreas wagon one sleigh, price to be $325 on delivery of a bill to the said H. McC. Hart, in witness whereof the parties hereto have hereuato their hands and seals set affixed the day & year first above written. Signed Sealed and delivered in the presence of

In this document the description of the subjects of sale is without ambiguity although, of course, requiring parol evidence to identify the objects denoted by that description. The "dwelling house, shop and premises" are identified as "those now occupied" by Boutilier. It is not in dispute that the premises occupied by Boutilier at New Bedford and occupied by him with the shop and dwelling house as part of the same *unum quid* included the property in dispute, the lane and the barn. It would seem, therefore, if we are entitled to accept this memorandum prepared by the respondent himself (admittedly with the object of expressing his own notion of the terms of the agreement) as clearly expressing those terms that the agreement was precisely that which the appellant alleges it was.

At this point, however, it is necessary to notice an observation in the judgment of Russell, J., in appeal, 28 D.L.R. 791, 50 N.S.R. 211. The observation is: "It is equally true that it would be no misdescription of the property which the defendant says he intended to sell to describe it as property occupied by the defendant although there was other property adjoining which the defendant also occupied."

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With respect I am unable to concur with this observation. The description is the "dwelling house shop and premises now occupied." These words, I am compelled to read in the absence of some qualifying context, as denoting the whole of the premises occupied with and for the same purposes as the dwelling house and shop and I am compelled to say that I should consider it a "misdescription" if the intention had been to denote only part of the premises so occupied.

It is necessary to note also a point in argument based upon the words "subject to a mortgage for the sum of $1,200 held by P. Annie Holland." This mortgage in fact affected the Holland property only; and the purport of the argument is that the words quoted indicate that the parties are dealing only with the Holland property. Upon this the remarks of the trial Judge are quite conclusive.

These words are in no part of the description of the subjects with which the parties are dealing: they are associated and identified with the words expressing the consideration for the sale, and they shew that the purchaser is to assume the burden of the mortgage. That is their whole effect and their whole office and I agree with the trial Judge, Harris, J., that there can be no doubt that the intention of the respondent when he wrote them was limited to that.

The respondent's substantial defence is that he, in fact, contemplated only the sale of the Holland property. The first remark to be made with regard to this defence is that it must be examined on the assumption that the language used by the respondent in concluding the oral agreement between himself and the appellant was the unambiguous language of the memorandum which unequivocally denoted that which the appellant understood the respondent was agreeing to sell him. I think that is sufficiently clear not only from the evidence of the appellant but as well from that of the respondent quoted in the judgment of the trial Judge, which is so important that it must be reproduced in full:—

> The defendant was first examined before me on October 12th, and what he then said about this document is as follows:—"Q. The agreement made with Mr. Hart is set out in W/4? A. I think so. Q. It embodies all the terms? A. Yes, I intended that, yes. Q. Every term? A. I think so."
>
> The trial was then adjourned on account of the illness of a witness and the next hearing was on Dec. 2nd, and in the meantime the reporter's notes of

the first hearing were transcribed and the defendant was recalled and in this report:—"Q. This writing W/4 you signed; that you said contained the terms of the agreement between you, what property did you intend to describe? A. (Objected to) The Holland property, and it reads 'now under mortgage held by Mrs. Holland' the property on which Mrs. Holland had a mortgage."

Cross-examined:—"This agreement contains the exact terms of the sale, that is what you said before? A. I intended the Holland property."

The plaintiff says that the memorandum was in fact the basis of the agreement and the trial Judge accepts his statement. We have therefore the evidence of the appellant and the admission of the respondent which in no way differ as to the actual words employed in making the agreement.

What then is to be said of the respondent's defence that the words in which he conveyed to the appellant his intention as to the property involved in the sale were words which did not clearly express that intention but clearly expressed a very different intention? I assume that this would be a good defence if made out; in other words, if it appeared that there was no concurrent intention on the subject of the barn and the lane—that as regards these parties were not *ad idem*. I may in passing take leave to express a doubt whether the case of *Fowler* v. *Sugden* (1916), 115 L.T. 51, cited on behalf of the respondent, extends to a case where unambiguous language is used in describing the subject of a contract of sale by one of the parties and where the subsequent conduct of the parties supports an inference that the party setting up the mistake arising from the inaccuracy of his own language was aware that the other party was acting on the faith of the agreement having been entered into, and effect being given to it, in accordance with the natural meaning of the words employed. I do not pursue the matter because that would lead us into a discussion without utility in the circumstances of this case.

There is another formidable objection against accepting the testimony of the respondent that he did not mean the agreement in question to take effect in accordance with the language of the memorandum. The respondent was engaged in a business transaction, he was not selling a title as such or rights as such derived from a title; he was selling concrete objects for a price which he must be presumed and which, beyond doubt, he did fix with reference to what he considered to be the value of these concrete

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objects; the origin of his title being in this respect of no consequence whatever. I cannot believe if he had fixed his price with reference to his premises exclusive of the barn and lane that he would have employed the language he did employ in his memorandum. I concur in the view of the trial Judge (which indeed so thoroughly accords with what appears to be the natural inference from the admitted facts that his finding, I think, must be accepted as conclusive), that the respondent's resort to the phrase about the Holland mortgage as an explanation of his attitude was an afterthought and a dishonest subterfuge.

The respondent's subsequent conduct is not less difficult to understand. The appellant took possession of the barn and stable and remained there for 6 years until some comments of his manager led to an investigation and the fact that the description in the deed excluded the lane and the barn was disclosed. The respondent attempts an explanation which does not remove the difficulty, he says it was part of the arrangement between them that the appellant should occupy the barn and the lane for 5 years after the purchase; but that is no explanation of the fact that the appellant's occupation continued for 6 years without a word of protest or comment from the appellant; and there is no attempt to explain the fact that the arrangement is not noted in the memorandum which, as the respondent himself admits, was intended to set out the whole of the terms of the agreement.

The defence being without substance there remains only a word of comment upon the acts of the appellant alleged to be inconsistent with his claim for rectification. A single sentence is sufficient. The appellant's evidence contains an explanation tha. if true destroys the assumption which is the pith of the argument made against him. The respondent really contends that on these points his own evidence and that of a gentleman named Buchanan must be accepted in preference to that of the appellant. Upon this the judgment of the trial Judge is decisive; on the all-important point of date he rejects the evidence offered by the respondent and this has the effect of depriving the incidents relied upon of any material significance.

Anglin, J.

ANGLIN, J.:—I understand that other members of the Court would allow this appeal chiefly on the ground that a memorandum of the agreement between the parties prepared by the defendant

but not executed, conclusively establishes that it was the intention of both of them that the parcel of land in dispute should be included in the sale to the plaintiff. There are, no doubt, other circumstances in the case fully developed in the judgment of the trial Judge, such as the position of the doors of the barn in dispute and the annex building, which point to the same conclusion. On the other hand what occurred, according to his own story and apart altogether from the evidence of Buchanan, in connection with the sketch prepared by the plaintiff and attached by him to the deed, his inaction from 1911 when he became aware that the boundary given by the deed was not the straight line to which he now makes claim and the conversation of 1913 sworn to by the defendant and the witness Peverill, and in part admitted by the plaintiff, the significance of which is indicated by Russell, J., 28 D.L.R. 791, in my opinion cast such grave doubt upon the plaintiff's claim that I find myself unable to say that the case made for a reformation is so convincing that we should reverse the unanimous judgment of the Nova Scotia Appellate Court holding that the plaintiff had failed to discharge the onerous burden resting upon him. To these features of the evidence favourable to the defendant the trial Judge would appear not to have attached the weight to which I think them entitled; at least he makes no allusion to them. No doubt the case is close to the line, and that opposite views may not unreasonably be taken of the evidence is apparent from a perusal of the opinions of Harris, J., and of Russell, J. After carefully weighing the testimony, however, the view taken of it by Russell, J., commends itself to my judgment.

Appeal allowed.

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Manitoba Court of Appeal, Perdue C.J.M., Cameron, Fullerton and Dennistoun JJ.A. November 29, 1920.

DAMAGES (§ III P—340)—AGREEMENT TO BREAK LAND—INTENTION OF PARTIES CLEAR—LAND TO BE CROPPED IN SPRING—BREACH OF CONTRACT—LOSS OF PROFITS—ESTIMATION OF.

If in an agreement to break land it is clear that the parties knew that the object was to make the land ready for cultivation as soon as weather conditions permitted, and it was obviously the intention that a crop was to be sown on the freshly broken land as soon as possible, a postponement of the breaking beyond the proper time for making use of the land that year is a breach of contract, which entitles the injured party to damages for loss of profits which might have been reaped. In estimating such loss adequate allowance must be made for labour, and other elements of costs.

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[*Hadley* v. *Baxendale* (1854), 9 Exch. 341, 156 E.R. 145; *Hydraulic Engineering Co.* v. *McHaffie* (1878), 4 Q.B.D. 670; *Horne* v. *Midland R. Co.* (1873), L.R. 8 C.P. 131; *Rivers* v. *George White, Sons & Co.* (1919), 46 D.L.R. 145; *Canada Foundry Co.* v. *Edmonton Portland Cement Co.* (1916), 32 D.L.R. 114, 10 Alta. L.R. 232, affirmed (1918), 43 D.L.R. 585; *Leonard & Sons* v. *Kremer* (1913), 11 D.L.R. 491, 48 Can. S.C.R. 518, considered.]

APPEAL by plaintiff from the judgment at the trial on defendant's counterclaim for damages for breach of contract to break land. Varied.

O. H. Clark, K.C., for appellant; *C. H. Locke*, for respondent.

Perdue, C.J.M.

PERDUE, C.J.M., concurs with CAMERON, J.A.

Cameron, J.A.

CAMERON, J.A.—This action was brought for the recovery of the sum of $16,954, alleged to be due by the defendant for interest and principal on an agreement dated March 6, 1918, for the purchase of certain lands near Clandeboye, in this Province, for the sum of $16,800. In the action the defendant counterclaimed for damages alleged to have been sustained by the defendant by reason of the breach of the following covenant in the agreement:

> The vendor covenants with the purchaser that if there is not now broken and under cultivation on the said lands at least 250 acres then he will as soon as weather conditions permit, in the spring of the year 1918, the working and operation of the tractor engine now owned by the vendor, enter unto the said lands and break up sufficient land to bring the cultivated land on the said premises up to a total of 250 acres.

The amount due for instalments of principal and interest was paid into Court and the action was accordingly dismissed by Curran, J., pursuant to King's Bench Rule 259, without prejudice to the defendant's counterclaim. He then proceeded with the trial of the issues raised by the counterclaim and gave judgment for the defendant for $3,075.

Of the breach of the covenant there was and is no question. The trial Judge held the measure of damages, directly referable to the plaintiff's breach, to be the defendant's loss of the potential crop of the 102 acres admitted to be the actual shortage of lands not broken and in cultivation on March 8, 1918. He arrived at the value of this potential crop by reference to crops grown in similar land in the vicinity. The defendant's son, a student at the Agricultural College, gave evidence of net profits of $31.62 per acre from flax grown on this farm in 1918 at a selling price of $2.75 per bushel and of $27.50 per acre from oats.

The Judge states that he proposes to be under rather than over the mark and in assessing the potential value of the crops on the 102 acres allows $15 per acre, or $1,500 on this account. For the loss of the crop on 45 acres in 1919 he allowed at the same rate, or $675, an item which was abandoned by notice served shortly before the argument before us. For the cost of brushing and breaking the 45 acres, admittedly left undone by the plaintiff, he allowed the sum of $20 per acre or $900 and entered a verdict on the counterclaim for $3,075.

The trial Judge was sitting as a jury and his findings are not to be disturbed without good reasons therefor. We have before us, however, in his judgment the precise method in which he arrives at his conclusion and this method is directly challenged as unwarranted on legal principles. The question involved is one of difficulty not so much in ascertaining those principles as in determining their application.

The rules governing damages arising out of breach of contract laid down in *Hadley* v. *Baxendale* (1854), 9 Exch. 341, 156 E.R. 145, are set out in Mayne on Damages, 9th ed., p. 12, and need not be restated. The author says that the case is supposed to lay down three rules which he sets out at pp. 13 and 14, and which are regarded as authoritative statements.

Remoteness is held to be a ground of exclusion in applying the principles by which the assessment of damages is governed.

Mayne on Damages, at p. 45 says:—

> Damage is said to be remote, when, although arising out of the cause of action, it does not so immediately and necessarily flow from it, as that the offending party can be made responsible for it.
>
> . . . .
>
> The first, and in fact the only inquiry, in all these cases is whether the damage complained of is the natural and reasonable result of the defendant's act; it will assume this character if it can be shewn to be such a consequence as, in the ordinary course of things, would flow from the act, or in cases of contract, if it appears to have been contemplated by both parties.

Otherwise the damage is too remote.

"Damages are held to be too remote where the plaintiff claims compensation for the profits he would have made, if the defendant had carried out his contract. It is by no means true, however, that such profits can never form a ground of damage." See Mayne, at p. 53.

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"A person who fails to supply a piece of mechanism, which is, and which he knew to be, only valuable as forming part of an entire machine, will be responsible for any loss of profits flowing from the inutility of that which it was intended to complete." *Hydraulic Engineering Co.* v. *McHaffie* (1878), 4 Q.B.D. 670 cited, Mayne on Damages, p. 55.

The question comes to this: Is the particular result such as might have been contemplated by the parties, as naturally flowing from the act done? See Mayne, at p. 59.

On this branch of the case it was contended that it could not be said, having regard to the covenant in question, that there could have been contemplated a loss of a future crop as a result of its breach and that damages to be recoverable must be in contemplation of the parties who must have agreed that these arise from the breach. In support of this we were referred to Mayne on Damages, p. 11, where *British Columbia etc., Saw Mill Co.* v. *Nettleship* (1868). L.R. 3 C.P. 499, is referred to. In that case the defendant had failed to ship from Glasgow an essential part of machinery required for the plaintiff's mill at Vancouver Island. It was held that the measure of damages was the cost of replacing the lost parts in Vancouver Island. A claim made for compensation for the loss of profits while the mill remained idle was not allowed. Willes, J. says, at p. 509:—

> To my mind, that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it.

In *Horne* v. *Midland Ry.* (1873), L.R. 8 C.P. 131, the plaintiffs sued for the loss of profits on the sale of shoes to the French Government. The defendants were notified of the necessity for prompt delivery. They were not delivered in the time specified and were rejected. It was held that the plaintiffs were not entitled to recover the difference between the price at which they had contracted to sell the shoes and the price ultimately realised, the damage not being such as might be reasonably considered as arising from the defendant's breach of contract, or such as might reasonably be supposed to have been in the contemplation of the parties at the time they made the contract. It was also held in the same case by Blackburn, J., and Martin, B., that a mere notice is not

sufficient but to have any effect it must be given under such circumstances as that an actual contract arises on the part of the defendant to bear the exceptional loss. This dictum is cited in the footnote in 10 Hals. 314; but in Sedgwick on Damages, p. 291, it is criticised and the weight of authority is said to be against it, citing *Cory* v. *Thames Ironworks Co.* (1868), L.R. 3 Q.B. 181, where the plaintiffs purchased a floating derick intending to use it for a certain novel purpose while the defendants agreed to construct it believing it was to be used for an entirely different purpose. It was held that the plaintiff could recover damages on the latter basis.

Cockburn, C.J., at p. 190 says:—"There can be no hardship or injustice in making the seller liable to compensate him in damages so far as the seller understood and believed that the article would be applied to the ordinary purposes to which it was capable of being applied."

Reference was also made to *Sapwell* v. *Bass*, [1910] 2 K.B. 486. The defendant, the owner of a stallion, had agreed that the defendant's stallion should serve one of the plaintiff's brood mares. The contract was broken and the plaintiff sued for damages on the footing that he had lost a valuable foal. It was held that the damages were too remote and contingent. Also to *Steinacker* v. *Squire*, (1913), 19 D.L.R. 434, 30 O.L.R. 149, a case based on similar facts, but this breeding case is obviously of a special and speculative character and is hardly applicable to that before us.

It was argued for the defendant that the wording of the covenant, and in particular, the use of the words in it "as soon as weather permits," the occupation of the defendant, and the circumstances of the purchase lead to the inference that it was in the contemplation of both parties that the land in question should be broken and made ready for crop purposes in 1918, that the breach of the covenant was flagrant and inexcusable and that the damages allowed were occasioned directly by the breach, and are reasonable and justified by the evidence. "Loss of profits can be recovered if reasonably within the contemplation of the parties." Chitty on Contracts, 16th ed., 885, and it was argued that such was the case here. Numerous decisions were cited to the same effect. In *Jaques* v. *Millar* (1877), 6 Ch. D. 153, in addition to judgment

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for specific performance of an agreement to grant a lease, damages were awarded the plaintiff for loss of profits from his trade during the time he was kept out of possession. In *The "Argentino"* (1889), 14 App. Cas. 519, Lord Herschell held, at p. 523, that the loss of the use of a vessel when it was under repair owing to a collision and therefore not available for trading purposes was certainly damage directly flowing from it, and that such damages would not be necessarily limited to the money that could have been earned while the vessel was actually under repair. In *Lepla* v. *Rogers*, [1893] 1 Q.B. 31, 5 R. 57, loss sustained by fire to premises sublet without consent of the lessor was allowed, in the circumstances, as the natural result of the breach of the covenant not to sublet without leave. In *Wilson* v. *Northampton and Banbury Ry.* (1874), L.R. 9 Ch. 279, the refusal of the company to erect a railway station according to agreement was held to give the right to the plaintiff to have the probable benefit to the plaintiff's estate of the construction of the station taken into consideration and other probable profits which it was declared, though more or less indefinite, were proper for consideration by a jury. In *Hydraulic Engineering Co.* v. *McHaffie, supra*, the plaintiffs were held entitled to the expenses incurred and the loss of their profit on their other contract with Justice which was dependent on the contract with the defendant. It was held it was fully implied that the plaintiffs would hold the defendants responsible for any loss sustained by the defendants' default if thereby the plaintiffs became unable to carry out their contract with Justice. Other cases were cited, all varying in their facts, and leading to the conclusion that in certain circumstances the loss of profits is allowable as damages.

In *Simpson* v. *London & North Western Ry.* (1876), 1 Q.B.D. 274, there was a claim for loss of time or loss of profit due to non-delivery of goods intended to be exhibited at an agricultural show. Lord Cockburn says, at p. 277, "As to the supposed impossibility of ascertaining the damages, I think there is no such impossibility; to some extent, no doubt, they must be a matter of speculation, but that is no reason for not awarding any damages at all."

It was held that the carrier had notice of the plaintiff's object in sending the goods and that the loss of profit was a natural consequence of the failure of the object. This is a strong case against a carrier.

In *Rivers* v. *George White, Sons & Co.* (1919), 46 D.L.R. 145, a judgment allowing plaintiff damages for breach of warranty of a threshing machine was varied by adding damages for loss of profits. Haultain, C. J., points out that the suggestions in some decisions that there must be something akin to a contract to enable a party to recover for special consequences of a breach of contract is not sustained by later authorities. He cites with approval on this subject an article by F. E. Smith in vol. 16 of the *Law Quarterly Review*, where it is stated, at p. 286: "In determining what consequences the parties may be reasonably supposed to have contemplated the knowledge of the circumstances under which the contract was made must be, not merely an important, but the decisive consideration."

It is impossible to cover the entire range of cases. The distinctions that are drawn seem at times narrow and elusive. It is, as has been observed, like attempting to draw a line between day and night, where there is a twilight zone that is neither.

In *Canada Foundry Co.* v. *Edmonton Portland Cement Co.* (1915), 25 D.L.R. 683, 10 Alta. L.R. 232, a mechanics' lien action was brought in which the plaintiff's claim was undisputed save in some small items and at the trial before Walsh, J., judgment was entered for $12,740.35. The real contest was over the counterclaim, in which the defendant claimed damages in the pleadings for $108,000, but at the trial reduced to $78,714.15 for loss of profits sustained by reason of the plaintiff's failure to supply and erect the material contracted for within the time agreed. Walsh, J. (25 D.L.R. 683), refused to give the full amount claimed on the ground of defects in the calculations and on the authority of *Leonard & Sons* v. *Kremer* (1913), 11 D.L.R. 491, 48 Can. S.C.R. 518, but considered that the defendant company was entitled to some damages for loss of profits and fixed them at $10,000. There were other considerations entering into the case which do not concern us here. This judgment was affirmed by the Court of Appeal (1916), 32 D.L.R. 114. Stuart, J., in his judgment, deals at length with the facts and the quantum of damages and carefully reviews the decisions many of which I have already mentioned. He refers to the passage in Mayne on Damages at p. 64 which I have cited, *Chaplin* v. *Hicks*, [1911] 2 K.B. 786, and *Leonard & Sons* v. *Kremer, supra*, which had been followed by the trial Judge. He

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then deals with *Hadley* v. *Baxendale*, 9 Exch. 341, and *British Columbia Saw Mill Co.* v. *Nettleship*, *supra*, and holds that the idea suggested in that case by Willes, J., that there must be practically a contract with regard to loss of profits before they can be recovered, which is to be found also in *Horne* v. *Midland Ry.*, *supra*, and in *Elbinger Actien-Gesellschafft* v. *Armstrong* (1874), L.R. 9 Q.B. 473, is answered by Cotton, L.J., in *Hydraulic Engineering Co.* v. *McHaffie*, *supra*, and in the judgments of Bowen and Fry, L.JJ., in *Hammond* v. *Bussey* (1887), 20 Q.B.D. 79. Stuart, J., considers *Simpson* v. *L. & N.W. Ry.*, which I have quoted, a very strong case in favour of awarding damages for loss of profits. He refers to other similar cases where damages have been given for loss of profits (or rather prevention of gains) and points out that the Courts have hesitated in such cases more in actions against carriers than against manufacturers and builders. He concludes by holding the amount fixed by the trial Judge as not too large and that there was clearly a loss of at least that amount. He adds that to be deprived for five months of the use of the buildings should be compensated for in damages quite aside from the profits and that such damages would be found to be as much as $10,000 in any case. In the result the plaintiff's appeal against the judgment of the trial Judge on the counterclaim and the defendant's cross-appeal to increase the damages were both dismissed.

The plaintiffs appealed to the Judicial Committee of the Privy Council from the judgment of the Court of Appeal. The judgment of Lord Atkinson dismissing the appeal is to be found in (1918), 43 D.L.R. 583. Lord Atkinson states the method adopted by the trial Judge in arriving at the amount of damages and points out that (at p. 592),

> no question arose as to any loss of profit by the respondents on any particular contract or transaction. The profits which they claimed to have lost were merely those which the sale in the open market of what they could have produced would have enabled them to reap.

He goes on to say:

> It is clear upon the evidence that both parties knew the purpose for which this factory was designed, namely, the manufacture of Portland cement for sale. They were both necessarily well aware that the installation of machinery within it was indispensable for this purpose, that the completion of the building was the necessary preliminary of the installation, that delay in the completion of the building necessarily involved the postponement of the latter, and that the loss of the use of the machinery

which could not be installed would result in the loss of those ordinary profits which might have been reaped upon what, if worked, it would have produced. So that the loss of this profit was at once what fairly might be considered as arising naturally, that is, according to the ordinary course of things from the breach of the appellants' contract complained of, and was also such a loss as might reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of the breach of it. If so both the tests laid down in *Hadley* v. *Baxendale*, *supra*, and the cases which have followed it, would appear to be satisfied. The damages in addition appear to be very moderate in amount. The Court of Appeal approved of the amount.

Their Lordships are therefore of opinion that the judgment appealed from was right and should be affirmed, and the appeal be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the present case both parties knew that the object of the covenant to break the land in question was to make it ready for cultivation. The land was to be broken as soon as conditions of weather permitted, obviously to permit its use as soon as possible. I think it must be taken as established that certain crops can be grown profitably on freshly broken land. It can further be reasonably inferred from the covenant itself and the circumstances of the purchase that this use of the land in question was in contemplation of the parties, and that a postponement of the breaking beyond the proper time for making use of the land would result in the loss of those ordinary profits, which might have been reaped, was likewise in their knowledge. The knowledge of the circumstances is a decisive consideration.

The question of *quantum* is difficult. The defendant claims $3,900 in his pleadings, an amount in excess of the price of the land which was bought at $35 per acre. This claim is, to my mind, altogether out of proportion and extravagant. The calculation submitted to the trial Judge of the possible net profits from raising flax and oats seem to me defective and unsatisfactory. They are based on unusually high prices and assume ample returns, and do not make adequate allowance for labour and other elements of costs which may be difficult to arrive at but cannot be ignored. The trial Judge reduced these calculations in fixing his estimate of the net profit of the crops which might have been grown but for the plaintiff's breach at $1,500. I think myself an allowance of say $10 per acre, or $1,000, would be adequate. That would certainly be ample in ordinary circumstances.

MAN.

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MORTGAGE AND AGREEMENT PURCHASING CO. LTD. v. TOWNSEND.

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No objection was taken to the allowance for breaking the land except that it is excessive and that branch of the case was not pressed. The item of $675, loss of crop on 45 acres, was abandoned shortly before this motion came on to be heard.

Amongst other grounds urged on the appeal it was contended that the defendant could have taken steps to avoid or minimise his loss. The evidence does not sustain this contention. Nor can I accede to the argument that the dismissal of the action necessarily disposed of the counterclaim.

While the estimate of the defendant's damages I have arrived at may seem still large, it is to be remembered that this is a case of an inexcusable breach of contract and that the defendant is entitled to every reasonable presumption as to the benefit he might have obtained by the *bonâ fide* performance of the contract, as pointed out by Lord Selborne in *Wilson* v. *Northampton and Banbury Ry., supra.*

The judgment entered will be varied by reducing it from the sum of $3,075 to $1,900.

The plaintiffs are entitled to their costs of this appeal.

Fullerton, J.A.

FULLERTON, J.A.—I have had the advantage of reading the very full and carefully considered reasons for judgment of my brother Cameron and I agree with his conclusions.

Dennistoun, J.A.

DENNISTOUN, J. A., concurs.

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In Re LUCIANO.

Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J. February 2, 1921.

HABEAS CORPUS (§ I C—10)—WARRANT ISSUED IN ANOTHER PROVINCE—REGULARLY INDORSED UNDER SEC. 662, CRIM. CODE—QUESTIONS CONSIDERED.

Where a warrant of arrest is issued in one Province and is duly indorsed by a Justice in another Province, under sec. 662 of the Criminal Code, the Court where the warrant is executed will not go into the merits of the case, and anything that may be alleged by way of defence is for the magistrate and Courts where the warrant issued.

[*The King* v. *Galloway* (1909), 15 Can. Cr. Cas. 317, discussed. See Annotation, Habeas Corpus—Procedure, 13 D.L.R. 722.]

Statement.

APPLICATION for the discharge of a prisoner under *habeas corpus*. The prisoner was arrested under a warrant issued by a Police Magistrate of the City of Ottawa charging non-support under the provisions of the Cr. Code, sec. 242a. The warrant was regularly indorsed by a Police Magistrate of the City of

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Halifax under the provisions of sec. 662 of the Code. The application was referred to the full Court by the Judge at Chambers to whom it was made.

H. L. Webber, for the prisoner; *W. J. O'Hearn*, K.C., for the prosecution.

Harris, C.J.

HARRIS, C.J.:—A warrant was issued by the Police Magistrate of the City of Ottawa on an information laid in that city against Antonio Luciano for neglect to provide necessaries for his wife and children without lawful excuse, they being in necessitous circumstances. (Cr. Code, sec. 242 (1)).

The warrant was duly indorsed by a justice in Halifax under the provisions of sec. 662 of the Cr. Code and the accused was thereupon arrested by a constable of Halifax to be taken to Ottawa to answer the charge.

The accused applied to a Judge at Chambers for an order *nisi* for a writ of *habeas corpus* under the Crown Rules and the matter coming on for a hearing the Chambers Judge referred it to the full Court.

The return shews the warrant duly issued by the Police Magistrate at Ottawa and duly indorsed at Halifax.

The accused produces an affidavit made by himself in which he suggests adultery on the part of his wife and says that he has been sending to his wife $50 per month on the average since December 26, 1917, and until November 1, 1920, and he says that since November 1, 1920, he has not sent any money because money owing to him on certain contracts has been withheld, and he says his intention was as soon as he was in receipt of this money or any other money to immediately remit to his wife.

He also swears that he is informed and verily believes that his arrest has been inspired by malice and that the proceedings have not been instituted *bonâ fide*.

We are asked to discharge the accused on the authority of the decision of Beck, J., in *The King* v. *Galloway* (1909), 15 Can. Cr. Cas. 317. Assuming that case to be a correct statement of the law, it is manifest that the facts here do not entitle the accused to his discharge. It is obvious that this Court cannot try the accused at all, and to discharge him in this case would be to try him on his own testimony alone without giving the prosecution any chance of producing evidence. His own bald statement

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that he is informed and verily believes that his arrest is inspired by malice and that the proceedings have not been instituted *bonâ fide* is not supported by any facts from which such an inference can properly be drawn and the application for these reasons would fail assuming *The King* v. *Galloway* to be correctly decided.

The return shews a good cause of detainer and there is nothing to shew any defect of jurisdiction.

I am not prepared without further consideration to accept all that Beck, J., has said in the *Galloway* case, 15 Can. Cr. Cas. 317, and on the other hand I do not wish to be understood as saying that in no case can this Court interfere where a warrant has been issued outside this Province and executed here. It is sufficient to say that this application must fail whether the *Galloway* case can or cannot be supported.

The application will be dismissed.

Russell, J.

RUSSELL, J.:—I concur with Mr. Justice Ritchie.

Ritchie, E. J.

RITCHIE, E.J.:—A warrant good on its face was issued by a Police Magistrate at Ottawa in the Province of Ontario authorising the apprehension of Luciano.

Sec. 662 of the Cr. Code is as follows:—

662. If the person against whom any warrant has been issued cannot be found within the jurisdiction of the justice by whom the same was issued, but is or is suspected to be in any other part of Canada, any justice within whose jurisdiction he is or is suspected to be, upon proof being made on oath or affirmation of the handwriting of the justice who issued the same, shall make an endorsement on the warrant, signed with his name, authorising the execution thereof within his jurisdiction. 2. Such endorsement shall be sufficient authority to the person bringing such warrant, and to all other persons to whom the same was originally directed, and also to all constables of the territorial division where the warrant has been so indorsed, to execute the same therein and to carry the person against whom the warrant issued when apprehended, before the justice who issued the warrant, or before some other justice for the same territorial division.

The warrant was duly indorsed by a stipendiary magistrate of the City of Halifax and Luciano was arrested thereunder. The indorsement having been made as provided by the statute there is absolute statutory authority for arresting Luciano and carrying him before the justice who issued the warrant. When the statute says "such indorsement shall be sufficient authority" I think there is an end of the question. An affidavit of Luciano's is filed setting out facts which he might properly raise by way of defence to the charge and he also swears that he believes that his

arrest has been inspired by malice and that the proceedings are not *bonâ fide*. On this affidavit counsel contended for the discharge of Luciano on *habeas corpus*.

In my opinion anything that may be alleged by way of defence is for the magistrate and Courts in Ontario and not for this Court. With a warrant good on its face, and an indorsement in compliance with the statute I think there is only one course for this Court and that is to refuse the application.

Ritchie, E. J.

Application refused.

JONES v. SHAW.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 23, 1920.

CONTRACTS (§ V C—390)—WAGES—UNCONSCIONABLE BARGAIN—GUARDIAN—WARD OF LOW INTELLIGENCE—RESCISSION—ORDER FOR REASONABLE ALLOWANCE FOR WORK—STATUTE OF LIMITATIONS.

An unconscionable bargain as to wages made by an employer, who really stands in the position of guardian, with his ward, who is of low mentality and intelligence and uneducated, will be set aside by the Court and a reasonable wage allowed covering the periods of employment. The contract being one of simple debt is within the Statute of Limitations and can only be set aside as to that part which is not barred.

APPEAL by defendant from the trial judgment in an action brought to recover a reasonable wage during a period of employment. Affirmed. Statement.

J. F. Bryant, for appellant; *S. R. Curtin*, for respondent.

HAULTAIN, C.J.S.:—I agree that the appeal and cross-appeal should both be dismissed with costs. Haultain, C.J.S.

NEWLANDS, J.A.:—The facts in this case are stated in my brother Elwood's judgment. I agree with the result he has arrived at, but for a different reason. I do not see that a contract, which is set aside on the ground that it is unconscionable, should be binding for the term for which it would be barred under the Statute of Limitations. If the contract is voidable because undue influence has been used by one of the parties, it should be set aside not only for the term which is not barred by the Statute of Limitations, but *in toto*. In this case, the parties were originally in the position of guardian and ward, or, rather, the defendant was in *loco parentis* to the plaintiff, and, on account of his mentality, this position was never changed. In such a case I do not think the Statute of Limitations has any application. Newlands, J.A.

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I am of the opinion, therefore, that the contract last made between the parties should be set aside, and plaintiff's wages fixed on a *quantum meruit*. The amount allowed by the trial Judge, I think, is sufficient to compensate the plaintiff for his work on that basis, and I would therefore dismiss the appeal with costs.

LAMONT, J.A., concurs with Newlands, J.A.

ELWOOD, J.A.:—The respondent, on May 10, 1899, entered the service of the appellant, who was a farmer, under a contract made with the agent for Dr. Barnardo's Homes, by which the appellant engaged the respondent, then a boy 11 years of age, for a period of 5 years, ending April 1, 1904. For such services the respondent was to receive his board, lodging, clothing, washing and necessaries and the sum of $100, at the expiration of said period. The respondent remained in the service of the appellant after the expiration of said period until February 3, 1920, under agreements made from time to time, by which the respondent was to be paid as follows: For the first 5 years after said first period, $500; for each of the next 3 years, $150; and for each subsequent year, $200. With the exception of the $100 to be paid under the contract with the agent for Dr. Barnardo's Homes, and the sum of $200 hereinafter referred to, no portion of the respondent's wages were ever paid and no demand was ever made for said wages. On or about March 18, 1919, it was arranged between the appellant and respondent that the appellant should, on behalf of the respondent, apply to the Canadian Government for the purchase of a deferred annuity of $484.03, to be payable in equal quarterly instalments; the first payment of annuity to be made 25 years after the date of the first payment of premiums, and the premiums of said annuity to be at a yearly rate of $200 for 10 years. The appellant paid the initial payment of $200, and agreed in the application to make the remaining payments. Subsequently it was agreed between the appellant and the respondent that the balance of the wages coming to the respondent was $2,350, which would be in accordance with the various agreements with regard to wages above referred to.

This action was brought, *inter alia*, for a reasonable wage and interest thereon covering the said periods of employment.

The trial Judge gave judgment for the plaintiff for a balance of $3,908.33, for the last 6 years of the period of employment at what, on the evidence, he concluded was a reasonable wage, and for the

periods preceding the said 6 years at the various rates agreed upon between the parties and set forth above. In arriving at said sum of $3,908.38, the sum of $200 paid to the Dominion Government was taken into consideration. From this judgment the appellant has appealed, claiming that the trial Judge should have found that the total amount due to the respondent was the sum of $2,350, being the wages agreed upon, less the sum of $200 paid; that the trial Judge should have held that all of the wages prior to the last 6-year period were barred by the Statute of Limitations.

In giving judgment for the respondent for the last 6 years of hiring, the trial Judge held that the contract entered into between the parties was an unconscionable one. The evidence shewed that, from the time that the respondent came to live with the appellant, the respondent had practically never left the appellant's home, except for an occasional visit to Regina; that the respondent was much below the average in intelligence, and that the appellant in making an agreement as to wages with the respondent, took advantage of the want of intelligence of the respondent and of the fact that the respondent had never gone to school, and was, except for a very little instruction which he received at the home of the appellant, practically uneducated, and had no opportunity of arriving at a conclusion as to what would be a fair wage.

I am of the opinion that the trial Judge was correct in coming to the conclusion that the bargain was an unconscionable one, and that it was only on account of the relationship of the parties and the want of intelligence and education of the respondent that the bargain was entered into.

So far as the amount allowed is concerned, I am of the opinion that the payment made to the Dominion Government prevented the claim from being barred by the Statute of Limitations. At the time that payment was made, it was made on account of the indebtedness then owing by the plaintiff to the respondent, and which was arrived at by figuring the wages at the rate previously agreed upon between the appellant and the respondent, and, with the exception of the last 6 years of the hiring, this sum as agreed upon was exactly the sum allowed by the trial Judge.

It was urged on behalf of the appellant that the appellant should be credited with the whole amount of the premiums which

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he agreed to pay to the Dominion Government in the application for the annuity. I do not understand that there is any liability on the part of the appellant with regard to the premiums that he agreed to pay, and therefore, in my opinion, the appellant is not entitled to credit for these deferred premiums. The bargain that was entered into, that the wages should be applied in payment of these premiums was an unconscionable one, and was so held by the trial Judge, and I would not disturb that finding.

There was a cross-appeal by the respondent, which contended that not only should he receive a reasonable wage for the last 6 years of the employment, but that he should receive a reasonable wage for the preceding years, irrespective of the bargain between the parties. It was urged for the respondent that the appellant stood in a fiduciary relationship towards the respondent, and that the claim could not therefore be barred by the statute.

Without expressing any decided opinion on the question as to whether or not there was a fiduciary relationship as to the wages which were agreed between the parties to be paid, and I incline very strongly to the opinion that there was no such relationship—that the relationship as to these wages was simply that of debtor and creditor—I am very strongly of the opinion that, when it is sought to have the Court, in effect, make a new bargain between the parties and fix the amount of the remuneration to be paid to the respondent irrespective of the bargain between the parties, no relationship existed which could take, outside of the Statute of Limitations, the amount so fixed by the Court.

I do not think it could be successfully urged that the appellant could be successfully prosecuted for misappropriation of trust funds.

In *Soar* v. *Ashwell*, [1893] 2 Q.B. 390, at 397, Bowen, L.J., in discussing the position of a person occupying a fiduciary relationship, says:—

> His possession of such property is never in virtue of any right of his own, but is coloured from the first by the trust and confidence in virtue of which he received it.

In the case at Bar, the wages payable under the contract between the parties were never received by the appellant from any third person, or as the proceeds of any property belonging to the respondent, but always constituted a debt from the appellant to

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the respondent. Much less can it be successfully contended that the wages sought to be payable—not under an agreement between the parties, but by virtue of a new contract made by the Court—are held by the appellant as a trustee, or under any trust, express or implied. They would be simply a debt, and subject to all of the limitations surrounding a claim for debt.

It was further contended by the respondent by way of cross-appeal that the respondent was entitled to interest.

In *Last West Lumber Co.* v. *Haddad* (1915), 25 D.L.R. 529, 8 S.L.R. 407, my brother Lamont, who delivered the judgment of the Court, quoted as being the law what was laid down by the Privy Council in *Toronto R. Co.* v. *Toronto Corp.*, [1906] A.C. 117, at 121, as follows (see 25 D.L.R., at 533):—

> The result, therefore, seems to be that in all cases where, in the opinion of the Court, the payment of a just debt has been improperly withheld, and it seems to be fair and equitable that the party in default should make compensation by payment of interest, it is incumbent upon the Court to allow interest for such time and at such rate as the Court may think right.

It will be observed that it is there held that interest will not be allowed merely in a case where a just debt has been withheld, but in a case where it has been improperly withheld, and it therefore seems to me that, in order to entitle the respondent to interest, we must come to the conclusion that the payment of the wages was improperly withheld. That surely does not mean that if it was overdue it was improperly withheld. The evidence clearly shews that there was never any demand for payment; that the respondent acquiesced in the appellant retaining the money; that if a demand had been made the appellant would have been willing at any time to have paid the wages. There was no fraud on the part of the appellant in retaining the wages, and he retained them because he felt that it was in the best interest of the respondent that he should retain them; that if the respondent obtained the money he would probably spend it foolishly. I think, under the circumstances, therefore, of this case, that the money was not improperly withheld, and that there should be no allowance made to the respondent for interest.

I would, therefore, dismiss both the appeal and the cross-appeal with costs. *Appeal dismissed.*

N. S.

S. C.

MILLER v. MILLER.

Nova Scotia Supreme Court, Russell, Longley and Chisholm, JJ. December 18, 1920.

VENUE (§ II A—10)—CHANGE OF—CONDITIONS ON WHICH ALLOWED—GOOD DEFENCE.

One of the conditions on which a defendant will be granted a change of venue under Order XXXIV. R. 2 (Nova Scotia) is that he shall satisfy the Court that he has a good defence to the case on the merits, and where this is not shewn the application will be refused.

Statement. APPEAL from the refusal of Ritchie, E.J., to grant defendants' application for a change of venue. Affirmed.

O. S. Miller, for appellant; *A. Whitman*, K.C., for respondent.

Russell, J. RUSSELL, J.:—No answer was made on the argument of the appeals in these cases to the reasons assigned by the Judge for the order refusing to change the venue, or to refusing security for costs in the case of Leander Miller. But a ground was taken for changing the venue which as I understand the defendants' counsel did not urge before the Judge at Chambers. It is based on O. XXXIV. R. 2, and is applicable to the case of a plaintiff out of the Province which is this case. One of the conditions however on which the granting of the application in such a case depends, is that the defendant shall satisfy the Court or Judge that he has a good defence to the action on the merits. No serious attempt has been made to satisfy the Court on this point. The affidavits so far as they have been produced tend to produce an impression that there is no defence to the action. The appeal will therefore be dismissed with costs.

Longley, J. LONGLEY, J.:—An application was made to Ritchie, E.J., for a change of venue in this case, and he filed a judgment to the effect that no affidavit had been made that this application was not for the purpose of delay, and therefore it could not be granted. Since then, however, another statute has been developed which was not brought to the notice of Ritchie, E.J., to the effect that a party may obtain an order for changing the venue when he has disclosed that there is sufficient defence to the action. I do not know whether in this case the defendant has disclosed sufficient or not, but at all events the plaintiff is going to trial and insists upon going to trial at once. Now the fact is that the defendants have four or five witnesses all of whom reside at or near Bridgetown in the county of Annapolis. The plaintiff resides out of the Province altogether and if she came to Nova Scotia she might as

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well go to Bridgetown as to Halifax. Under these circumstances it is beyond all doubt the Court would order a change of venue. It is where the land is situated, where all the parties reside; there is no balance of it at all; it is a question all on one side so far as the balance of convenience in trying the case is concerned. At one stage I believe that Mr. Whitman, acting on behalf of the plaintiff, was about to offer to pay the costs of the defendants if they would attend in Halifax, but when pressed upon that point he declined distinctly to give any assurance. Now, of course, if the defendants' plea is not worthy of consideration I don't see how the plaintiff will insist upon going to trial upon it; if it is not satisfactory to establish he has a defence the motion might not succeed, but I regard it as an unfortunate circumstance that such a motion should have been received and should have been treated as such.

Chisholm, J.

CHISHOLM, J.:—I concur with Russell, J.

Appeal dismissed.

FILLION v. VALLIERE.

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C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 23, 1920.

SALE (§ III C—70)—OF CHATTELS—FRAUDULENT MISREPRESENTATION—RESCISSION.

A bill of sale of certain horses and cattle executed by the plaintiff in favour of the defendants was ordered to be set aside and delivery of the horses and cattle and their increase ordered and also damages for being deprived of the use of the said horses and cattle on the ground that the bill of sale was executed through the fraudulent misrepresentation of the defendant.

[*The Winkfield*, [1902] P. 42; *Compton* v. *Allward* (1912), 1 D.L.R. 107, 22 Man. L.R. 92; *Cotton Co. Ltd.* v. *Coast Quarries Ltd.* (1913), 11 D.L.R. 219, referred to.]

Statement.

APPEAL by defendant from the trial judgment in an action brought to set aside a bill of sale of certain horses and cattle. Affirmed with a variation.

T. D. Brown, K.C., and *W. D. Graham*, for appellant.

P. H. Gordon, for respondent.

The judgment of the Court was delivered by

Elwood, J.A.

ELWOOD, J.A.:—This is an action which was brought to have set aside the bill of sale of certain horses and cattle executed by the respondent in favour of the appellant, and to have delivered to the respondent said horses and cattle and the increase thereof,

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or their value and damages, on the ground that said bill of sale was executed by the respondent through the fraudulent misrepresentation of the appellant to the respondent.

The trial Judge gave judgment for the respondent, declaring the bill of sale null and void and ordering delivery to the respondent of said horses and cattle and their increase thereof, or judgment for their value, and also judgment for damages for being deprived of the use of said horses and cattle. Said damages were at the rate of 5% per annum from March 20, 1918, being the date of the bill of sale, on the valuation fixed by the trial Judge at $2,075. From this judgment the appellant has appealed.

There is in my opinion ample evidence to justify the conclusion that the bargain entered into between the appellant and Jean Fillion was that the appellant should convey to Jean Fillion the Quebec property of the appellant, including chattels, and should pay Jean Fillion the sum of $600, and that Jean Fillion should transfer to the appellant his land in Saskatchewan, being his homestead, on which there was a mortgage to the appellant upon which was due about $1,100, and a piece of land purchased from the C.P.R. Co., upon which was due about $1,200; and the appellant was to assume payment of both mortgage and the amount owing to the C.P.R. Co. That being so, then the representations which were made by the appellant to the respondent when he came to Saskatchewan were false and fraudulent, and it was in consequence of these false and fraudulent statements that the respondent was induced to execute the bill of sale.

It was contended on behalf of the appellant that we must look solely at the power of attorney contained in the appeal book for the bargain between the parties. I do not agree with that contention. That power of attorney was never intended to represent the bargain between the parties, but was merely a document executed by Jean Fillion authorising his father the respondent to execute a conveyance of the Saskatchewan lands, and we are quite at liberty to travel outside of that document in order to ascertain the bargain between the parties. During the argument, it was suggested by one of the members of the Court that certain correspondence which took place in March, 1918, between J. T. Leger, a solicitor at North Battleford, Saskatchewan, and Mr. Grenier, a notary in the Province of Quebec, constituted

a waiver by Jean Fillion of any right to claim the return of 7 of the horses mentioned in the bill of sale. It may be mentioned in passing that, of the animals contained in the bill of sale, 7 of the horses were the property of Jean Fillion; 2 fillies and 4 cows were the property of the respondent, and all were in the possession of the respondent. I am of the opinion that this objection which was raised by the Court is not a bar to the respondent's right to recover. The evidence shews that at the time that Jean Fillion executed the documents in Quebec which conveyed his Saskatchewan property, he was advised by a solicitor and by the notary who I think was acting as agent of appellant's solicitor, said J. T. Leger, that the execution of those documents would not prevent his taking proceedings to recover these horses, and in executing these documents, and in paying to Jean Fillion the money which was paid at the time of the execution of the documents, the parties were merely carrying out the bargain which had been previously entered into between Jean Fillion and the appellant in Quebec.

A further question raised by the Court was, that, in view of the fact that Jean Fillion was the owner of certain of the horses, the respondent would not be entitled to damages for the detention of those horses. The rights of one having a mere possessory interest in chattels as against a wrongdoer are dealt with very fully in the case of *The Winkfield*, [1902] P. 42, and it seems to me that what is held in that case is authority for the proposition that in the case at Bar the respondent would not only be entitled to a return of the animals, or their value, but would also be entitled to damages for their detention. See also *Compton* v. *Allward* (1912), 1 D.L.R. 107, 22 Man. L.R. 92, and *Cotton Co. Ltd.* v. *Coast Quarries, Ltd.* (1913), 11 D.L.R. 219.

It was contended on the part of the appellant that, in any event, the sum upon which the damages for detention are to be based is too large a sum. I think that is so. The seven horses which were the property of Jean Fillion were valued by Jean Fillion at $900. The evidence is quite clear that he was willing to sell them to the appellant for that sum. The 2 fillies are valued by the respondent at $300, and the 4 cows at $100 each; which would make a total of $1,600. So that the damages for detention instead of being 5% on $2,075, should be 5% on $1,600, and to that extent the judgment appealed from should be varied.

SASK.

C. A.

Elwood, J.A.

The main argument in this appeal was directed to points upon which the appellant has failed, and under the circumstances I would not allow any costs of the appeal to either party.

Affirmed with a variation.

N. S.

S. C.

BURBIDGE v. THE STARR MANUFACTURING Co. Ltd.

Nova Scotia Supreme Court, Russell, Longley and Chisholm, JJ. January 11, 1921.

NEGLIGENCE (§ I B—5)—DANGEROUS AGENCIES—INSUFFICIENTLY GUARDED —INJURY TO CHILD—DAMAGES.

The machinery of the defendant company was operated by water power by which a shaft contained in a wheel house was driven at a speed of something over 200 revolutions a minute. The plaintiff's son, a boy between six and eight years of age, entered the wheel house after being cautioned by a companion not to do so and his clothing was caught in the shaft, resulting in his death.

Held, affirming the judgment at the trial, that the defendant was negligent in not more effectively guarding the shaft or to exclude the children and that it was liable in damages.

[See Annotation, Duty to Trespassers, 6 D.L.R. 76.]

Statement.

APPEAL by defendant from the judgment of Ritchie, E.J., in an action to recover damages for injuries causing the death of his infant son due to the alleged defective system of maintenance and operation of defendant's manufacturing plant.

The facts of the case are fully set out in the judgments.

J. L. Ralston, K.C., for appellant.

S. Jenks, K.C., for respondent.

Russell, J.

RUSSELL, J.:—I think this case is substantially the same as the House of Lords case of *Cooke* v. *Midland Great Western R. Co.*, [1909] A.C. 229. The notice forbidding trespassers in that case seems to me to be fully equivalent to the casual efforts of the employees of the company in this case to eject children from the company's premises. The allurement was as enticing in this case as in that and the danger was much more obvious and serious. Indeed, I cannot understand how any individual owner of such premises, exposing children to the risk of fatal injury from a revolving shaft which he must have known would be passed and repassed every day by numbers of them, could under all the circumstances of this case be acquitted of a reckless disregard of human life. He would have known that the possible and indeed the probable consequences of his omission to either take efficient measures to exclude children or to spend "fifty cents" in surrounding the shaft with a sheathing such as that adopted by this company

after the accident would be that sooner or later one of them would be killed. Anyone with common sense would anticipate the possibility of a rusty shaft revolving two hundred times a minute catching the clothes of a child stooping to pass under it to and fro, and it seems to me the next thing to a miracle that the inevitable fatal accident did not occur sooner than it did.

I have examined all the cases cited by counsel at the argument subsequent to the House of Lords case and I think that those in which the plaintiff failed to recover were clearly distinguishable in essential features from the present. The case of *Latham* v. *Johnson & Nephew Ltd.*, [1913] 1 K.B. 398, bears as much resemblance to this case as a sheep does to a wolf. In the *Latham* case the "allurement" was an innocent pile of paving stones and sand, nothing intrinsically dangerous or from which accidents would be reasonably anticipated. The same may be said, though not always with so clear and strong an emphasis, of the other cases cited for the defendant.

In my opinion the appeal should be dismissed with costs.

Longley, J.

LONGLEY, J. (dissenting):—This is a question that involves the most subtle kind of intellect, and it is preceded by several cases which are like it; some have been decided for the plaintiff and some for the defendant. The nearest like it that has been decided for the plaintiff was *Cooke* v. *Midland Great Western R. Co.*, [1909] A.C. 229.

I will first give the circumstances and facts in regard to the present case. The Starr Manufacturing Co. has a large series of works operated on what was formerly known as the Shubenacadie Canal. Below the road which leads across it, Portland street, is a mill, on the east side, operated by a revolving wheel on the west side, and at the extreme foot of the hill is a little power house which one can only enter by half doors, and it is inside this house the wheel revolves. The location of the house at the foot of the hill seems to be almost the last place on earth that anyone, be it male or female, man woman or child, would think of approaching. Yet it seems on a certain day a lad, the son of the plaintiff, who was about 8 years of age, did crawl into this place, accompanied by some older boys who very conveniently stayed out. While the boy was coming out of the wheel house in the most careless manner possible, not stooping down or endeavouring

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to avoid the accident, he was caught by something in the wheel-shaft, probably a rough part of it, and twirled to his death.

The action is brought to recover damages for the boy's death from the Starr Manufacturing Co. Ritchie, E.J., who tried the case, awards the damages at $800.

It appears from the evidence in the case that boys were in the habit of passing this locality for the purpose of fishing and playing in the water and that the employees of the company were "constantly driving them off." The trial Judge finds that the machinery was attractive to the curiosity of the boy, which I think is open to some question. There was no machinery—simply a wheel turning round—and it was in a most difficult and dangerous place to get at, and it seems to me that nothing but bravado would induce any person to go there.

Cooke v. *Midland etc. Co.*, [1909] A.C. 229, decides in favour of the boy under conditions somewhat similar, and also somewhat different to the present case. In that case Lord Loreburn makes the following observation, at p. 242:—

> I must add that I think this case is very near the line. The evidence is very weak, though I cannot say there was none. It is the combination of the circumstances to which I have referred which alone enables me to acquiesce in the judgment proposed by . . . Lord Macnaghten.

In that case a variety of circumstances were combined to produce the result of negligence on the part of the defendants; but we are informed by this high authority that it is an extremely doubtful case. My opinion is that if this case were put out of the question, scarcely any question would arise in regard to the defendant's liability. On the other hand, take the case of *Hardy* v. *Central London R. Co.*, [1920] 3 K.B. 459, which seems also to be extremely in point. In that case there was a moving staircase on which persons were passing to and from a railway station by the hundreds every day. The boys in the vicinity used to make a practice of going on the staircase, and they were forbidden to do so and ordered home. Two of them on the occasion in question looked to see if the policeman was watching them, and finding he was not, ran up on the staircase and one of the boys was injured, his hand being caught in the apparatus; and an action was brought against the company. It was considered that he was a trespasser and that he was warned not to go there In this present instance the boy was a trespasser and, to use the expression

of the trial Judge, the company's employees were "constantly driving them off." I don't know why there should be a distinction made in regard to the extent of the driving off. The policeman and the men in charge of these stairs, which were open to the public freely, constantly told the boys not to go there. The employees of the Starr Co. may not have told these boys as often not to go there, but they were "constantly driving them off" and the place was most difficult to get at and an unnatural place to visit, whereas the other was the most natural thing and hundreds of people were going over it. It does not seem to me it is possible to draw any distinction between the two cases, and although I have the greatest respect for the trial Judge, and the care with which the case was tried, I am compelled to think that it comes within the category of cases in which the defendants are not liable. He was a trespasser, he had received no license to go there, he never had been led to suppose that any persons would be allowed there, and he was "constantly driven off;" and I think that the accident, while most unfortunate, under all the circumstances was the result of sheer bravado on the part of the boy and for which the company is not responsible.

Chisholm, J.

CHISHOLM, J.:—I have come to the conclusion that this appeal ought to be dismissed. I see no reason for setting aside the findings of fact of the trial Judge, who had the advantage of a view of the locus, and I adopt his findings and the reasoning by which he has arrived at his decision. In my opinion the defendant was negligent in not taking more effective steps to prevent young children from invading its premises, which were attractive to young children, and also in not enclosing the revolving shaft which was in itself attractive to young children and dangerous. Lord Collins, in *Cooke* v. *Midland etc. Co.*, [1909] A.C. 229, speaks of the special considerations applicable in the case of young children as distinguished from adults; and I think the present case comes well within the authority of that case, rather than within the authority of later cases in which Judges have held the *Cooke* case not to apply.

I would dismiss the appeal with costs.

Appeal dismissed.

CAN.

Ex. C.

HALEY v. S.S. "COMOX."

Exchequer Court of Canada, British Columbia Admiralty District, Martin, L.J.A. August 9, 1920.

SHIPPING (§ I—1)—ACTION FOR NECESSARIES—PART OF REGISTRY—EVIDENCE ADMITTED TO CONTRADICT—TRUE OWNER—DOMICILE—JURISDICTION OF COURT—24 VICT., 1861, CH. 10, SEC. 5—53-54 VICT., 1890, CH. 27.

The home port of a vessel is where its true owner is domiciled, even though it may be registered elsewhere, and evidence may be admitted to contradict the register and shew the true owner and home port.

If it is shewn to be a foreign vessel, the Court has jurisdiction under the Admiralty Courts Act, sec. 5.

[*The "Polzeath,"* [1916] P. 241; *The "St. Tudno,"* [1916] P. 291; *The "Proton,"* [1918] A.C. 578; *The "Hamborn,"* [1918] P. 19, referred to.]

Statement.

The facts of the case are as follows:—

The plaintiff sued for necessaries supplied in the shape of material and labour in refitting the defendants' ship at New Westminster in the Province of British Columbia. The defendants objected to the jurisdiction of the Court and alleged that the ship belonged to the port of Vancouver, on the ground that she was owned by the Henrietta Ship Co., having its head office at the port of Vancouver, but the evidence shewed that of a thousand shares of stock which comprised the capital stock of the Henrietta Ship Co., 995 shares were owned by Captain Woodside who lived and was domiciled in San Francisco.

Captain Woodside's wife and son, the other directors of the company, lived and were domiciled at San Francisco, and it was argued by counsel for the plaintiff, Mr. Mayers, that therefore the ship was really owned in San Francisco, and was a foreign ship, and that, in consequence, sec. 5 of the Admiralty Courts Act, 1861, 24 Vict., applied.

The following cases were cited in support of the contention that the Court should look behind the register of the ship to ascertain the true ownership:—

The "Polzeath," [1916] P. 241; *The "St. Tudno,"* [1916] P. 291; *The "Proton,"* [1918] A.C. 578; *The "Hamborn,"* [1918] P. 19.

By the Admiralty Court Act, 1861, 24 Vict., ch. 10, sec. 5:—

the High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shewn to the satisfaction of the Court that at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales. . . .

By the Colonial Courts of Admiralty Act, 53-54 Vict., 1890, ch. 27, the word "Canada" is substituted for "England and Wales."

E. C. Mayers, and *G. L. Fraser*, for plaintiffs.

C. B. Macneill, K.C., for defendant.

MARTIN, L.J.A.:—This is an action claiming $19,258.29 for necessaries supplied in the shape of material and labour in refitting the defendant ship at New Westminster in this Province. An objection is taken to the jurisdiction founded on the submission that the ship belongs to the port of Vancouver and that she is owned by the Henrietta Ship Co., a Canadian company with head office at that port, but I have no hesitation whatever in finding upon the evidence that whatever the documents may pretend to shew, her home port is in San Francisco and her true owner is Alexander Woodside, domiciled there.

Part of the work was done under a written contract dated February 12, 1920, for $13,100, and the balance under a later verbal one: the submission that the plaintiffs' right to recover was dependent upon the owner being able to obtain classification from the British Corporation or otherwise is not supported. I find as a whole that the work done under both contracts was a fair job of its class, and the prices charged were reasonable, which leaves only a few items that require particular notice.

The main one relates to the engine, etc., under this clause of the written contract:—

> All propelling machinery to be installed complete with auxiliaries and pumps, also cargo winches. The above items to be supplied by the owners ready to install. It is assumed that the present tail shaft and propeller will be used.

It is submitted that under this clause the plaintiffs were required to supply the engine bed and therefore a large number of items in their bill covering the considerable cost of that work, about $5,000, should be disallowed. In Murray's New English Dictionary, vol. 5, p. 347, I find these definitions:—

> Install (2) To place (an apparatus, a system of ventilation, lighting, heating, or the like) in position for service or use:
>
> . . . .
>
> Installation (2) The action of setting up or fixing in position for service or use (machinery, apparatus, or the like); a mechanical apparatus set up or put in position for use; *spec.* used to include all the necessary plant, materials and work required to equip rooms or buildings with electric light.

The main idea of "installing" thus conveyed is to place or set up in position for use, and though in certain circumstances and some trades it may have a special or wider meaning, yet there is

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nothing in the circumstances of this case to so enlarge it. I am of the opinion that it was and must have been in the contemplation of the parties that the new engine was to be placed in position upon a bed sufficient for that purpose already in "place" in the ship. The statement of the witness Lockhart, marine engineer, on cross-examination, that it meant the plaintiffs were to get the engine, auxiliaries and pumps from the owner "ready to install" and then couple them up for sea in the ship's engine room seems the reasonable view to take of the situation, and it is, moreover, supported by the correspondence between the parties, even if the blue print, Ex. 38, is to be discarded in this connection, as is rightly, I think, submitted by defendant's counsel, it being merely an over-all dimension plan, as explained by the witness Akhurst. Therefore said items covering the cost of the engine bed will be allowed.

As to certain "hardwood" items, it is clear from the evidence that unless otherwise specified by name local shipwrights include Douglas fir under that category and that wood was in fact used, therefore the items are allowed.

With respect to the two wing tanks for oil, that question has occasioned me the most difficulty but after a careful consideration of the evidence and the circumstances I have reached the conclusion that the owner, Woodside, has so acted that he must be held to have accepted them after full knowledge of the result of the test, and their capacity, if the plaintiff Christian's evidence is to be believed, and I prefer it to Woodside's; the latter did not insist upon larger tanks being substituted, as the plaintiffs offered to do, because they would reduce the cargo space, and, consequently, earning power, and it is difficult to understand if his objection were so serious as now put forward, why he nevertheless put to sea without any further alterations to them: as they are now with a capacity of 3,800 gallons, instead of the 5,000 as specified for, they still give a 19 day voyage range on the engine consumption of 200 gallons per day, which he doubtless agreed to regard as sufficient; furthermore, his representative, Wallace, agreed to test them though he knew their capacity was short and that they were not ¼" plate and did not order them to be taken out after the test, though he had the power to do so, simply because it would have delayed the vessel in sailing. I am of the opinion, on the whole aspect of this item, that it is too late for the owner to successfully contest it.

There are five items, however, which the owner is entitled to have disallowed, viz., those charged for the time occupied in purchasing materials, under these headings in the monthly "Statement of Wages":—

J. F. Haley, looking after extra materials, work	$125.00
Overhead (April)	83.33
Do. (May)	83.22
Do. (June 1st half)	125.00
Do. (June 2nd half)	125.00
	$541.55

The verbal contract was that the plaintiffs were to purchase the material and supply the labour and do the work on a percentage of 20% of the cost, and it is submitted that the time occupied in purchasing is part of the overhead cost of labour and that as in this case the plaintiffs did not include their office expenses in "overhead" they are entitled to exclude non-productive work outside the office, that is, instead of including in "overhead" the office administrative expenses they excluded them and therefore should be allowed for them as time occupied in the "labour" of purchasing. But I am of opinion that, while it may be the plaintiffs made an error in excluding their general expenses from "overhead" and estimated too low as pointed out by witness Lockhart, yet, nevertheless, that was the contract they made and if they made a mistake in it they must bear the loss, so consequently the said 5 items will be disallowed. Judgment will be entered in favour of the plaintiffs for all the other items.

With respect to the counter claim: it has not been supported by evidence and must fail. While the telegram of May 26, from the defendants to Woodside concerning the arrival of the engine, beginning "Expect engine, etc.," was an unfortunate one, yet an ordinarily prudent man would not treat such expectations of the arrival of an engine, especially in these days of delayed transportation, with much confidence; the engine, as a matter of fact, did not arrive in the plaintiff's yard until June 8, and after that time I am unable to find that there was any undue delay, bearing in mind the fact that under the verbal contract additional and collateral work was being continually ordered by the owner's agent,

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Wallace, even up to July 3, two days before sailing. It is therefore impossible to hold that the owner really suffered any loss or damage on this head.

The whole result is that judgment should be entered for the plaintiffs as above indicated, and the costs will follow the event.

Judgment accordingly.

N. S.
S. C.

THE KING v. FLAVIN.

Nova Scotia Supreme Court, Harris, C.J., Russell and Longley, JJ., Ritchie, E.J. and Chisholm, J. January 11, 1921.

JUSTICE OF THE PEACE (§ III—12)—ILLEGAL ARREST—CRIME WITHIN JURISDICTION OF MAGISTRATE—JURISDICTION TO TRY ACCUSED.

Although an arrest is illegal, when the person arrested is once before the magistrate, all that is necessary to give the magistrate jurisdiction is to shew that the crime with which the accused is charged is within the jurisdiction of the magistrate.

[*The Queen* v. *Walsh* (1897), 29 N.S.R. 521; *The Queen* v. *Hughes* (1879), 4 Q.B.D. 614, followed; *Rex* v. *Pollard* (1917), 39 D.L.R. 111, distinguished.]

Statement.

MOTION to quash a conviction for unlawfully keeping intoxicating liquor for sale, the conviction having been removed into this Court by *certiorari*.

James Terrell, K.C., for defendant.

W. J. O'Hearn, K.C., for prosecutor.

The judgment of the Court was delivered by

Ritchie, E. J.

RITCHIE, E.J.:—The defendant was convicted before a stipendiary magistrate of unlawfully keeping intoxicating liquor for sale. The conviction has been removed into this Court by *certiorari* and a motion to quash is made. The point was made that Flavin was illegally arrested and brought before the magistrate and that consequently the subsequent adjudication was void for want of jurisdiction.

I agree that the arrest was illegal, but am of opinion that the conviction is not thereby invalidated. *Rex* v. *Pollard* (1917), 39 D.L.R. 111, 29 Can. Cr. Cas. 35, 13 Alta. L.R. 157, is authority for Mr. Terrell's contention that the arrest was illegal, and that therefore the magistrate had no jurisdiction. If the *Pollard* case was sound it would not avail as it is distinguishable because in that case the objection was taken before the magistrate. In this case it was waived by conduct. Counsel for Flavin made no

objection, waived the reading of the information, and pleaded not guilty; submitted to the jurisdiction and went into his defence on the merits.

In *Dixon* v. *Wells* (1890), 25 Q.B.D. 249, at 255, Lord Coleridge, C.J., said:

> The document called a summons in this case was, in my opinion, no summons at all. But the accused was before the magistrate. Two distinctions, however, separate this case from those cited. First, in all the cases to which our attention has been called there was no protest made by the person who appeared, and the Courts said, applying a well-known rule of law expounded centuries ago, that faults of procedure may generally be waived by the person affected by them. They are mere irregularities, and if one who may insist on them, waives them, submits to the Judge, and takes his trial, it is afterwards too late for him to question the jurisdiction which he might have questioned at the time.

It is of no avail to cite *Rex* v. *Pollard*, 39 D.L.R. 111, 29 Can. Cr. Cas. 35, 13 Alta. L.R. 157, when it is in direct conflict with *The Queen* v. *Hughes* (1879), 4 Q.B.D. 614. There was no doubt about the illegality of the arrest in that case. Hawkins, J., said, 4 Q.B.D. at 622:

> I am of opinion that the conviction was right and ought to be affirmed. In arriving at this opinion I have assumed as a fact, from the case as stated, that Stanley was arrested . . . upon as illegal a warrant as ever was issued.

The case was very fully argued, first before five Judges, and then re-argued before ten very able Judges, when the Court stood nine to one in affirming the conviction. In *The Queen* v. *Hughes*, as in this case, no objection to the jurisdiction was taken at the trial, but the *ratio decidendi* is that if the accused is present and the magistrate has jurisdiction over the offence a protest is of no avail. The effect of the decision in *The Queen* v. *Hughes* is stated by Lord Coleridge, C.J., in *Dixon* v. *Wells*, 25 Q.B.D. at 255, as follows: "The case establishes the proposition that when a person is before justices who have jurisdiction to try the case they need not inquire how he came there but may try it."

And in *In re Maltby* (1881), 7 Q.B.D. 18, at 28, Pollock, B., speaking of the word "charge" said:

> Only 2 years ago the meaning of this word underwent much consideration in the Court of Criminal Appeal before a number of Judges, and from the judgment of my brother Hawkins in *The Queen* v. *Hughes* it may be seen that in many cases the word "charge" in no way involves a written information, and that it is sufficient to shew that a person is brought before the

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magistrates somehow or other and that all that is necessary to give the magistrate jurisdiction is to shew, the person being once before him, that the crime with which the accused is charged is within the jurisdiction of the magistrate.

Other technical objections were taken but they are without substance. I therefore do not discuss them. If I could find a legal ground which would justify me in quashing this conviction I would be quite willing to avail myself of it, because I have grave doubt as to whether there was any evidence on which to base the conviction, but I am precluded by *The Queen* v. *Walsh* (1897), 29 N.S.R. 521, from dealing with this question.

The motion must be refused with costs.

Motion refused.

SASK.

C. A.

WALKER v. SHARPE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. January 21, 1921.

DAMAGES (§ III K—217)—AGREEMENT TO THRESH CROP—BREACH—INJURY TO, BY WILD DUCKS AND WEATHER—COMPENSATION.

On the dissolution of a partnership in a threshing outfit, the defendant agreed to thresh plaintiff's crop after he had threshed half of his own. Owing to failure of the defendant to fulfil his contract the plaintiff had to hire another machine to do his threshing and on account of the delay his crop was damaged by wild ducks and weather conditions.

Newlands and Elwood, JJ.A., affirming the decision of the trial Judge, held that the plaintiff should be allowed as damages the amount he paid for the other machine and also the loss occasioned by the destruction of the crop by ducks and the weather conditions.

Haultain and Lamont, JJ.A., held that the destruction of the crop, by ducks, could not have been in the contemplation of the parties at the time the contract was entered into and was too remote and that plaintiff was only entitled to the additional cost of threshing owing to defendant's breach of contract.

Statement.

APPEAL by defendant from the trial judgment in an action for damages for breach of contract to thresh a crop of grain. Affirmed by an equally divided Court.

J. F. Frame, K.C., and *E. L. McLaren*, for appellant.

W. A. Doherty, for respondents.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurs with Lamont, J.A.

Newlands, J.A.

NEWLANDS, J.A.:—The plaintiffs and defendant were in partnership in a threshing outfit. In 1916 they agreed to dissolve partnership, defendant paying plaintiffs $1,100, and doing plaintiffs' threshing for the season 1917 after he had threshed half of his own crop.

The plaintiffs bring this action for damages for breach of defendant's agreement to thresh their crop in 1917.

The trial Judge found the agreement to be as above stated, with which finding I agree, and he found that a large portion of plaintiffs' crop had been destroyed by snow and ducks while they were waiting for defendant to fulfil his contract, and he allowed them as damages the amount they paid for another machine to thresh and the loss occasioned by the destruction of the crop by ducks and the weather conditions.

The only question in this case is as to the damages allowed for loss of crop. Although there is evidence that plaintiffs could have got another machine to do their threshing, the evidence shews that defendant put them off from time to time by promising to come as soon as he had finished certain work.

The decision in *Smeed* v. *Foord* (1859), 1 El. & El. 602, 120 E.R. 1035, applies directly to this case. Lord Campbell, C.J., at pp. 613-615, says:

> The rule upon this subject is to be found in *Hadley* v. *Baxendale* (1854), 9 Exch. 341, 156 E.R. 145, where it is laid down, in accordance with the Code Napoléon, with Pothier, with Chancellor Kent, and with all other authorities, that the damages which one party to a contract ought to receive, in respect of a breach of it by the other, are such as either arise naturally, that is, in the usual course of things, from the breach itself, or such as may reasonably be supposed to have been contemplated by the parties, when making the contract, as the probable result of the breach. I do not say how far this rule was applicable to the particular circumstances of that case; but, as an abstract rule of law, I think it is correct. Applying it to the facts of the present case, we must hold that the plaintiff is entitled to recover all losses which naturally arose, or which were contemplated by him and the defendant as likely to arise, from the delay in the delivery of the machine. Now the plaintiff, a large farmer, known to the defendant to be such, wanted a machine to thresh his wheat: the defendant agreed to supply him with one on August 14, 1856, about the time when wheat would be expected to be ripe. The defendant knew that the plaintiff required the machine for the purpose of threshing wheat in the field. Then, was it not contemplated by the parties, that if the machine was not delivered by the time fixed, damage to the wheat would, in all probability, be the result; particularly in such a variable climate as this? Owing to the non-delivery of the machine, the wheat was stacked, and afterwards damaged by the rain which ensued. This injury, and the loss and expense which it involved, were the natural results of the defendant's delay. They were also results which the parties must have foreseen. But it is said that the plaintiff ought to have hired or borrowed another machine. Had it been proved that he could have done so, the case might have been different. No such evidence, however, was given. On the other hand, there was evidence that the plaintiff did apply for a machine in one quarter, but in vain. Moreover, the defendant led him on from day to day to suppose that the machine which he had ordered would be speedily delivered to him. The plaintiff, therefore, being in no default, I think that he is entitled to

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substantial damages in respect of all those items of loss which resulted from the fall of rain. He is not, however, in my opinion, entitled to any damages in respect of the fall in the market price of the wheat; for that could not have been in the contemplation of the parties when the contract was made; nor can it be said to have been in any way the natural result of the defendant's breach of contract. For aught that the parties knew, or that might naturally have happened, the price might have risen instead of fallen.

On the question as to whether plaintiffs should have hired another machine, Wightman, J., says (1 El. & El. at 615):

If there had been an actual refusal by the defendant to deliver the machine, he might have had a better case; for then it would have been the plaintiff's own fault if he had not made every effort to procure another. But the defendant, by continually promising the plaintiff that the machine was on the point of arriving, prevented the latter from taking any further steps.

And Hill, J., says (1 El. & El. 617):

At first, I thought that the damages were to be restricted to the cost of hiring another machine on August 14. But it appears that the continued assurances of the defendant that the machine was shortly coming, precluded the plaintiff from hiring or borrowing another.

I am therefore of the opinion that the trial Judge was right in assessing the damages he did, and would dismiss the appeal with costs.

Lamont, J.A.

LAMONT, J.A.:—In the fall or winter of 1916, the plaintiffs and defendant, who had been in partnership in a threshing outfit, agreed to dissolve partnership. The terms of the partnership were that the defendant should take the outfit, pay the plaintiffs the sum of $1,100, and do their threshing in the fall of 1917. The defendant took the outfit, paid the $1,100, but neglected to thresh for the plaintiffs in 1917; as a result of which, the plaintiffs were obliged to hire another machine. They have brought this action to recover the costs of obtaining the other machine, and, in addition, thereto, to recover damages for loss sustained through the crop being in part destroyed by wild ducks while they were waiting for the defendant's machine. The trial Judge awarded them $284.50, being the additional cost of threshing owing to the defendant's breach of contract, and $636 for damage done to the crop by the ducks and the weather. The defendant now appeals.

It having been found on disputed evidence that the defendant agreed to do the plaintiffs' threshing in 1917, the award of $284, the expenses of getting this grain threshed by another, must be affirmed. The correctness of the award of $636 for destruction of crop is attacked on the ground that such damage was not proven, and that, in any event, it is too remote.

The principle upon which damages for breach of contract are determined was laid down by this Court in *Rivers* v. *White & Sons Co.* (1919), 46 D.L.R. 145, at 147, 12 S.L.R. 366, as follows:

> The measure of damages for breach of contract is determined by the knowledge, actual or constructive, which the parties had of the probable consequences of the breach. If they contemplated or ought to have contemplated, the consequences which have proximately followed, they are liable to pay damages accordingly. In determining what consequences the parties may be reasonably supposed to have contemplated, the knowledge of the circumstances under which the contract was made must be, not merely an important, but the decisive consideration.

In *Griffin* v. *Colver* (1858), 16 N.Y. Rep. 489, at 494, Selden, J., following the rule laid down in *Hadley* v. *Baxendale*, 9 Exch. 341, 156 E.R. 145, said:

> The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation.

The question then which we have before us in this case is: Did the parties at the time the contract was entered into contemplate, or should they be held to have contemplated, that a portion of the plaintiffs' crop would be destroyed by wild ducks in case the defendant failed to keep his contract to thresh for the plaintiffs?

As to the cause of the loss, the plaintiffs gave the following testimony:

> Q. What happened to the grain? A. Well, there were the ducks that fall, they were very bad, and a heavy snow-storm. The grain was cut in a seasonable time and left in stooks till 10th November which is very late, and the ducks and the storm made a big loss. Q. What about the ducks through that part of the country, Mr. Walker? A. They are always very bad in that district. It is close to the big meadows, and they come there in their thousands.

To succeed for the damage done by the ducks, it must be shewn that the defendant had either actual or constructive notice that a breach of his contract would naturally be followed by the loss of a portion of the plaintiffs' crop of oats through its being destroyed by the wild ducks. This imports notice on his part that ducks habitually destroyed the plaintiffs' grain, and that the plaintiffs would probably leave their grain in stook until November 10 before getting another machine, notwithstanding the fact, as the plaintiffs admit, that they could have had two other machines in the early part of the season. The damage done by the ducks was a continuous damage until November 10.

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That the defendant had any actual notice that the ducks would likely do damage, there is not one iota of evidence. The plaintiffs' case then must rest on his having constructive notice; that is, that there were facts and circumstances within his knowledge which would have led an ordinarily prudent man to conclude that damage by the ducks would result from a breach of his contract. Had the defendant lived beside the plaintiffs' place, and had ducks been in the habit of feeding on the plaintiffs' grain, I think a reasonable man, under these circumstances, would be aware of the fact and would conclude that the ducks would likely do damage. But there is no evidence that the defendant lived near the plaintiffs. In fact, one of the reasons given by him for not going to the plaintiffs to thresh was, that it was a too long haul. This would indicate that he did not live in the neighbourhood. The only evidence given by the defendant as to the destruction of grain by the ducks is the following:

Q. Do you know whether, after the snow came, the ducks were bad in that part of the country in the grain fields? A. They were bad in mine—I don't know about anybody elses. Q. Did they destroy any of your grain? A. Yes, they destroyed some of it. . . . Q. They destroyed a lot of grain in the fields that are left late? A. Yes.

There is, in my opinion, nothing in this evidence which would justify the conclusion that the defendant must have known when the contract to thresh was made that the ducks would likely destroy the plaintiffs' grain if he failed to keep his contract.

Furthermore, evidence of the defendant's son, brought out by counsel for the plaintiffs, seems to me to rebut the argument that the defendant had constructive notice. On being asked in reference to the ducks, Archie Sharpe said: "They were not in Dooey's field, so how were they in Walker's?" Counsel for the plaintiffs then put to him this question:

Q. Do you mean to say it is an uncommon thing for ducks to take one field and leave the other fields alone? A. No, it is not, but I never saw any ducks in Walker's field.

Every hunter of wild ducks in this Province knows that answer to be correct; that it is no uncommon thing for ducks to prefer to feed in one field in preference to another. Also that the feeding ground in one year may be an entirely different one from that frequented the preceding year.

In view of these facts, I fail to see how it can be said to be established that the defendant contemplated, or ought to have

contemplated, the destruction of the plaintiffs' crop by the ducks as a result naturally to be expected to follow the breach of his contract. In the absence of special circumstances made known to the defendant, the damages are restricted to those which flow in the usual course of things from the breach.

In this case, these in my opinion are: (1) the cost of getting the grain threshed by another thresher, and (2), any damage to or destruction of the crop as a result of unfavourable weather conditions, not out of the ordinary, occurring between the breach and the time when the plaintiffs reasonably could have obtained another machine. These damages the defendant should be held to have contemplated, but he should not, in my opinion, be held liable for damage caused by wild ducks, without evidence that he had notice that such damage would likely occur, or evidence of circumstances from which the conclusion might reasonably be drawn that he must have known that such damage would result. As I have already indicated, I do not find such evidence here.

In *Smeed* v. *Foord*, 1 El. & El. 602, 120 E.R. 1035, the defendant broke his contract to supply a machine to thresh the plaintiff's grain, with the result that the grain was injured by rain. In an action for damages the plaintiff was held entitled to recover for the damage done by the rain. In his judgment, Lord Campbell, C.J., said (1 El. & El. at 614):

> The defendant knew that the plaintiff required the machine for the purpose of threshing wheat in the field. Then, was it not contemplated by the parties, that if the machine was not delivered by the time fixed, damage to the wheat would, in all probability be the result; particularly in such a variable climate as this? Owing to the non-delivery of the machine, the wheat was stacked, and afterwards damaged by the rain which ensued. This injury, and the loss and expense which it involved, were the natural results of the defendant's delay. They were also results which the parties must have foreseen. But it is said that the plaintiff ought to have hired or borrowed another machine. Had it been proved that he could have done so, the case might have been different. No such evidence, however, was given. On the other hand, there was evidence that the plaintiff did apply for a machine in one quarter, but in vain.

In the case at Bar we have the clear admission of the plaintiffs that they could have had not only one machine, but two.

It was argued that the defendant by promising to bring his machine from time to time, prevented the plaintiffs from getting another. The evidence, in my opinion, does not support the allegation upon which this argument is based. The plaintiff

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Albert Walker testified that early in the threshing season he saw the defendant, who told him he would be over with the machine the following Monday or Tuesday. The defendant did not go. This plaintiff says that the next time he saw the defendant was some 3 or 4 weeks later, when he was threshing at Dooey's, and that the defendant promised to thresh for him as soon as he finished at Dooey's. Before he finished at Dooey's, the plaintiff had another machine. The other plaintiff testified that the only time he saw the defendant about doing their threshing was on the first of the above-mentioned occasions, when the defendant promised to come the following Monday or Tuesday.

From this evidence it is clear that the defendant's conduct was not instrumental in keeping the plaintiffs from getting their grain threshed by another machine.

I am, therefore, of opinion that the damages allowed for destruction of the crop by the ducks cannot be supported.

I would allow the appeal with costs and reduce the judgment to $284.50.

Elwood, J.A. ELWOOD, J.A., concurs with NEWLANDS, J. A.

Appeal dismissed by an equally divided Court.

N. S.

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STAIRS, SON AND MORROW v. NEILSON.

Nova Scotia Supreme Court, Harris, C.J., Russell and Longley, JJ., Ritchie, E.J., and Chisholm, J. December 4, 1920.

STATUTES (§ II B—110)—CONSTRUCTION OF ORDER 46, RULE 5, N.S.—LIBERAL CONSTRUCTION—EACH CASE TO STAND ON ITS OWN MERITS. Order 46, R. 5 (Nova Scotia) should be construed liberally and each case must depend upon its own merits. The goods and stock of a sail-maker are not of such a perishable nature as to justify an order for sale under the rule.

Statement. APPLICATION to a Chambers Judge for an order for the sale of goods taken in execution on the ground that the defendant against whom the execution issued was an absent or absconding debtor and the goods in question were liable to depreciation from mildew and other causes. The Judge to whom the application was made referred to the full Court the question whether goods of the character referred to were within the scope of O.46, R.5. Application refused.

W. A. Henry, K.C., in support of the application.

No one *contra*.

The judgment of the Court was delivered by

HARRIS, C.J.:—The defendant was a sailmaker at Parrsboro and absconded and his stock of canvas and rope and a sewing machine, gasoline engine and some small articles used by him in his business have been attached at the suit of the plaintiffs. An application was made to the Chambers Judge for an order for the sale of the goods under the provisions of Order 46, Rule 5, which was referred to the full Court.

The rule provides that:

> Where the goods consist of stock or are shewn upon affidavit to be of a perishable nature or likely to injure from keeping and the agent of the debtor if any does not within three days after notice of the appraisement give security for the value a Judge may in his discretion cause the same to be sold at public auction and the proceeds thereof shall be retained by the sheriff or paid into Court to respond the judgment.

The first contention is that the word "stock" as used in this rule means stock in trade.

An examination of the authorities shews that the proceeding of attaching the goods of an absent or absconding debtor and holding them to satisfy the judgment which the plaintiff may recover does not exist at common law but is the creature of the statute. It is so in the United States and writers there have said that the prevailing rule in the Courts of that country is to construe strictly all such Acts. The theory of the proceeding is that the property seized is to remain in the hands of the officials of the Court to answer any demand which the plaintiff may establish against the defendant by the final judgment of the Court in the action, and if he does not establish his claim and judgment is entered for the defendant then the property is to be returned to the defendant. The attaching creditor merely acquires a security or lien for his claim and the right of property remains in the debtor subject to the lien.

Two things soon became apparent if such proceedings were to be allowed against an absent or absconding debtor. The first was that as the defendant had no personal service or notice of the proceedings a reasonable time must elapse before final judgment could be entered up against him; and the second was that during the interval so allowed the property must not be allowed to depreciate or perish; and a sale in certain cases was suggested as the best means of avoiding loss.

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In 4 Cyc. 712 it is stated that:

The object of the statutes providing for the sale of attached property in *limine* or before final judgment is not to alter the rights of the parties but to substitute in the possession of the Court or officer imperishable money requiring no expense to keep for perishable property or property expensive to keep.

While in Nova Scotia we had as early as 1761 an Act regulating the procedure in cases against absent or absconding debtors it was not until 35 Geo. III., 1795 ch. 1, sec. 9, 1 P.L. 347, that there was any provision as to sales in *limine*. By this statute it was provided that:

Where goods and chattels of a perishable nature or live stock of any kind shall be taken by attachment and appraised, and the party whose goods or stock are so taken shall not within three days after notice of such appraisement being made, give sufficient security for the value thereof, according to law, it shall and may be lawful for any Judge of the Court out of which such writ of attachment shall have issued, upon application of the plaintiff, and notice thereof to the defendant, or, if the defendant be an absent or absconding debtor, to his agent, factor, or trustee, if he have any, and no cause to the contrary shewn, to order the goods, chattels, or stock, so attached and appraised, to be sold by the sheriff at public auction; and the money arising from such sale to be retained in the hands of the sheriff, or paid into Court, to respond the judgment to be afterwards given in such cause.

Apparently there was no change in the wording of this provision until the R.S. 1851, ch. 141, sec. 7, which reads as follows:

7. Where the goods consist of stock, or are shewn upon affidavit to be of a perishable nature, and the agent shall not within three days after notice of the appraisement give security for the value, a Judge, or the prothonotary of the county in his absence, may at his discretion cause the same to be sold at public auction and the proceeds thereof shall be retained by the sheriff or paid into Court to respond the judgment.

Beamish Murdoch in his Epitome of the Laws of Nova Scotia, vol. 3, p. 137, published in 1833, says:

The usage in all attachments has been for the sheriff, if sufficient security be offered him, to deliver up the goods to the defendant or his agent and in the case of perishable goods or live stock if after three days' notice of the appraisement of the articles attached such security be not given an application may be sustained for their immediate sale.

The question is whether the change of phraseology in 1851 effected any change in the meaning or whether the word "stock" in the new statute still meant live stock. I am clearly of opinion that no change in meaning was effected at that time. The fact that live stock would require constant daily care and expense to keep it alive shews that it was one of the main reasons for the passage of the Act authorising a sale of property attached.

The argument is that "stock" as used in the new Act means "stock in trade" and not live stock. The adoption of such a construction presupposes that the Legislature deliberately took away the authority to order a sale of live stock which was still as necessary as before, and gave authority to sell "stock in trade" in all cases whether it was or was not of a perishable nature, and whether or not an inherent necessity existed for its being sold. I cannot think the Legislature would have effected so far-reaching and important a change in such a careless and slipshod manner, and it is, I think clear, that it had no such change in mind.

I suppose the argument would be that there was a presumption of a change of intention to be made out by the change of language employed but that argument has little or no force under the circumstances. Maxwell on Statutes, 6th ed., at p. 564, says:—

> But just as the presumption that the same meaning is intended for the same expression in every part of an Act is, as we have seen, not of much weight, so the presumption of a change of intention from a change of language (of no great weight in the construction of any documents) seems entitled to less weight in the construction of a statute than in any other case; for the variation is sometimes to be accounted for by a mere desire to avoid the repeated use of the same words, and often from the circumstance that the Act has been compiled from different sources; and further, from the alterations and additions from various hands which Acts undergo in their progress through Parliament. Though the statute is the language of the three estates of the realm it seems legitimate, in construing it, to take into consideration that it may have been the production of many minds; and that this may better account for the variety of style and phraseology which is found, than a desire to convey a different intention. Even where the variation occurs in different statutes the change is often not indicative of a change of intention. Thus there is no difference between a "stream" and a "river" in secs. 27, 28, of the Statute 24-25 Vict., 1861, ch. 109; and "ordinary luggage" in an act and "personal luggage" in a by-law made under it, have been construed as meaning the same thing.

In my opinion "stock" in the present rule means "live stock" and not "stock in trade" and we must therefore look to the remaining portion of the rule as to whether the order applied for should be granted.

In other words, are the goods here "shewn to be of a perishable nature or likely to injure from keeping?"

In some of the Courts of the United States where they have a similar statute the term "perishable property" which is perhaps of much the same meaning as "of a perishable nature" has been held to apply only to property which is inherently liable to de-

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terioration and decay (*Fisk* v. *Spring* (1881), 25 Hun (N.Y.) 367) while in other cases the term "perishable" has been given a more liberal interpretation and would embrace property the keeping of which may render it of no value in the end to satisfy the claims, and goods the styles of which change every season and which are liable to become hard and unsuitable for use and moth-eaten and injured by dust and dirt. I think the statute should receive a liberal construction but so construing it I find myself unable to reach the conclusion that the goods in the present case are of a perishable nature or likely to injure from keeping. There may be cases in which some or all of the grounds relied upon here might, under the peculiar circumstances of the case or the nature of the goods in question, be regarded as justifying an order for sale. It is obvious that what might be a good reason in one case may be no reason in another and each case must depend on its own merits. Here the goods are of substantial value, not inherently liable to mildew or deterioration, and the sheriff can no doubt arrange—as it is his duty to do—for their suitable storage at a moderate rental.

I think the application fails.

Application refused.

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DUCHZYSCZN v. BRONFMAN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont, and Elwood, JJ.A. December 23, 1920.

CONTRACTS (§ IV D—369)—SALE OF GOODS—PAYMENT DOWN—PENALTY CLAUSE—COUNTERMAND OF ORDER—RECOVERY OF PAYMENT—RIGHTS OF VENDOR UNDER PENALTY CLAUSE.

Where there is a contract of sale and a part payment thereon has been made, if the contract gives the purchaser a right to countermand the order, subject to a penalty for doing so, no matter what the penalty is the purchaser upon countermanding the order is entitled to a return of the payment made, and the penalty clause not being fixed by the parties as liquidated damages in case the purchaser should insist on countermanding the order the vendor can recover only such loss as he has sustained.

[See Annotation, Distinction between Penalties and Liquidated Damages, 45 D.L.R. 24.]

Statement.

APPEAL by plaintiff from the trial judgment in an action on a contract for the sale and purchase of automobiles. Reversed.

L. McK. Robinson, for appellants.

W. R. Parsons, and *W. B. O'Regan*, for respondent.

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Haultain, C.J.S.

HAULTAIN, C.J.S.:—Except as for the claim for the return of $600, I would dismiss this appeal on the ground that the findings of fact of the trial Judge, on very conflicting evidence, should not be disturbed. No useful purpose will be served by a discussion of the numerous cases cited to us bearing on the question of the power of a Court of Appeal to review and reverse findings of fact by the Court below. The trial Judge found himself confronted with two absolutely contradictory stories, and, after hearing the evidence and seeing the witnesses, he accepted the story of the defendant and his witnesses. After a careful consideration of the evidence as set out in the appeal book, I am inclined to the same conclusion.

As to the $600 paid by the plaintiff to the defendant under the written order, I am of opinion that, while it is called a "deposit" in the written order, it was not intended to be a deposit in the ordinary sense of the term, as the order makes express provision for payment of a certain amount by the plaintiff in the event of the order being countermanded. *Palmer* v. *Temple* (1839), 9 Ad. & E. 508, 112 E.R. 1304. The defendant, however, is entitled to succeed on his cross-appeal for damages under the above-mentioned clause in the agreement. These damages should be ascertained and the action finally disposed of as provided for in the judgment of my brother Lamont.

Newlands, J.A.

NEWLANDS, J.A. concurs with Lamont, J. A.

Lamont, J.A.

LAMONT, J.A.:—Two questions are involved in this appeal: (1) Did the plaintiffs repudiate their contract to purchase six automobiles from the defendant, who was carrying on business under the name of "City Garage," before the automobiles arrived at Kamsack, and (2), if so, are they entitled to a return of the $600 deposit?

The contract in part is as follows:—

City Garage, H. Bronfman, Yorkton, Sask., May 8th, 1919.

Please enter my order for the following goods to be delivered about at once, soon as possible, at Kamsack.

This order cannot be countermanded.

Three 3 Gray Dort Special five passenger cars, $4,890.00.

Three 3 Gray Dort Regular five passenger cars, $4,470.00.

15% discount off Chatham price.

Terms, deposit $600.00. Balance Sight Draft Bill of Lading.....

Settlement to be made on receipt of invoice and bill of lading.

It is further agreed that this order may be countermanded only at the option of the City Garage, and that in case countermand is insisted upon an amount equal to 20 per cent. of the net price of the goods will be due and payable to the City Garage.

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The automobiles were shipped from Chatham. The defendant swore that, before they arrived in Kamsack, the plaintiff Duchzysczn told him over the telephone that he could not pay for them and would not take them. This the plaintiffs deny, and say that they were ready to pay for them and wanted them. When the automobiles arrived in Kamsack, the defendant sent his agent Brown to take delivery from the railway company. Brown testified that he then went to see the plaintiffs and asked them if they would take the cars; that Duchzysczn said they could not, giving as a reason that they did not have the money; that he then asked him if they could take two or three of the cars, and that Duchzysczn replied that they could not. The trial Judge accepted the evidence of Brown and Bronfman, and held that the contract had been repudiated by the plaintiffs.

As the trial Judge had the witnesses before him and had an opportunity of observing their demeanour, which we have not, his finding should not be disturbed.

As to the deposit, the trial Judge held that the plaintiffs had entered into a contract on which they had made a payment by way of deposit, which contract they broke, and that, under such circumstances, they were not entitled to recover the deposit. The cheque which paid the deposit stated on its face that it was in part payment of the automobiles. When the plaintiffs refused to take the cars, the defendant kept them himself. There is no evidence as to what disposition was made of them.

Paragraph 13 of the defendant's statement of defence, and para. 3 of his counterclaim, read as follows:—

> 13. The defendant pays into Court the sum of $630 and says same is sufficient to satisfy the plaintiffs' claim herein.
>
> 3. The plaintiffs wrongfully insisted on the countermanding of said order or contract, and did countermand same, and the defendant claims 20% of the net invoice price $9,360, viz., $1,872 for such countermanding.

Under these circumstances, were the plaintiffs entitled to a return of the $600?

In *Howe* v. *Smith* (1884), 27 Ch. D. 89, the purchaser had paid £500 which was stated in the contract to be paid "as a deposit" and "in part payment of the purchase money." Cotton, L.J., at p. 94, cites *Collins* v. *Stimson* (1883), 11 Q.B.D. 142, at 143, where Pollock, B., said:—

According to the law of vendor and purchaser the inference is that such a deposit is paid as a guarantee for the performance of the contract, and where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit.

I am, therefore, of opinion that, where there is a contract of sale and a part payment thereon has been made, and the purchaser before completion repudiates or abandons the contract he cannot recover the part payment which he has made. He cannot set up his own default as a ground for a return of the moneys paid, as against a vendor ready and willing to complete, unless there is something in the contract indicating an intention that he might do so. See also *Hall* v. *Burnell*, [1911] 2 Ch. 551; *Sprague* v. *Booth*, [1909] A.C. 576.

The question here then is: Was it the intention of the parties that the $600 should become the absolute property of the defendant in case the plaintiffs were unable or unwilling to complete the contract? In my opinion it was not. The clause in the contract which provides "that in case countermand is insisted upon an amount equal to 20% of the net price of the goods will be due and payable to the City Garage," seems to me to indicate a clear intention that if the plaintiffs insisted on having the order countermanded such would be done, but it would subject them to a penalty of 20% of the net price.

If the contract gives the plaintiffs a right to countermand the order, as I hold it does, then, no matter what the penalty may be for their so doing, they are entitled to a return of the $600, paid thereon. This seems to have been the meaning which the defendant himself placed upon the contract, for he paid the $600 and interest into Court, and counterclaimed for the 20% penalty, and has cross-appealed here to recover the same.

The penalty clause not being fixed by the parties as liquidated damages in case the plaintiffs should insist on countermanding the order, the defendant can only recover such loss as he has sustained. To ascertain the amount of that loss, there should be a reference to the local registrar at Yorkton.

In the result, therefore, in my opinion the appeal should be allowed, and the judgment below varied by allowing the plaintiffs judgment for a return of the $600 and interest paid into Court, and by allowing the defendant on his counterclaim such damages as he shews he has sustained by reason of the plaintiffs' insisting on

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countermanding the order. One sum should be set off against the other, and judgment given for the party entitled to the difference. The plaintiffs are entitled to costs in the Court below up to the time the $630 was paid into Court, and the defendant is entitled to all other costs of the action and of the counterclaim. As both parties succeed on appeal, I would allow no costs of appeal.

Lamont, J.A.

Elwood, J.A.

ELWOOD, J.A. concurs with LAMONT, J.A.

Appeal allowed.

CAN.

EX. C.

THE HALIFAX GRAVING DOCK Co. v. THE KING.*

Exchequer Court of Canada, Audette, J. July 6, 1920.

CONTRACTS (§ I D—55)—DAMAGE TO DRY DOCK—WAR MEASURES ACT—VOLUNTARY ASSISTANCE OF CROWN—EXPROPRIATION—QUESTION OF ESSENTIALS OF CONTRACT.

The suppliants, having asked for the Crown's assistance in repairing their properties on the understanding that they bear a portion of the expense, and the Crown having assisted them, although under no legal obligation to do so, what was done by the Crown did not amount to any acknowledgment of a right of action or an act that might imply a contract, it being shewn from the correspondence that the parties were never in accord, as regards the nature of the payments to be made by the suppliants.

[*Samson* v. *The Queen* (1888), 2 Can. Ex. 30, referred to.]

Statement.

PETITION OF RIGHT to recover the sum of $195,638.18, estimated cost of the works of reconstruction of suppliants' dock at Halifax at the date of expropriation of the same by the Crown.

L. A. Lovett, K.C., and *J. S. Roper*, for suppliants.

Audette, J.

AUDETTE, J.:—The suppliants, by their petition of right, seek to recover the sum of $195,638.20, that is $217,850.40 less the $22,222.20 hereinafter mentioned, being the amount claimed as representing what they are entitled to, under the provisions of the Order in Council dated January 15, 1918, for the expenditure upon the works of repair and reconstruction of the dock and shops, etc., at Halifax.

As the result of a disastrous explosion which occurred at Halifax, on December 6, 1917, creating a great upheaval inflicting considerable damages upon the property in the city, the Dominion Government, of its grace and bounty, came to the rescue of the sufferers.

The suppliants' dry dock, with its usual repair shops and plant, was considerably damaged thereby and the Crown, wishing to

*Appeal to Supreme Court of Canada pending.

extend a helping hand, dealt with them in the manner that will clearly appear from the following Orders in Council. The Order in Council of January 15, 1918, reads as follows:—

The Committee of the Privy Council have had before them a report, dated January 5, 1918, from the Minister of Public Works, submitting as follows:—

That a Dry Dock, with necessary repair shops and plant, was constructed in the harbour of Halifax, N.S., by the Halifax Graving Dock Co., Ltd., of England, and completed in 1889, the dock in question being 570 ft. long, 88 ft. wide at entrance and 30 ft. deep over sill at high water, spring tides. This dock was subsidized by the Dominion Government under Act 45 Vict., ch. 17, and also by the Imperial Government and the City of Halifax. The subsidies were each for $10,000 per annum for a period of 20 years. Payment of the Dominion Government subsidy was completed in the fiscal year ending March 31, 1910, and it is assumed that full payment has also been made of the two other subsidies;

That, in the recent disastrous explosion of a munition ship in the harbour of Halifax, the dock was badly damaged and the repair shops and plant connected therewith were practically destroyed;

That the port of Halifax is a naval base and is very largely used by warships and warcraft of all kinds of His Majesty and of His allies. It is also used as a rendezvous for ships needing convoy. For these reasons it is urgently necessary for the purposes of the war that all facilities for the repairing of ships-of-war and other ships should be effectively available with the least possible delay. That the owners of the dock are not, at present, in a position, financially, to enable them to undertake the necessary repairs to same and the reconstruction of the shops and plant, as this work will cost considerably more under present winter conditions and the scarcity of labour than would ordinarily be the case;

That the owners originally proposed that the Government expropriate the property and they offered to sell their interest in same for a sum not to exceed $1,250,000 to which would have to be added the full cost of rebuilding the dock, etc. The acceptance of this proposition would, moreover, necessitate the operation of the dock by the Government;

That an alternative proposal has, however, been made by the owners in which they offer to proceed with the reconstruction of the dock and to furnish the sum of $111,000, which is the amount of the insurance, towards the cost, provided the Government supply the balance of the cost of reconstruction by way of a subsidy relieving the Government of any further liability, as well as responsibility for the operation and maintenance of the dock. It is understood that the work of repair and reconstruction shall not consist of anything beyond the replacement of the dock and shops, etc., in the same condition in which they existed at the time of the disaster. The final decision as to the exact nature and extent of such repair, reconstruction and equipment, of the dock and plant to rest entirely with the Minister of Public Works or his delegated representative on the work; the actual work of reconstruction and purchase of material therefor to be under the inspection, supervision and control of the representative of the Department of Public Works.

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The Minister, in view of the foregoing and of the imperative necessity that docking and repairing facilities at Halifax be forthwith re-established and made available at once for ships awaiting repairs in that port, recommends that authority be given, under the War Measures Act, to proceed with the repairing, re-construction and re-equipment of the dock and plant at that place under the following conditions:—

1. The Halifax Graving Dock Co., Ltd., the owners of the dock damaged, do contribute towards the cost thereof the sum of $111,000;

2. The balance of the outlay required to be defrayed by the Government from the War Appropriation;

3. The final decision as to the exact nature and extent of the repair, reconstruction and re-equipment of the dock and plant as well as the actual work of reconstruction and purchase of material therefor, to be under the inspection, supervision and control of the representative of the Minister of Public Works.

The Order in Council of May 20, 1918, which rescinded the Order in Council of January 15, 1918, reads as follows:—

The Committee of the Privy Council have had before them a report, dated May 14, 1918, from the Minister of Public Works, submitting as follows:—

That under the authority of an Order in Council, dated January 15, 1918, the work of repair and reconstruction of the Halifax Graving Dock and plant, which were badly wrecked in the disastrous explosion of a munition ship in the Halifax harbour last fall, was entrusted to the Halifax Graving Dock Co., Ltd., on the following conditions:—

1. The Halifax Graving Dock Co., Ltd., the owners of the dock damaged, to contribute towards the cost thereof, the sum of $111,000 (which is the amount of insurance).

2. The balance of the outlay required to be defrayed by the Government from the war appropriation.

3. The final decision as to the exact nature and extent of the repair, reconstruction and re-equipment of the dock and plant, as well as the actual work of reconstruction and purchase of material therefor, to be under the inspection, supervision and control of the representative of the Minister of Public Works.

That the work was commenced in due course, but the arrangements made with the company in regard to sub-letting contracts having proved unsatisfactory to the Minister of Public Works, actual building operations were taken over by the department direct and work has proceeded to an extent that vessels are capable of being received and repaired in the dock;

That it is considered advisable, therefore, that further operations be suspended for the present, and the Minister, therefore, recommends that authority be given to rescind the Order in Council of January 15, 1918, accordingly.

The committee concur in the foregoing recommendation, and submit the same for approval.

The Order in Council of May 27, 1918, which provides for the expropriation of the dock, reads as follows, viz.:—

The Committee of the Privy Council have had before them a report, dated May 24, 1918, from the Minister of Public Works, stating that in the disastrous explosion of a munition ship in the harbour of Halifax on December 6 last, the dry dock, with necessary repair shops and plant, which was constructed in the harbour of Halifax, Nova Scotia, by the Halifax Graving Dock Co., Ltd., and completed in 1889, was badly damaged and the repair shops and plant connected therewith were practically destroyed.

That in view of the great importance of the port of Halifax as a naval base and of the fact that it is very largely used by war-ships and war-craft of all kinds and by transports of His Majesty and His allies and also as a rendezvous for ships needing convoy, it was urgently necessary for the purposes of the war that all facilities for the repairing of ships-of-war and other ships should be effectively available with the least possible delay.

In order to attain this object an agreement was entered into with the owners of the dock in which they agreed to proceed with the reconstruction of the dock and to furnish the sum of $111,000, which was the amount of the insurance, towards the cost, provided the Government would supply the balance of the cost of reconstruction by way of a subsidy, relieving the Government of any alleged liability, as well as responsibility for the operation and maintenance of the dock.

That the progress made by the company in the reconstruction of the dock has not been satisfactory, and in view of the urgency of restoring the port of Halifax to its former status as a naval base and rendezvous during the war and of preparing it to meet the greatly increased needs of shipping after the war, it is necessary that the Government take immediate measures to enter into possession of the said dock at once and to proceed with the reconstruction of the same.

That from reliable information received it would seem that the sum of one million, one hundred thousand dollars is a fair estimate of the value of the dock as it stands at the present time, and the Minister recommends that authority be given to offer this sum to the Halifax Graving Dock Co., Ltd., for the property as it stands at present, and that if this offer is refused authority be granted pursuant to the powers conferred by the War Measures Act, 1914, and all other powers vested in Your Excellency in Council, for reasons declared to arise out of the present war, of the business, property and rights of, or connected with the operations of the dry dock which was constructed in the harbour of Halifax by the Halifax Graving Dock, Ltd., aforesaid, and that the question of compensation for the property, etc., as aforesaid, be submitted to the Exchequer Court for adjudication.

The Committee concur in the foregoing recommendation and submit the same for approval.

The Crown therefore expropriated the said dry dock, as will more fully appear from the case *The King* v. *The Halifax Graving Dock Co., Ltd.* (1920), 56 D.L.R. 21, 20 Can. Ex. 44, in which I this day delivered judgment and wherein I have allowed the present suppliants compensation to cover the value of the dock, as it stood on June 24, 1918, inclusive of all works, buildings, erections, etc., executed by the Crown and the suppliants from the date of the explosion to the date of the expropriation.

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Now the suppliants' contention, as set forth in para. 7 of the petition of right, is founded on the following method of reasoning, to wit:—

> The estimated cost of said reconstruction was $450,000. The amount still to be done when Order in Council P.C. 1291 was passed to put the said dock in the same condition as before the explosion would amount to about $250,000, or about five-ninths of the work. Your suppliant in accordance with said letter more fully set out in para. 3 of this petition, collected $50,000, the cash results of the insurance monies on the said dry dock. As the respondent rendered it impossible for your suppliant to do any more than four-ninths of the work of reconstruction under said Order in Council, said respondent is only entitled to four-ninths of the insurance monies, or $22,222.22.

They contend that the above Order in Council constituted a contract and that as the total work of repairs and reconstruction, estimated at $450,000, were not entirely done, but only four-ninths thereof, that the Crown is only entitled to four-ninths of their insurance monies of $111,000, namely, $22,222.22.

The question which *in limine* presents itself for decision, as I understand it, is whether or not it can be found that from the evidence a legal contract was ever entered into between the said parties for the reconstruction of the dock, or whether what was done by the Crown was not solely referable to its grace, bounty and benevolence shewn to the suppliants by reason of their loss through the explosion at Halifax in 1917, and therefore cannot be treated as giving rise to a contract with all its attendant consequences in case of breach.

In respect of the English law of contract the Crown is at least in no worse position than the subject. Tested by this parallel, how will the situation between the Crown and the suppliants eventuate under the authorities? It is an elementary question, but certitude is sometimes only attained by going back to first principles.

What is necessary to constitute a contract?—

> In its legal sense, it is the union of two or more persons, in a common expression of will affecting their legal relations.
>
> An agreement implies the assent of two minds. This idea is often expressed by the phrase, "It takes two to make a bargain." Or, to state it in other words, it must be understood between the parties that one party has made an offer and the other has accepted it. . . .
>
> In construing an agreement "the question is, what by a fair and reasonable construction of the words and *acts of the parties*, was the bargain between them, and not what was the secret interest and understanding of either of them."

Among the essential elements to the validity and enforcement of a contract are:—

1. A communication whereby the parties unite in a common *expression of will* as to their legal relation, in other words, offer and acceptance. 2nd. A consideration. 3rd. A writing, wherever it is required by the Statute of Frauds. 4th. Capacity of the parties to make a contract. 5th. Reality of the consent expressed in offer and acceptance.

In the case of offer and acceptance, the latter must be absolute and identical with the terms of the offer.

"The intention of the offeree to accept must be expressed without leaving room for doubt as to the fact of acceptance or as to the correspondence of the terms of the acceptance with those of the offer." Anson on Contracts, 15th ed., p. 49.

"The acceptance of an offer may introduce terms not comprised in the offer, and in such cases no contract is made, for the offeree in effect refuses the offer, and makes a counter-offer of his own." Anson on Contracts, p. 50.

The first Order in Council, of January 15, 1918, clearly stated that: "1. The Halifax Graving Dock Co. Ltd., the owners of the dock damaged, to contribute towards the cost thereof the sum of $111,000." It did not attach to the clause any stipulation that this amount must first be recovered from the insurance companies, before it became payable.

Now the suppliants never complied with this requirement—they never did, up to the present day, pay the sum of $111,000 or any part of it to the Crown or on its account. Upon this question a long and protracted correspondence was carried on, which establishes beyond controversy that the parties have always failed to come to final terms or arrangement upon the question. They were never *ad idem* upon this point.

From the correspondence filed of record as Exs. 1 and 2, it clearly appears that both parties always agreed to disagree from the very date of the first Order in Council.

However, the intention of the parties was clearly set out by the suppliants before the date of the first Order in Council. Indeed, as far back as January 1, 1918 (p. 2 of No. 1), we find a telegram of the president of the company addressed to Mr. Carvell, stating as follows: "As the dock is of such paramount importance, will accept, on behalf of the company, your proposal that we hand you the insurance, $111,000, and you do the rest."

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On June 15, 1918 (p. 19, Ex. No. 2), the president, on behalf of the suppliants, was writing to the Minister of Public Works, saying:—

> The proceeds of our insurance was to be handed to you and no doubt this will be paid, but I cannot say when unless the Government does something to force them. However, we will endorse our policies over to you so you are perfectly secure.

On June 18, 1918 (p. 26, Ex. No. 2), Mr. Carvell writing to the president, says:—

> I am sorry, however, that I cannot agree with your contention that we were to take the proceeds of the insurance policy. While I think you may have opposed that, yet it was *distinctly understood* that you were to collect the policies and pay us $111,000 as your contribution to reconstruction, *regardless of whether the policies were collected or not.* We therefore cannot have anything to do with the policies.

And again, at p. 35 of the same Exhibit, we find another letter of Mr. Carvell to the president saying:—

> In reply to your letter of the 15th inst., I realise just as much as you do the necessity of having our matters closed up at the earliest possible moment, but I think I should say to you frankly that before anything can be paid on the re-instatement account, we must have a settlement with you as to the insurance. You know the terms of the Order in Council and my views as to the agreement made between us. The moment you are ready *to pay the $111,000,* or to recognize it as your contribution, we are prepared to make a settlement of this whole transaction.

Then in Mr. Hunter's letter, recited at para. 3 of the petition of right, it is stated "you are to collect your own insurance policies, and hand over the cash results to the Government"—refusing the assignment of the policies. To which letter the president answers on February 2, 1918 (p. 27, Ex. No. 1), saying: "Both clauses in your letter are quite satisfactory." At pp. 65 and 66 of the same Exhibit, on April 5 and 8, 1918, the president again asks Mr. Hunter what he is to do with the insurance, and Mr. Hunter answers: "Collect and hand over cash to the Government."

At pp. 97 (May 2, 1918) and 110 (May 13, 1918), Mr. Hunter again refuses to pay out any moneys until the sum of $111,000 reaches the Government.

Then after the expropriation on August 23, 1918 (p. 126 of the Exhibit), the president joins issue with Mr. Carvell on the insurance moneys and says (as alleged in the pleadings):

I think you would not be entitled to the whole of the insurance, but only part of it, because you did not finish the re-instatement of the dock, but took it out of our hands. . . . If the full insurance were collected, viz., $111,000, the proportion payable to the Government would be as $400,000 is to $185,000.

This last proposition enunciated both in the letter and on the pleadings is not to be found either in the Order in Council or in the correspondence on behalf of the Crown. It is outside of the alleged proposed agreement—*de hors* the alleged contract.

From the above cited correspondence, and from numerous other letters, and from the obvious fact that the $111,000 were never paid by the suppliants—it conclusively appears that the parties were never *ad idem*, after the passing of the Order in Council of January 15, 1918, with respect to this sum of $111,000—which the suppliants were to pay but never did pay. On the other hand, it appears clearly that the Crown always adhered to the Order in Council, never waivering and never ceasing to ask for the $111,000. Therefore, it must be found—as the parties were never *ad idem*—that there could never have existed any legal contractual obligation under which the suppliants could recover in an action like the present one.

It is perhaps noteworthy that on January 17, 1918 (p. 14 of Ex. No. 1), the secretary of the Department of Public Works wrote to the company, "An agreement is being prepared in the matter, and it will be submitted to you for signature." Now, what can be deduced from this statement, except the Crown was then willing to enter into a contract with the suppliant, could the parties come to terms? This they wholly failed to do—no such contract or agreement has ever been entered into or executed by the parties. See *Love and Stewart* v. *Instone Co., Ltd.* (1917), 33 T.L.R. 475. The Crown has borne the expense of the considerable work it has performed at the dock, and in addition thereto the Crown has paid for it over again as part of the compensation in the expropriation of the dock.

Assuming for the sake of argument that a contract had been entered into, could the suppliants recover for any work of reconstruction done, or to be done, outside the period between May 20, 1918 (when the Order in Council of January 15, 1918, was rescinded), and June 21, 1918, the date of the expropriation.

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Indeed, on June 21, 1918, would not such contract be put at an end by the expropriation? That was the doctrine laid down by this Court in the case of *Samson* v. *The Queen* (1888), 2 Can. Ex. 30. See also Nichols, Eminent Domain, pp. 700 *et seq.* And for all such work executed up to the time of the expropriation, they have received full compensation in the expropriation case, *The King* v. *Halifax Graving Dock Co.* (1920), 56 D.L.R. 21, 20 Can. Ex. 44.

Under all the circumstances of the case, I have come to the conclusion that there existed no legal contract between the parties, and when the Crown came to the help of the suppliants in this great upheaval and calamity, it did so of its own benevolence, and what it has done is referable to its grace, bounty and benevolence, and does not constitute an acknowledgment of a right of action or does not amount to any act that might imply any contract upon which an action would lie.

Therefore, my judgment is, that the suppliants are not entitled to any portion of the relief sought by their petition of right.

Judgment accordingly.

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.

RODGERS v. WILLIAMS.

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Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. November 23, 1920.

BROKERS (§ III B—35)—*Sale of mining property—Commission—Compensation—Principal and agent.*]—Appeal by plaintiff from the judgment of the Court of Appeal for British Columbia reversing the judgment of Murphy, J., and maintaining the respondent's action.

G. F. Henderson, K.C., and *J. G. Gibson*, for appellant.

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

The appellant and one H. owned all the shares of a mining company. The appellant made a contract with the respondent by which he undertook to pay respondent a commission of $10,000 for the sale of the mining property. The respondent procured a purchaser. At the appellant's suggestion, the respondent brought action against H. and obtained judgment for $10,000, which he could not enforce in New York, where H. resided. The respondent then sued the appellant for $10,000.

The trial Judge dismissed the action but the Court of Appeal allowed the appeal and directed judgment to be entered for the plaintiff.

The appeal to the Supreme Court of Canada was dismissed.

Appeal dismissed.

WARD v. HENRY AND DUMAINE.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 21, 1920.

LANDLORD AND TENANT (§ III F—119)—*Fire—Liability—Fault—Presumption—Art. 1629, C.C. (Que.)*]—Appeal by plaintiff from the judgment of the Court of King's Bench, appeal side (1918), 28 Que. K.B. 159, reversing the judgment of the Superior Court sitting in review and dismissing the appellant's action with costs.

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Paul St. Germain, K.C., and *C. M. Cotton*, for appellant.

J. L. Perron, K.C., and *R. Genest*, for respondent Henry.

A. E. J. Bissonnet, K.C., for respondent Dumaine.

The appellant sued the respondents, of whom Henry was his tenant and Dumaine a plumber employed by him, for damages resulting from the burning down of the dwelling house leased by appellant to respondent Henry. The appellant invoked against Henry the presumption of fault edicted by art. 1629 C.C. (Que.), and alleged also against both respondents the fault of respondent Dumaine, who, according to appellant, would have caused the fire by using a gasoline lamp to thaw frozen pipes in the house.

The trial Court dismissed the action. The Superior Court, sitting in review, Greenshields, J., dissenting, reversed this judgment and maintained the action for $2,000. The Court of King's Bench, 28 Que. K.B. 159, Cross and Pelletier, JJ., dissenting, restored the judgment of the trial Court.

On appeal to the Supreme Court of Canada, after hearing counsel of both parties, the Court reserved judgment, and, on a subsequent day, dismissed the appeal with costs, Idington, J., dissenting. *Appeal dismissed.*

JUKES v. DONALD.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. November 2, 1920.

PRINCIPAL AND SURETY (§ II—15)—*Debt assignment—Rights of assignee—Notice—Laws Declaratory Act, R.S.B.C., 1911, ch. 133, sec. 2 (55).*]—Appeal from the judgment of the Court of Appeal for British Columbia (1920), 54 D.L.R. 688, reversing the judgment of the trial Judge, Macdonald, J., and maintaining the respondent's, plaintiff's, action.

Alfred Bull, for appellant.

F. H. Chrysler, K.C., for respondent.

The action was for recovery of moneys under a covenant of guarantee which had been assigned to the respondent. The appellant guaranteed payment of moneys owing by J. After payment was due, the debt and covenant of guarantee were assigned to the respondent. A notice of the assignment was given to the appellant, the guarantor, but not to J., the primary debtor.

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The trial Court and the Court of Appeal both held that this notice was sufficient to enable recovery against the appellant. But the Court of Appeal reversed the judgment of the trial Judge, finding that the moneys advanced to J. by E. (to whom the guarantee was given) were really the moneys of the respondent and not of the estate of which E. was trustee and the respondent administratrix; and hence on the assignment to respondent the debt was hers in her own right; and the respondent was entitled to a judgment on her action.

The Supreme Court of Canada, after hearing counsel and reserving judgment, dismissed the appeal.

Appeal dismissed.

LAVIN v. GEFFEN.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. November 23, 1920.

PARTNERSHIP (§ II—8)—*Sale of interest by one partner to the other—Oral agreement—Partnership assets—Statute of Frauds—Sale of Goods Ordinance.*]—Appeal from the judgment of the Supreme Court of Alberta, Appellate Division (1920), 51 D.L.R. 203, 15 Alta. L.R. 556, reversing the judgment of the trial Judge, Scott, J., who had dismissed the respondent's action, and ordering a new trial.

A. McL. Sinclair, K.C., for appellant.

J. B. Barron, for respondent.

The respondent, plaintiff, and the appellant, defendant, were carrying on a business in partnership as farmers, ranchers and general dealers in cattle. The respondent alleged that the appellant orally agreed to buy out the respondent's interest in the partnership on certain terms and sued for the price agreed. The appellant denied this, pleaded the Statute of Frauds and counterclaimed for an order dissolving the partnership and for an accounting. Upon the case coming on for trial, the respondent admitted that among the assets of the partnership was a leasehold interest in some real estate. The trial Judge then dismissed the respondent's action holding that such an agreement as the one in the present case was within the Statute of Frauds and must be in writing. The Appellate Division held that such an oral agreement was not

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within the statute, where there is nothing in the partnership agreement to shew that "contrary intention" referred to in sec. 24 of the Partnership Ordinance, C.O.N.W.T. 1915, ch. 94, sec. 24, which provides that unless such intention appears land which has become partnership property shall be treated as between the partners as personal estate.

The Supreme Court of Canada, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, dismissed the appeal with costs, Duff, J., dissenting.

Appeal dismissed.

NOZICK v. DENNY.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. May 4, 1920.

VENDOR AND PURCHASER (§ II—30)—*Sale—Real estate—Vendor's lien—Security for debt.*]—Appeal from the judgment of the Supreme Court of Alberta, Appellate Division (1919), 48 D.L.R. 310, 15 Alta. L.R. 288, reversing the judgment of Walsh, J., at the trial and maintaining the respondent's, plaintiff's, action.

H. H. Parlee, K.C., for appellants.

E. Brice, for respondent.

The action was one brought by the respondent, the vendor, for a lump sum, for certain hotel premises, including a license and furnishings. The respondent asked for a declaration that he had a vendor's lien for the balance of the purchase price. The respondent took from the appellant promissory notes for part of the price, which notes were indorsed to a bank for security for advances; he also transferred the immovable property to a third party and the transfer contained a statement that he had received payment of the sum stipulated as its purchase price.

The trial Judge dismissed the action on the ground that the appellant owed the money claimed to the bank and not to the appellant. The Appellate Division held, 48 D.L.R. 310, 15 Alta. L.R. 288, that there was a lien on the real estate for the whole amount remaining unpaid under the agreement.

On appeal to the Supreme Court of Canada, after hearing counsel on behalf of both parties, the Court reserved judgment and, on a subsequent day, allowed the appeal with costs, Idington and Mignault, JJ., dissenting. *Appeal allowed.*

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McNICHOL v. BURNS.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. March 8, 1920.

APPEAL (§ VII—437)—*Negligence—Jury—Verdict—Omission to consider elements of case—Instructions—Presumption.*]—Appeal from the judgment of the Supreme Court of Alberta, Appellate Division (1919), 49 D.L.R. 132, 15 Alta. L.R. 1, affirming the judgment of the trial Judge with a jury and maintaining the appellant's, plaintiff's, action.

A. H. Clarke, K.C., for respondent.

The action is for damages for the death of appellant's husband who was killed in a collision with a motor truck belonging to the respondent. The verdict of the jury, confirmed by the trial Judge, awarded the appellant $2,450 damages. The grounds of appeal, before the Appellate Division of the Supreme Court of Canada were inadequacy of the verdict and misdirection by the trial Judge.

On the appeal by the plaintiff to the Supreme Court of Canada, the Court, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, dismissed the appeal with costs.

Appeal dismissed.

VAN DYKE AND Co. v. HAINS.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. November 12, 1920.

MASTER AND SERVANT (§ V—340)—*Workmen's Compensation Act—Industrial company—R.S.Q. 1909, art. 7321.*]—Appeal from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1920), 29 Que. K.B. 460, affirming the judgment of the trial Judge, Roy, J., and maintaining the respondent's action.

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

Maurice Rousseau, K.C., for respondent.

The respondent's son was killed, while he was working for the appellant company. The respondent made a petition to be allowed to sue the appellant company under the Workmen's Compensation, Act. He then brought an action for $2,500 against the appellant and the trial Judge gave judgment for that amount. Upon the appeal to the Court of King's Bench, the appellant urged princi-

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pally the ground that the respondent had neither alleged in his declaration nor proved at the trial that the appellant company was an industrial company and within the terms of sec. 7321 of the R.S.Q. 1909. The Court of King's Bench dismissed the appeal.

The Supreme Court of Canada, after argument by the appellant's counsel and the respondent's counsel, submitting his case upon his factum, affirmed this judgment and dismissed the appeal with costs. *Appeal dismissed.*

GODSON v. GREER.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. November 2, 1920.

BROKERS (§ III B—35)—*Sale of ship—Authority of broker to sell—Commission.*]—Appeal from the judgment of the Court of Appeal for British Columbia (1920), 52 D.L.R. 374, affirming the judgment of the trial Judge, Clement, J., and maintaining the respondent's, plaintiff's, action.

A. H. MacNeil, K.C., for appellant.

Eug. Lafleur, K.C., for respondent.

The appellant promised the respondent a commission if respondent made sale of a ship. The respondent employed a broker as sub-agent who mentioned the matter to another broker and it was passed on through others until, about 9 months after the agreement with the respondent, a broker to whom the matter was mentioned came to the appellant and made an arrangement directly with him resulting in a purchaser being obtained. The respondent however continued his services, which were accepted by the appellant, up to the time of sale, and was of assistance in procuring the Government's consent to a transfer of the ship to a foreign registry.

The Supreme Court of Canada, having heard counsel and reserved judgment, dismissed the appeal.

Appeal dismissed.

WELLINGTON COLLIERY COMPANY v. PACIFIC COAST COAL MINES. CAN.

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Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. March 8, 1920.

TRESPASS (§ I C—17)—*Consent by one now deceased—Evidence.*]—Appeal from the judgment of the Court of Appeal for British Columbia (1919), 48 D.L.R. 703, 27 B.C.R. 404, reversing the judgment of the trial Judge, Murphy, J., and dismissing the appellant's, plaintiff's, action.

H. B. Robertson, for appellant.

Geoffrion, K.C., and *Brethour*, for respondent.

The action is to recover damages for certain coal which, it was alleged, the respondent had fraudulently, secretly and wilfully taken from the appellant's mine. The respondent urges that it was justified doing so under a verbal agreement made with one Coulson, then manager of the appellant.

The agreement was sworn to by two witnesses and could not be contradicted on account of the death of Coulson before the trial.

The trial Judge, in rejecting the testimony of these witnesses, stated that in justice to them and in order "that the hands of any appellate tribunal may be perfectly free," his conclusions "were not based on their demeanour in the witness box nor on the manner in which their evidence was given, but because he felt their evidence could not be accepted in view of all the facts." But this judgment was reversed by the Court of Appeal.

On appeal to the Supreme Court of Canada, the judgment of the Court of Appeal was affirmed, Brodeur and Mignault, JJ., dissenting. *Appeal dismissed.*

CUSHMAN MOTOR WORKS OF CANADA v. LAING.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Brodeur and Mignault, JJ. March 8, 1920.

SALE (§ III C—72)—*Of engine—Condition—Engine ordered not delivered—Action for purchase price—Rescission of Contract.*]—Appeal from the judgment of the Supreme Court of Alberta, Appellate Division (1919), 49 D.L.R. 1, 15 Alta. L.R. 53, affirming the judgment of Stuart, J., at the trial and dismissing the appel-

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lant's, plaintiff's, action. The action is for the recovery of a lien note given by the respondent as part of the purchase price of a combination threshing outfit. The respondent pleaded that the machine did not fulfil the conditions and the warranties contracted for.

A. H. Clarke, K.C., for the appellant.

J. W. McDonald, K.C., for the respondent.

The trial Judge and the Appellate Division found as a fact that the respondent never got the article he bargained for and also found, in the circumstances of this case, a sufficient explanation of the retention by the respondent of the machine for a long period.

On the appeal by the plaintiff to the Supreme Court of Canada, the Court, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, dismissed the appeal with costs.

Appeal dismissed.

SIMPSON v. TASKER-SIMPSON GRAIN Co.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. April 6, 1920.

PARTNERSHIP (§ III—14)— *Corroboration — Evidence Act — Question of fact—Burden of proof.*]—Appeal from the judgment of the Supreme Court of Alberta, Appellate Division (1919), 49 D.L.R. 303, 15 Alta. L.R. 139, affirming on an equal division the trial judgment. Reversed.

H. P. O. Savary, K.C., for appellant.

G. H. Ross, K.C., for respondent.

The appellant claimed $8,147.99 for grain sold and delivered to the respondent. This claim was not disputed by the respondent, but he filed a counterclaim for a greater amount claimed to be due him by appellant's husband upon transactions made on behalf of an alleged partnership between Tasker and Simpson, before the incorporation of the respondent company, the claim having been transferred by Tasker to the respondent. The whole question was whether the evidence of Tasker as to the existence of such partnership was sufficiently corroborated to satisfy the Alberta Evidence Act, 1910 stats. (2nd sess., Alta.), ch. 3, in a case of a claim against the executor of the estate of a deceased person, as in the present case the appellant had been named executrix of her husband's estate.

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The trial Judge found in favour of the respondent, and the Appellate Division, upon an equal division of the Court, affirmed this judgment, 49 D.L.R. 303, 15 Alta. L.R. 139.

On the appeal by the plaintiff to the Supreme Court of Canada, the Court, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, allowed the appeal with costs.

Appeal allowed.

McCRAE v. NAPIERVILLE JUNCTION R. Co.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. November 18, 1920.

RAILWAYS (§ IV—86)—*Negligence—Truck on platform—Accident.*]—Appeal from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1919), 29 Que. K.B. 414, affirming the judgment of the trial Judge, Monet, J., which dismissed the appellant's action.

F. J. Bisaillon, K.C., for appellant.

F. L. Beïque, K.C., and *Fred. Beïque*, K.C., for respondent.

The appellant brought an action against the respondent company for $10,000 for herself and $10,000 for her three children, as damages for the death of her husband who was killed by a train of the respondent company. The station agent at Napierville is also the agent of an express company. On the arrival of each train, he placed a truck on an earth elevation near the tracks and placed in it the goods unloaded from the train, in order that the persons interested could take delivery of these goods. The appellant's husband, who was expecting some goods, went near the truck while speaking with a friend, and, in order to examine the contents, placed himself between the truck and the rails. He was then struck by a locomotive and instantly killed.

The trial Judge dismissed the action, holding that the appellant's husband was entirely at fault. The Court of King's Bench affirmed this judgment.

The Supreme Court of Canada, at the conclusion of the argument of the appellant's counsel and without calling on the respondent's counsel, dismissed the appeal.

Appeal dismissed.

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STEARNS v. STEARNS.

Alberta Supreme Court, Walsh, J. December 11, 1920.

MISTAKE (§ VI D—115)—*Widow owner of land—Son making improvements on understanding that land willed to him—Change of intention—Duress—Transfer by widow to son—Encumbrance on land for widow's keep—Mistake of parties as to documents signed—Transfer set aside—Lien for improvements made by son.*]—Action by widow to set aside a transfer of land and vacate its registration and to restore to her the title to the land.

L. W. Brockington, for plaintiff.

Robert Ure and *W. D. Gow*, for defendant.

WALSH, J.:—The plaintiff is the mother of the defendant. She was until June 28, 1918, the registered owner, free of encumbrance of a quarter section of land west of Carstairs in this Province. On that day a transfer of this land from her to the defendant was recorded and concurrently therewith there went upon the record an encumbrance from him to her charging this land in her favour with "a home, necessaries, board, lodging, pin money, clothing, nursing and medical attention in a manner suitable to her station in life and of the value of six hundred ($600) dollars and no more." Upon the registration of this transfer the defendant became, and he has ever since been the registered owner of this land subject only to this encumbrance. The plaintiff's action is brought to set aside this transfer and vacate its registration and restore to her the title to this land which she has lost by its registration.

The plaintiff has been a widow for 28 years and the defendant is the youngest of her large family. She came to this country from the United States 18 years ago and homesteaded this quarter. The defendant took up a homestead of his own a short distance from hers, which after patent he disposed of and then bought another quarter adjoining his mother's homestead. He and she lived together on her land. He put up substantial buildings and made other lasting improvements on it to the neglect in this respect of his own land. Some years ago each of them made a will under which each was given all the property of the other. The defendant was a faithful, industrious and honest boy, devoted to his mother and her interests and she on her part was greatly attached to him and looked after him and his welfare with affectionate zeal. He married early in 1918 and brought his wife to his

mother's home and here the three of them lived on most excellent terms. The plaintiff's oldest son Albert, who had been left behind in the States when the plaintiff came to Canada, came to his mother's place some time before this transfer was made and after his arrival trouble began. He speedily supplanted the defendant in the affections of their mother. The defendant learned from the solicitor who had drawn the wills of his mother and himself, and contrary to the opinion that he had up to that time held on the subject that his mother's will did not secure him in the ownership of this land as it was subject to revocation. He feared from what he saw and what he heard of Albert's intrigues that he might lose the land which he had grown to look upon as his own with all of the improvements that he had put upon it, and he apparently had reason for that fear as it seems that Albert was scheming to secure a transfer of it from his mother. When this situation disclosed itself to him he went to three of his brothers, resident in that district, and told them of it. They at once appreciated the defendant's danger and took it into their own hands to free him from it for they had all grown to look upon the mother's land as land to which, if he was not then actually entitled, he and he alone would eventually be the owner. They went into Carstairs on March 28, 1918, and after consultation with a local Justice of the Peace laid an information against Albert for vagrancy. A constable went out for Albert and brought him into Carstairs and his mother came in with him. The defendant brought some hogs to Carstairs that day and so as a result of this combination of circumstances the plaintiff and the defendant, the son Albert, whose intrigues brought about this trouble, and the three other sons who had interested themselves to save the defendant from the consequences of these intrigues, were all in Carstairs at the same time. At the suggestion of the magistrate one of these three sons telephoned to Mr. Bury, a solicitor in Olds, to come down and conduct the vagrancy prosecution which had been set on foot against Albert. On his arrival he discountenanced the idea of proceeding with that charge which he considered an abuse of criminal process, and so it was dropped and an arrangement was reached under which Albert agreed to go back to the States.

It was then suggested, by whom does not clearly appear, but I think by one of the three sons who had interested themselves in

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the matter, that as the plaintiff and the defendant were both in. Carstairs and a lawyer was there they had better have some agreement drawn between the plaintiff and the defendant which would protect the latter's interest in the land in question and prevent a recurrence of the danger which had threatened it. And so the mother and her four sons, including the defendant, but not Albert, and the Magistrate Dickson and the lawyer, and a local merchant named Kelly, repaired to Kelly's house where for some time, a couple of hours or more, a discussion took place at the end of which the plaintiff put her mark to the transfer in question. The encumbrance was not drawn then but was prepared later by Mr. Bury and sent down by him to Carstairs where it was executed by the defendant and his wife, but not by the plaintiff. The whole transaction was completed exactly three months from the date upon which the transfer was executed by the registration of the two instruments on June 28.

The determination of this action must rest principally upon the events which happened in Kelly's house on the afternoon of March 28, though the history of the subsequent events is not without its bearing upon the case. The plaintiff's story is that the defendant took her to Kelly's, but for what purpose was not disclosed to her. At Kelly's she says there was a lot of talk about Albert being sent away, and then they began to talk about papers, and the lawyer looked in his satchel and said he had something that would do, that though they were there for three hours there was not much talk and that her homestead was not even mentioned. Finally she went to the kitchen for a cup of tea and whilst there the lawyer came out with a paper and told her that it was something for her benefit and without further explanation, and the document not having been read to her, she made her mark to it. She says that she can read and write but her eyesight is poor and her hand was shaking so that she could not write that day. Bury's evidence is in point blank contradiction of this. He says that the sons, except the defendant, talked to her about turning the place over to the defendant and that she did not want to do it but after Kelly talked to her she agreed to do so. He (Bury) then said this should be done by a transfer from her and an encumbrance back from the defendant securing her livelihood, that having no form of transfer with him he sent for one

and filled it up, and procured from one of the defendant's brothers information as to the value of the buildings from which he filled up the affidavits required under the Unearned Increment Tax Act (4 Geo. V. 1913 (Alta. 2nd sess., ch. 10)), and he then read over to the plaintiff the transfer and her affidavit under the above Act and explained them to her and that she approved of them both and set her mark to each of them.

Marshall Stearns, one of the three sons above referred to, was a witness for the plaintiff. He and the defendant are not good friends now and his evidence may perhaps have been coloured to some extent by this. He says that Bury was told that what was wanted was an agreement so that the defendant could run the place as before as Albert was influencing her against the defendant and that Bury did some writing on a paper and went out to the kitchen and came back with it signed by his mother, and that he did not know what was on the paper until this year. He says that he and his brothers wanted to protect both their mother and the defendant by having him take care of her and get the place, and that Bury did not tell them that a transfer was necessary, but he said he could draw an agreement at Olds and send it down. He did not hear Bury ask any questions about the value of the buildings and he says that so far as he knows no deception was practiced on his mother that day.

Chester Stearns, another of these three sons, was a witness for the defence. He says that the meeting at Kelly's originated in the idea of his brothers and himself, that the defendant had not enough authority at his mother's place, and that there should be an agreement that would give him the necessary authority. His understanding was that the defendant was to take care of their mother and get the place when she was through with it. He says that the word transfer was not used, that he did not see his mother sign any paper but that he learned from the defendant two months later that he had a transfer.

The defendant does not profess to relate the discussion as it took place. He says that Bury read and explained the paper to his mother and he saw her put her mark to it. His own idea of the arrangement arrived at was that the land should be his at his mother's death and in the meantime he should support her.

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Kelly, at whose house this meeting was held, professed in the witness box entire ignorance even of the subject of discussion at it. He claimed to have been there but a short time, to have left practically before the talk began and to have come back home only after everything was settled.

The third son, Charles, is now living in the United States and his evidence was not available. Mrs. Kelly was not in the room where this discussion took place and knows nothing of it. Her evidence was directed to the fact of Bury coming out to the kitchen where the plaintiff was with some papers in his hand but she knew nothing whatever of what occurred between them. Dickson, the magistrate, the only other possible witness, was not called though I twice adjourned the trial for the purpose of getting his evidence. I was reluctantly obliged to bring the trial to a close without having the advantage of knowing what he had to say in the matter.

I do not think that the plaintiff was as candid a witness as she should have been. She is an old lady, being at the time of this transaction about 72 years of age, but she is even now, nearly three years later, a woman with an alert mind and a domineering disposition. Her evidence even when read in cold type will, I am sure, convey this idea of her to the minds of those who read it. Much more so did it thus impress me who saw her and listened to the quickness of her answers and witnessed the vigour of them and remarked the impatience which brooked no interference with her and her rights. It is impossible for me to believe that she sat throughout this discussion which lasted for probably two hours and the main theme of which undoubtedly was this land of hers without knowing that it was being talked about and in connection too with the defendant's interest in it. Neither can I fancy that so strong-minded a woman as she is would docilely set her signature to a document presented to her by a complete stranger as Bury then was upon his mere assurance that it was something that would be of benefit to her. She undoubtedly was considerably perturbed that day by the proceedings that had been set on foot looking to the separation from her of her favourite son Albert, proceedings which she strongly disapproved of and vigourously resented and that fact in all probability robbed her mind

for the time being of some of its keenness. But notwithstanding that I am satisfied that she knew far more of what was going on than she now gives herself credit for.

I am satisfied that Bury acted with no evil intent in putting the transaction into the form that it took under his handling of it. He was until that day a complete stranger to all of the parties. He came to Carstairs expecting to be concerned in a Police Court case and then found himself thrust into this family dispute. I think that he learned from the discussion that was carried on that it was the unanimous view of those engaged in it that the title to this land should be put in such shape that the rights of the defendant in it should be protected without throwing the plaintiff on the world. To his mind, as a lawyer, the course that he took was the easy and the proper one, and I am sure that he adopted it as being in consonance with what he understood to be the wishes of those whose interests he was there to serve. I think, however, that he quite failed to make any one there understand the course that he was taking. Not one of the witnesses even including the defendant himself knew that what was being done there was the transfer to him of the present, immediate ownership of that land. The defendant's conception of it as expressed in the witness box was that as a result of it he would get the land at his mother's death. He put it thus on his examination for discovery.

208. Q. The transfer which is the document which your mother signed purports to give to you that quarter section. Is that what you thought your mother was doing? A. At that time? 209. Q. Yes. A. No. I didn't. 210. Q. You did not think she was? A. I didn't not hardly know it was until after it was explained again to me.

To Mr. Bury's trained legal mind what he was doing was a very simple and very ordinary transaction which, perhaps because of the very frequency with which he was called upon to do it, called in his opinion for no elaborate explanation, from him. He was, however, dealing with people untrained in business of this character. He was taking away from this old woman by her signature to a document which in her then condition she could not read, and which without a thorough explanation she could not fully understand property of which she was the legal owner. He owed her the duty of making absolutely clear to her not only what she was doing but the effect of it. I think that he failed in that

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duty. Without attributing to him any sinister motive and without discrediting his statement that he read and explained this document to her I am satisfied that when she made her mark to it neither she nor any one then present except Bury had the slightest idea that she had signed away her title to her homestead. I think that though she would have been willing to sign something that would have secured this property to the defendant as she had always intended at her death she was not then minded to dispossess herself of it and I am sure that she would not have knowingly signed anything that would have that effect.

The defendant personally is entirely blameless for anything and everything that was done on that day. He had neither hand nor part in the attempted deportation of Albert. His other brothers did that entirely on their own initiative. He had nothing to do with bringing Bury to Carstairs. His brothers did that though he subsequently paid Bury's bill. At the conference he did not open his mouth. That is admitted by every one including the plaintiff. He sat there crying through sheer emotion over the threatened loss of what he had grown to look on as his own. He made not the slightest attempt even by suggestion to bring results for himself out of this conference. His case was in the hands of his brothers. They were making the fight for him and for no other reason than to see justice done to him without injustice to their mother for I am sure that none of them intended that she should be wronged. He is a dull-witted but honest-minded man who has neither the capacity nor the will to frame up or execute a dishonest trick.

The subsequent story, so far at least as it is material, is comparatively short. Mr. Bury drafted the encumbrance and submitted it to the registrar for approval before having it executed. As drawn it was unlimited in amount. The registrar suggested that "it would be well for you to fix a maximum amount of money to be paid to the mother." Bury thereupon provided by it as shewn in the above extract that the provision thereby secured to the mother should be "of the value of $600 and no more." He had absolutely no instructions to so limit it if indeed he had any authority at all for the preparation of such a document. He says that he got this idea of $600 from something that was said in the discussion to the effect that that was the extent of the plaintiff's

interest in this land. Admittedly this limitation should never have been placed upon this provision and Mr. Ure for the defendant recognising this asked me to remove it from the encumbrance so as to leave the plaintiff's maintenance absolutely without limitation as to amount.

The plaintiff was asked to sign this without being told what it was but refused to sign anything and so it was registered without her knowledge or approval. For this part of the transaction I have nothing but censure and Mr. Bury must be the one to bear the blame for it as he alone is responsible for it. The plaintiff did not know until this spring, two years after the execution of the transfer, that she had ceased to be the owner of this land, and that her son had become the registered owner of it subject only to this unauthorised and quite unjustifiable encumbrance in her favour. This action promptly resulted. I did my utmost at various stages of the trial to bring about a settlement but I failed and so now I must say what result must, in my opinion, follow from the facts as I have found them. Mr. Ure both at the opening and the closing of the trial made a vigourous effort to have me dismiss the action, basing his argument upon the contention that the allegations of the statement of claim even if proved do not entitle the plaintiff to any relief. I refused to do this and now having heard all of the evidence and made my findings of fact I propose to dispose of the case in the manner that these findings in my view of the law compel me to regardless of the exact frame of the pleadings.

I think that Bury in procuring the execution of the transfer as he did was technically guilty of fraud. I do not use the word offensively for I have already acquitted him of any evil design in the matter of the transfer. I use it in the sense in which Viscount Haldane, L.C., defines it in *Nocton* v. *Lord Ashburton*, [1914] A.C. 932, at 954, in the following language:—

> But when fraud is referred to in the wider sense in which the books are full of the expression, used in Chancery in describing cases which were within its exclusive jurisdiction, it is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent, even in such a case as a technical fraud on a power. It was thus that the expression "constructive fraud" came into

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existence. The trustee who purchases the trust estate, the solicitor who makes a bargain with his client that cannot stand, have all for several centuries run the risk of the word fraudulent being applied to them. What it really means in this connection is, not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience.

Bury, though afterwards paid by the defendant, was really there to protect the interests of both the parties. That is what the sons who brought him there expected of him. I think he owed just as much of a duty to the plaintiff as he did to the defendant. She had no independent advice and she obviously signed in reliance upon him. He was under the obligation to her to see that she thoroughly understood what she was doing when she executed this transfer. In this he failed and by his breach of this obligation he ran the risk as Lord Haldane put it of having the word fraudulent applied to him. He acted for the defendant in recording the transfer and the defendant has accepted and defended the title thus procured for him.

If I am wrong in attributing fraud to Bury even in this limited sense I think that his conduct amounted to an innocent misrepresentation of the contents of the document whose execution he secured, which entitles the plaintiff to rescind the transaction.

A misrepresentation may consist just as well in the concealment of that which should be disclosed as in the statement of that which is false for misrepresentation unquestionably may be made by concealment. If the non-disclosure of a material fact which the representor is bound to communicate is deliberate the misrepresentation is a fraudulent one; if it is unintentional it is none the less a misrepresentation though an innocent one. A transaction induced by a misrepresentation whether fraudulent or innocent is voidable at the option of the representee who on discovery of the truth has a right to elect whether he will affirm or disaffirm it. The plaintiff promptly elected to rescind this transaction when she became aware of it and is now entitled to be restored to her former position as registered owner of this land.

There were many other grounds suggested to me in argument why the transaction could not stand. In view of the opinion that I have above expressed I do not think it necessary to deal with them. If it should appear that I have mistaken the ground upon which relief should be extended to the plaintiff it may be

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that in some one or more of the other reasons advanced to me there may be found sufficient for that purpose. It would, in my opinion, be a deplorable thing if in the facts of this case as they appear to me the Court should be powerless to undo the wrong that has been done to this woman no matter how unwittingly.

There will be judgment setting aside the transfer and vacating its registration and ordering the registrar to re-issue to the plaintiff her certificate of title to this land. The defendant must pay the plaintiff's costs of the action. She also asks for possession of the lands. If she really wants it she is entitled to it. The defendant by his counterclaim seeks to have it declared that he is entitled to a lien on this land for the lasting improvements placed by him upon it, if his title to it is taken from him. These improvements were put upon it by him before the making of the transfer in question, and they were so put upon it as I find under the mistaken idea on his part that the execution by the plaintiff of a will devising this land to him secured him in the ownership of it. The plaintiff lived with him on this land all of the time and she knew perfectly well what he was doing, and I think she knew why. There is no room for doubt that she stood by and consented to the expenditure of the defendant's time and money in the making of these improvements.

In *Riddell* v. *McRae* (1917), 34 D.L.R. 102, 11 Alta. L.R. 414, the Appellate Division gave the plaintiff a lien on the defendant's land for the taxes against the same which he had paid basing its judgment upon the inference that the defendant must have been under the impression that either someone was paying the taxes or that it had been or was in danger of being sold for arrears. Beck, J., in delivering the judgment of the Court, says, 34 D.L.R. at 103:

> Had deceased or the plaintiff made lasting improvements upon the defendant's lot, at least under circumstances from which it ought to be inferred that the defendant was standing by and consenting, the Court would, as I shall shew, declare a lien.

That is this case exactly, and without further search for authority this is quite sufficient to justify me in granting the defendant this relief. By consent no evidence was given before me as to the *quantum* of this lien it being understood that it should be determined by a reference. There will be judgment declaring that the defendant is entitled to a lien on the lands in question for

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the value of the lasting improvements made by him at his own cost and expense upon the same before March 28, 1918, and referring it to a referee to be selected by the parties, and failing such agreement to be appointed by a Judge of this Court to ascertain and fix the amount of the same. The plaintiff has offered without prejudice to pay to the defendant $1,500. If that offer is not accepted and the defendant gets no more as the result of the reference he will pay the costs of the reference. If he gets more than $1,500 as the result of the reference the plaintiff will pay the costs of it. If the defendant has incurred any costs of the counterclaim as separate and distinct from the costs of his defence he will have the same down to and including the trial from the plaintiff. *Judgment accordingly.*

Re HEXTALL ESTATE.

Alberta Supreme Court, Walsh, J. November 23, 1920.

EXECUTORS AND ADMINISTRATORS (§ III B—70)—*Judgment against executors—Proper form—Payment in due course of administration—Execution—Insolvency.*]—Application for appointment of a receiver. Application refused.

C. T. Jones, K.C., for the estate.

J. C. Brokovski, K.C., for the execution creditor.

WALSH, J.:—It is settled by the judgment of the Appellate Division in *Northern Crown Bank* v. *Woodcrafts* (1919), 46 D.L.R. 428, 14 Alta. L.R. 473, that the proper form of judgment against executors or administrators in respect of a liability of the deceased is for payment in due course of administration, unless there is on their part a distinct affirmative admission of assets sufficient to pay all the creditors of the estate and that, upon a judgment for the amount recovered to be paid in due course of administration, it is improper to issue any executions whatever upon the judgment. There was no admission of sufficient assets in this case and the judgment in question was, therefore, in substance if not in exact form for payment in due course of administration and the execution issued upon it was, therefore, under the above authority improperly issued. The estate is insolvent and the execution creditor must come in and take its dividend with the other cred-

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itors. The execution prevents a sale of the lands of the estate for it stands against them in the Land Titles office. It must, therefore, be removed and the order will go as asked.

If any actual default has occurred on the part of the administrator or one is anticipated, the remedy of the execution creditor, as pointed out in the above judgment, is to apply for an order for administration and if necessary the appointment of a receiver. There is not before me sufficient material to justify such an order here, and I must, therefore, refuse Mr. Brokovski's alternative application. This refusal is without prejudice to his right to make a substantive motion for this relief if so advised.

The estate is entitled to its costs of this application from the execution creditor and I fix them at $50.

Judgment accordingly.

Re HILL ESTATE.

MAN.
K. B.

Manitoba King's Bench, Prendergast, J. October 22, 1920.

WILLS (§ III A—75)—*Construction—Implied power of appointment—Exercise of power by will.*]—Application for the advice and direction of the Court under the Manitoba Trustee Act, R.S.M. 1913, ch. 200.

H. A. Bergman, K.C., for executors.

F. M. Burbidge, K.C., for children.

J. F. Davidson, for creditors.

PRENDERGAST, J.:—Thomas Hill died August 19, 1898, leaving a widow and several children and having made a will appointing his said widow his executrix and containing the following clause, viz.:—

I give and bequeath to Mary Hill, my wife, my farm of three hundred and twenty (320) acres of land on which I now reside, being composed of the S. ½ of Sect. 20 Tp. 6 & R. 14, W. of 1st M., also all household furniture, implements, book and other accounts owed to me, together with all my personal property also all stock owned by me during her natural life, at her death if she makes no will all my real estate and personal property is to be sold and equally divided among my surviving children.

Mary Hill died April 4, 1917, having first made a will appointing the applicants herein her executors and trustees, and containing the following, namely:—

I direct my said trustees to pay all my just debts funeral and testamentary expenses, I give unto my beloved son Leslie Hill the sum of one thousand dollars. I give to my following sons and daughters viz.: William James Hill,

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Thomas Edward Hill, Robert Hill, John Alexander Hill, Arthur Fleming Hill, Mary Ann Reid, Lucinda Anderson and Martha Card the sum of one dollar each. All the residue of my real and personal estate I give and bequeath to my beloved daughter Eliza Jane Martin to have and to hold the same absolutely forever. I give my said trustees full power to sell any or all of my real and personal estate at any time they see fit so to do.

The only available property involved in the application is the half section of land set out in Thomas Hill's will, and which is valued at $6,000 and mortgaged for $3,000.

All the debts owing by Thomas Hill, except the mortgage on the farm, were paid out of the estate by his widow; but she left at her death liabilities amounting to nearly $4,000.

I cannot at all adopt the suggestion that in Thomas Hill's will the words "together with all my personal property also all stock owned by me during her natural life" form a separate and distinct provision in such a way that the words "her natural life" should be held to apply only to the gift of the "personal property" and "stock," and not to the bequest of the half section, furniture, implements and accounts. That would be contrary to what I take to be the plain meaning of the clause as a whole.

The deceased, as I have no hesitation in finding, meant to give his wife a life interest in all his property.

Then, the words "at her death if she makes no will," imply that she has power to make a will and therefore impliedly confer upon her a power of appointment.

Mr. Burbidge for the children contended that this power of appointment is a special one. I fail to see any ground at all for so holding. I am of opinion that the power is general for the simple reason that there is nothing whatsoever to limit it. Of course, in case of her making no will, the estate would be divided equally among the surviving children, but that places no limitation on the power granted her, even if it be only by implication of disposing of his estate in her will. The contention really is that the testator meant that the children should take the remainder in any event. But why should he not have simply so stated, instead of resorting to this complicated and unnatural method of a power of appointment and the contingent bequest?

Now, should the widow be deemed by her will to have exercised that power of appointment?

MAN.

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Assuming, as I do, that the power of appointment is general, the question is answered affirmatively by sec. 25 of the Wills Act, R.S.M. 1913, ch. 204. See also *In re Mills* (1886), 34 Ch. D. 186, and *In re Williams, Foulkes* v. *Williams* (1889), 42 Ch. D. 93.

The answer to the questions put will be: (1) The widow Mary Hill takes a life interest only but with general power of appointment. (2) Her executors are entitled to sell the said land and apply the proceeds in payment of her debts, and distribute the surplus if any as directed by her will.

Counsel appearing respectively for the executors, for the children and for the creditors will be paid their costs out of the estate. *Judgment accordingly.*

HUGHES v. INTERNATIONAL HARVESTER Co. Ltd.

Manitoba King's Bench, Macdonald, J. August 12, 1920.

VOLUNTEERS AND RESERVISTS (§ I—1)—*War Relief Act, 1918, ch. 101 (Man.)—Violation of—Right to damages—Statute of Westminster II. (13 Edw. I., 1285)—Waiver of right.*]—Action for damages for wrongful seizure and sale of goods.

L. L. Broad, for plaintiff; *G. R. Coldwell*, K.C., for defendant.

MACDONALD, J.:—The plaintiff brings this action claiming damages arising out of the following circumstances:—On or about October 4, 1919, the defendant company by its warrant authorised its co-defendant Calendar to act in its behalf and to take all the goods and chattels mentioned in lien notes (Ex. 5) made by the plaintiff in its favour, and pursuant thereto the plaintiff alleges and charges that the defendant Calendar and his co-defendant Jackson did wrongfully enter upon certain lands and premises of the plaintiff and did wrongfully and unlawfully seize and remove from the said lands and did sell or otherwise dispose of the following goods, the property of the plaintiff:—One Goodison separator, one sleigh, one horse, and one binder.

The plaintiff is and was for a considerable time prior to August 1, 1914, a resident of Manitoba and on or about January 10, 1916, did enlist and become mobilised as a volunteer in the forces raised by the Government of Canada in aid of His Majesty in the war which then existed. The said plaintiff had so enlisted and

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become mobilised before the commencement of the proceedings mentioned and the defendants well knew that the plaintiff had so enlisted and become mobilised.

The plaintiff claims the benefit of the War Relief Act, 8 Geo. V., 1918 (Man.), ch. 101.

Counsel on behalf of the defendant contends that an action for damages does not lie for violation of that Act, that the only remedy is prohibiting of action against a volunteer and cites the case of *Shipman* v. *Canadian Imperial Trust Co.* (1917), 31 D.L.R. 137, 27 Man. L.R. 238, in support of his contention as interpreting sec. 2 of that Act.

I do not construe that case as determining this point in the manner contended by counsel; his interpretation is based on the headnote (27 Man. L.R. 238), which reads: "Since the War Relief Act, 5 Geo. V., 1915, (Man.), ch. 88, seriously interferes with contracts and the legal rights of creditors, it ought to be construed so as not to interfere with them to any greater extent than is expressly or by necessary implication provided, and the proper construction of sec. 2 of the Act, when read along with the preamble to the Act, is to confine its application to the prohibiting of actions or proceedings against a volunteer," and the language of Perdue, J.A. (now C.J.M.), where he says, 31 D.L.R., at 140: "I think the proper construction of the section is to confine its application to the prohibiting of actions or proceedings taken against a volunteer, or which affect his property, lands, goods or chattels."

This language had reference only to the case under consideration and an interpretation of the statute only as applicable to that case and not as expressing the full meaning of the Act. That case was brought for a declaration that all proceedings taken by the defendant subsequent to the enlistment of the plaintiff's husband were contrary to law and void and for an order restraining the district registrar from granting foreclosure and issuing certificate of title under mortgage sale and foreclosure proceedings, and the finding was that the proper construction of the section was to confine its application to prohibiting of actions or proceedings taken against a volunteer and did not extend to the wife of the volunteer and not a finding confining the remedy of a volunteer in all cases to prohibiting the bringing of an action in exclusion to all other remedies.

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The Statute of Westminster, II. (13 Edw. I., 1285), gave a remedy by action on the case to all who are aggrieved by the neglect of any duty created by statute and it is laid down in Comyn's Digest that in every case where a statute enacts or prohibits a thing for the benefit of a person he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done him contrary to the said law; and in *Couch* v. *Steel* (1854), 3 El. & Bl. 402, 118 E.R. 1193, it was stated as a broad general proposition that wherever a statutory duty is created any person who can shew that he has sustained injuries from the non-performance of that duty can bring an action for damages against the person on whom the duty is imposed.

Section 2 of the War Relief Act, 5 Geo. V., 1915 (Man.), ch. 88, provides that:—

> During the continuance of the said war, it shall not be lawful for any person or corporation to bring any action or take any proceeding, either in any of the civil Courts of this Province or outside of such Courts, against a person who is or has been at any time since the first day of August, 1914, a resident of Manitoba and has either enlisted and been mobilised as a volunteer in the forces raised by the Government of Canada, in aid of His Majesty . . . or of any of his allies in the said war as a volunteer or reservist, . . . or against the wife or any dependent member of the family of any such person, for the enforcement of payment by any such person of his debts, liabilities and obligations existing or future, or for the enforcement of any lien, encumbrance or other security, whether created before or after the coming into force of this Act, or for the recovery of possession of any goods and chattels or lands and tenements now in his possession or the possession of his wife or any dependent member of his family, and, if any such action or proceeding is now pending against any such person, the same shall be stayed until after the termination of the said war.

In contravention of this statute the defendant company, through its agent the defendant Calendar, seized the goods mentioned under the said lien notes and sold and disposed of the said goods and by reason of this illegal act on the part of the defendant company plaintiff has sustained damages.

The part taken by the defendant Jackson was of so unimportant and trivial a character that as against him the action is dismissed but without costs.

The defendant company claims that the plaintiff waived for good and valuable consideration all right to any relief which he might be entitled to under the War Relief Act in respect of the

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matters complained of in the statement of claim and as evidence of the fact puts in Ex. 7, a letter written by the plaintiff's solicitors to the defendant company's solicitors, in which they say:—

> He will consent to your clients taking judgment and will not plead the War Relief Act if you will agree after taking judgment not to proceed further but to hold matters over until the coming fall when he undertakes to make a satisfactory settlement with your clients. Dr. Hughes (plaintiff) is now out of the army and attending to his private practice.

The defendant did not invoke the War Relief Act as a defence to that action which was an action at law on the notes (Ex. 5) and the defendant company recovered a judgment against him and did observe their part of the agreement and waited not only until the then next fall but until the fall following and the plaintiff failed to make a settlement, then the defendant company caused the seizure and sale of the goods as mentioned, the plaintiff protesting against their doing so.

The agreement as to waiver applied only to the action at law.

The seizure was made at a time when part of the goods were in use in the plaintiff's farming business. He was in the midst of the threshing of his crop and by reason of being deprived of the separator and unable to secure another could not complete his threshing and a quantity of rye and oats and a small quantity of wheat were destroyed and lost to the plaintiff and for this I am of the opinion that the plaintiff is entitled to damages.

There were 60 acres of rye and about 5 acres of oats. Thirty-three acres of the rye crop was what is known to the farming community as a volunteer crop, that is, a crop that is self-seeded and the yield would be light. Four bushels of rye of the volunteer crop and 40 bushels of oats to the acre would I think be a fair estimate of the yield. The remaining acreage of the rye crop would yield 15 bushels to the acre. The wheat crop was of a very inferior quality and fit only for feed.

There is no other damage to the plaintiff. The goods seized and sold were sold at their value and the sale openly and fairly held and to the best possible advantage.

I place the damages to the plaintiff for the loss of his crop by inability to complete his threshing, taking into account the cost of threshing and marketing, at $600, for which there will be judgment in his favour with costs.

Judgment for plaintiff.

TROTTER v. PEDLAR. MAN.

Manitoba King's Bench, Mathers, C.J.K.B. July 19, 1920. K. B.

FRAUDULENT CONVEYANCES (§ III—10)—*Preferences—Attack on within 60 days—Interpleader issue—Intent or pressure—Insolvency —Onus of proof—Assignments Act, R.S.M. 1913, ch. 12, secs. 40-42.*] —Interpleader issue to try the question whether certain horses seized by the sheriff under an execution upon a judgment recovered by the plaintiff were at the time of seizure exigible as against the claimant who claims the animals seized under a chattel mortgage.

C. Blake, for plaintiff; *J. H. Howden*, K.C., for defendant.

MATHERS, C.J.K.B.:—The plaintiffs are horse dealers at Brandon and the execution debtor is a farmer and stock raiser residing near Neepawa. The debt upon which the judgment was recovered was incurred in 1915. The statement of claim was issued on January 23, 1920, and was served on the defendant on February 3, 1920. On February 21, 1920, judgment was signed by default for $2,271.09 and on the same day an execution was issued and placed in the hands of the sheriff. About March 18, 1920, the sheriff's bailiff seized on the debtor's farm a number of horses. One bay mare was claimed by the debtor as exempt; a black Percheron stallion was claimed under a lien note; six were claimed by Pedlar under a chattel mortgage, leaving four which the sheriff sold, realising the net sum of $108.85, less sheriff's poundage. The animals claimed under the chattel mortgage consist of one Hackney mare, one four-year-old gelding, one black stud colt, one bay stud colt, two black colts.

In August, 1918, the claimant and the execution debtor entered into a profit-sharing agreement respecting sheep-raising. By its terms the claimant was to purchase a number of sheep which the debtor was to feed and care for and receive one-half of the profits from the sale of wool and lambs or upon the resale of all or any of the sheep. If the undertaking resulted in a loss he was to bear one-half of it. In the fall of 1918, Pedlar bought several hundred sheep. Some were resold that fall and they had left about 500 at the beginning of 1919. The wool clip of that year was marketed and the debtor received $600 on account of his share. Pasturage was poor and the sheep and lambs were not in good condition for sale in the fall of 1919. It was intended to sell the

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lambs later on when their condition had improved from running on the stubble, but unfortunately these plans were upset by the snowfall in October. The debtor had neither feed for the sheep during the winter nor the money wherewith to purchase it, and for this purpose the claimant advanced for him upwards of $4,500. It was to secure this debt that the chattel mortgage is said to have been given.

The chattel mortgage is impeached on the ground that the debtor was at the time it was given in insolvent circumstances or unable to pay his debts in full and it had the effect of giving the mortgagee a preference over the plaintiff. These proceedings having been instituted within 60 days, it is claimed that the mortgage is utterly void under secs. 40 and 42 of the Assignments Act, R.S.M. 1913, ch.12.

It is also impeached on the ground that it was given with the intent, shared in by both mortgagor and mortgagee, to defeat, hinder or delay the plaintiff and is therefore void under the Statute of Elizabeth.

An interpleader proceeding such as this is "an action or proceeding which . . . is brought, had or taken to impeach or set aside" the chattel mortgage within the meaning of sec. 40 of the Assignments Act; *Cole* v. *Porteous* (1892), 19 A.R. (Ont.) 111; *McKinnon* v. *Coffin* (1906), 2 E.L.R. 176. The mortgage was made on February 9, 1920, and the notice of motion to interplead was served on the mortgagee on April 8 or 9, 1920, within 60 days thereafter. It follows that the chattel mortgage is void if the debtor was at the time in insolvent circumstances or unable to pay his debts in full and the mortgage had the effect of giving the mortgagee a preference as defined by sec. 42 of the Assignments Act over the execution creditor, no matter what the intent was in giving it and no matter what pressure was exerted to obtain it. Such was the interpretation placed upon secs. 40, 41 and 42 by Robson, J., in *Empire Sash and Door Co.* v. *Maranda* (1911), 21 Man. L.R. 605, at 616, and I agree with him. To the same effect is *Smith* v. *Sugarman* (1909), 2 Alta. L.R. 442, affirmed (1910), 47 Can. S.C.R. 392.

The question then is, was the debtor "in insolvent circumstances" or "unable to pay his debts in full" when he executed

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the mortgage in question? The authorities show that these two phrases denote the same financial condition: Cassels' Ontario, Assignments Act, 4th ed., 26.

Various tests of insolvency have been from time to time formulated and applied, but the one which has been received with most favour in this Province is that given by Vice-Chancellor Spragge in *Davidson* v. *Douglas* (1868), 15 Gr. 347, at p. 351. He there says that in considering the question of the solvency or insolvency of a debtor the proper course is "to see and examine whether all his property, real and personal, be sufficient if presently realized for the payment of his debts, and in this view we must estimate his land, as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it would bring in the market at a forced sale; or at a sale when the seller cannot await his opportunities, but must sell."

This definition was adopted by Killam, J., in *Bertrand* v. *Canadian Rubber Co.* (1897), 12 Man. L.R. 27, and his decision was affirmed by the Full Court. He does not agree with Rose, J., in *Dominion Bank* v. *Cowan* (1887), 14 O.R. 465, that a debtor's property is to be estimated at what it would bring at a sale under legal process even with the qualification that such a sale be fairly and reasonably conducted and adds that such a sale "may frequently involve a sacrifice beyond what the debtor 'who cannot await his opportunities, but must sell' is obliged to make."

The same definition of insolvency was adopted by Robson, J., in *Empire Sash and Door Co.* v. *Maranda*, *supra*, and by Curran, J., in *Robinson* v. *McCauley* (1913), 13 D.L.R. 437; 14 D.L.R. 681, 23 Man. L.R. 781.

The Spragge test seems to me the proper one as applied at least to a non-trader and I propose to apply it in this case.

The fact of insolvency must, of course, be proved by those who allege it (Cassels, p. 26), but he may in the first place satisfy the onus by shewing that the debtor is unable to pay his debts as they become due. In *Rae* v. *McDonald* (1886), 13 O.R. 352, Rose, J., at p. 358, quotes with approval a passage from Bump's Law and Practice of Bankruptcy, 10th ed., p. 812, to the effect that, "If the debtor is unable to pay his debts as they become due the burden of proving that his property is sufficient to pay his debts rests upon him."

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Authority given for the passage, Rose, J., says is *In re Ryan*, (1873), 2 Saw (U.S. Circuit Ct.) 411. After quoting approvingly this part of the judgment of Rose, J., Robson, J., in *Empire Sash and Door Co.* v. *Maranda*, *supra*, states that inability after considerable delay to meet the current demands of creditors affords strong evidence of insolvency.

The debt in question was contracted in 1915. Partial payments were made in 1916 and 1917, but although frequently pressed the debtor has paid nothing since. When suit was threatened in December, 1919, the debtor offered to convey to the plaintiff a quarter section of land and to return two of the horses purchased. He admits that he had not then and has not since had the wherewithal to pay the claim in money and that up until he gave the mortgage in question he had been unable to sell any of his property for the purpose of raising it. These facts shew that he was *primâ facie* in insolvent circumstances and unable to pay his debts in full. The onus was then shifted to the claimant to shew if he could that, notwithstanding this *primâ facie* evidence of insolvency, he still had property sufficient to pay his debts.

At the time the chattel mortgage was executed the debtor owned five parcels of farm lands. I have no information as to the value of each parcel or the encumbrance thereon, but that given by the debtor himself. His valuation is $30,500. Each parcel is encumbered, the total encumbrances amounting to $12,800. His personal property consisted of the six horses mortgaged to Pedlar, valued at $690, and thirteen others, four of which were seized and sold by the sheriff for $250, and nine more which he valued at $3,850. Two of these are subject to a lien note for $813; the rest are clear. He has twenty-five sheep, which he valued at $15 each, one cow and calf, valued at $200, agricultural implements valued at $1,000, and a motor car valued at $500. Total personal property, including exemptions, $6,062. The horses were all in very poor condition from lack of feed and care and quite unsalable.

His liabilities consist of:—

The plaintiff's judgment	$2,271.09
Pedlar's claim	4,500.00
Other accounts	1,400.00
	$8,171.09

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Under these circumstances has it been shewn that the debtor was solvent when the mortgage was given? That is to say, had he available property which could be presently sold for sufficient to pay his debts in full without waiting for a favourable opportunity?

I am not satisfied that the debtor's property could be sold within any reasonable time or at all at anything like the prices he has put on it. There are indications that the values given are much beyond the market price. For example, the value he now places on the south-west quarter of sec. 22, tp. 21, rge. 17, west, is $2,500, but he admits that he offered to turn this quarter over to the plaintiff in part payment of his debt at $1,200. Sheep which he values at $15 each the claimant says he would gladly sell if he could at $10 each.

Upon the most careful consideration I have been able to give the whole matter there seems to be no escape from the conclusion that at the time the chattel mortgage was given the debtor was in insolvent circumstances and unable to pay his debts in full within the meaning of the Assignments Act, R.S.M. 1913, ch. 12. It follows from this finding that the chattel mortgage would have the effect of giving the defendant a preference over the plaintiffs. It is, therefore, in my opinion, void as against them.

There will be judgment that the goods and chattels in question were at the time of the seizure by the sheriff exigible under the plaintiff's execution. The plaintiffs are entitled to the costs of the issue. *Judgment accordingly.*

KORDO v. TOLOSKO.

Manitoba King's Bench, Mathers, C.J.K.B. December 22, 1920.

COSTS (§ II—20)—*Malicious prosecution—Action for damages—Nominal damages awarded.*]—Application as to costs in an action for damages for malicious prosecution.

S. H. Green, for plaintiff; *W. H. Trueman*, K.C., for defendant.

MATHERS, C.J.K.B.:—The action having been tried by a jury, by R. 934, sub-sec. 2, costs must follow the event unless "for good cause shewn," I "otherwise order."

The only cause for interference that has been suggested is that the jury assessed the plaintiff's damage at one dollar.

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The smallness of the verdict standing alone is not even *primâ facie* good cause: *Moore* v. *Gill* (1888), 4 T.L.R. 738; *O'Connor* v. *"Star" Newspaper Co.* (1893), 68 L.T. 146. It is, however, an important element to be considered and if it can be interpreted as meaning that the charges were very nearly true, or that the plaintiff was of bad character, or where no moral character was at stake, as in the case of a corporation suing for libel, that no commercial damage had been suffered, the smallness of the verdict may constitute good cause: *Red Man's Syndicate* v. *Associated Newspapers, Ltd.* (1910), 26 T.L.R. 394; *Wood* v. *Cox* (1889), 5 T.L.R. 272.

The proper way of approaching the question is to ascertain as far as possible by an analysis of the facts of the case and the jury's findings just why they fixed the damages at the sum stated: *Wood* v. *Cox, supra, Williams* v. *Ward* (1886), 55 L.J. (Q.B.) 566; *Wootton* v. *Sievier* (No. 2), (1913), 29 T.L.R. 724.

There is no evidence that the plaintiff had acted improperly or oppressively in bringing the action. The jury have found that the defendant prosecuted him criminally upon a false charge of uttering seditious words in the truth of which charge the defendant had no honest belief, and moreover in doing so he was actuated by malice. There was ample evidence to justify these findings.

In malicious prosecution damage is the gist of the action. The plaintiff must shew that he has suffered in either person, reputation, or estate, or his action fails. The evidence shewed that a serious criminal charge had been preferred against him and so he suffered in reputation; that he had been taken into custody and so suffered in person; and that he had been put to expense and so suffered in his estate. The evidence would have justified a verdict for a substantial amount. Then, why did the jury award but one dollar? The only logical conclusion is that they thought his reputation had been fully vindicated by his acquittal by the jury before whom he was tried upon the criminal charge and that he suffered no damage on that score. As reasonable men they must have thought that he had suffered some damage by being arrested and imprisoned and in defending himself against the false charge. During the war the defendant had prosecuted the plaintiff for permitting his bull to be at large and the plaintiff had threatened to get even with him by informing the military authorities that

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the defendant had a son of military age whom he said was hiding to avoid conscription. Immediately after this threat the prosecution complained of was instituted.

Either the jury must have found it impossible to agree upon an assessment of a larger amount than one dollar for general or special damage or they believed the action was brought from spite arising out of the quarrel with the defendant and refused for that reason to award him larger compensation. That the action was brought from spite has sometimes been thought a reason for depriving the plaintiff of costs: *Morgan* v. *Wallis* (1917), 33 T.L.R. 495. But even if so actuated I do not think it should alone be regarded as good cause in this case. The answers of the jury to the questions put to them shew that the plaintiff had a substantial cause of action. I do not see how they could arrive at the conclusion that he had suffered no commercial damage and I do not think their finding should be so interpreted. Whatever their reason was for fixing the damage at one dollar I do not think they meant to express the view that the plaintiff had no right to bring the action.

They have found that the defendant did not believe that the plaintiff had uttered the seditious words charged and that in instituting the prosecution was actuated by malice.

I have found no case in which, where malice was expressly found, the smallness of the verdict has been regarded as a reason for exercising the discretion conferred by the rule. On the other hand, in *Macalister* v. *Steedman* (1911), 27 T.L.R. 217, a slander action in which the verdict was but one shilling, the trial Judge treated a finding of express malice as sufficient reason for non-interference. A similar conclusion was arrived at in *Emerson* v. *Ford-McConnell, Ltd.* (1911), 16 B.C.R. 193.

Under the circumstances I do not think that good cause has been shewn for depriving the plaintiff of his *primâ facie* right to costs, and I make no order.

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C. A.

KENNY v. NICHOLSON.

Manitoba Court of Appeal, Perdue, C.J.M., and Cameron, Fullerton and Dennistoun, JJ.A. March 8, 1920.

VOLUNTEERS AND RESERVISTS (§ I—1)—*War Relief Act (Man.) —Debt incurred after enlisting but before passing of Act—Debt not protected by Act.*]—Appeal by the plaintiff from the judgment of a Ct. Co. J., non-suiting the plaintiff. Reversed.

A. Griffin, for appellant; *A. Sullivan*, for respondent.

The defendant enlisted for active service overseas, on September 11, 1916. On September 20, 1916, the defendant ordered from the plaintiff certain signs for advertising purposes for which he agreed to pay. The defendant at the time of contracting the debt was a person within the protective provisions of sec. 2 of the Manitoba War Relief Act, 8 Geo. V., 1918 (Man.), ch. 101. Action was instituted June 30, 1919.

The Court, reversing the judgment of the trial Judge, held, on a consideration of sec. 18 of the War Relief Act, 1918, that the debt in question was not protected by the said Act.

Judgment accordingly.

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HOFFMAN v. McLAUGHLIN MOTOR CAR COMPANY LIMITED.

Manitoba King's Bench, Mathers, C.J.K.B. December 1, 1920.

SALE (§ III—45)—*Contract to purchase automobile—Property in, reserved in vendor—Non-acceptance by purchaser—Remedy of vendor.*]—Action to rescind a contract for the purchase of a motor car on the ground that the plaintiff was induced to make the contract by the misrepresentation of the defendants' salesman, and for the return of $500 paid at the time the contract was entered into.

J. D. Suffield, for plaintiff.

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

MATHERS, C.J.K.B.:—The contract is for the purchase of a used Light Six Coupe for the price of $2,150. Until a few days before the trial the only misrepresentation alleged to have been made was that the car was a McLaughlin car throughout. It was said this representation was untrue because the engine with which that model is equipped was not manufactured by the defendant company but is made for it by the Northway Motor Company.

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A few days before the trial the plaintiff amended his statement of claim and set up an entirely different representation as the inducing cause of the contract namely, that the engine in the Light Six car was identical with the engine in the Big Six and Master Six models sold by the defendants with the exception that the former was 44 and the latter 60 horse-power.

[Review of evidence. Judge finding no misrepresentation on behalf of defendants, dismisses plaintiff's action.]

The defendants counterclaim for the balance of the purchase-price. By the terms of the order the property in the car was not to vest in the plaintiff until the price was paid in full. Under the circumstances the defendants cannot recover in an action for the purchase-price: *Gold Medal Furniture Co.* v. *Homestead Art Co.* (1919), 45 D.L.R. 253. Their only right of action was one for damages for refusal to accept. No evidence has been given on which I could find on the question of damages.

To avoid the costs of a new action I will allow the defendants to amend their counterclaim and set it down for the assessment of damages if they see fit. If such amendment is not made within 10 days the counterclaim will be dismissed with costs. If made the costs of the counterclaim will be reserved to be disposed of at the trial.

Fiat for examination for discovery.

REX v. ARMSTRONG.

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Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. November 29, 1920.

INTOXICATING LIQUORS (§ III I—91)—*The Manitoba Temperance Act—Conviction covering several distinct offences—Penalty imposed for one offence only—Uncertainty—Validity.*]—Application to quash a conviction under the Manitoba Temperance Act, 6 Geo. V., 1916, ch. 112.

J. P. Foley, K.C., for accused; *John Allen*, K.C., for the Crown.

The judgment of the Court was delivered by

FULLERTON, J.A.:—This is an application to quash a conviction made under sec. 49 of the Manitoba Temperance Act, 6 Geo. V., 1916, ch. 112. The offence charged is stated in the conviction as follows:—

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For that he, the said Alex. Armstrong, on the 3rd day of October, A.D. 1920, at the City of Portage la Prairie, in Province aforesaid, *did have, keep or give* liquor in a place other than the private dwelling house in which he resides without having first obtained a druggist's license authorising him so to do.

The penalty adjudged "for his said offence" was the sum of $200 and $6.85 costs.

Section 49 clearly covers three distinct offences, viz., to have, to keep, to give.

Under sec. 65 the penalty for each offence is not less than $200 nor more than $1,000. The magistrate has no discretion as to reducing the fine below $200.

The main objection taken to the conviction is that it charges one of three offences, imposes a penalty for one offence and it is impossible to say what offence is intended.

Prior to the passing of 11 & 12 Vict., ch. 43, two or more offences could be charged in one information, but when the penalty imposed was in respect of one offence only it was always held that it must shew on the face of the conviction the offence in respect of which the penalty is imposed.

In *Rex* v. *Salomons* (1786), Term. Rep. 249, 99 E.R. 1077, two offences were charged in the information and the conviction was for "the said offence." The Court held the conviction bad on the ground that the defendant was charged with two offences and was convicted of the said offence, so that it did not appear of which offence he was convicted.

In *Reg.* v. *Young* (1884), 5 O.R. 184*a*, the defendant was convicted under sec. 41, of R.S.O., ch. 181, for selling liquor without a license, and under sec. 46, for allowing liquor to be consumed on the premises, and one penalty was inflicted "for his said offence," It was held that the conviction was bad, in not shewing for which offence the penalty was imposed.

In Paley on Summary Convictions, 8th ed., p. 196: Another indispensable property of a conviction is *certainty*. But as there will be occasion to illustrate this more particularly afterwards, it may suffice at present to observe that the same rule holds true with equal strictness in convictions as in indictments, viz., that the charge should be positive and certain, in order that the defendant may be protected from a second accusation for the same fact; and in order also that the judgment may appear appropriate to the offence. An offence, therefore, cannot be charged *disjunctively*, or in the alternative, in a conviction, though it may perhaps be so in an order.

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C. A.

It is clear, therefore, that at common law the conviction in this case is bad. Is there anything in the Manitoba Temperance Act which justifies it? We have been referred to secs. 77, 96, 100 and 101 of the Act. Section 77 authorises several charges of contravention of the Act to be included in one information. Section 96 says that "one conviction for several offences, and providing a separate penalty for each, may be made under this Act, although such offences may have been committed on the same day."

Neither of these sections helps and I can find nothing in the Act to authorise a conviction in the form in which this conviction is made.

We cannot amend the conviction under sec. 101 for it is impossible to say for which of the three offences charged the defendant has been convicted.

Since writing the above, I have found a case practically on all fours with this decided by Meredith, C.J.C.P., *Rex* v. *Kaplan* (1920), 52 D.L.R. 596, 47 O.L.R. 110.

There the defendant was charged that he did unlawfully "have or give liquor."

While in this case there were other grounds upon which the conviction was held bad, Meredith, C.J.C.P., 52 D.L.R., at 598, dealing with the alternative form of the conviction, said: "So, too, I have no doubt, the conviction in the alternative form is bad. Convictions must be certain for obvious reasons."

After referring to several sections of the Ontario Temperance Act, he proceeds (at p. 598): "But I have found nothing, and nothing has been referred to, authorising a conviction in the alternative: it would be extraordinary if there were any such power. So that, apart from the question of time, I cannot think that the conviction, being in the alternative, could be sustained."

The conviction should be quashed.

Conviction quashed.

N. S.

S. C.

McMULLIN v. CAMPBELL.

Nova Scotia Supreme Court, Harris, C.J., Russell, Longley and Chisholm, JJ. December 18, 1920.

TRESPASS (§ I A—10)—*Chattel—Loaned by owner—Demand for return—Excuses for not returning—Owner taking peaceable possession —Damages.*]—Appeal from the trial judgment in an action to recover possession of an old stove and for damages to the plaintiff caused by defendant in the act of removing it.

D. D. McKenzie, K.C., for appellant.

R. D. McCleave, for respondent.

The judgment of the Court was delivered by

RUSSELL, J.:—The stove was the property of defendant's father-in-law who died intestate. It was left in the old house of which defendant's wife says she held the key. This fact is disputed by a witness who says there was no key and the house was open. Defendant's wife says that her sister renounced to her all claim to the stove and there is no evidence that any other member of the family ever claimed it. Defendant's wife, therefore, had all the ownership and right of possession necessary to maintain an action of trover and there was no one else in the world who could assert ownership as there was no administration or executorship. Defendant's wife had no immediate use for the stove and lent it to the plaintiff's wife nine years before the recaption hereinafter described. Plaintiff's witnesses make the period longer but that is of no consequence. A demand for its return was made more than once, perhaps not to the plaintiff but to a member of his family who seems to have been the main supporter of the household, the father being ninety-five years old and the son in actual charge of the property. Excuses of one kind and another were given and at length the defendant's wife and her husband started out to retake the property, the husband following with a cart, the wife taking a short cut and arriving first on the scene. It seems to have been a case of "*dux femina facti*" for the defendant says that he would not have interfered in the matter if he had supposed there was going to be trouble. The stove was taken out of the plaintiff's possession, the plaintiff himself and another member of his family, if not more than one other, assisting in the operation. There was no unnecessary force used, nor any force at all that I can find in the evidence. The owner of personalty wrongfully in

possession of another has always been held entitled to peacefully retake it ever since the abandonment of the old rule that it could only be done "according to the old formula of fresh pursuit." Williams on Personal Property, 17th ed., p. 14 (see note *b*). I think the defendant's wife had such ownership as to justify the peaceable retaking of the property, at all events as against the plaintiff whose rights were derived from her, and that the judgment for damages should be reversed, the appeal being allowed, I wish I could add without costs, but I see no grounds upon which that can be done. *Appeal allowed.*

THOMPSON v. LYNNE.

Saskatchewan King's Bench, Brown, C.J.K.B. November, 1920.

VENDOR AND PURCHASER (§ I E—29)—*Sale of land—Deposit paid to agent—Refusal of tenant to vacate—Inability to give possession—Recovery back of deposit.*]—Action to recover back a deposit made in connection with the purchase of land and also for damages.

W. J. Perkins, for plaintiff; *W. W. Lynd*, for defendant.

BROWN, C.J.K.B.:—The plaintiff's claim asked for recovery of a deposit made in connection with the purchase of land and also for $500 damages which plaintiff says defendant agreed to pay because of his failure to carry out the agreement.

In so far as the claim for damages is concerned, I intimated during the progress of the trial that I did not see how the plaintiff could succeed.

The pleadings set up an agreement whereby the defendant agreed to pay the plaintiff this $500. There is absolutely no evidence that the defendant personally made any such agreement or had any knowledge of any such agreement having been made on his behalf. There is evidence that the agent, George F. Doner, agreed that some compensation should be made the plaintiff, the amount of same being left in a somewhat indefinite shape. I find, however, that Doner, although he had authority to find a purchaser for the land that was listed with him, had no authority whatever from the defendant, either in writing or otherwise, to make any such agreement as is here set up with reference to the claim for damages.

As to the other branch of the action which calls for the recovery of the deposit of $500 the defendant contends that Doner had no

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authority to accept on his behalf any such deposit and that the plaintiff's action should be against Doner rather than the defendant. Counsel for the defendant cited a number of authorities, but all that these authorities hold is that in certain circumstances the agent has no authority to accept payment of the purchase price so as to bind a vendor, that the purchaser should take precaution to pay the purchase money direct to his vendor. In the case at Bar the defendant had listed his lands with Doner for sale. There was, however, in possession of the farm a tenant whose lease had not expired and the agent seemed to clearly understand that it would be necessary to get the tenant off the property before any agreement of sale could be satisfactorily arranged or completed. The plaintiff was shewn the land by the agent and signed a contract for the purchase of same. This contract was signed by Doner on behalf of the defendant but apparently without authority. One of the terms of the contract so signed by the plaintiff required a deposit of $500 to be paid and this amount was paid to Doner. The defendant having gone to eastern Canada was advised by his agent by wire that a sale had been made and he immediately came west and met the agent at Winnipeg when the contemplated sale was discussed fully and gone into. I accept the evidence of the agent Doner as to what took place at the time of that meeting and I am satisfied that when Doner and the defendant visited Carnduff immediately after the meeting and went out to the farm to see the tenant that the defendant was fully aware of the terms of the agreement and was prepared to accept same provided he could get his tenant to vacate. Having failed, however, to get the tenant to vacate the premises the defendant could not go through with the contemplated deal and it was therefore not pressed any further.

Under the circumstances of this case it was essential that the purchaser should be secured before action was taken to have the tenant vacate, and securing the contract under the signature of the plaintiff and also getting a deposit as security for its performance was all in the interests of the defendant.

It is not necessary that I should decide as to whether or not the terms of this contract were in accordance with the stipulation made in the listing agreement. I am of opinion as already indicated that they were agreeable to the defendant and that the

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contract would have been executed by him but for the fact that his tenant would not vacate the premises. It seems to me clear that the agent, Doner, in accepting the deposit as he did under the circumstances of this case, was acting as the agent of the defendant and not of the plaintiff. In *Soper* v. *Arnold* (1889), 14 App. Cas. 429, Lord Macnaghten, at p. 435, says:—

> Everybody knows what a deposit is. The purchaser did not want legal advice to tell him that. The deposit serves two purposes—if the purchase is carried out it goes against the purchase-money—but its primary purpose is this, it is a guarantee that the purchaser means business.

An auctioneer who takes a deposit at time of sale is regarded as a stake-holder but though it is his duty to hold the deposit as a stake-holder he is so far the agent of the vendor in receiving it that the vendor is responsible to the purchaser in the event of a loss through the insolvency of the auctioneer.

The agent, Doner, in this case apparently holds the $500 deposit, claiming it as a commission on the sale. I express no opinion as to his right to hold it as it is not necessary to do so. In my opinion, under the circumstances, the plaintiff has properly brought his action for the recovery of the deposit against the defendant rather than the agent.

There will therefore be judgment for the amount claimed, namely, $500, with interest thereon at legal rate from November 14, 1918, and costs of action on the low scale of the King's Bench tariff. *Judgment accordingly.*

ARNOTT v. THE CANADIAN FAIRBANKS MORSE Co. Ltd.

Saskatchewan King's Bench, MacDonald, J. December 6, 1920.

SALE (§ II A—29)—*Tractor and stubble plow—Agreement in Form "A" of Farm Implement Act, 8 Geo. V. 1917, Sask., 2nd sess., ch. 56—Breach of warranty—Damages.*]—Action for damages for breach of warranties under a contract for sale under Form A of the Farm Implements Act (Sask.).

P. M. Anderson, K.C., for plaintiff; *A. E. Bence*, for defendant.

MACDONALD, J.:—This is an action brought by the plaintiff against the defendant for damages for alleged breach of warranties contained in an agreement between the parties. On October 10, 1918, the plaintiff and the defendant entered into an agreement

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in writing in Form A in the schedule to the Farm Implement Act for the purchase by the plaintiff from the defendant of: 1, 15-25 Wallis tractor with furrow guide, and 1, 3-furrow cast stubble plow, for the price and sum of $2,200.

The machinery was delivered by the defendant to the plaintiff, and the plaintiff paid therefor on October 12, 1918, the sum of $1,220.32, and the balance in March, 1919.

The plaintiff endeavoured to perform some work with the machinery but never had much success as either some part of the machinery broke from time to time, or for some reason the machinery refused to work, and experts of the defendant went out from time to time to endeavour to put the machine in working order, and the defendant also supplied free of charge any parts of the machinery that had been broken. Finally, on April 23, 1919, the plaintiff had the machinery brought into Govan and there handed over to a representative of the defendant company whose employee was instructed by the plaintiff to notify the defendant of such return. The plaintiff thereupon brings this action, claiming, first, rescission, and, in the alternative, damages.

At the close of the plaintiff's case the counsel on behalf of the defendant moved to have the case withdrawn from the jury, but I considered the best course to adopt would be to reserve my judgment on said motion and submit the whole question to the jury as though the plaintiff was not precluded from seeking any other relief offset by any provisions in the contract. Accordingly, the following questions were submitted to the jury and they returned thereon the answers set opposite them:—

1. Q. Was the machinery well made? A. No. 2. Q. Was the machinery made of good materials? A. No. 2a. Q. If not, what parts were not? A. Casting in the power lift, valve springs, wrist pin, clutch. 3. Q. Was the machinery properly used and operated? A. Yes. 4. Q. Did it well perform the work for which it was intended? A. No. 5. Q. Was the machinery used and kept with proper care? A. Yes. 6. Q. Was the machinery durable? A. No. 7. Q. Were all parts proving defective and returned replaced free of charge? A. Yes. 8. Q. Would the engine if properly operated pull upon 7.26.21, three fourteen-inch plows in stubble at a depth of six inches? A. No. 9. Q. What was the difference in value of machinery contracted for and machinery delivered and repaired? A. $1,600. 10. Q. What damage, if any, did the plaintiff sustain in his crop? A. $1,240.

As above stated the contract was in Form A in the schedule to the Farm Implement Act and so contained the warranties Nos. 1, 2, 3 and 4 in said statutory form.

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With respect to warranty No. 2 that the engine will well perform the work for which it is intended if properly used and operated, I am of opinion that it is not open to the plaintiff under the contract to seek any relief for alleged breach of said warranty inasmuch as the only letter of complaint that he ever wrote to the defendant was dated February 20, 1919, and, even if the sending of the experts by the defendant thereafter would be a waiver of the failure to give the notice of complaint within the time provided by the contract, there was no waiver of the failure to give the notice of rejection also called for by the contract. I am, therefore, of opinion that I should not have submitted to the jury questions Nos. 3 and 4 of those submitted to them, and that that branch of the case should have been withdrawn.

Subject to what is said hereafter in respect to Question No. 10, so far as the other questions submitted to the jury are concerned, it is unnecessary for me to review the evidence at length, but I content myself with saying that in my opinion there was evidence, which, if accepted by the jury, would entitle them to return the answers they have returned.

The counsel for the defendant, however, contends that the only remedy for breach of the warranty that the machinery will be durable, if properly used and kept in proper care is the return of the parts and the obtaining free of parts to replace same, but, on this point, this case cannot in my opinion be distinguished from that of *Ontario Wind Engine* v. *Bunn* (1915), 21 D.L.R. 420, 8 S.L.R. 58. There, his Lordship, Newlands, J., delivering the judgment of the majority of the Court, says, as follows, at p. 422:—

> The only question in my mind as to the warranty is whether the provision [respecting] replacing parts found defective is exclusive of other remedies. This contract does not contain the provision . . . that "no other remedy than the return of the said machinery in the manner herein provided shall be had for any breach of warranty or warranties in this purchase"; it does however contain a provision in the agreement as to operation that, in the event of the company repairing, replacing or retaking the machine the company shall not be responsible to the purchaser in any damages whatsoever. This provision is in the body of the contract and does not in my opinion apply to the warranties on the back and anyway the engine in question has neither been repaired, replaced nor retaken by the company. I am therefore of the opinion that plaintiff's remedy for damages for breach of warranty has not been taken away by the contract.

In this case the contract does not contain a provision that in the event of the company repairing, replacing or retaking the

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machinery the company shall not be responsible to the purchaser in any damages whatsoever, so that this case is very much stronger in support of the plaintiff's contention that the provisions for returning the defective parts is not exclusive, and, in my opinion, therefore, the answer to question No. 7 to the effect that all parts proving defective when returned were replaced free of charge does not mean that there is no other remedy open to the plaintiff for the breach of warranty of the durability of the machinery found in answer to question No. 6.

The learned counsel for the defendant further contends that the damages found in answer to question No. 10 were too speculative and remote. The plaintiff contended that, owing to the fact that he could not use the machinery in question at the time when farming operations could have been commenced in the spring, he was delayed and was therefore unable to cultivate his land to the same extent with the same thoroughness as he would have done had he had proper working machinery at the outset, and that therefore his crop was poorer than he would naturally expect it to have been had the land been properly cultivated and seeded earlier in the spring. Now, it seems to me that if there was a question that could be said to be speculative that question is how much better crop would be found to be in the fall if the seed had been sown a week or ten days earlier in the spring, or if the land had been more thoroughly cultivated than it in fact had been, and I am therefore of opinion that on the authorities this contention of the defendant must be upheld and the damages found by the jury in that respect, amounting to $1,240, be disallowed: *Ontario Wind Engine* v. *Bunn*, 21 D.L.R. 420, 8 S.L.R. 58; *Cross* v. *Douglas* (1909), 3 S.L.R. 97; *Murdoch* v. *Minneapolis Threshing Machine Co.*, [1920] 2 W.W.R. 985. I am not overlooking the fact that in *Mager* v. *Baird Ranch* (1919), 48 D.L.R. 724, Curran, J., allowed a loss of profits of land and crop by reason of the failure of the tractor to do its complete work, but, in my opinion, the first mentioned authorities, which are binding on me, are to the contrary, and I entirely agree with what is said by Bigelow, J., in *Murdoch* v. *Minneapolis Threshing Machine Co.*, on the said case of *Mager* v. *Baird Ranch*, 48 D.L.R. 724.

Counsel for the defendant contends that as the jury found that the machinery would not perform well the work for which it was

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intended and found the difference between the value of the machinery contracted for and that delivered as $1,600, that assessment is based on the breaches of all the warranties, and inasmuch as breach of warranty No. 2 should not have been submitted to the jury he argues that the plaintiff cannot have judgment until the damages are re-assessed. But under the facts it is clear that the reasons the machinery would not perform well the work for which it was intended were because it was not well made, of good material and durable. Accordingly, the same damages flow from a breach of warranties 1 and 3, as from that of warranty 2. The plaintiff cannot recover for breach of warranty 2, but he can for breach of warranties 1 and 3, and in my opinion recover the full amount mentioned in question No. 9.

There will, therefore, be judgment in favour of the plaintiff for $1,600 and costs. *Judgment for plaintiff.*

LEACH v. RURAL MUNICIPALITY OF MANTARIO and BEN MOIR.

Saskatchewan King's Bench, MacDonald, J. November 24, 1920.

CONVERSION (§ I B—10)—*Animals legally at large—Impounded under municipal by-law—Sale under Stray Animals Act—Notices required by Act not posted—Animals not properly described—Conversion—Damages.*]—Action for damages for the improper sale of animals impounded under the Stray Animals Act, 6 Geo. V. 1915, Sask., ch. 32.

F. G. Wheat, for plaintiff; *G. W. Murray*, for defendants.

MACDONALD, J.:—The plaintiff is a rancher and the defendant Moir was at the times in question in this action a pound-keeper in and for the defendant municipality.

In the fall of 1919 the plaintiff sent some 23 horses into the defendant municipality where they were turned loose to winter. On November 11, 1919, seven of these horses were found by one Zukerman, *damage feasant* on his land, namely, the north-west quarter of 28-26-29, W. 3rd Mer. within defendant municipality, and took the same to the pound kept on his own land within the municipality by the defendant Moir, claiming $10 for alleged damage to his crop. The owner of these horses was not known. On the same evening the defendant Moir made out, posted and published notices of impounding in purported compliance with

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the law in that behalf. He held the horses for 20 days after the notice appeared in the Saskatchewan *Gazette* and then posted notices of sale. The horses were actually sold on December 27.

The plaintiff brings this action for damages, claiming irregularities in the proceedings taken by defendant Moir on behalf of the defendant municipality, the two relied on being: (1) that notices were not posted up in three conspicuous places in the municipality, and (2) that the notices did not contain a description of the brand on the horses.

The law then in force respecting Stray Animals was ch. 32 of 6 Geo. V. 1915 (Sask.), with amendments thereto, and under said statute it was lawful to allow animals to run at large in Saskatchewan except in cities, towns and villages, subject to this, that the council of any municipality might, subject to certain provisions of the Act not material here, define by by-law the portion of such municipality and determine the period of the year in which animals should be restrained from running at large.

The plaintiff's statement of claim appears to assume the existence of a by-law of the municipality restraining the running at large of animals in the municipality at the time of the year in question, for it complains, not that the defendants had not the right to impound and sell the horses at all, but that it illegally exercised that power through non-fulfilment of what he alleges are conditions precedent to such exercise. The defendants in justification do not plead any such by-law but content themselves with saying that the animals were "legally impounded," without specifying under what authority. However, in view of plaintiff's pleadings, and of the fact that throughout the trial and argument, the existence of such a by-law was assumed, although not alluded to, I think I am justified in making the same assumption and do so.

The first sub-section of sec. 27 of the Stray Animals Act, 6 Geo. V. 1915 (Sask.), ch. 32, reads as follows:—

> Any animal not released from the pound within 20 days after notice has been inserted in *The Saskatchewan Gazette*, as in sec. 25 mentioned, shall be sold by public auction after notice of sale shall have been posted for 8 days in 3 conspicuous places within the herd district or rural municipality, as the case may be, one of which places shall be the post office nearest the pound.

The defendant Moir posted notices of sale, one at the nearest post office, one at the pound and one at the post office at Alsask. Alsask is not within the defendant municipality so that said section was not complied with.

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I am of the opinion that unless and until the requirements of said sec. 27 were satisfied the right of the defendants to sell the animals did not arise, and that they were therefore guilty of conversion in selling them when they did. To my mind the case is analogous to the sale by the vendor of goods the subject of "conditional sale," without the giving of the statutory notices and a long line of decisions holds that such a sale cannot be said to be in exercise of the powers given by statute in that behalf.

(*The American Abell Engine & Threshing Co.* v. *Weidenwilt* (1911), 4 S.L.R. 388; *Sawyer & Massey* v. *Bouchard* (1910), 13 W.L.R. 394; *North-West Thresher Co.* v. *Bates* (1910), 13 W.L.R. 657.)

In *Sawyer Massey Co.* v. *Ethier*, [1920] 1 W.W.R. 869, following a tentative opinion of Wetmore, J., in *John Abell Engine & Machine Works Co.* v. *Scott* (1907), 6 Terr. L.R. 302, I refused to confirm a sale of land under execution where rule 486 as to publishing the notice of sale in the newspaper nearest the land was not complied with. That also seems analogous to this case. It is true that the wording of R. 486 is somewhat different from that of sec. 27, but the difference is, in my opinion, not material. The rule says the sheriff "shall not sell" until notice has been published 2 months in such newspaper; the Act says that "any animal . . . shall be sold by public auction after notice of sale shall have been posted for 8 days in 3 conspicuous places within the municipality," etc. Apart from the Act the defendants had no right to sell the animals; under the Act the right arises only after the required posting; when therefore the required posting is not done the right does not arise at all.

The description of the horses in the various notices did not give any brands. The evidence satisfies me that the horses were branded with the plaintiff's brand, though owing to the fact that the horses had long hair at that season of the year, the brands were not so distinct as to be discernible except on close examination, when in my opinion, according to the evidence, the brand could be seen. The defendant Moir however made no such examination. He says the horses were wild and he could not get near them. They could however have been driven into the stable, as was actually done on the day of the sale—"It is most

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important that the whole description is given, and the most important description is the brand." (*Traquair* v. *Michelson* (1917), 10 S.L.R. 453, at 454.)

I am therefore of opinion that it was negligence on the part of defendant Moir, for which of course the defendant municipality also is answerable, not to have examined the horses for brands and mentioned in the description of the horses the brands which a careful examination would have revealed. Had that been done the witness, Auger, who was watching the notices in the *Gazette* for the plaintiff would have known that the horses advertised were plaintiff's.

The plaintiff in his evidence placed the value of the horses at $1,010, or, "an average of $175 each," a manifest miscalculation. He gave no basis whatever for his valuation. The horses sold for $332 and although the amount is small, the evidence on behalf of defendants satisfies me that in the state of the market in December, 1919, that was the market value of the horses.

As the sale was illegal I do not think the defendants have any right to deduct an amount for pound-keeper's fees or expenses. In *Traquair* v. *Michelson*, *supra*, a deduction was made for impounding fees, but that was with plaintiff's consent.

There will be judgment for the plaintiff against both defendants for $332 with costs on District Court scale, but defendants will have no set-off for costs.

Judgment accordingly.

MILLER MORSE HARDWARE Co. v. DOMINION FIRE INSURANCE Co. MILLS NATIONAL INSURANCE Co., LONDON MUTUAL FIRE INSURANCE Co.

Saskatchewan King's Bench, Embury, J. October 20, 1920.

INSURANCE (§ III E—75)—*Policies covering stock-in-trade and fixtures—Improper method of arriving at amount of claim—Fraud of assignor—Claim of bonâ fide assignee not vitiated by—Evidence.*]—Action to recover amounts due on certain policies of insurance.

J. F. Frame, K.C., for plaintiff.

P. M. Anderson, K.C., for defendants.

EMBURY, J.:—These were three separate actions which were tried together. The subject-matter of the actions consists of four

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policies of fire insurance. Of these four policies one covers a certain building to the extent of $1,600, and the others cover the stock-in-trade and the fixtures.

Consideration of the matters in dispute naturally divides itself along the lines of the policy covering the building on the one hand and the policies covering the stock-in-trade and fixtures on the other.

Dealing with the policies covering the stock-in-trade and fixtures: the method adopted by the plaintiffs of arriving at the amount of their claim is an indirect one, but in making their computation there are certain items which I consider to be improper and among these particularly the following: J. Robinson Co., $100; T. Eaton Company, $250. Further, the claim for vegetables, etc., is vastly overstated, to the extent, I think, of over $400. There are further items which are improperly charged, as follows: Credit slip, Imperial Oil Co., $49.20; certain other credit notes, $83.30, $29.90, $9.63; R. J. Whitla account, $33.88; Miller Morse Co. account, $22.58; P. Burns account, $23.00; for posters, $9.50; *Herald* Printing account, $43.25; total, $304.24. These are by no means minor mis-statements, and the effect of them is materially and improperly to increase the plaintiffs' claim. Indeed, with regard to them it is impossible to come to the conclusion that they could have been made otherwise than in utter disregard of the actual facts. Such a claim or proof of loss if made by the assignee (plaintiff), would have vitiated the policy. See statutory condition No. 21, which reads as follows, 6 Geo. V. 1915 (Sask.), ch. 15, sec. 80:—

21. Any fraud or false statement in any statutory declaration in relation to any of the above particulars shall vitiate the claim of the person making the declaration.

But it is urged in this connection that, the claim having been made by the insured after the time of the assignment, and the plaintiff being in the position of an assignee for value, that the claim of the insured only is affected and not the claim of the assignee; and I cannot see that any of the authorities cited go so far as to hold that under the wording of our statutory condition No. 21, the claim of a *bonâ fide* assignee for value can be vitiated by a fraud of the assignor which occurred after the completion of the assignment. See R.S.S., 1909, ch. 146, secs. 1 and 4; *Maple Leaf Milling* v. *Colonial Ass'ce Co.* (1917), 36 D.L.R. 202, 27 Man.

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L.R. 621; *Kanady* v. *Gore District etc. Co.* (1879), 44 U.C.Q.B. 261; *North British* v. *Tourville* (1895), 25 Can. S.C.R. 177.

The defendants have urged other grounds as a reason why the plaintiff should not succeed, namely: that the insured at the outset made certain false representations which should have voided the policy from the beginning. I do not consider that the false representations respecting the insured having purchased a very small portion of this stock at 85c. in the dollar was of such a material character that it should void the policy, and with regard to the statement *re* other insurance, if any false information was given I believe it was honestly given, and on the evidence I am unable to find that it is proved that false information was given. On the question of how the building is lighted, the information given in the application appears to me to be correct, and in any case the defendants' agent Flatager himself knew how the building was lighted. As to the information that stock had been taken on November 22, I do not think that the application to amend to take advantage of this should be allowed, as the plea is one of fraud, and further, as the application was made at the close of the trial, the plaintiff would have had no opportunity to answer it. It is further urged that the insured kept an improper quantity of gasoline on the premises. I do not consider that this is proved.

With regard to the claim for loss on the building, I think the plaintiff is also entitled to succeed. The proofs of loss contain the same mis-statements of fact as the ones above referred to, but in any event these mis-statements of fact are not material to the claim for loss of the building, and I consider are to be treated purely as surplusage.

It is urged that certain of these policies of insurance were cancelled, but the evidence in my judgment clearly fails to establish any such cancellation.

I am therefore of the opinion that the plaintiffs are entitled to recover under all the policies, and there will be judgment accordingly with costs.

There may be some question as to the calculation of the amount which is payable under the policies, also as to how it should be distributed. In case counsel are unable to agree as to this, either party will be at liberty to apply to me or in Chambers for further directions upon these points should they desire to do so.

Judgment accordingly.

ARTHUR L. SULLIVAN (in his personal capacity and also as Executor of John H. Sullivan) v. **GRAHAM.**

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Saskatchewan King's Bench, Bigelow, J. November 25, 1920.

EXECUTORS AND ADMINISTRATORS (§ II A—27)—*Verbal agreement as to cropping land—Death of one party—Crop put in by executor—Right of executor to share of crop under agreement.*]—Action to recover the share of crop under a crop agreement.

G. C. Price, for plaintiff; *T. P. Morton*, for defendant.

BIGELOW, J.:—I am satisfied that there was a verbal agreement made between defendant and John H. Sullivan, that defendant was to supply the seed and Sullivan was to put in the crop on the land in question. Each was to pay one-half the cost of twine and threshing, and Sullivan was to harvest the crop and deliver one-half to defendant.

It is urged by defendant that plaintiff should not recover because this was a verbal agreement only and that it was to be followed by a written agreement which was never completed.

In *Ridgway* v. *Wharton* (1857), 6 H.L. Cas. 238, at p. 268, 10 E.R. 1287, the Lord Chancellor states:—

> I again protest against its being supposed, because persons wish to have a formal agreement drawn up, that therefore they cannot be bound by a previous agreement, if it is clear that such an agreement has been made.

I am satisfied that the verbal agreement was made. Elliott, who impressed me as a very fair witness, says so and corroborates Arthur Sullivan.

The defendant's seed was used and the plaintiff as John H. Sullivan's executor put the crop in. I do not believe the evidence of Brittenback. Plaintiff made arrangements to have the crop cut and stooked and he intended to come back and look after the threshing. When plaintiff arrived on the scene to attend to the threshing it was all done. The defendant's evidence is that when plaintiff demanded his share of the crop he had paid it all over to Brittenback. This is also borne out by the receipt that defendant took from Brittenback, Ex. "2" which was put in evidence by the defendant.

Plaintiff as executor is entitled to an accounting for this one-half share of the crop. There was not sufficient evidence given at the trial to enable me to ascertain this amount. I will therefore refer it to the local registrar.

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In taking these accounts defendant is entitled to charge the plaintiff with one-half of the cost of the twine and threshing and to charge the $75 which plaintiff owed Brittenback for cutting and stooking and which was paid by defendant to Brittenback.

In arriving at the cost of threshing there will be included a reasonable charge to Brittenback for his time in threshing. The evidence given at the trial may be used by either party before the local registrar.

Plaintiff will have judgment for the amount so found by the local registrar: leave to apply further, if necessary.

Judgment accordingly.

HENWOOD v. BEHM.

Saskatchewan King's Bench, McKay, J. December 10, 1920.

DAMAGES (§ III A—62b)—*Agreement to purchase land—Repudiation of agreement by purchaser—Measure of compensation.*]—Action for damages for repudiation of an agreement to purchase land.

A. E. Neville, for plaintiff; *Gavin Allan*, for defendant.

MCKAY, J.:—By agreement in writing dated April 16, 1919, the plaintiff agreed to sell the east half of section 34, in tp. 35, in range 23, west of the 3rd meridian, to the defendant. The defendant went into possession, and cropped the said land in 1919. The defendant repudiated the agreement to purchase claiming that plaintiff had no title to the land and that there were more encumbrances against the land than what he had agreed to pay for it, and he abandoned the land in November, 1919.

The plaintiff brings this action for damages.

The first question to decide is, was the defendant justified in repudiating the agreement to purchase? Defendant contends that, although the agreement is dated April 16, 1919, it was in fact executed by the plaintiff and defendant on January 4, 1919, and that at that time the north-east quarter (plaintiff's pre-emption) of said section stood in the name of the Crown, and that the said agreement for sale is null and void, under sec. 31 of 7-8 Ed. VII. 1908 (Can.), ch. 20: The Dominion Lands Act.

There is no doubt that the defendant spoke to plaintiff about buying the said land in January, 1919, and perhaps the agreement

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was then partially prepared by the solicitors, as the date "14th January A.D. 1919," is endorsed on the back of the agreement, but no agreement was then entered into. The north-east quarter of said section 34 was plaintiff's pre-emption, and he says that he was at that time waiting for the certificate of recommendation under sec. 27, sub-sec. 3 of 4-5 Geo. V. 1914 (Dom.), ch. 27, sec. 3, as amended by sec. 10 of 8-9 Geo. V. 1918 (Dom.), ch. 19. The south-east quarter of said section was plaintiff's homestead.

The plaintiff swears that the agreement was signed by the plaintiff, his wife and defendant on March 4, 1919, at Kerrobert. And the certificate of the Justice of the Peace who examined and took the acknowledgment of Mrs. Henwood, under the Homestead Act, 6 Geo. V. 1915 (Sask.), ch. 29*, is dated March 4, 1919. Further, a letter admitted in evidence by defendant's counsel, as Ex. "E," dated March 6, 1919, from a solicitor, F. E. Jaenicke, whom the defendant consulted, to Hanbidge & Hanbidge, barristers, at Kerrobert, reads as follows:—

Gentlemen,

Re E. C. Henwood to Florian Behm.

I have been interviewed by Florian Behm the above named with regard to the sale of the east half of 34-35-23 west 3rd. Behm bought that land and they were in Kerrobert on Tuesday last and signed the contracts . .

"Tuesday last" referred to in this letter was March 4, 1919. I find from the evidence that the agreement was signed and entered into on March 4, 1919.

I also find from the evidence that at that time the certificate of recommendation for the north-east quarter of said section had been issued to plaintiff on February 17, 1919, and that he had already received this certificate at the time the agreement was signed. This certificate gave plaintiff the right to sell said quarter or his interest therein, and this certificate was in force at the trial of this action. The plaintiff is and was since September 16, 1912, the registered owner of the south-east quarter of said section.

I therefore find that plaintiff had sufficient title to the said land at the time he agreed to sell to defendant, and defendant was not justified in repudiating the agreement to buy for want of title.

Then as to the other question, that there were more encumbrances against the said land than the amount defendant agreed to pay for it.

*See R.S.S., 1920, ch. 69.

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The evidence satisfies me that such is not the case. The sheriff's certificate as to executions, and the abstract of title shew a great deal more than what was actually due, as plaintiff had reduced some of those encumbrances by payments thereon, and in any event plaintiff's creditors were willing to take less than was actually due to them.

I find from the evidence that the encumbrances were between $4,000 and $5,000 and the plaintiff would have been in a position to pay these off had plaintiff obtained the due execution of the mortgage of $3,000 provided for in the agreement.

I therefore find on this ground also that the defendant was not justified in repudiating the contract.

The next question is what damages is plaintiff entitled to recover?

The plaintiff claims:—1. $93.25 for cost of cultivating 75 acres summerfallow and destroying weeds thereon, which defendant neglected to destroy. 2. $125 for cost of summerfallowing 25 acres which defendant neglected to do. 3. $132.78 for taxes for 1919 which defendant agreed to pay and did not pay. 4. $200 for damages to trees, etc. 5. $100 damages to buildings. 6. $1,000 damages by reason of defendant's refusal to assume mortgage for $3,000 and abandoning the said agreement to purchase.

Under the agreement Ex. "A," the defendant agreed to pay the taxes charged against the lands from and after December 31, 1919. He was in possession of the land in 1919, cropped it and harvested and got the benefit of all the crop. In my opinion he should have paid the taxes for 1919. The evidence shews the taxes for 1919 amounted to $142.80. I will treat the plaintiff's claim as amended and allow him this amount.

I find from the evidence that the damage for which defendant is liable to the trees was $100, and to the buildings $100. I allow these amounts.

With regard to (1) $93.25, and (2) $125. There was no evidence to shew that the plaintiff did any of the work for which these amounts are claimed, but I find from the evidence that the defendant should have done it and he neglected to do so, and the land must necessarily have been damaged by such neglect, and I will allow the plaintiff something for this by way of general damages.

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With regard to the $1,000: The defendant signed the mortgage, but his wife did not, and he admitted in his evidence that she might have signed if he asked her to, but in any event I find he was not justified in repudiating the agreement, and, although the evidence does not satisfy me that the plaintiff suffered $1,000 damages, yet there is no doubt he suffered some damages, by such repudiation in addition to the special damages I have above allowed.

I will therefore allow plaintiff $300 for general damages in addition to the $342.80 I have above allowed.

The agreement provides that the plaintiff "shall receive only that portion of the crop over and above 15 bushels per acre in the year 1919 . . . ," and I find from the evidence that the crop did not amount to 15 bushels per acre in 1919. And I also find from the evidence that defendant did not agree at any time to give plaintiff any portion of the crop for 1919, other than as stated in the agreement. Therefore the plaintiff is not entitled to any of it, or to an accounting.

The plaintiff will be entitled to judgment against the defendant for $642.80 with costs.

The defendant's counterclaim will be dismissed with costs to plaintiff. *Judgment accordingly.*

SCHLOSSER v. SAWYER MASSEY Co. Limited.

Saskatchewan King's Bench, MacDonald, J. December 16, 1920.

SALE (§ II A—29)—*Tractor—Farm Implement Act, 8 Geo. V. 1917, Sask., 2nd sess., ch. 56—Breach of warranty—Damages.*]—Action for damages for breach of warranties under a contract in form "A" in the schedule to the Farm Implement Act.

C. E. Gregory, K.C., and *A. E. Hetherington*, for plaintiffs.

F. L. Bastedo and *H. Ward*, for defendant.

MACDONALD, J.:—In this action, which was tried before me with a jury, the plaintiffs seek damages for breach of warranties. The plaintiffs purchased a tractor from the defendant under a contract in Form "A" in the schedule to the Farm Implement Act, 8 Geo. V. 1917 (Sask., 2nd sess.), ch. 56. The warranties, breach of which is complained of, are those numbered 1 and 3 in said Form A, which read as follows:—

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1. The vendor warrants that the said machinery is well made and of good materials . . . 3. The vendor warrants that the said machinery will be durable if used and kept with proper care . . .

Breach of other warranties was alleged in the statement of claim but abandoned at the trial.

At the conclusion of the plaintiffs' case, counsel for the defendant moved to have the case withdrawn from the jury. I then reserved decision on said motion and the right to counsel to argue the same subsequently, and submitted to the jury the following questions to which they returned the answers set opposite the same:—

Q. 1. Was the engine well made: (a) with first connecting rods? (b) with new type connecting rods? A. (a) No. (b) No.

Q. 2. Was the engine of good materials? A. No. Q. 3. Was the engine durable if used and kept with proper care? A. No. Q. 4. What, if any, is the difference between the value of the engine at the time of delivery to the plaintiffs and the value it would have had if it had answered to the warranties? A. $1,025. Q. 5. What damage, if any, did the plaintiffs suffer through loss of use of engine, and loss of time? A. $700.

On the subsequent argument of the motion above mentioned I held that there was a case made out for submission to the jury, reserving for further consideration only the question whether the $700 referred to in the answer to question No. 5 was recoverable by the plaintiffs for breach of said warranties.

The defendant relies on sec. 51 (3) of the Sale of Goods Act, R.S.S. 1909, ch. 147, secs. 51 and 52 of which read as follows:—

51. Where there is a breach of warranty by the seller or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may: (a) Set up against the seller the breach of warranty in diminution or extinction of the price; or (b) Maintain an action against the seller for damages for the breach of warranty. (2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty. (3) In the case of breach of warranty of quality such loss is *primâ facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty. (4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

52. Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable or to recover money paid where the consideration for the payment of it has failed.

In Benjamin on Sale, 5th ed., p. 1018, following a quotation of the subsection corresponding to said 51 (3), it is stated:—

> At common law the value of the goods as warranted is their intrinsic value, and not any special value which they may have to the buyer. To apply the latter standard would enable the buyer to recover special damages without having brought to the seller's knowledge the particular circumstances which may give to the goods their special value. There is nothing in the Code to alter this rule. Any case, however, where a buyer is enabled to recover special damages—*i.e.*, damages calculated according to the difference between the value of the goods actually delivered and their special value if they had answered to the warranty—is governed by sec. 54, and not by sec. 53 (2) or (3) that is by sec. 52 of our Act and not by 51 (2) or (3).

From the foregoing it is clear that there are cases of breach of warranty of quality where the damages are not to be measured under sec. 51 (3). In fact, the use of the expression "*primâ facie*" in said sub-section indicates that said sub-section raises merely a presumption, not an irrebuttable one. "Quality of goods" includes their state or condition: Sec. 2, sub-sec. 11.

In *Randall et al.* v. *Raper* (1858), El. Bl. & El. 84, 120 E.R. 438, the plaintiffs, being corn factors, bought a quantity of barley, which was warranted to be seed barley of a particular quality, and in the course of their trade resold it, with a like warranty, to certain persons who sowed it on their land believing that it was of the stated quality. The crop which came up was of an inferior kind of barley, and claims were made upon the plaintiffs by the sub-purchasers for compensation in respect of the damage which they had suffered, and the plaintiffs agreed to satisfy them; but no sum was fixed. In an action by the plaintiffs against the defendant it was held (Wightman, J., *hæsitante*) that they might recover the amount of damages which the sub-purchasers had suffered, as they were liable to pay it to them, though they had not in reality paid anything. Wightman, J's. hesitation was due to the fact that the plaintiffs had not paid the claims; he stated that he entertained no doubt that if the claims had been paid, the plaintiffs could recover the amount thereof.

In *Smith* v. *Green* (1875), 1 C.P.D. 92, the defendant sold a cow to the plaintiff with a warranty that the cow was free from the foot and mouth disease. The cow in fact had that disease, and the plaintiff, who was a farmer, put the cow with other cows of his, and she communicated the disease to them, and they died

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in consequence. In an action for such breach of the warranty the Judge at the trial directed the jury that in assessing the damages they might take into account the loss arising from the injury to the other cows, if they thought the defendant knew or ought to have known that the plaintiff was a farmer and would in the ordinary course of his business place the cow with other cows as then the damage resulting from the breach of the warranty was one which would naturally occur from such breach, and would be in the contemplation of both parties at the time the warranty was given. In the Common Pleas Division, it was held that such direction was correct.

Here, from the very nature of the transaction, it undoubtedly was known to the defendant that plaintiffs were farmers, and it would necessarily be in the contemplation of both parties that they would use the machinery in question. They would also necessarily lose time when they could not use the machinery.

In *Ontario Wind Engine* v. *Bunn* (1915), 21 D.L.R. 420, 8 S.L.R. 58, the Court held that, in addition to the difference between the value of the engine at the time it was delivered and the value it would have had if it answered to the warranty, that it was well made, of good material and durable with proper care, the purchaser was entitled to recover a sum of $120 he had paid out to a third party for his engine to do spring plowing, when the engine in question would not work.

I am therefore of opinion that the plaintiffs are entitled to recover the sum of $700 found by the jury as the amount of damage suffered by the plaintiffs through loss of use of the engine, and loss of time while the engine could not be used on account of breach of said warranties.

There will therefore be judgment for the plaintiffs against the defendant for $1,725 and costs.

Judgment for plaintiff.

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