D

Dominion Law Reports

CITED "D.L.R."

COMPRISING EVERY CASE REPORTED IN THE COURTS OF EVERY PROVINCE AND ALSO ALL THE CASES DECIDED IN THE SUPREME COURT OF CANADA, EXCHEQUER COURT, THE RAILWAY COMMISSION, AND THE CANADIAN CASES APPEALED TO THE PRIVY COUNCIL

ANNOTATED

For Alphabetically Arranged Table of Annotations to be found in Vols. I-XXII D.L.R., See Pages ix-xviii.

VOL. 22

EDITED BY
W. J. TREMEEAR
C. B. LABATT *and*
EDWIN BELL

CONSULTING EDITOR
E. DOUGLAS ARMOUR, K.C.

TORONTO:
CANADA LAW BOOK CO., LIMITED
84 BAY STREET
1915

347.1
'0847
D671
1912-22
22
QL
Mugg

Copyright (Canada) 1915 by R. R. Cromarty, Toronto

CASES REPORTED

IN THIS VOLUME.

TABLE OF ANNOTATIONS

(Alphabetically arranged)

APPEARING IN VOLS. 1 TO 22 INCLUSIVE
OF THE DOMINION LAW REPORTS.

INDEX OF SUBJECT MATTER, VOL. XXII., PART 1.

(For Table of Cases Reported see end of this Index.)

CASES REPORTED, VOL. XXII., PART 1.

GRAND TRUNK R. CO. v. ROBINSON.

CAN.

P. C.

Judicial Committee of the Privy Council, Viscount Haldane, L.C., Lord Dunedin, Lord Parmoor, Sir George Farwell and Sir Arthur Channell.
April 20, 1915.

1. CARRIERS (§ III G—441)—LIABILITY OF RAILWAY CO. TO CARETAKER OF STOCK—REDUCED FARE—EXEMPTION FROM LIABILITY.

One who travels upon a railway in charge of live stock, at a reduced fare paid by the shipper of the stock under a special contract between the shipper and the railway company, and pays no fare himself, and has no other ticket or other authorization entitling him to be upon the train, cannot be heard to deny that he is travelling under the provisions of the special contract, though he has neither read nor signed it, and is bound by a provision therein relieving the railway company from liability for his death or injury, though caused by the negligence of the company.

[*Robinson* v. *G.T.R. Co.*, 12 D.L.R. 696, reversed.]

2. CARRIERS (§ IV—519)—GOVERNMENTAL CONTROL—POWER OF BOARD OF RAILWAY COMMISSIONERS—AUTHORIZATION OF CONTRACT EXEMPTING RAILWAY CO. FROM LIABILITY.

It is within the power of the Railway Board under the provisions of the Railway Act, R.S.C. ch. 37, to authorize a contract relieving the company from liability to one travelling in charge of live stock at a reduced fare, for injuries caused by the negligence of the company or otherwise.

[*Robinson* v. *G.T.R. Co.*, 12 D.L.R. 696, reversed.]

Statement

APPEAL from *Robinson* v. *Grand Trunk R. Co.*, 12 D.L.R. 696.

The judgment of the Board was delivered by

Viscount Haldane, L.C.

VISCOUNT HALDANE, L.C.:—The question raised in this appeal relates to the right of the respondent, who was plaintiff in an action in the High Court of Justice for Ontario, to recover damages against the appellants for injuries suffered by him in an accident on the appellants' railway. He was travelling in charge of a horse consigned under what is known as a "Livestock special contract," in a form authorised by the Railway Commissioners for Canada. The terms of the contract purported to relieve the appellants from liability for injuries arising from accident, even where caused by negligence, to a person travelling with the live stock, in case he had been permitted to travel at less than full fare.

The course of the litigation disclosed much difference of judicial opinion. The Court of first instance decided in favour of the

CAN.

P. C.

GRAND TRUNK RY. CO. v. ROBINSON.

Viscount Haldane, L.C.

respondent (5 D.L.R. 513). The Court of Appeal for Ontario, by a majority (Garrow, Maclaren, and Meredith, JJ.A.), reversed this decision, Magee and Lennox, JJ.A., dissenting (8 D.L.R. 1002). There was an appeal to the Supreme Court of Canada, and in that Court, by a majority (Davies, Idington, Duff, Anglin, and Brodeur, JJ., the Chief Justice dissenting), the judgment of the Court of Appeal for Ontario was reversed (12 D.L.R. 696). On an application for special leave to appeal to the King in Council, this Board thought fit, in view of the importance of the question raised, to recommend that special leave should be given, but, in the circumstances, only on the terms that the appellants should, whatever the result of the appeal might be, pay the whole costs of this appeal as between solicitor and client.

Before adverting to the facts out of which the litigation arose, it will be convenient to refer to certain provisions of the Railway Act of Canada. Apart from statute, a carrier is liable in Canada, as in England, for injury arising from negligence in the execution of his contract to carry unless he has effectively stipulated that he shall be free from such liability. The freedom so to stipulate has been restricted in Canada by the Railway Act (ch. 37 R.S.C.). Under sec. 340 no contract restricting liability for carriage is to be valid unless it is of a kind approved by the Railway Board, which is empowered to determine the extent to which such liability may be impaired, restricted, or limited, and generally to prescribe by regulation the terms and conditions under which any traffic may be carried. Standard and special freight tariffs are to be filed with the Board and to be subject to its approval, and are to be published, and made open to the inspection of the public at the railway companies' stations and offices. Under the Act the companies are, by sec. 284, put under a general obligation to carry and deliver with due care and diligence, and anyone aggrieved by a breach of this duty is to have a right of action, from which the companies are not to be relieved by any notice, condition, or declaration if the damage arises from negligence or omission. It is, however, to be observed that this right is expressed by the section to be given "subject to this Act." Their Lordships think that where, under sec. 340 and the other sections which deal with special tariffs, forms of stipulation limiting liability have been approved by the Board,

and the conditions for making them binding have been duly complied with, the companies are enabled in such cases to contract for complete freedom from liability for negligence.

In 1904 the Board approved a form of live-stock special contract, and the order approving it was duly published. The appellants adopted this form, and, so far as appears, have complied with the conditions prescribed for its use. It is out of a contract in the approved form that the present question arises.

The facts of the case are shortly as follows: The respondent lives in the town of South River, in Ontario. He undertook to Dr. McCombe, who resides in that town, to go to Milverton and bring back a horse by rail from there. Dr. McCombe had arranged with Dr. Parker, of Milverton, to buy the horse for him. When the respondent arrived at Milverton he went with Dr. Parker to see the horse, and it was thereafter brought to the appellants' siding to be put on one of their cars under arrangements made by Dr. Parker with their local agent. The respondent and Dr. Parker placed the horse in the car. Dr. Parker had originally been under the impression that the horse could travel without anyone accompanying it, but he had been informed by the agent that, for a long journey, it must be accompanied by someone. Arrangements had, therefore, to be made between Dr. McCombe, Dr. Parker, and the respondent, for the latter to travel with the horse. After putting it on the train, Dr. Parker went with the respondent to the agent's office, and Dr. Parker and the agent signed a contract in the presence of the respondent. Dr. Parker folded it up and said he should send it to Dr. McCombe by mail, but the agent told him in the respondent's hearing to give it to the latter to carry with him, as it shewed that he was travelling with the horse. The document was accepted by Dr. Parker, but he did not think it necessary to take the trouble of reading it through. The respondent himself did not read it, but simply put it in his pocket, where it remained till some time after the accident, when he gave it to Dr. McCombe. The officials on the train appear to have recognised the respondent, who looked after the horse, as the person travelling with it. He was not asked for any ticket or fare. In the course of the journey there was a collision, due to the negligence of the appellants' servants, and the respondent was injured.

CAN.

P. C.

GRAND TRUNK RY. CO. v. ROBINSON.

Viscount Haldane, L.C.

The case was heard before Latchford, J., and a jury. There was no dispute as to the negligence, and the only question left to the jury was the amount of the damages. These the verdict assessed at $3,000. The learned Judge afterwards gave judgment for the respondent. In order to appreciate the significance of what he decided, it is necessary to turn to the terms of the special contract. This, as has already been stated, was substantially in the form prescribed by the Railway Board. It was expressed to be made between the appellants and Dr. Parker. It acknowledged the receipt from him of a horse, which the appellants undertook to transport to South River on the terms that their liability in respect of the horse should be restricted to a specified amount, in consideration of a rate lower than the full rate being agreed on. It went on to provide, as one of the stipulations on its face, that, in case the appellants should grant to the shipper, or any nominee of the shipper, a pass or privilege at less than full fare to ride in the train on which the horse was being carried, for the purpose of taking care of it while in transit and at the owner's risk as before mentioned, then as to every person so travelling on such pass or reduced fare, the appellants were to be entirely free from liability in respect of his death, injury, or damage, whether it was caused by the negligence of the appellants, or their servants, employees, or otherwise howsoever. The contract concluded with a declaration, signed by Dr. Parker as shipper, that he fully understood its meaning. Across it was printed in red ink, "Read this special contract." On the margin was put, "Pass man in charge half fare." The document thus contained the authority to travel for the man as well as the horse. The practice was for the railway companies in such cases to obtain payment from the consignee on delivery, and Dr. McCombe some days subsequently paid the appellants the amount of the freight, including the half fare for the respondent.

These being the material facts, the learned Judge held that the respondent was not debarred from what he called his common law right. Any other view, he said, appeared to him to imply that by a contract to which he was not a party and of the terms of which he had no knowledge, his right to be carried without negligence was taken away. The Court of Appeal for Ontario

by a majority reversed this judgment, on the ground that a contract excluding liability even for negligence had been made and was binding on the respondent. Their judgment was, however, overruled by a majority in the Supreme Court of Canada, who held that, although the language of the contract purported to exempt the appellants from their liability, it did not contain the real terms on which the respondent travelled in the train which met with the accident.

It is obvious that the question on which this appeal turns is one as to the terms on which the respondent was accepted by the appellants as a passenger.

There are some principles of general application which it is necessary to bear in mind in approaching the consideration of this question. If a passenger has entered a train on a mere invitation or permission from a railway company without more, and he receives injury in an accident caused by the negligence of its servants, the company is liable for damages for breach of a general duty to exercise care. Such a breach can be regarded as one either of an implied contract, or of a duty imposed by the general law, and in the latter case as in form a tort. But in either view this general duty may, subject to such statutory restrictions as exist in Canada and in England, in different ways, be superseded by a specific contract, which may either enlarge, diminish, or exclude it. If the law authorises it, such a contract cannot be pronounced to be unreasonable by a Court of justice. The specific contract, with its incidents either expressed or attached by law, becomes in such a case the only measure of the duties between the parties, and the plaintiff cannot by any device of form get more than the contract allows him.

A second proposition is that if the contract is one which deprives the passenger of the benefit of a duty of care which he is *primâ facie* entitled to expect that the company has accepted, the latter must discharge the burden of proving that the passenger assented to the special terms imposed. This he may be shewn to have done either in person or through the agency of another. Such agency will be held to have been established when he is shewn to have authorised antecedently or by way of ratification the making of the contract under circumstances in which he must be taken to have left everything to his agent.

CAN.

P. C.

GRAND TRUNK R. CO. v. ROBINSON.

Viscount Haldane, L.C.

In such a case it is sufficient to prove that he has been content to accept the risk of allowing terms to be made without taking the trouble to learn what was being agreed to.

The company may infer his intention from his conduct. If he stands by under such circumstances that it will naturally conclude that he has left the negotiation to the person who is acting for him, and intends that the latter should arrange the terms on which he is to be conveyed, he will be precluded by so doing from afterwards alleging want of authority to make any such terms as the law allows. Moreover, if the person acting on his behalf has himself not taken the trouble to read the terms of the contract proposed by the company in the ticket or pass offered, and yet knew that there was something written or printed on it which might contain conditions, it is not the company that will suffer by the agent's want of care. The agent will, in the absence of something misleading done by his company, be bound, and his principal will be bound through him. To hold otherwise would be to depart from the general principles of necessity recognised in other business transactions, and to render it impracticable for railway companies to make arrangements for travellers and consignors without delay and inconvenience to those who deal with them.

In a case to which these principles apply, it cannot be accurate to speak, as did the learned Judge who presided at the trial, of a right to be carried without negligence, as if such a right existed independently of the contract and was taken away by it. The only right to be carried will be one which arises under the terms of the contract itself, and these terms must be accepted in their entirety. The company owes the passenger no duty which the contract is expressed on the face of it to exclude, and if he has approbated that contract by travelling under it he cannot afterwards reprobate it by claiming a right inconsistent with it. For the only footing on which he has been accepted as a passenger is simply that which the contract has defined.

Applying these principles to the facts of the present case, what is the construction to be put upon them by a Court of justice? It may well be that the respondent did not actually know the latitude allowed by the law of Canada to railway com-

panies. It is highly probable that he did not think of any such question as has arisen. But he must have known that he required to obtain permission from the company in order to travel with the horse, and, for the rest, the law imputes to him the duty of knowing its principles. He had taken a single ticket only when he came to Milverton.

The proper inference appears to be that when he and Dr. Parker had put the horse into the train, he went with Dr. Parker to the agent's office with the intention that Dr. Parker should make, as regards both the horse and himself, the whole of the necessary arrangements at the office. If Dr. Parker had been acting for himself, there can be no doubt that he would have been bound by the terms of the document he received from the agent and by his signature expressly told the company that he understood. Can the respondent be in a better position? On the evidence, can he say that the company's agent was not led by him to believe that Dr. Parker, by whose side he stood while the contract was being made, was making it with his assent. "I was standing right there," he says in his cross-examination, "alongside Dr. Parker."

Q.—What did Dr. Parker say after he had signed the contract? A.—He folded the contract up and said he would send that to Dr. McCombe by mail, and "it will be there before you will be there," and he says, "No, you must give it to this man, he must carry it with him, and it shews that he is travelling with this car." They just handed it to me and I put it in my pocket.

Under such circumstances the true inference is that the respondent accepted the document knowing that it contained the contract obtained by Dr. Parker for his journey, and in accepting it accepted all the terms which were set out on the face of the document, and which he would have seen had he taken the trouble to look at what was handed to him. It does not appear possible to say, in this case, that he was misled in any way, or that the agent need have done more than he did when he handed over a document which set out the terms offered for acceptance with great distinctness, in the form which the Railway Board had directed.

Such view is not inconsistent with any finding of fact by the jury, or even by the learned Judge who tried the case. It is based on the legal consequences which flow from facts about which there is no controversy. The majority in the Court of

CAN

P. C.

GRAND TRUNK RY. CO. v. ROBINSON.

Viscount Haldane, L.C.

Appeal for Ontario appear to have interpreted these consequences in the only way which the law warrants.

Having regard to the conclusions at which their Lordships have thus arrived, they will humbly advise His Majesty that the appeal should be allowed, and the action dismissed with costs in all the Courts below. The appellants must, however, under the terms on which special leave to appeal was given, pay the whole of the costs of the appeal to the King in Council as between solicitor and client.

Appeal allowed.

MAN.

K. B.

WHYTE v McTAGGART.

Manitoba King's Bench, Curran, J. June 23, 1915.

1. MASTER AND SERVANT (§ I C—10)—CONTRACT OF HIRING—REMUNERATION—"NET PROFITS"—WHAT ARE.

Where under a contract of hiring depends entirely on the "net profits" realized from sales which the employee has been directly or indirectly instrumental in making, the Court will not be astute to deprive the employee of such profits where it seems reasonably clear that they have been earned, and in determining the "net profits" a just proportion of the overhead charges of the business should be allocated to that quantum of business done in which the employee is to participate.

2. CONTRACTS (§ II D—145)—REMUNERATION—BUSINESS WHICH SHALL HAVE ASSUMED "DEFINITE SHAPE"—MEANING OF.

Where under a contract of hiring it is a term of the contract that the remuneration shall be based on the business which shall have assumed "definite shape" during the term of the contract, a tender for a contract, accompanied by a letter and a marked cheque, where the tender was afterwards accepted, is sufficient proof that the necessary stage of definiteness has been reached.

Statement.

ACTION on a contract.

C. P. Fullerton, K.C., and *G. D. MacVicar*, for plaintiff.

J. Kent Hamilton, for defendant.

Curran, J.

CURRAN, J.:—It is conceded that the plaintiff is entitled to an account, and the parties have agreed to a reference to the Master for this purpose, but require the judgment of the Court upon two points involved in the action, the decision of which will materially affect the reference and govern the Master in taking the accounts.

These questions are: First, the construction or meaning of the expression or term "net profits" used in the plaintiff's contract of hiring with the defendant; second, whether or not the plaintiff is entitled to participate in the profits derived or to be

derived from a certain contract made by the defendant with the Public Works Department of the province of Manitoba, based upon the defendant's tender, ex. 2.

The second question is purely one of fact to be determined upon the evidence, and I will deal with it first.

The contract of hiring and service between plaintiff and defendant is in the words and figures following:—

Winnipeg, Man., November 17th, 1911.

W. H. Whyte, Esq.,
Winnipeg, Manitoba.

Dear Sir:—

We hereby agree to employ you on the following basis, *viz.*: We will give you 50% of the net profits of all sales of B. F. Sturtevant apparatus in which you have been instrumental in making directly or indirectly, at the same time guarantee you $25.00 per week, which will be deducted from your share, or half of net profits.

You are to take a keen interest in all lines we handle, and use your best endeavours in trying to make sales in these lines.

By "Sturtevant apparatus" we mean all lines pertaining thereto; that is, air washers and motors.

This agreement to be perpetual until either you or ourselves are dissatisfied, when all that will be necessary will be four weeks' notice to terminate same. All business in these lines that have assumed definite shape during the time you are with us, and are eventually closed after you have left, you are to get credit for. By "definite shape" we mean on what we have quoted definite prices.

Hoping this will be satisfactory to you, and wishing you every success, we are,

Yours very truly,

Accepted: J. A. McTaggart & Company,
W. H. Whyte. Per J. A. McTaggart.

It will be observed that the parties agree that the contract is to be perpetual until either party is dissatisfied, when it can be terminated by either party giving four weeks' notice to the other. There is no stipulation that this notice shall be in writing, so I take it that any notice, whether written or verbal, if sufficiently explicit, and conveyed by one party to the other, would legally terminate the agreement at the expiration of four weeks from the date such notice is so given.

The plaintiff alleged in his statement of claim, clause 3, as originally issued, that during the month of April, 1914, he gave the defendant due notice in accordance with the terms of said contract of his intention to terminate the same, and at the expiration of the period set out in the notice the plaintiff determined said contract and left the employ of the defendant. At the

MAN.

K. B.

WHYTE v. MCTAGGART.

Curran, J.

trial the plaintiff was allowed to amend his statement of claim by striking out the foregoing clause and substituting the following: "On or about June 1, 1914, the said contract was rescinded by mutual consent, and the plaintiff thereupon left the defendant's employ."

It is necessary to determine when the plaintiff's contract of hiring actually did terminate in order to answer the second question.

The plaintiff had made an affidavit in this action, ex. 4, clause 3 of which has been specially referred to, on cross-examination, as being at variance with his present testimony on the subject of notice, as the plaintiff now states that there never was a notice given that the contract would be determined in four weeks or any notice given at all in accordance with the contract, whereas clause 3 affirms that on or about March 25, 1914, the plaintiff gave the defendant verbal notice of his intention to determine the contract. The plaintiff was cross-examined at the trial on this affidavit, and the following questions and answers on such cross-examination were affirmed by him:—

Q. 31—Of course you didn't feel you were bound to remain there after the four weeks had expired? A.—No, sir, I didn't feel I was bound to remain there after the four weeks had expired.

Q. 37—There really was no occasion, so far as your own interest was concerned, why you should remain on after April 22? A.—Nothing further than looking it over, and one thing more, to get some money out of McTaggart.

This cross-examination was not put in at the trial, and only these two questions read into the record on the plaintiff's cross-examination. The following question and answer upon the plaintiff's examination for discovery were also read into the record at the trial in the same way:—

Q. 45.—You gave notice to the defendant to terminate the contract in accordance with its terms, did you? A.—I did.

Now, the defendant alleges that the contract was terminated by notice to him from the plaintiff at a meeting between these parties in the Travellers' Club, in the city of Winnipeg, somewhere about, but not later than, March 25, 1914. If this is so, the date of termination would be April 22 following.

The power house contract referred to did not assume definite shape as defined in the contract until certainly April 24, when definite prices for the work were prepared ready for quotation.

I must say that the defendant's testimony upon this most important point seems to tally with the foregoing statements and admissions of the plaintiff. However, at the trial the plaintiff made a different statement, and gave what seemed to me not unsatisfactory reasons for so doing. He says he was not really very sure about the date of his conversation with the defendant given as March 25, 1914, when the affidavit was made, but is now in a position to fix it by a reference to a cheque which he cashed in Chicago on his way home. From this he positively fixes March 25, 1914, as the date of his return to Winnipeg, and on which date he had an interview with the defendant, when some discussion of their business relations took place; but that nothing definite was then done. He says he told the defendant he would think over matters and talk to him again a week later, which he did. This would be on April 1. Plaintiff then told the defendant there was no possible chance of their getting along together, as there had been continued friction between them, and he must cancel the contract. Upon this he says the defendant wanted to know when he, plaintiff, would leave, to which the plaintiff replied that he was in no hurry to go until the defendant got another man.

He continued with the defendant till about June 1, when he left, although the defendant had not then got another man. Up to this time he says he was doing the same kind of work for the defendant as he had previously done in the course of his employment.

The defendant's evidence on this subject is, shortly, that the plaintiff left Winnipeg for a trip to the Eastern States in March, 1914, without his knowledge; that the plaintiff wrote him the letter, ex. 5, from the city of Boston; that the plaintiff returned to Winnipeg about March 25, 1914, when he saw him at the Travellers' Club, and told him it was no use in carrying on on account of his, plaintiff's, conduct and the feeling between them. He went on to say: "We both spoke of the ill-feeling between us. I thought it impossible to continue our business relations on account of his conduct. There was strong feeling on my part, because he went away without my consent. I said 'In another four weeks I expect to have another man to take your place.' I didn't look on the plaintiff as being in my employ after the four weeks terminated."

MAN.

K. B.

WHYTE v. McTAGGART.

Curran, J.

The defendant does not, however, say he gave the plaintiff notice of his intention to terminate the employment, although the plaintiff might well have gathered from the trend of the conversation and the feeling of hostility displayed, at all events by the defendant, that it was becoming impossible to continue their former business relations, and that the defendant desired to put an end to the hiring. But I cannot find that any definite intimation to this effect was given on this occasion, March 25, 1914, by either party to the other.

The defendant admits, however, that after April 22 the plaintiff did work in connection with the power house tender, such as preparing estimates, fixing a price for the whole work, preparing a list of articles required for this contract to be purchased from the Sturtevant company, and ordering same, obtaining quotations on goods required for this contract from the Red River Metal Company and ordering these goods; also that the plaintiff had been for some time working to get this power house contract for the defendant, and that he prepared part of the figures upon which the defendant's tender was based.

There undoubtedly was friction and ill-feeling between the parties occasioned by the plaintiff's conduct in taking the trip to Boston without the defendant's leave or knowledge. There is also no doubt that the defendant thought the plaintiff was going down to Boston to undermine him with some of the eastern agencies and get the business away from him, and would have been quite justified, on the plaintiff's return, in dismissing him for absenting himself without leave.

There is no doubt that some talk took place between the parties on the plaintiff's return to Winnipeg on March 25, which indicated that the parties would have to separate and the agreement be terminated. But I cannot find, as before stated, that there was then any definite notification given by either party to the other to this effect so as to put an end to the contract in accordance with the provisions for termination therein contained.

The defendant has not denied that there was a second conversation, a week later, on April 1—at all events I cannot find any reference to this in my notes of the defendant's testimony—although his evidence seems to indicate that, according to his recollection, there was but one conversation. He certainly refers to one only, which took place not later than March 25.

Both men appeared to me honest and respectable and one entitled to credence as much as the other.

The plaintiff's counsel, however, contends that the onus is on the defendant to shew termination at a date anterior to the date on which the power house contract assumed that "definite shape" mentioned in the hiring agreement, which would entitle the plaintiff to participate in the profits from it. On the statement of claim, as amended, I think this is so. The plaintiff alleges that the contract was not terminated until June 1, and that he remained in the defendant's employ until that date, and his evidence at the trial bears this out. I think, therefore, that the onus is now on the defendant to shew an earlier dissolution of the contract of employment. At all events, considering that the plaintiff's remuneration depended entirely on profits realized from sales of Sturtevant apparatus and all lines pertaining thereto which he had been directly or indirectly instrumental in making, I think the Court ought not to be astute to find reasons to deprive the plaintiff of such profits where it seems reasonably clear that they have been earned, partly at all events, through the plaintiff's instrumentality, and under the circumstances such as we have here.

A copy of the defendant's tender for the power house contract has been put in as ex. 2. It bears no date, but attached to it is a copy of a letter from the defendant to the then Minister of Public Works, which appears to have accompanied the tender, and also enclosed the defendant's marked cheque, which is attached to the tender. It is to be noted that the letter bears date April 24, 1914, and at that date it is evident the defendant was in a position to quote definite prices on this work, although the price itself is not stated in the letter, but is stated in the tender, the amount being $20,528.

Now, the test as to the plaintiff's right to participate in the profits of business secured by the defendant firm is that such business shall have assumed definite shape during the time the plaintiff was with the defendant—that is, in his employ. By "definite shape" the contract says "we mean on what we have quoted definite prices." I think the letter in question may well be considered evidence that this stage of definiteness in connection with the power house contract has been reached. If the

MAN.

K. B.

WHYTE v. MCTAGGART.

Curran, J.

contention is correct that notice was given on March 25, the plaintiff's contract would have terminated on April 22, just two days before this stage of definiteness was reached, which would result in depriving the plaintiff of the profits on this large transaction, notwithstanding the fact that he had been largely, if not wholly, instrumental in securing this business for the defendant, and certainly did a considerable part, if not all, of the work required to be done in connection with the defendant's tender, which was ultimately accepted on May 20 following.

The evidence is conflicting to a certain extent, but, on the whole, the plaintiff gives a more detailed account of what actually happened than the defendant does. I think there were two interviews, as the plaintiff says; that whatever notice was given was so given at the second of these interviews, which took place on April 1. I do not think any definite notice of the termination of the contract was even on that date given, but, if there was, the plaintiff's engagement would not have expired in virtue thereof until April 28 at the earliest. The tender admittedly went in on April 27, and the plaintiff would, therefore, be entitled to share in the profits derivable from this contract, and I so hold.

As to the first question, I agree with the defendant's contention that a just proportion of the overhead charges of the defendant's business should be allocated to that quantum of business done in which the plaintiff was to participate. I do not see what other meaning can be given to the expression "net profits" used in the contract. There is nothing in the agreement to indicate that any but the ordinary meaning should be given to this expression. In taking the accounts, therefore, the Master will ascertain profits on this basis, charging the plaintiff with a just proportion of the overhead expense.

I reserve the question of costs and further directions until after the Master has made his report.

Judgment for plaintiff.

GREEN v. CANADIAN NORTHERN R. CO.

SASK.

S. C.

Saskatchewan Supreme Court, Haultain, C.J., Lamont, Brown and Elwood, JJ. January 9, 1915.

1. EMINENT DOMAIN (§ III C—148)—EXPROPRIATION—RAILWAY PURPOSES—VALUATION.

On the expropriation of land for railway purposes the value to be paid is the value to the owner as it existed at the date of the taking and not the value to the taker; such value is the present value alone of the advantages which the land possesses whether present or future.

[*Cedars Rapids* v. *Lacoste*, 16 D.L.R. 168, [1914] A.C. 569; *R.* v. *Trudel*, 19 D.L.R. 270, 49 Can. S.C.R. 511, followed.]

2. COSTS (§ I—8)—EXPROPRIATION FOR RAILWAY PURPOSES—ARBITRATORS' FEES—TAXATION OF—SEC. 199, RAILWAY ACT (CAN.).

The arbitrators' fees are not to be included in and made part of the award in an expropriation for railway purposes; such fees are governed by sec. 199 of the Railway Act, Can., and are to be taxed if the parties do not agree upon the amount.

3. ARBITRATION (§ III—41)—COMPENSATION — INTEREST ON — STATUTORY RIGHT TO—POWER OF ARBITRATORS.

The right to interest upon the compensation awarded for the compulsory taking of lands under the Railway Act, Can., is a statutory right, and the arbitrators have no power to include such interest in their award.

[*Re Ketcheson & C.N.O.R. Co.*, 3 D.L.R. 854, 29 O.L.R. 339, followed.]

Statement

APPEAL from an award under the Railway Act.

J. A. Allan, K.C., for appellant.

W. E. Knowles, for respondent.

The judgment of the Court was delivered by

Elwood, J.

ELWOOD, J.:—This is an appeal from an award made to the respondent under the provisions of the Railway Act of Canada. On behalf of the appellant a number of grounds of appeal were taken, but for the purposes of this appeal it seems to me only necessary to deal with a few of those. The arbitrators, in their award and in their reasons for the award, have allowed compensation, first, for land actually taken, and, second, for damage which, they find, is sustained to certain portions of the land of the respondent by reason of the construction of the railway. In addition to the above, the arbitrators fixed their fees at $6,750, which they added to and declared to form part of the award; and they also allowed to the respondent interest on the amount of compensation thereby awarded to him, for the land taken and the land injuriously affected on the south-east half of section 29, as from May 21, 1912, and for the land taken and the land injuriously affected on the east half of section 20, from September 14, 1912.

SASK.

S. C.

GREEN v. C.N.R. CO.

Elwood, J.

So far as the amount allowed as compensation for the land taken and the land injuriously affected is concerned, the only evidence given on behalf of the respondent with respect to the value of the land taken and affected was evidence which shewed that a great deal of land surrounding and in the neighbourhood of the land in question had been subdivided into city lots, that some of this land had been sold, that some had not been sold, and a list of prices at which the lots in these various subdivisions had been sold was given, and a comparison of prices that might be got for the land in question, were it subdivided, was made. It seems to me that throughout the whole of the case for the respondent it was assumed that, because certain subdivisions situated similarly to that of the respondent had sold at certain prices, therefore the land of the respondent would, if subdivided, sell for the same price. On the other hand, evidence on behalf of the appellant was given as to the value of the lands having in view the possibility of the lands being subdivided.

The principle upon which compensation is to be awarded is stated in *Cedars Rapids* v. *Lacoste*, 16 D.L.R. 168, at 171, [1914] A.C. at 576, where I find the following:—

> The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England, and it has been explained in numerous cases, nowhere with greater precision than in the case of *In re Lucas and Chesterfield Gas and Water Board*, where Vaughan Williams and Fletcher Moulton, L.JJ., deal with the whole subject exhaustively and accurately.
>
> For the present purpose it may be sufficient to state two brief propositions: (1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

This principle is followed in *The King* v. *Trudel*, 19 D.L.R. 270, 49 Can. S.C.R. 511.

Applying the above principle to the case at bar, it seems to me that the only evidence which is of value in determining the value of the property taken and injuriously affected is that given on behalf of the appellant. The arbitrators, in their reasons for award, have fixed the following values, namely: the high lands on the north-east quarter of 20, $500 an acre; the high lands on the south-east quarter of 20, $300 an acre; the south-east of 29, $1,150 an acre. I am unable to see how the arbitrators

SASK.

S. C.

GREEN v. C.N.R. Co.

Elwood, J.

could have arrived at the above figures except by assuming that, if the lands were subdivided, they might realize the above sums, but there was no evidence before them which would justify them in coming to the conclusion that the above sums were the values of the land to the owner as it existed at the date of the taking. A number of witnesses gave evidence on behalf of the appellant as to the value, and the highest valuations put upon the land were by the witness Caulder. He valued the south-east quarter of 29, in the spring of 1912, at $500 an acre; the south-east of 20, in the fall of 1912, at $200 an acre; and the north-east of 20, in the fall of 1912, at $400 an acre. The time at which the valuation should be placed upon the land is, as to the south-east quarter of 29, May 21, 1912, and the east half of 20, on September 14, 1912. The arbitrators, in referring to the evidence of Caulder, state that he valued the south-east of 29 at $700 an acre in the fall of 1912. I have looked carefully through the evidence, and find that his valuation is $600 in the fall of 1912, but it is $500 in the spring of 1912. In my opinion, the above valuations given by Caulder are the ones which should govern in arriving at an estimate of the amount of compensation to be paid. The arbitrators found as a fact that certain portions of the land had been injuriously affected as follows: The high lands on the north-east of 20, 10 per cent.; the high lands on the south-east of 20, 10 per cent.; and the south-east of 29 as follows: Parcel B, 14 per cent.; parcel C, 7 per cent.; parcel D, 40 per cent.; parcel A, 7 per cent.; parcel E, 7 per cent.; the percentage of parcel F is not given, but I shall refer to that later. There was evidence which would justify the arbitrators in coming to the conclusion that the above parcels of land had been damaged to the extent to which they found in the award they had been damaged, and, under these circumstances, I do not think that we should disturb that finding. The principle which should govern the Court seems to me to have been properly stated in *Re Ketcheson and C. N. O. R. Co.*, 13 D.L.R. 854 at 856, where Hodgins, J.A., states:—

> In other words, I think that this Court is entitled and bound to come to its own conclusion upon all the evidence, and is also entitled to disregard the reasoning of the arbitrators if it does not agree with it, or to adopt it if it so desires, or to support the award on any ground sufficient in law, whether or not that ground is relied on by the arbitrators, provided that

SASK.

S. C.

GREEN v. C.N.R. Co.

Elwood, J.

the Court pays due regard to the award and findings and reviews them as it would that of a subordinate Court.

Allowing the respondent the percentages of damage found by the arbitrators to have been sustained, and applying those percentages to the valuations which, in my opinion, the arbitrators should have found had they followed the principle above stated in *Cedars Rapids* v. *Lacoste*, I would allow the following sums:—

For land taken for right-of-way through the south-east quarter of 29, 6.58 acres, at $500 an acre	$3,290.00
For land taken for right-of-way through the south-east quarter of 20, 4.05 acres, at $200 an acre	810.00
For land taken for right-of-way through the north-east quarter of 20, 6.37 acres, at $400 an acre	2,548.00
For 10 per cent. damage to the north-east quarter of 20, 153.60 acres, at $400 an acre	6,144.00
For damage to the south-east quarter of 20, 10 per cent., 45.5 acres, at $200 an acre	910.00
For damage to the south-east quarter of 29: Parcel B, 27.09 acres, 14 per cent	1,953.00
Parcel C, 7.1 acres, 7 per cent	248.50
Parcel D, 7.4 acres, 40 per cent	1,480.00
Parcel A, 9.1 acres, 7 per cent	318.15
Parcel E, 50.18, at 7 per cent	1,756.30
In Parcel F the percentage of damages is not given in the award, nor the reasons for the award, but the damage is evidently figured at the land being worth $1,150 an acre. As I have stated above, the land should have been valued at $500 an acre, and, valuing it at $500 instead of $1,150 an acre, the damage sustained with respect to parcel F would be	4,108.30
	$23,566.60

In my opinion, therefore, the amount allowed as compensation for the land taken and for the land injuriously affected should be reduced to $23,566.60, which is the sum I would allow.

So far as the arbitrators' fees are concerned, the arbitrators, in my opinion, had no right to include them in and make them part of the award. Their fees are governed by sec. 199 of the

SASK.

S. C.

GREEN v. C.N.R. Co.

Elwood, J.

Railway Act, and, in the event of the parties not agreeing upon the amount of costs, those costs will have to be taxed by the Judge, as provided by the Act. Therefore, the portion of the award which fixes the amount of the arbitrators' fees and adds that to the award must be struck out.

So far as the interest is concerned, the arbitrators had no power to include that in their award, as the right to interest is statutory. See *Re Ketcheson and C. N. O. R. Co., supra*, at p. 858. The provision as to interest, therefore, should be struck out.

The respondent should pay the appellant's costs of this appeal.

Judgment accordingly.

Re WESTERN CANADA FIRE INSURANCE CO.

ALTA.

S. C.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, Beck and Walsh, JJ. February 19, 1915.

1. CORPORATIONS AND COMPANIES (§ V B—177)—STOCK — SUBSCRIPTION FOR—CONDITIONS TO SUBSCRIPTION.

The effect of sec 57A of the Companies Ordinance, C.O. 1898, ch. 61 as amended 1909, ch. 5 is to make voidable a subscription for stock obtained by verbal representations to the subscriber where he has not received a copy of the prospectus, such being the effect of the words "no subscription, etc., shall be binding upon the subscriber," which do not imply that the contract shall be absolutely void and incapable of ratification.

2. CORPORATIONS AND COMPANIES (§ V B—175)—STOCK—SUBSCRIPTION FOR —REPUDIATION—NOTICE OF.

A distinct and unequivocal repudiation of a company share subscription where the subscriber is entitled to repudiate, need not be by the institution of proceedings to set aside his subscription; a notice of repudiation given to the directors may be sufficient for the purposes of a winding up under the Companies Winding-up Ordinance, 1903, 1st session, ch. 13, if given before the winding-up proceedings had commenced.

[*Reese River Silver Mining Co.* v. *Smith*, L.R. 4 H.L. 64, applied; *Re Scottish Petroleum Co.*, 23 Ch.D. 430 (C.A.), dissented from; *Oakes* v. *Turquand*, L.R. 2 H.L. 325, discussed; *Re Retailer Merchants Assn.*, 15 D.L.R. 890, overruled.]

3. COURTS (§ V B—295)—RULES OF DECISION—STARE DECISIS—BINDING EFFECT.

The Supreme Court of Alberta is not bound by the decisions of the English Court of Appeal.

CASE stated by Stuart, J. Statement

A. H. Clarke, K.C., for liquidators.

W. A. Wells, for Cowper.

ALTA.

S. C.

RE WESTERN CANADA FIRE INS. CO.

Stuart, J.

HARVEY, C.J., and SCOTT, J., concurred with BECK, J.

STUART, J.:—Although I at one time entertained a different impression and gave expression to it, I believe, in *Re Retailer Merchants' Association*, 15 D.L.R. 890, a case which was not quite as fully argued in Chambers as the present case has been before us, I am now convinced that I was there wrong, so far as the real point involved in this case is concerned, and I concur fully in the opinion of my brother Beck. I just wish to add that it seems to me that when the legislature used the expression "binding upon the subscriber," it should be deemed to have had in mind the distinction which had been drawn by the Courts between a void contract and a voidable one and which had been, in frequent cases, expressed by the use of the very term "not binding upon the purchaser" (or subscriber) in reference to voidable contracts.

Beck, J.

BECK, J.:—This is a case stated by STUART, J. Few of the facts set out in the stated case need be repeated.

By the Statute Law Amendment Act, Part II. ch. 5, of 1909, sec. 1, the following section was inserted in The Companies Ordinance (C.O. 1898, ch. 61).

57 (a). Every company heretofore or hereafter incorporated *under the authority of* this Ordinance or *under the authority* of any special Ordinance or Act, the number of shareholders of which is increased to a number greater by ten than the number of applicants for incorporation or which has its debentures or other securities held by more than ten persons, and every company incorporated *otherwise than as above set out* which has more than ten shareholders or holders of debentures or other securities within Alberta, shall file a prospectus in the manner hereinbefore set out.

(2) All purchases, subscriptions, or other acquisitions of shares, debentures or other securities of any company required, in the manner above provided, to file a prospectus, shall be deemed *as against the company or the signatories to the prospectus* to be induced by such prospectus and any term, proviso or condition of such prospectus to the contrary shall be void.

(3) No subscription for stock, debentures or other securities induced or obtained by *verbal representations* shall be binding *upon the subscriber*, unless prior to his so subscribing he shall have received a copy of the prospectus.

The question was raised during the argument whether this section was applicable to this company. But the question must be answered affirmatively because of the later words of the sec-

tion making it applicable to "every company incorporated otherwise than as above set out" inasmuch as it is admitted that it fulfils the other conditions of the section.

This company was incorporated by special Act ch. 24 of 1910, 2nd sess. Sec. 28 (*i*) of that Act restricts the application of the Companies Ordinance to this company to the provisions

relating to the right of inspection of the Lieutenant-Governor in Council and the filing of annual returns with the Registrar of Joint Stock Companies and . . . which give the Lieutenant-Governor in Council or the Registrar of Companies the power to compel a proper disclosure by the company of the exact condition of its affairs to which the Western Canada Fire Ins. Co. Ltd. (a company with which amalgamation was authorized by the Act) is at the time of the passing of this Act subject.

I note some provisions of the company's charter: sec. 3 after providing for the company's capital stock says:—

Such shares shall and are hereby vested in the several persons to whom they shall be allotted, their legal representatives and assigns, subject to the provisions of this Act.

Sec. 11 says:—

In the event of the property and assets of the said company being insufficient to liquidate all debts, liabilities and engagements, the shareholders shall be liable for deficiency, but to no greater extent than the amount of the balance remaining unpaid upon their respective shares in the capital stock.

There is nothing in the charter referring to a register of members. Nor does there appear to be any reference to a register in the sections of the Companies Ordinance regarding annual returns which are made applicable to this company. It seems to be expedient to note also some of the provisions of the Companies Winding-up Ordinance (ch. 13 of 1903, 1st sess.).

Sec. 2 (3) says:—

"Contributory" shall mean any person liable to contribute to the assets of a company under this Ordinance in the event of the same being wound up, and in all proceedings prior to the final determination of such persons any person alleged to be a contributory, and shall also include the personal representative or representatives of any such person.

Sec. 7 states the consequences ensuing upon the commencement of winding-up proceedings among which are:—

Any alteration in the status of the members of the company, after the commencement of the winding up shall be void.

Sec. 14 provides for the liquidators settling a list of contributories and sub-sec. (2) says:—

ALTA.

S. C.

RE WESTERN CANADA FIRE INS. CO.

Beck, J.

Every shareholder or member of the company or his representative is liable to contribute the amount unpaid on his shares of the capital, or on his liability to the company or to its members or creditors, as the case may be, under the Ordinance, charter or instrument of incorporation of the company.

Sub-sec. (5) reads:—

Any list so settled shall be *primâ facie* evidence of the liability of the persons named therein to be contributories.

Sec. 15 says:—

The list of contributories may be settled by the Court, in which case the liquidators shall make out and leave at the chambers of the Judge a list of the contributories of the company.

Sec. 22 contains provisions respecting the enforcing of payment by the contributories.

I think I have set out all the statutory provisions which have any bearing upon the question to be determined except those relating to prospectuses, which I refer to further on.

Many of the cases deciding questions analogous to the present one are made to depend to a very large extent upon provisions of the Companies Acts which are not made applicable to this company.

In this case the first question to be answered is whether a subscription made upon oral representations without any prospectus is, by virtue of sec. 57*a* void or merely voidable. I have no doubt that it is voidable only. The words are "(not) binding *upon the subscriber.*" The provision is clearly for the benefit of the subscriber and if so he can waive it—not I think precedently or contemporaneously, for waiver at that stage is, I think, if not expressly, at least by clear implication, excluded by the obvious intention of the provisions of the Companies Ordinance relating to prospectuses which include I think not only sec. 57*a*, but, by virtue of the expression therein—"a prospectus in the manner hereinbefore set out"—also secs. 55 and 56, relating to the contents of the prospectus; and in sec. 56 (4) we find the provision:—

Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section or purporting to affect him with notice of any contract or document not specifically referred to in the prospectus shall be void.

And sub-sec. (2) of sec. 57*a* which I have already quoted is a somewhat similar provision.

I see no reason, however, why after that full disclosure of the condition of affairs of the company, which a prospectus in accordance with the Ordinance is calculated to give, the subscriber cannot deliberately affirm his subscription by some unequivocal act, *e.g.*, subsequently receiving a proper prospectus, investigating the affairs of the company in the light of it and thereupon writing to the company to the effect that although he had become aware that his subscription was not binding upon him he had since received a proper prospectus; that he had fully investigated the company's affairs, that he found that they were as represented, and that he now affirmed his subscription. If this conduct would be effective, it must be so because the original subscription was merely voidable by him, not void; for what is void cannot be affirmed. A voidable contract, however, is good unless the party entitled to avoid it elects so to do. This is the position in the case of a contract obtained by fraud.

Clough v. *L. & N.W.R. Co.*, L.R. 7 Ex. 26, is the leading case. The Court there, after referring to a case of a lessor, entitled to re-enter for breach of covenant, where the question was whether he had "waived the forfeiture" said that the case of a contract obtained by fraud—the case before them—was similar and proceeded:—

> In such cases the question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election? We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind.

This general rule is applied in the case of an incorporated company actively soliciting subscriptions or carrying on business where there is a liability upon the shareholders to contribute in case of a deficiency of assets, in this way: A shareholder entitled to rescind as voidable by him his contract of subscription, must make his election against the contract with what, under the circumstances, is to be considered promptness, the reason being that it is obvious that it is at least likely that third parties may have been influenced to become shareholders or creditors

ALTA.

S. C.

RE WESTERN CANADA FIRE INS. CO.

Beck, J.

by the fact of his subscription: *Oakes* v. *Turquand* (1867), L.R. 2 H.L. 325, 352, and in the earlier cases it was held that the shareholder must also have succeeded in getting his name actually removed from the register of shareholders before a winding-up order was made. Ultimately the question came before the House of Lords in *Reese River Silver Mining Co.* v. *Smith* (1869), L.R. 4 H.L. 64.

The precise point there decided—I quote a portion of the head-note—was this:—

> If before a winding-up order is made, a person files a bill against a company alleging that he had been induced by fraud and misrepresentation to become a member of the company, and on that ground praying to have his name removed from the lists of its members, he will (on establishing his allegations) be entitled to have his name removed from the lists of the company, although between the date of his filing his bill and the decree of the Court upon it an order has been made to wind up the company.

The Lords taking part in the judgment were Lords Hatherley (L.C.), Westbury, Colonsay, and Cairns.

Lord Hatherley said:—

> The argument then is this: We are (say the appellants) within the rule laid down by this House in the case of *Oakes* v. *Turquand*, L.R. 2 H.L. 325. We find that there was an agreement, and that this gentleman was, therefore, by the 6th section of the statute, a person who had agreed to take shares. And we find another portion of the statute which says that anybody who has agreed to take shares is a member of the company, and another which says that anyone who is a member is, in certain cases, a contributory; and they contend therefore, that Mr. Smith is brought by this process within the description of a contributory to the company and that his name ought to remain upon the list.
>
> The case of *Oakes* v. *Turquand*, was decided when the position of circumstances was this: A then shareholder had entered into what the House held to be a voidable, but not a void agreement; . . . the agreement subsists until rescinded; that is to say, in this sense—until rescinded by the declaration of him, whom you have sought to bind by it, that he no longer accepts the agreement but entirely rejects and repudiates it. It is not meant, I apprehend, by that expression "until rescinded," . . . to say that the rescission must be an act of some Court of competent authority, and that until the rescission by the Court of competent authority takes place, the agreement is subsisting in its full rigour. . . . I apprehend the true view of the case is this. The agreement is valid until rescinded. If in a case of this description the directors had committed the fraudulent act of putting a man's name upon the list which they ought not to have put there, and had allotted him shares, so that if it turned out to be beneficial it would be competent to the person to say:

"Now, I elect to hold them because, although coming to me by your fraud upon me, I find it is beneficial to me to hold them, and you cannot aver your own fraud to prevent my so doing;" in that case the directors could not have taken the name off the list without communication with him. But, if immediately that he knows what the directors have done, he says: "I have made up my mind to reject the contract, and I assert that intention of mine in the plainest and most open manner competent to me, by my communication to you insisting upon having my name removed, and, on your neglecting your duty to remove my name, I proceed to file my bill to compel you to do so"—I take it that thereupon the contract is at an end, and the gentleman is entitled to have his name removed from the list. *Because it was the duty of the directors not to wait for the filing of the bill* if they knew, as we must assume them to have known, that the contract had been entered into upon those fraudulent representations. *The moment they were told that the contract was rejected, and that he claimed no interest under that fraudulent act of theirs, it was their duty to remove his name, which could no longer be retained there, the contract being thus avoided and by that means to avoid all further controversy.*

That, however, was not done, then what must be the next proposition on behalf of the appellants? It must be that the directors having neglected their duty, having neglected to do that which they were manifestly bound to do, they had thereby given rights to creditors which, if they had performed their duty, could never have had any possible existence. The thing seems absurd upon the face of it, and I apprehend that happily the law does not justify such a proposition.

. . . . . .

The legislature, therefore, having given the Court the power, it seems to me that it is perfectly competent to the Court to place this list in the condition in which it ought to have been. It ought to have been corrected by the directors without a suit. Certainly after the bill was filed, it should have been corrected by them.

Lord Westbury was careful to limit the ground of his decision to this:—

That it was the duty of the directors, at the time when the bill was filed at all events, if not before, to remove Mr. Smith's name from the register, and that gives birth to the farther proposition, that what the directors ought clearly to have done, there being a default on the part of the directors, may now be done by the Court in pursuance of the right asserted by Mr. Smith in that suit.

Lord Colonsay was equally careful to confine himself to the particular case putting his reason thus:—

That the party having taken steps to have his liability judicially put an end to, and to have his contract rescinded, which he was entitled to have rescinded, and that having been done before the machinery for winding up was put into motion at all, he is entitled to be regarded as if that had been done by the Court at the time he demanded it.

Lord Cairns said:—

ALTA.

S. C.

RE WESTERN CANADA FIRE INS. CO.

Beck, J.

The clear duty of the directors was, when the claim was made in a way as to which there could be no mistake, to comply with that which was the right of the plaintiff in that suit, and to take his name off the list of shareholders at all events upon the filing of the bill.

In *Re Estates Investment Co. Pawle's Case* (1869), L.R. 4 Ch. 497 (C.A.) decided after the decision in *Reese River Silver Mining Company* v. *Smith*, the facts were these: Eleven shareholders repudiated their share on the ground of fraud and refused to pay calls. One (Ross) brought an action. It was agreed between the solicitors for the company and the ten remaining shareholders that the position of the latter should not be prejudiced by reason of their not taking proceedings. Judgment was given in the action for the plaintiff; the company appealed; pending the appeal a winding-up order was made. The ten had taken no proceedings. It was held that it was still open to the Court to remove their names from the list of contributories.

In *Re Estates Investments Co., Ashley's Case* (1870), L.R. 9 Eq. 263, the Court refused to remove the name of Ashley from the list of contributories under the circumstances that he was not one of the eleven shareholders acting in concert with Ross and that *he took no steps to repudiate his subscription* though with knowledge of these other proceedings and of the company continuing its business, but was awaiting the result of the litigation before deciding whether he would repudiate or not. Especial emphasis was laid by the Master of the Rolls (Romilly) upon the necessity for prompt repudiation in such a way that the fact that his repudiation would be beyond doubt, so that in the event of the company turning out a financial success he could not against the will of the company retain his position as a shareholder.

In *Re Scottish Petroleum Co.* (1883), 23 Ch.D. 430, the Court of Appeal, affirming in this respect the judgment of Kay, J., held that the actual taking of legal proceedings, before the making of a winding-up order, by the repudiating shareholder or by some other repudiating shareholder, whose proceedings were adopted with the consent of the company as a test case was an essential condition for the removal of the repudiating shareholders name from the register.

The case was argued on behalf of the repudiating shareholder by Mr. Haldane the present Lord Haldane, Lord Chancellor. He contended that:—

> The case of *Oakes* v. *Turquand*, only decides that in the case of a company there must be a repudiation before the commencement of winding-up and all I need shew is that I repudiated before that time. There are early cases which say that steps must be taken to get rid of the shares before the winding-up, but they cannot be reconciled with the decision of the House of Lords in *Reese River Silver Mining Co.* v. *Smith* . . . *The cases are all made consistent by holding that nothing more is required than that a distinct repudiation precluding the allottee from ever claiming the shares should be made before the commencement of the winding-up*

This was the interpretation which I had put upon the decision of the House of Lords in *Reese River Silver Mining Co.* v. *Smith*, before reading the decision in *Re Scottish Petroleum Co.*

The members of this Court are unanimously of opinion that the view put forward by Mr. Haldane, as the proper interpretation and logical conclusion to be drawn from the decision of the House of Lords in *Reese River Silver Mining Co.*, is the correct one, and that in *Re Scottish Petroleum Co.* was wrongly decided, and that as we are not bound by the decisions of the English Court of Appeal we should not follow the latter decision. We think that a distinct unequivocal (and therefore irrevocable) repudiation of a subscription (where the subscriber is entitled to repudiate) conveyed to the directors so that it becomes their duty to remove the repudiating shareholder's name from the list of shareholders if made before the commencement of the winding-up proceedings (where that is the only suggested answer) is sufficient to entitle him to have his name removed from the list of contributories without the necessity for the further step of the initiation of proceedings before the commencement of winding-up proceedings.

Coming to the facts of the present case, it appears that Cowper subscribed for ten shares in the company some time in May, 1911, the application being for some reason post-dated June 6, 1911; that on July 6, 1911, he repudiated his subscription and asked that his subscription for the shares be cancelled. This was done by letter which was acknowledged by letter July 13, 1911, and although the company declined to

ALTA.

S. C.

RE WESTERN CANADA FIRE INS. CO.

Beck, J.

accede to the request the letter of repudiation would appear to have been unequivocal. At the time of subscription, Cowper gave two promissory notes totalling the amount of the deposit. He says in his evidence:—

> Nothing has been paid on the notes. On June 5, 1911, at the meeting I entered a very strong protest against the application. I took legal advice and wrote letter of July 6, and got the letter of July 13. I went to the office of the company in Calgary and made a very strong protest. The man there laughed at me. He was a high official of the company. He said they would put me in prison if I didn't pay. I employed a lawyer in Edmonton who made certain enquiries and then told me to await action by the company.

No attempt was, so far as appears, ever made by or on behalf of the company to collect the amount of the notes or any further calls if there were any on the shares until the liquidator by notice dated October 1, 1914, notified Cowper that he was on the list of contributories with a liability of $1,000. After a lapse of three years and three months it might, I think, be very well said that Cowper might well assume that the directors of the company had fulfilled their obvious duty and have removed his name from the list of shareholders. But I prefer to rest the decision of this case on the ground of his prompt and unequivocal repudiation conveyed to the company as a complete and sufficient rescission of his contract of subscription. Mr. Justice Stuart's question on the stated case is: "Whether, quite aside from the truth or falsity of the verbal representations, Cowper's name should be removed from the list of contributories owing to the terms of sub-sec. 3 of sec. 57*a*."

I would, for the reasons indicated, answer this question affirmatively. Answering this question, I think, fulfils the duty of this Court. The question of costs and any other questions remain, I think, with the Judge of first instance.

Walsh, J.

WALSH, J., concurred with BECK, J.

Judgment accordingly.

VICK v. MORIN & THOMPSON.

B. C.
S. C.

British Columbia Supreme Court, Macdonald, J. January 8, 1915.

1. NEGLIGENCE (§ II B—88)—CONTRIBUTORY—NEGLIGENCE OF CHILDREN.
The doctrine of contributory negligence does not apply to an infant of tender years.
[*Gardner* v. *Grace*, 1 F. & F. 359; *Clark* v. *Chambers*, 3 Q.B.D. 327, 338, referred to.]

2. NEGLIGENCE (§ I C—55)—INJURIES TO CHILDREN—DANGEROUS ATTRACTIONS—BUILDING MATERIALS ON SCHOOL PREMISES.
Where material not dangerous in itself is left in a safe but inconvenient position by a contractor on school premises where he was employed to do certain repairs, he will not be liable for damage which resulted to one of the scholars from its being moved by third parties to a dangerous position, which change the contractor could not have reasonably anticipated.
[*Mekins* v. *Piggott*, 29 Can. S.C.R. 188, distinguished; *Jackson* v. *London County Council*, 28 Times L.R. 359, referred to.]

ACTION for damages for injuries to an infant. Statement

Alex. MacNeil and *M. A. Macdonald*, for plaintiff.

E. S. H. Winn, for defendants.

MACDONALD, J.:—Plaintiff on January 6, 1914, was attending the public school at Phoenix, B.C. He was aged nine years, and, while playing in the basement of the school, had his leg broken by an iron section of a steam heater falling upon him. It appears that this piece of iron was about 5 feet in height and weighed over 500 lbs. It had been supplied by the defendants in the construction of a steam heater, but shortly before the accident it had been detached from the heater and remained on the floor for a short time. It was then with another like section placed against the wall of the basement in an almost perpendicular position. In view of the circumstances, this was an act of gross carelessness and most reprehensible as what happened was most likely to occur. The children used this basement in cold weather as a playground. To my mind, it is immaterial as to what exactly caused the iron section to fall and in the excitement of his play it is not probable that the plaintiff could recollect with any particularity the events that took place just prior to his being thrown to the floor. Even if he had taken hold of this section having regard to his age and experience, I would not consider him to blame. In expressing this opinion as to the infant plaintiff not being liable under such circumstances, Macdonald, J.

B. C.

S. C.

VICK v. MORIN & THOMPSON.

Macdonald, J.

I am following the view of the law expressed in Ruegg (Employers' Liability), 8th ed., and cases there cited, in preference to that in Mayne on Damages, 8th ed., p. 83. I might state that one of the cases cited in Mayne in support of the statement that "it is now settled that the doctrine of contributory negligence applies to infant plaintiffs" is questioned, if not expressly overruled, in *Clark* v. *Chambers* (1878), 3 Q.B.D. 327, at p. 339, where Chief Justice Cockburn on this point refers to *Mangan* v. *Atterton*, 4 H. & C. 388, as "obviously in conflict with other "cases cited." Channel, B., in *Gardner* v. *Grace*, 1 F. & F. 359, says, "the doctrine of contributory negligence does not apply to an infant of tender age." I do not think plaintiff did anything which it is unreasonable to expect such a child to do. Where then, does the liability rest for the pain, suffering and expense consequent upon the accident? It was the duty of the Board of School Trustees to have the basement reasonably safe as a playground, but the action is not against the Board. It is sought to hold the defendants liable as having not only supplied the iron section which caused the injury, but for carelessly leaving it in a place where such result might happen. Notwithstanding the strong contention to the contrary, I am quite satisfied that the defendants were the contractors for the installation of the steam heater and as such supplied the section in question. Such a weighty piece of iron was not necessarily dangerous if allowed to remain on the floor in the course of their work, or for a short time after it had been temporarily discarded. As soon as the children resumed the use of the basement after the Christmas holidays, it became apparent that it was an inconvenience in the course of their play but did not while in that position cause any injury. It was moved and placed against the wall so as to be a standing menace to the safety of the children. This was clearly an act of negligence, but, assuming that it was not done by a servant or agent of the defendants but by a third party, then are the defendants liable? Defendants were not called to give evidence on their own behalf and certain admissions made by them to the father of the plaintiff remained uncontradicted. They appear to have gone some length in such admissions, if they did not consider themselves to blame, but

on the other hand, their statements may have only been actuated by sympathy and the thought that although not to blame, still they had supplied the material which, through the carelessness of another party, had caused the injury. Defendants as contractors only had a limited use of this basement and after the holidays, except for repairs or adjustments to the steam heater, the Board had complete possession and control of such basement. They are not thus in the same position as the defendants in *Makins* v. *Piggott*, 29 Can. S.C.R. 188. This iron section was not under ordinary circumstances something that might be considered dangerous to human life or limb. Defendants, however, knew that the basement was being used as a playground and the question is, if the thing left might under such circumstances be dangerous to the children. Considering its size, weight and shape, was it an obstruction to the use of the playground that the defendants might reasonably expect its removal? "There can be no negligence unless there is a duty"—Lord Dunedin in *Nocton* v. *Ashburton*, [1914] A.C. 932, at 964. Such a duty may arise in many ways. Even assuming that the defendants might expect that the section would be removed to give freer play to the children, still defendants doubtless would contend that they were not negligent because they might presume that in removal it would not be placed in such a dangerous position. Have the defendants a right to assume that such material would be properly disposed of? Was there a duty cast upon them to see that no danger was likely to result to those whom they were aware had the right to use the premises —that a thing, not inherently dangerous, might become so in any such manner as here occurred? It was certainly an obstruction and one which would likely be speedily removed to some place near at hand. In *Clark* v. *Chambers*, 3 Q.B.D. 327, a barrier armed with spikes was placed by the defendant upon the road and moved by a third party to another portion of the highway where the plaintiff was injured. While the instrument dealt with is not of a similar character to the one considered in this action, still the decision assists in determining the point as to the liability of a person obstructing a public or private

B.C.

S.C.

VICK
v.
MORIN & THOMPSON.

Macdonald, J.

place. Chief Justice Cockburn refers to the liability of a party placing the barrier on a road as follows:—

> A man who unlawfully places an obstruction across either a public or a private way might anticipate the removal of the obstruction by some one entitled to use the way as a thing likely to happen, and, if this should be done, the probability is that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near. If the obstruction *be a dangerous one wheresoever placed*, it may, as was the case here, become a source of damage from which, should injury to an innocent party occur, the original author of the mischief should be held responsible. Moreover, we are of opinion that if a person places a dangerous obstruction on a highway or in a private road over which persons have a right of way he is bound to take all necessary precautions to protect persons exercising their right of way and that if he neglects to do so he is liable for the consequences.

This quotation would absolutely govern the situation if the obstruction placed by the defendants in this playground were held to be a "dangerous one wheresoever placed."

In *Jackson* v. *London County Council and Chappell*, 28 T.L.R. 359, both the defendant council, which had the management or control of the school, and Chappell, who was employed to carry out certain repairs to the school, were held liable. In that case the contractor sent to the school a truck containing materials known as rough stuff and composed of four parts of sand and one part of lime with a little hair. The truck and its contents were left at the suggestion of the caretaker in a corner of the boys' playground. When the school re-opened after the Christmas holidays, the headmaster noticed the truck and gave instructions to the caretaker to have it removed as he considered it dangerous. The caretaker telephoned to the contractor asking him to remove it, but he did not do so. At the close of the school in the afternoon as the boys were leaving, the truck, which had been left unguarded, tipped over and one of the boys threw a portion of the contents and injured the eyes of the plaintiff. The action had been tried before a Judge and jury and the trial Judge expressed great doubt as to whether there was any evidence of negligence fit to go to the jury. He instructed the jury that they must be reasonably satisfied that the accident which happened was *one which might reasonably have been anticipated by the defendants and guarded against*. It was a question of

degree, and it was difficult to say when near the border line, on which side the case fell. It was more a question of fact than of law. Judgment having been given for the plaintiff against each of the defendants, the matter came before the Court of Appeal for consideration. Lord Justice Vaughan Williams stated that the jury had found, in substance, that the accident was one which might have anticipated from the mere fact of leaving the truck where it was. He held that the jury had also found that such truck was dangerous on account of being left where it might have been a convenient plaything for the boy. Reference was made to the fact that the schoolmaster had recognized the truck as a source of danger. No particular reference was made to the contents of the truck being dangerous while in the playground on account of the nature of the mixture.

In *Cooke* v. *Midland & G.W.R. Co.*, [1909] A.C. 229, the defendant company was held liable through permitting children to go on its premises and play with a turntable which was in a dangerous condition. The House of Lords held, that, under the peculiar circumstances, there was evidence of negligence to go to the jury. The article, thus allowed to be used by the children was in itself dangerous and the decision does not, to my mind, assist the plaintiff in this action. It is contended, however, that from the remarks of Lord Macnaghten in this case, referring to *Lynch* v. *Nurdin* (1841), 1 Q.B. 29, the section in question left as it was should be considered a "nuisance." This contention is entitled to considerable weight but I do not think should be accepted.

In *Bailey* v. *Neill* (1888), 5 T.L.R. 20, a child aged 9½ years left school and while trying to clamber on a roller standing on the street near the school got his fingers caught in the wheels in consequence of another boy tampering, in play, with the shafts of the roller. Defendants were held not liable, but in that case great precautions had been taken to secure the roller and keep it in place.

As to the removal of the section, Barnes, the schoolmaster, gave instructions to the caretaker on account of its inconvenience to the children. He was a favourable witness for the de-

B. C.
S. C.
VICK
v.
MORIN &
THOMPSON.
Macdonald, J.

fendant, and while he did not give specific evidence as to how the removal of this particular section took place, he accepted the responsibility of having placed the other section against the wall in like position. He seemed disposed to have the Court draw the inference that the section which caused the injury was moved by the caretaker under his instructions though he could not be certain in this connection. It was stated that the caretaker was in attendance at the trial but he was not called as a witness by the defendants.

Assuming that the section in question was placed against the wall by the schoolmaster or the caretaker, could the defendants expect that such a careless act would have been performed, and were they required on that account to take precautions to prevent an accident occurring. Was such an act "of a sort that might have been foreseen and very easily prevented." I do not think so. If the section had been left on the floor, as far as the evidence discloses, it would only have been an inconvenience and not a danger to the children while engaged in play. It only became dangerous through the neglect of some third party who did not purport even to act on behalf of the defendants. The accident to the plaintiff is to be regretted, but, in my opinion, the action should be dismissed. This does not preclude the plaintiff from bringing action against any other person or persons in connection with his injury. Defendants are entitled to their costs, but if their sympathy towards the plaintiff and his father is the same as at the time when the boy was in the hospital, then they may be inclined to forego such costs.

Action dismissed.

MAN.
K. B.

THORSTEINSON v. RURAL MUNICIPALITY OF NORTH NORFOLK.

Manitoba King's Bench, Metcalfe, J. March 1, 1915.

1. MUNICIPAL CORPORATIONS (§ II G—235)—LIABILITY FOR DAMAGES—CONSTRUCTION OF DAM—DIVERTING WATER.

A rural municipality in Manitoba is liable in damages for constructing through its servants a dam in the improvement of its roadways and so diverting water from its natural course that more water came upon the plaintiff's farm than would otherwise have reached it.

[*Mondor* v. *Tache*, 11 D.L.R. 620, 23 Man. L.R. 457, and *Stott* v. *North Norfolk*, 16 D.L.R. 48, 24 Man. L.R. 9, referred to.]

Statement

ACTION for damages against a municipality.

J. T. Thorson, for plaintiff.

Hon. Arthur Meighen, K.C., for defendant.

METCALFE, J.:—The plaintiff claims that the defendant, a rural municipality, negligently constructed a dam and diverted water from its natural course, and subsequently negligently dug a ditch, which caused water thus diverted to be carried on to the plaintiff's land, so causing damage. The plaintiff's land is low and flat. It is in the municipality of Westbourne, lying about 3 miles south of the dam in question. The ditch complained of runs along the road allowance, ending without an outlet opposite the plaintiff's land. The dam and the first 2 miles of the ditch were completed in 1895, and the last mile of the ditch in 1906. The land now owned by the plaintiff was then unoccupied and appeared to have belonged to the C.P.R.—in any event it was known as C.P.R. land. It was then a hay meadow, producing hay grass, swamp grass and reeds. It is lower than the land to the north, and the water of Image Creek, except such as would evaporate and soak into the ground, and such as would remain in depressions along the way, all found its way eventually to this C.P.R. land and the immediate vicinity by various courses and runways, all of which were about a mile and a half longer than the straight line. Since the dam across Image Creek and the ditch were constructed some of this water goes by the ditch and some still follows the natural course. At various points in the last two miles of the ditch the water overflows into these natural courses and runways, and, except as aforesaid, thus eventually on to the plaintiff's land.

The work is such as would naturally be constructed by a grading machine in the hands of some farmers doing the work for the municipality in preparing the road allowance for a roadway, together with such ditching as would be required to drain the road allowance.

Stone, who was councillor for that ward, says that in those days the council left such matters to the councillor for the ward. Early in the year the councillor would ask the council for an appropriation for his ward; an appropriation would be made, and the councillor would get the work done as and when he saw fit until the whole amount of his appropriation was exhausted; that such work was paid for sometimes without a resolution being passed. All the old vouchers are either destroyed or lost. There

MAN.

K. B.

THORSTEINSON v. RURAL MUNICIPALITY OF NORTH NORFOLK.

Metcalfe, J.

is evidence that Stone ordered at least the first mile of the ditch to be dug and the first mile of the road to be made. There is a resolution of the council ordering money to be paid to the man Poole, who was employed by Stone.

Regarding the dam, Stone says: "I remember I built it. I built it for a road. I remember a washout. I caused it to be fixed up." There is also evidence that the municipality paid the man who did the work on the other two miles, and that it was all constructed in the manner Stone says was employed by the council in those days.

Considering the lapse of time and all the surrounding circumstances, I think I should hold that the work was done by the servants of the municipality and within the scope of their authority.

Urging that Stone, although not an engineer, is a person whom the council deemed competent to perform this work, the defendant argues that it is protected by sec. 634 of the Municipal Act. Having regard to all the circumstances, I do not think the statute applies.

The plaintiff homesteaded the land in 1908. He says he knew that the C.P.R. had given up the land because it was too wet. It is objected that for these reasons the plaintiff has no cause of action. Similar objections were held untenable by Prendergast, J., in *Stott* v. *North Norfolk*, 16 D.L.R. 48, 24 Man. L.R. 9.

It is generally conceded that the whole district, including the plaintiff's land, is drier now than it was when the C.P.R. gave up the land.

The water carried by the ditch goes of course in a more direct line than if it had been left to its natural courses and runways. The damage complained of occurs for the most part in the spring-time before the frost is far out of the ground. At such times naturally the evaporation and absorption is not great. While I am of the opinion that more water comes on to the plaintiff's land by reason of the ditch being there, I believe the greater part of the plaintiff's trouble would occur in any event.

As I said in *Mondor* v. *Tache*, 11 D.L.R. 620, 23 Man. L.R. 457:—

> Although I have arrived at the conclusion that the plaintiff has established a case against the municipality, I have great difficulty in assessing the damage. . . . It is impossible to say to a nicety how much of the damage was caused by the action of the municipality.

In that case, however, I believe the damage was more considerable.

Exercising the best judgment that I can under the circumstances, I find for the plaintiff for $200 and the costs of an action in the County Court. There will be no set-off.

Judgment for plaintiff.

HERON v. LALANDE.

British Columbia Supreme Court, Clement, J. March 4, 1915.

1. TAXES (§ III F—148*a*)—TAX DEED—SETTING ASIDE.

A tax deed in British Columbia, made in 1898, can be annulled only upon the grounds stated in R.S.B.C., 1911, ch. 222, sec. 255.

ACTION to set aside a tax sale deed. Statement

D. A. Macdonald, for plaintiff.

George E. McCrossan, for defendant.

CLEMENT, J.:—I am precluded by authority from holding that the deceased, Heron, lost title to the property in question by laches, abandonment or estoppel. Clement, J.

I am happily, however, also precluded, in my opinion, from declaring void the tax deed of 1898 by the statute law of this province; and, of course, that deed standing, the plaintiffs have no status to attack the later tax sale proceedings. Section 255, ch. 222, R.S.B.C. (1911), provides as follows:—

> A tax sale deed shall, in any proceedings in any Court in this province, and for the purposes of the Land Registry Act, except as hereinafter provided, be conclusive evidence of the validity of the assessment of the land and levy of the rate, the sale of the land for taxes, and all other proceedings leading up to the execution of such deed; and, notwithstanding any defect in such assessment, levy, sale or other proceedings, no such tax deed shall be annulled or set aside, except upon the following grounds and no other:—
>
> (*a*) That the sale was not conducted in a fair or open manner;
>
> (*b*) That the taxes for the year or years for which the land was sold had been paid; or
>
> (*c*) That the land was not liable to taxation for the year or years for which it was sold.

I have not been referred to any case in which these provisions have been construed. I am well aware that there is high authority for the proposition that I should approach curative sections such as these in a spirit to confine them within as narrow limits as possible. Approaching them in that spirit, I must, nevertheless

B. C.

S. C.

HERON v. LALANDE.

Clement, J.

less, have due regard to the English language and to the intention of the legislature as it is to be gathered from the language used. Unless one is to insert the words "if valid" after the words "tax-sale deed" and "tax deed," as used in sec. 255, it seems to me, as I have already intimated, that this statute tells me in so many words that I am not to annul or set aside the tax sale deed of 1898. To interpolate the words I have suggested would, it seems to me, border on the nonsensical. The action is dismissed with costs.

Action dismissed.

ALTA.

S. C.

FOSTER v. BROCKLEBANK.

Alberta Supreme Court, Walsh, J. March 26, 1915.

1. MECHANICS' LIENS (§ VIII—63)—SUFFICIENCY OF STATEMENT—WORK ON SCHOOLHOUSE—DEFECTIVE AFFIDAVIT—OMISSION OF NAME AND RESIDENCE.

The saving clause (sec. 14) of the Mechanics' Lien Act, Alta., may operate to make a lien effective although the affidavit of lien did not shew, as required by sec. 13, the name and residence of the owner of the property or interest to be charged, *ex. gr.* on a lien which the affidavit shewed to be for work on a school identified by name and location although the board of school trustees was not named as owner.

2. MECHANICS' LIENS (§ VI—46)—SUB-CONTRACTORS' LIENS—RIGHT TO—EXTENT OF—EXCAVATION AND CLEANING UP.

Where the contract work both with the principal contractor and the sub-contractor for excavating expressly included the cleaning up of the debris on the completion of the building, and the owner called upon the principal contractor to do it before taking over the building and the latter replied that he would have the sub-contractor do it, the sub-contractor's lien for the excavation work will be kept alive by the cleaning up done by the latter in good faith in fulfilment of his sub-contract although his last prior work (the excavating) was done more than five months before.

[*Clarke* v. *Moore*, 1 A.L.R. 49, referred to.]

Statement

TRIAL of a mechanics' lien action.

T. M. Tweedie, for plaintiff.

E. A. Dunbar, for trustees.

James McCaig, for the C.P.R. Co.

Walsh, J.

WALSH, J.:—The defendant Brocklebank was the contractor, under the defendant trustees, for the erection of a school building in Calgary. The plaintiff, under a sub-contract with him, did all of the work of excavating and certain specified portions of the concrete work in connection with this building. Whilst engaged in this work, he, from time to time, did some back-filling

and other work for Brocklebank on this job, which was not covered by his sub-contract. All of the constructive work under the sub-contract was done and the work of the other character was performed by the end of January, 1914. About the middle of March following, the plaintiff and Brocklebank fixed the amount payable to the former in respect of all this work at $3,200, and the matter rested there without any payment being made on account or anything being done looking to its payment until the following June. On June 4 the trustees' Commissioner of School Buildings wrote Brocklebank that he was instructed to take over the building upon certain work, which he specified in the letter, being done by Brocklebank. One of the things specified was, "Clean up the grounds." Brocklebank informed the commissioner that it was the plaintiff's duty, under his sub-contract, to clean up the ground, and that he would have him do it. He accordingly communicated to the plaintiff this request of the commissioner, and ordered him to do this work in fulfilment of his contract. The plaintiff at once acquiesced in the view that it was his duty to remove from the ground the litter of rejected and unused material left there by him in the carrying out of his contract, which was the cleaning-up required by the commissioner. On the following day he went up with a man and a team, and, as a result of six hours' work, cleaned up the ground, no charge being made by him for it. After this and in the same month on four different days he, with his team, did 57 hours' work on the ground for Brocklebank in grading and cleaning-up and other work of that class, quite outside of his contract work, for which he became entitled to be paid by Brocklebank $34.20. He claims a lien upon the school property in question, $3,234.20, being $3,200, the amount agreed upon between him and Brocklebank in March, and this later sum of $34.20. This amount is admittedly due to him by Brocklebank, who has not defended the action. The contest is entirely as to his right to a lien, a right which is contested as to the $3,200, principally upon the ground that the lien had ceased to exist before the registration of the affidavit under sec. 13 of the Act, which registration did not take place till July 6, 1914. At that time there was owing by the trustees to Brocklebank, under this contract, a sum more than sufficient to pay the plaintiff's claim and the claims of all other lien holders against the property.

ALTA.

S. C.

FOSTER v. BROCKLEBANK.

Web. J.

Brocklebank assigned to the Canadian Bank of Commerce all of the money due to him by the trustees in respect of this building, and they have paid the full amount of the same to the bank, upon its agreement to indemnify them against all claims for liens, including that of the plaintiff. This action is, therefore, in substance between the plaintiff and the bank, for, if his claim succeeds, it must pay the same under its agreement with the trustees; whereas, if it fails, it will be entitled to hold the funds free from the plaintiff's claim.

The only ground, of course, upon which the plaintiff can rest his right to a lien for the $3,200 is that the work done by him in June kept this alive. But for that, his lien had absolutely ceased to exist in July (when his affidavit was filed), for more than five months had elapsed between the date of the last work prior to the June work and the date of registration.

In my opinion, the work done by the plaintiff on June 10 was necessary for the complete performance of Brocklebank's contract with the trustees, and falling, as it did, within the scope of the plaintiff's sub-contract, was work to be done by him before he could be said to have completed it. That is the view that all parties took of it at the time. The trustees cannot be heard to say that this is not so, for the letter of their commissioner, to which I have referred, insists upon this very thing being done before the building would be taken over. Brocklebank at once admitted the propriety of this contention, and promptly placed the responsibility for it upon the plaintiff's shoulders. He assumed this responsibility without question and did the work without charge, because it was his duty as an honest contractor to do it. I am thoroughly satisfied of his entire *bona-fides* in the matter. There is not even a suspicion that this work was done by him colourably for the purpose of reviving the lien. I find that he did it under the honest belief that he had to do it in the complete performance of his contract. The evidence is all one way as to this being the correct view of his obligation. It does not rest alone upon the testimony of the plaintiff and his witnesses, but is to be found as well in what the trustees' commissioner says upon the subject under oath. The present Chief Justice, in *Clarke* v. *Moore*, 1 A.L.R. 49, at 52, says:—

> In the present case there is no doubt the work though inconsiderable was a part of the contract and something which the owner would have insisted on being done before accepting the work as complete.

More than that may be said in support of this claim, for in this case, not only would the owner have insisted, but he actually did insist, upon this work being done before accepting the building. And so I think June 10th was the last day upon which any work was done with respect to the $3,200 claim, and, as the lien was registered within 31 days from that date, it was then still alive.

An attempt was made to shew that the debris and material moved on that day were not standing upon the school grounds, but were removed from grounds adjoining the school premises. Even if that were so, it would not, in my opinion, affect the plaintiff's rights, but I find, as a fact, that that was not the case, and that the work done then by the plaintiff was performed upon the land in question.

I do not think that the subsequent work, amounting to $34.20, would have availed to revive the lien for the $3,200. It was in no sense connected with the work which gave rise to that claim, but was a separate and independent transaction, quite sufficient to entitle the plaintiff to a lien for $34.20, but no more.

The affidavit does not shew, as required by sec. 13, the name and residence of the owner of the property or interest to be charged. It shews that the work was done for the defendant Brocklebank on the new Bridgeland School and the number of the quarter section on which it stands is given. From these particulars it is just as easy to tell whose property or interest in this land is sought to be charged as if the trustees had been named in the affidavit as owner, and there is no possible prejudice arising from this omission to prevent the application of the saving provisions of sec. 14. See *Man. Bridge Co.* v. *Gillespie*, 20 D.L.R. 524.

The affidavit sets out "that the particulars of the work done or materials furnished are as follows:—Work performed and material supplied on the property hereinafter described in the sum of $3,234.20." It is objected that this is not a compliance with that part of sec. 13 which requires that the affidavit shall set out "the particulars of the kind of work or improvements done, made or furnished." If any harm had resulted to any one from the exceedingly meagre particulars thus given, I would hesitate to say that they are sufficient to satisfy the require-

ALTA.

S.C.

FOSTER v. BROCKLEBANK.

Walsh, J.

ments of the section, but I am not going to give effect to this objection when, as is the case here, not even a suggestion is made of any resulting prejudice.

The C.P.R. Co. was at the commencement of this action and still is the registered owner of the quarter section mentioned in the affidavit of lien. The trustees purchased from this company a small part of it as a school site, and the plaintiff's lien will, of course, be confined to that part. It is described by metes and bounds in the agreement produced at the trial, the trustees being now, as I understand it, entitled to be registered as owner of the same. The company was made a defendant, and properly so, I think, there being nothing upon the abstract to shew any interest in any one else in any part of it or to indicate the particular part of it in which the school board was interested. Counsel appeared for the company at the trial, and asked that the plaintiff's lien be confined to that part of the property or quarter section now owned by the trustees, the claim having been made by the pleadings for a lien on the whole quarter section in the absence of anything to describe that portion of it forming the school premises. Having been assured at the opening of trial that the plaintiff's lien, if given effect to, would be so confined, he asked for payment of the company's costs and withdrew. I think that the company is entitled to its costs, which I fix at $40, as nothing more was done by its solicitors than the filing of a defence and the formal appearance of counsel at the trial for the above purpose. The plaintiff will pay the costs, but may add them to his own.

There will be judgment in the usual form, declaring the plaintiff entitled to a lien on the school site and building for $3,234.50 and costs, including the costs directed to be paid to the defendant company. *Judgment for plaintiff.*

B.C.

S.C.

LANGLEY v. HAMMOND.

British Columbia Supreme Court, Clement, J. March 3, 1915.

1. CONTRACTS (§ IV C—402)—RESCISSION—MISREPRESENTATIONS—MATERIALITY.

In order to succeed on a claim to rescind a contract for misrepresentation or to obtain damages as an alternative, it must be shewn that the statement complained of was untrue and was made by the vendor with knowledge of its falsity or with such recklessness as to amount to moral guilt, and that the statement was in regard to a material fact and was an inducing cause leading the purchaser to enter into the contract.

ACTION on a covenant contained in a mortgage.

F. J. Fulton, K.C., for plaintiff.

E. P. Davis, K.C., for defendant.

CLEMENT, J.:—This is an action on a covenant contained in a mortgage made by the defendant in favour of the plaintiff. At the trial it was admitted that there is no defence to the action and judgment was accordingly given in the plaintiff's favour for the amount of the mortgage with interest and costs. The mortgage was given to secure the purchase price of what is known as the Basque Ranch situate on the Thompson river not far from Asheroft, the plaintiff mortgagee being the vendor. The defendant counterclaimed for rescission of the contract of sale, but at the trial he limited his claim to the alterattive one for damages suffered, as he alleges, through his having purchased the property, relying on certain statements made by the vendor. In such an action the burden is, of course, upon the party putting forward the claim. He must convince the Court that the fact was falsely stated, either with knowledge of its falsity or with such recklessness as to amount to moral guilt; that the statement was in regard to a material fact and was an inducing cause leading him to enter into the contract. The purchase was made at a time when there was much speculation in regard to what are called fruit lands. Now, when the action comes to be tried, there is practically no market whatever for such property; in other words, the "boom" has collapsed. Under such circumstances I am free to confess that when I find in all the correspondence which has passed between the parties themselves, as well as between their solicitors during more than four years, that there is not one word of suggestion by the defendant or on his behalf that he had been induced to enter into the contract by reason of false representations as to existing conditions upon the ranch or any suggestions indeed that the alleged representations had been in fact made; my attitude is, properly, I think, one of considerable scepticism. In such a case it is manifestly the duty of the Court to scrutinize with great caution the evidence advanced.

I have no doubt that during the negotiations the plaintiff did

B. C.

S. C.

LANGLEY v. HAMMOND.

Clement, J.

state his opinion or belief that enough water could be obtained from Hat Creek and Oregon Jack Creek to irrigate 1,000 acres; but, while I think the estimate was, in the light of later investigation, a very extravagant one, I am unable to say that it was dishonestly made. Moreover, at the conclusion of the hearing I strongly inclined to the view that any such representations made by the plaintiff were not in fact relied upon by the defendant. At that time a project was on foot for the erection of a reservoir in which could be collected and stored for use as required the waters of Hat Creek. That project, for reasons which appear in the correspondence, has not, as yet, been carried through. The title to the water records held by the plaintiff were duly passed by the solicitors then acting for the plaintiff. The railway belt of British Columbia, which includes territory covered by the water records in question, is the property, so far as unalienated, of the Crown in right of the Dominion. For this and other reasons the matter has, as put in one of the letters, got into a tangle, and that tangle, apparently, has not yet been straigtened out. This was the reason always put forward when an extension of time for payment either of principal or interest was asked. The letter of Mr. James Murphy, dated July 20, 1914, written on the defendant's behalf about the time this action was commenced, is, to my mind, a very illuminating document, and I am quite convinced that the ground now taken by the defendant is an afterthought.

In his counterclaim there is scarcely one feature of the transaction in regard to which fraudulent misrepresentation is not alleged. At the trial these were all abandoned with the exception of the one charge—that the plaintiff had falsely represented that the waters of Hat Creek and Oregon Jack Creek would suffice, without storage, for the irrigation of 1,000 acres. As I have said, there is not a word about this in the correspondence so that the matter rests now upon the oral testimony of the witnesses. Since the trial I have read carefully the extended notes of the evidence and I am confirmed in the view that any such statement made by the plaintiff did not, in fact, induce the defendant to purchase the property.

There were, no doubt, many discussions with regard to the

difficulty that had arisen with regard to the title to the water records. These are well summarized in Mr. Murphy's letter above referred to, but I do not believe that at any time the charge was seriously made by the defendant to the plaintiff that he had misrepresented the actual position of affairs with regard to the water supply. Mr. Young was called as a witness to corroborate the defendant's statement that upon one occasion the plaintiff agreed not to press for payment until the defendant should be satisfied that enough water was available to irrigate 1,000 acres. Mr. Young entirely failed to corroborate this statement and in fact, on cross-examination, the defendant stated that he was not sure that anything more had been said than that payment was not to be pressed for until the water trouble was straightened out.

It is only fair to the defendant to say that, if it were necessary to my judgment to make an affirmative finding upon the evidence of the plaintiff, I should have much hesitation in so doing. He certainly did not shew himself in the box to be a very reliable witness. At the same time, the account of the different interviews with the defendant, so far at all events as relates to the claim now put forward, is so entirely borne out by the documentary evidence that I accept it as substantially correct.

The counterclaim, therefore, is dismissed with costs.

Counterclaim dismissed.

DUNCAN & BUCHANAN v. PRYCE JONES LTD.

ALTA.
S. C.

Alberta Supreme Court, McCarthy, J. April 4, 1915.

1. SALE (§ I D—20)—BUYER OF GOODS—RETENTION—PRESUMPTION OF INTENTION—ACCEPTANCE.

The buyer of goods is liable because of his acceptance of same if he retained them after actual receipt of same for such a time as to lead to the presumption that he intended to take possession thereof as owner.

2. PRINCIPAL AND AGENT (§ I A—6)—RETAIL BUSINESS—HEAD OF DEPARTMENT—PERMISSION TO PURCHASE WITHOUT CONFIRMATION BY MANAGER—PROOF OF UNQUALIFIED AUTHORITY.

The fact that the firm had permitted one of the heads of a department in a retail store business to make purchases from the wholesaler without confirmation of same by the manager is admissible in proof of the unqualified authority of the head of the department to buy goods for his department from such wholesaler without such confirmation, although it was customary in the trade to have departmental orders so confirmed.

ALTA.

S. C.

DUNCAN & BUCHANAN v. PRYCE JONES LTD.

McCarthy, J.

ACTION for the price of goods sold and delivered.

R. T. D. Aitken, for the plaintiff.

A. B. Mackay, for the defendant.

McCARTHY, J.:—This is an action brought for the price of goods sold by the plaintiff to the defendant, and tried before me on March 1 and 2, 1915. While there may be some doubt in my mind as to the merits of the transaction, it seems to me that there are only two questions left for me to determine: (1) Was there a contract? (2) Was the employee (the head milliner) of the defendant acting within the scope of her employment?

The defendant contends that there was no contract, by reason of the fact that there was no official confirmation of the purchase or of the order bearing their official stamp, and allege that this is the custom with regard to purchases made by all departmental houses. While I can see that it is desirable that such a rule should be adopted by such concerns as the defendant company, at the same time the rules of this company are not the laws of the land, and it was quite open to them to make that condition, namely, official confirmation, part of the contract. The defendant contends notice of such a condition was sent out to all houses from whom they were purchasing, whose names appeared on their books. The books, however, are not produced, nor is any sufficient evidence produced to shew that such a notice (ex. 18) was sent to the plaintiffs. The defendant also offers in evidence statement of two witnesses, one from the defendant company and the other from the Hudson's Bay Co., to shew that such official confirmation is a well-recognized custom. As against this, however, there is the positive statement of one of the plaintiffs that in any sales that they had heretofore made to the defendant, through the head milliner (Mrs. Morrison), such confirmation was not required. It is left, therefore, then, for me to determine as between the evidence of custom offered by the defendant and the positive statement of the plaintiff. The order for the purchase of goods in question, apparently, was given at Calgary to a member of the plaintiff's firm, by the head milliner of the defendant company, in the month of April, 1913. The original order is not produced. A copy, however, was left with the defendant company, and it would be competent for the defendant to produce a copy. Both parties, how-

ever, allege that the original and the copy are no longer in existence. Subsequent to the order being given, the following telegrams and night lettergrams passed between the parties (ex. 11):—

C.P.R. Co.'s Telegraph—Night Lettergram.

August 20th, 1913.

Kippy, Toronto.

Your letter August 8th. Cannot find copy order. Cable us amount of order.

Curtis, Pryce Jones.

which was apparently answered by (ex. 12):—

C.P.R. Co.'s Telegraph—Telegram.

Toronto, Ont., Aug. 21st, 1913, via Fernie.

Curtis, care Pryce Jones,
Calgary, Alta.

Order amounts to about nine hundred dollars.

Duncan & Buchanan.

The defendant then sent the following night lettergram to the plaintiff (ex. 13):—

C.P.R. Co.'s Telegraph—Night Lettergram.

August 21st, 1913.

Kippy, Toronto.

Much too big an order. Could not possibly accept. Why did not you shew Miss Harris when in Toronto. Better dispose of them. Writing.

Curtis, Pryce Jones.

And shortly thereafter the following telegram is sent to the defendant by the plaintiff (ex. 14):—

C.P.R. Co.'s Telegraph—Telegram.

Toronto, August 23rd, 1913.

Mr. Curtis, Pryce Jones Co.,
Calgary.

Shall we send your goods express or freight. Wire.

Duncan & Buchanan.

On the same day, apparently, the following night lettergram was despatched by the defendant to the plaintiff (ex. 15):—

C.P.R. Co.'s Telegraph—Night Lettergram.

Duncan & Buchanan,
72 York Street, Toronto.

Ship one-fourth parcel velours equal assortment. Wait for instructions for remainder. We are writing.

Curtis, Pryce Jones.

The following night lettergram was sent by the defendant to the plaintiff, but the copy produced apparently bears no date. There is, however, a notation in writing in the corner of same, apparently not in the same handwriting, as the copy produced, as of August 23, and it would appear that such night lettergram

ALTA.

S. C.

DUNCAN & BUCHANAN v. PRYCE JONES LTD.

McCarthy, J.

was despatched on or about that date. (This night lettergram is put in as ex. 16):—

C.P.R. Co.'s Telegraph—Night Lettergram.

Duncan & Buchanan,
72 York Street, Toronto.

Ship parcel velours as our lettergram. "Express."

Pryce Jones.

September 5. Ex. 17 was sent by the plaintiff to the defendant, reading as follows:—

C.P.R. Co.'s Telegraph—Telegram.

Toronto, Ont., Sept. 5th.

Pryce Jones, Canada, Limited,
Calgary.

Goods were made specially to your order. Will not accept any returns.

Duncan & Buchanan.

The defendants having apparently advised the plaintiff by wire as follows (ex. 6):—

C.P.R. Co.'s Telegraph—Night Lettergram.

Calgary, Alberta, Sept. 4, 1913.

Duncan & Buchanan,
72 York Street, Toronto, Ont.

You have sent us all the parcels of velours we asked you to send on fourth. We are refusing the goods.

Pryce Jones.

There is other correspondence having reference to the matter, but it is not necessary for me to reproduce it here. The fact remains that the goods were shipped on August 25, and were retained by the defendant until November 4. There is evidence that the goods were of such a character that they were likely to depreciate in value if retained for any length of time. It will be observed that the defendant requested that the goods be sent to them by express. On the other hand, when they made up their minds to return them, they returned them to the plaintiff by freight. There is no doubt in my mind that the correspondence referred to is sufficient to satisfy the statutes that the buyer accepted and actually received the goods sold. The law is very clearly laid down in Ker, Sale of Goods, at pages 4, 8 and 10. At p. 8, it says:—

In particular an acceptance within the meaning of the preceding section takes place (1) where the buyer agrees unconditionally to buy specific goods or (2) where he retains goods or the documents of title thereto after an actual receipt thereof for such a time as to lead to the presumption that he intends to take possession thereof as owner.

ALTA.

S. C.

DUNCAN & BUCHANAN v. PRYCE JONES LTD.

McCarthy, J.

And at p. 9:—

> An actual receipt takes place when there is a delivery of the goods or of the documents of title thereto, to or into the control of the buyer and so as to divest the seller's lien in respect thereof. (*Idem.*) When the goods being in the possession of a third and neutral person the seller puts them at the disposal of the buyer and suffers him to take possession thereof.

The evidence in this case satisfies my mind that the plaintiff actually received the goods and there is evidence of acceptance.

Further, I might add that evidence offered on the part of the defendant shews that it was the practice of the buyers of the defendant to submit a copy of the order to their officials. There is no evidence in this case that their chief milliner (Mrs. Morrison) did so. She apparently left the defendant company some time in May of the year that the order was given. I can hardly hold the plaintiff responsible for her neglect to do so. She was an employee of the defendant company, and the defendant must bear any loss that they have suffered by reason of her neglect. As to the second branch of the case—was she acting within the scope of her employment—there is no doubt in my mind that she was. Ex. 4, a letter from the defendant to the plaintiff, shews that a member of the plaintiff firm and the manager of the defendant discussed a new "buyer" to succeed Mrs. Morrison. There was also evidence that she had made several trips to the eastern part of Canada for the purpose of purchasing goods for the defendant, and there was also evidence that the defendant had allowed her to make purchases from the plaintiff without official confirmation. I must find, therefore, that she was acting within the scope of her employment, and, if she fails to receive official confirmation of her purchase from the plaintiff, the plaintiffs cannot be held to be responsible for that. Under the circumstances, therefore, I must allow the plaintiff's claim to the extent of $1,030.30. The goods in question, of course, belong to the defendant, and the costs will follow the event.

Judgment for plaintiff.

ALTA.

S. C.

LUSK v. CITY OF CALGARY.
WHEATLEY v. CITY OF CALGARY.

Alberta Supreme Court, McCarthy, J. April 1, 1915.

1. HIGHWAYS (§ IV A—120)—BRIDGE—STATUTORY LIABILITY OF RAILWAY TO MAINTAIN—PUBLIC HIGHWAY—MUNICIPALITY BOUND TO REPAIR—FAILURE TO SUPPLY PROPER RAILING—ACCIDENT—LIABILITY.

Notwithstanding the statutory liability of a railway to maintain a bridge and its approaches built under the authority of the Irrigation Act, R.S.C. 1906, ch. 61, sec. 25, a municipality within the confines of which the approaches to such bridge form part of a public highway which it is bound to repair will also be liable for damages on failure to supply a proper railing on either side of the approach so as to render it safe for vehicle traffic where injury resulted from such neglect.

ACTION for damages.

I. W. McArdle, for plaintiffs.

C. J. Ford, for defendants.

McCarthy, J.

McCARTHY, J.:—The plaintiffs in these two actions, which have been ordered to be tried together, were driving into the city of Calgary, from the east, in a buggy driven by a single horse, and had got safely over a bridge which crosses the fifth meridian. When coming down from the bridge on the western approach thereto, the horse which they were driving shied at something on the road and became frightened and toppled over the embankment. The two plaintiffs were thrown out and injured. I find that there was no negligence on the part of either of the plaintiffs, and that the cause of their injuries was the failure on the part of someone to supply a proper railing on either side of the approach.

There is no doubt that the approaches to the bridge are and have been for a long time a serious danger to persons travelling into and from the city over the bridge in question. The bridge is one which was built by the C.P.R. over an irrigation canal. The city of Calgary extends on the east to the fifth meridian, and about two-thirds of the bridge are to the east of the city limits and one-third has, since the bridge was built, been made part of the city of Calgary by an extension of boundaries. The accident occurred on the western approach to the bridge and within the limits of the city.

The action is brought against the city of Calgary alone, the plaintiffs' advisers having been apparently of the opinion that they could not sue the C.P.R. Co. in the same action as that in which they sued the city.

It appears that there has been for a long time a dispute between the city and the C.P.R. Co. as to which of them is liable to maintain the bridge in question and its approaches, and the dispute not having heretofore been settled, neither the company nor the city has done what I think is necessary to make the bridge and its approaches safe for travel—to my mind a most unfortunate and regrettable condition.

It was argued by counsel for the city that, the bridge in question having been built under the authority of the Irrigation Act, ch. 61, R.S.C., under sec. 25 of that Act the liability to maintain the bridge and its approaches rests upon the company, it being provided in sub-sec. (2) of sec. 25 of that Act as follows:—

(2) Every such bridge and the approaches thereto shall be thereafter maintained by such person or company.

Notwithstanding that my opinion is that the C.P.R. is liable to maintain the bridge and would be liable if it had been joined in the action, I do not think the liability resting upon the company relieves the city of its duty to render safe that part of the bridge and its western approach which lies within the city limits.

I think that, as to Mrs. Lusk, her injuries will be perhaps fairly compensated for by an award to her of the sum of $1,000 damages and costs, and, as to Mrs. Wheatley, her injuries may be fairly compensated for by an award of $1,500 damages and costs, and I give judgment accordingly.

Judgment for plaintiffs.

ARMSTRONG v. MARSHALL.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, and Simmons, JJ. March 26, 1915.

1. CONTRACTS (§ V C2—395)—RESCISSION—ASSIGNMENT—ACTION BY ASSIGNEE—JUDICATURE ORDINANCE—LAND TITLES ACT (ALTA.)—EFFECT.

The effect of sec. 101 of the Land Titles Act (Alta.) is to make the assignment of the purchaser's rights under a written contract for the sale of land effectual at once even without notice to the vendor, subject to the proviso that any rights at law or in equity acquired under the agreement by the vendor before he receives notice shall not be prejudiced by the assignment; an action by a purchaser's assignee against the vendor to declare the contract rescinded and for a return of the money paid thereunder is not subject to the limitations of the Judicature Ordinance, 1907, Alta., ch. 5, sec. 7, sub-sec. 3, as to a preliminary written notice of assignment of a chose in action.

[*Armstrong* v. *Marshall*, 19 D.L.R. 183, disapproved; *Torkington* v. *Magee*, [1902] 2 K.B. 427; *McNiven* v. *Piggott*, 19 D.L.R. 846, referred to.]

ALTA.

S. C.

ARMSTRONG v. MARSHALL.

Stuart, J.

APPEAL from a judgment of Walsh, J., 19 D.L.R. 183.

I. W. McArdle, for the plaintiff, respondent.

C. A. Wright, for the defendant, appellant.

The judgment of the Court was delivered by

STUART, J.:—On April 23, 1912, the defendant agreed to sell certain property in Calgary to Chas. P. McCallum, Chas. J. Armstrong and Percy W. Jopp, for the sum of $1,350, payable $750 in cash, $300 on August 23, 1912, and $300 on December 23, 1912. The purchasers paid the second instalment on September 3, 1912, and on or about September 14 they assigned their contract to the plaintiff by signing an endorsement on the back of it in the following terms:—

> For value received we hereby assign all our estate, right, title and interest in the within contract between Albert R. Marshall and ourselves to Elizabeth Armstrong, wife of Charles J. Armstrong.

On December 30 the plaintiff paid a further sum of $52.52, and on January 27 the sum of $151.55, but these payments were made through the husband, Charles J. Armstrong, one of the original purchasers, and at the time they were made the defendant was not aware that Armstrong was acting for his wife.

During the whole of 1913 nothing was done except that the defendant made some efforts to secure title to the property which he had agreed to sell. He had bought it from one Dawson under agreement of sale. Dawson had bought from someone else, and that other from another, until finally the registered owners were reached. It appeared also that the property in question in this action was only part of what was covered by some of the previous agreements. Then there were foreclosure proceedings going on.

As the trial Judge pointed out, Marshall never was in a position to demand title from any one up to the time this action was commenced. On January 9, 1914, Messrs. McArdle & Davidson wrote a letter to the defendant on behalf of the plaintiff, in which they stated that they had been instructed by the plaintiff to demand a transfer of the lots or a return of moneys paid, and that the plaintiff was willing to pay the balance due whenever title could be given. No reply was made to this letter, and nothing happened till May 5, when Armstrong went to the defendant on behalf of the plaintiff and tendered the balance due and asked for a transfer. The defendant said he couldn't deliver title, but that

he thought he could in the morning. Nothing was done, and the defendant was then in fact quite unable to deliver title. On May 6 the plaintiff's solicitors wrote declaring that the contract was rescinded and demanding a return of the money, and on May 13 the action was begun by the plaintiff for a return of the money.

At the trial, Mr. Justice Walsh intimated that he thought the plaintiff would be entitled to succeed were it not for her position as an assignee of the contract; and, entertaining some doubt as to her right to maintain the action, he reserved that question. Subsequently he intimated that he thought she was unable to maintain it because, the agreement of sale being a legal chose in action, she could not sue upon it in her own name because notice of the assignment had not been given pursuant to sub-sec. 3 of sec. 7 of ch. 5 of the Statutes of 1907. He referred to *Torkington* v. *Magee*, [1902] 2 K.B. 427. He gave leave, however, to the plaintiff to apply to have the assignors added as plaintiffs. This having been done, he gave judgment for the plaintiff for a return of the moneys paid.

It seems to me to be open to serious argument whether the letter of January 9 might not be fairly treated as sufficient notice of the assignment, even though it does not in express terms refer to the fact of an assignment having been made. But I am of opinion that it is not necessary to decide that question, for the reasons I shall presently give.

I think, however, it may be pointed out that *Torkington* v. *Magee*, *supra*, was a case of an action at law for damages for breach of the contract. No doubt the right to bring an action at law for damages for breach of a contract, if it is a chose in action at all within the meaning of the Act, must be considered a legal chose in action. But it is a question in my mind whether the proper method is not to examine each separate right that may arise under an agreement of sale, and to see whether that right could have been enforced in a Court of law or in a Court of equity. The result of this might be that some of the rights passing by the assignment would be legal choses in action to which the Act would apply, and some of them merely equitable rights, not legal choses in action at all, to which the Act would not apply. In other words, to say simply that the agreement of sale is a legal chose in action is, in my view, using too general an expression.

ALTA.

S. C.

ARMSTRONG v. MARSHALL.

Stuart, J.

The respondent here contended, for instance, that the right to recover money paid by a purchaser when the vendor fails to make title is an equitable right enforceable only in a Court of equity. I have some doubt as to the correctness of this view, because it seems to me that the purchaser could, perhaps, have sued at law for money had and received in such a case, and his right to do so would be a legal chose in action, just as in *Torkington* v. *Magee*, *supra*.

But the learned trial Judge's attention was not called to the provisions of sec. 101 of the Land Titles Act, ch. 24, which reads as follows:—

> Any contract in writing for the sale and purchase of any land, mortgage or encumbrance shall, notwithstanding anything to the contrary therein contained, be assignable, and any assignment of any such contract shall operate according to its terms to transfer to the assignee therein mentioned all the right, title and interest of the assignor, both at law and in equity, subject to the conditions and stipulations in such assignment contained.
>
> Provided, however, that nothing herein contained shall affect any rights at law or in equity of the original vendor or owner of the land, mortgage or encumbrance until notice in writing of such assignment has been either sent to him by registered mail or served upon him in the way process is usually served.

It seems to me to be clear that the effect of this enactment is to make the assignment effectual at once, even without notice. In this it differs from the provisions of the statute of 1907 above referred to. The proviso as to notice it seems to me simply means that any rights at law or in equity acquired under the agreement by the vendor before he receives notice shall not be prejudiced by the assignment. There is no suggestion in this case that the defendant's rights will be prejudiced in any respect. He acquired no rights against the original purchasers after the assignment which will be or can be infringed or impaired by the enforcements of the plaintiff's rights under the assignment as given by sec. 101.

I therefore think that the addition of the original purchasers as parties plaintiffs was quite unnecessary.

I agree with the view taken by the trial Judge as to the right to recover the moneys paid. The case is very similar in its facts to the case of *Krom* v. *Kaiser*, 21 D.L.R. 700, in which judgment is being given at this Court. For the reasons there given, which apply even more strongly perhaps in this case, I think the plaintiff

ALTA.

S. C.

ARMSTRONG v. MARSHALL.

was entitled to succeed, and that the appeal should be dismissed with costs. The case of *McNiven* v. *Piggott*, 19 D.L.R. 846, seems also to be directly in point and to support this conclusion.

Appeal dismissed.

HOLMESTED v. CANADIAN NORTHERN R. CO.

SASK.

S. C.

Saskatchewan Supreme Court, Haultain, C.J., Lamont, Brown, Elwood and McKay, JJ. July 15, 1915.

INJUNCTION (§ I E—43)—DAMAGES—TRESPASS—STATUTORY RIGHT TO DO LEGALLY—PROPER COURSE—INJUNCTION RESTRAINING TRESPASS—RAILWAY ACT.

Damages are not assessable in a trespass action where the defendants have by statute a right to do legally (on complying with certain prerequisites) the very thing which constitutes the trespass. The proper course is by injunction restraining the defendants from continuing the trespass unless they acquire title and proceed to have the compensation or damages determined under the provisions of the Railway Act, within a reasonable time.

[*Holmested* v. *C.N.R. Co.*, 20 D.L.R. 577, varied.]

Statement

APPEAL from 20 D.L.R. 577.

W. Mills, K.C., for appellant.

W. B. Willoughby, K.C., for respondent Holmested.

J. E. Chisholm, for respondent Annable.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—The defendant company took possession of a portion of the plaintiff's land and proceeded to construct a railway across it without being legally entitled to do so.

The plaintiff brought this action and claimed damages for the trespass and an injunction restraining the defendants from continuing it, and also a mandatory injunction ordering the defendants to restore the land to its former condition.

The defendants admit being trespassers. At the trial all parties treated the action as one for fixing the amount to be allowed to the plaintiff for the damage done to the plaintiff's lands, other than the land actually taken by the railway, as if it were an arbitration under the Railway Act. They also proceeded upon the assumption that the land had been subdivided, and that compensation should be assessed as of the date of the filing of the railway plans, May 21, 1912.

Counsel for the railway company now contends that the land, on May 21, 1912, was not subdivided, and that damages should

SASK.

S. C.

HOLMESTED v. C.N.R. Co.

Lamont, J.

have been assessed on the basis of unsubdivided land, and counsel for the respondents admits the correctness of this contention. Counsel for the company now argues further that May 21, 1912, is not the proper date as of which the compensation should be fixed. He points out that by sec. 192 of the Railway Act, as amended by 8 and 9 Edw. VII. ch. 32, sec. 3, it is provided that compensation or damages shall be ascertained as of the date of the deposit of the plan, profile and book of reference; provided that, if the company does not actually acquire title to the land within one year of the date of such deposit, then the date of such acquisition shall be the date with reference to which such compensation shall be ascertained.

The railway company has not yet acquired title to the land taken by it for its railway, and it is contended, therefore, that the time for fixing the compensation has not yet arrived. I am of opinion that effect must be given to this contention.

The Act specifically fixes the time with reference to which compensation or damages will be paid. That time is the date of the filing of the plans, if title is acquired by the company within one year thereafter. But if title is not so acquired, then the time is the date of the acquisition of the title.

The plaintiff had it in his own hands to force the company to acquire title. In his action for trespass he had a right to judgment, not only for such damages as he suffered by reason of the trespass itself, but also to an injunction restraining the company from further trespassing on his land, unless it acquired title and proceeded to have compensation fixed within the time allowed by the Court for that purpose. Instead of securing these, he put in no evidence whatever of the damage caused by the trespass, but proceeded to have assessed the damages for the deterioration of the lands adjoining the lands taken by the railway. Such damages, in my opinion, are not assessable in a trespass action where the defendants have, by statute, a right to do legally —on complying with certain pre-requisites—the very thing which constitutes the trespass.

The plaintiff is, therefore, entitled to nominal damages and the costs of the action, and to an injunction restraining the defendants from continuing the trespass, unless they acquire title and proceed to have the compensation or damages determined

under the provisions of the Railway Act within a reasonable time. If the parties cannot agree as to what that time should be they may apply to the trial Judge to fix it. The judgment of the trial Judge should be varied accordingly.

As the defendants acquiesced in the procedure adopted by the plaintiff in the Court below, and did not raise, either before the trial Judge or in their notice of appeal, the point upon which he now succeeds, there should be no costs of this appeal.

Judgment accordingly.

SASK.
S.C.
HOLMESTED v. C.N.R. Co.
Lamont, J.

McGALE v. SECURITY STORAGE CO.

MAN.
C. A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. January 5, 1915.

1. WAREHOUSEMEN (§ II — 13) — LOSS OF GOODS — WAREHOUSE RECEIPT — LIMITATION OF LIABILITY.

The loss of goods in the hands of the warehouseman acting in violation of his contract by breaking open the original packages without authority is not subject to the conditions in limitation of liability contained in the warehouse receipt.

[*Harris* v. *G.W.R. Co.*, 1 Q.B.D. 534, applied.]

APPEAL from Dawson, C.C.J. Statement

J. B. Hugg, for appellant, defendant.

J. T. Beaubien, for respondent, plaintiff.

HOWELL, C.J.M.:—When the plaintiffs stored with the defendants the dresser and chiffonier, the drawers were filled with miscellaneous goods and were locked, and the evidence shews that the defendants knew this. These goods are not given in detail in the receipt, but merely the two articles of furniture. When the two articles of furniture were about to be handed over to Lewis, the defendants unlocked, or pried open, the drawers and took out the contents. This was not the wrongful or negligent act of one of the defendants' servants, but an act deliberately done pursuant to the directions of the chief officer of the defendant company. This was not the bailment originally agreed upon, and thus the defendants did an act to the goods not justified under the original contract. I assume that the Judge found that the defendants did this act without authority from the plaintiffs. The loss occurred then not when the defendants were carrying out their contract, but when they were acting in viola- Howell, C.J.M.

MAN.

C. A.

McGALE v. SECURITY STORAGE CO.

Howell, C.J.M.

tion of it within the principles mentioned by Lord Blackburn, in *Harris* v. *G.W.R. Co.*, 1 Q.B.D. 515, at 534, and the cases of *Lyon* v. *Mells*, 5 East 428, and *Davis* v. *Garrett*, 6 Bing. 716, at that page referred to by him, apply.

The matter might, perhaps, be looked at in another way. The goods sued for were never really by either party intended to be covered by the contract of bailment and were not described or set forth in the document. The case then simply is that the defendants got possession of the plaintiff's goods and lost them. I have assumed that the alleged receipt binds the plaintiff, a matter that might be open to argument.

On the finding of fact by the trial Judge, I think his judgment should not be disturbed.

The appeal should be dismissed with costs.

Haggart, J.A.

HAGGART, J.A.:—There is no question that the defendants had a perfect right to limit their liability in the contract of bailment by stipulating that "The responsibility of the company for any one piece or package (and the contents thereof) enumerated hereon shall be limited to the sum of $25, unless the value thereof is noted in said schedule and an additional charge made to cover the additional risk." Here no value is given of any package nor is there any notation on the schedule, nor was any additional charge made in respect of the two packages said to have been lost.

Zung v. *S.E.R.*, L.R. 4 Q.B. 359, was a case in which the plaintiff took a ticket to be conveyed as a passenger from London to Paris, on which was printed: "The South Eastern Railway is not responsible for loss or detention of, or injury to luggage of the passenger travelling by this through ticket except while the passenger is travelling by the S.E.R. Co.'s trains or boats." The plaintiff did not sign this memorandum. The plaintiff's luggage was lost between Calais and Paris, on a French railway, and Cockburn, C.J., says: "However harsh it may appear in practice to hold a man liable by the terms and conditions which may be inserted in some small print upon the ticket, which he only gets at the last moment after he has paid his money, and when, nine times out of ten he is hustled out of the place at which he stands to get his ticket by the next comer—however

hard it may appear that a man shall be bound by conditions which he receives in such a manner, and, moreover, when he believes that he has made a contract binding upon the company to take him, subject to the ordinary conditions of the general contract, to the place to which he desires to be conveyed—still we are bound on the authorities to hold that when a man takes a ticket with conditions on it, he must be presumed to know the contents of it, and must be bound by them."

Skipwith v. *G.W.R.*, 4 T.L.R. 589, 59 L.T. 520, and *Pratt* v. *S.E.R.* (1897), 66 L.J.Q.B. 418, are cases where articles were lost which had been left at the cloak or check room of railway stations. The conditions on the back of the ticket limiting the amount of damages recoverable are binding upon the bailor. The bailees receiving the goods have a right to name the terms of the bailment.

Here the condition limiting the liability to $25 on each package and its contents is on the face of the document and is in large and prominent type. Under ordinary circumstances, on the authorities above mentioned, the defendant would be liable only for the two packages, and the damages would be $50.

The bailees removed the contents of these two packages by forcing the lock. They endeavoured to justify this action by conversations with the plaintiff. There is a conflict of testimony as to what did take place. The trial Judge has accepted the plaintiff's version. I doubt whether I would have come to the same conclusion, but I do not feel justified in reversing his finding upon this point. There are some suspicious circumstances, such as the warehousing of jewellery in the manner described by the plaintiff. By reason of this change then, these detached articles taken from the dresser and chiffonier would not be valued according to the measure given in the orginal contract of bailment. I suppose the value of these articles is the measure of damages.

It is with some reluctance I come to the conclusion that the appeal should be dismissed.

Appeal dismissed.

MAN.

K. B.

STANLEY v. STRUTHERS.

Manitoba King's Bench, Curran, J. January 11, 1915.

1. VENDOR AND PURCHASER (§ I—27)—RESCISSION OF CONTRACT—FRAUD—DECEIT—ACTION FOR.

Separate representations by the vendor to members of the purchasing syndicate leading to a purchase agreement by a trustee for the syndicate will not, even if false, sustain an action to rescind a later agreement between such vendor and an incorporated company to which no representations were made by the vendor on his entering into a new agreement direct with the company and accepting a surrender from the syndicate trustee, particularly where some of the syndicate members elect to stand by the purchase; the plaintiffs' remedy under such circumstances is not an action for rescission but one for damages for deceit.

2. MORATORIUM (§ I—1)—MORATORIUM ACT (MAN.)—APPLICATION OF—AGREEMENT OF SALE—LANDS IN OTHER PROVINCE.

The Moratorium Act, Man., does not apply to the enforcement in Manitoba of an agreement for sale of lands situate in another Province.

Statement

ACTION for rescission of an agreement for sale.

C. P. Fullerton, K.C., and *P. C. Locke*, for plaintiffs.

A. E. Hoskin, K.C., and *W. J. Donovan*, for defendant, King.

R. W. Craig, for defendant, Struthers.

Curran, J.

CURRAN, J.:—This action is somewhat peculiarly framed as to parties. Upon the record as it comes before me there are 21 individual plaintiffs amd one company plaintiff; originally there were 22 individual plaintiffs and one company plaintiff. An amendment was made before trial whereby W. R. Lavery, J. J. Kilgour and C. F. J. Jackson, originally named as plaintiffs, were struck out, and Edwin R. Coleman and John David Burke added as plaintiffs. At the trial the plaintiff asked to have the name of S. Cook struck out as a party plaintiff for want of authority to use his name. I allowed this amendment, and also some other slight amendments to the pleadings which will appear in the record.

The plaintiffs ask for rescission of the agreement of sale, Ex. 2, made between the defendant King, as vendor, and the plaintiff company, as vendee, on the ground that such agreement was induced and entered into through false and fraudulent representations of the defendant Struthers, acting as the agent of the defendant King, in that behalf. The land in question is part of the townsite of Dunmore in the Province of Alberta, situated about 6 miles east of Medicine Hat. This townsite was purchased by the defendant King some time in the year 1912 on behalf of a syndicate of which he was a member. Subsequently the syndicate

became incorporated in Manitoba as the Dunmore Development Company. The land was subdivided and a plan registered. King was and is a trustee of the land for this company, and his firm in Winnipeg acted as selling agents on a commission basis of 30%.

The defendants Struthers and King met in Medicine Hat some time in January, 1913. Struthers had learned that King was heavily interested in Dunmore property. Returning to Winnipeg on the same train, they got into conversation about Dunmore, and Struthers told King he would like to secure some of this property. No arrangement was then made. Struthers says he then knew that Niblock & Tull had the exclusive right to sell these lots, and that he could not obtain any lots except through them. Eventually he says he did acquire the lots in question through King. The evidence as to when and how, and the terms upon which these lots were so acquired, is vague, indefinite and inconclusive. There is a singular lack of definiteness in the evidence of both King and Struthers on these very important points. Who was the purchaser, whether Struthers, or Struthers and a man called Munro, or the syndicate which Struthers formed, does not clearly appear, neither does it clearly appear when the price was fixed, who fixed it, and how it was arrived at. Struthers does not claim to have been King's agent, and King positively denies the alleged agency of Struthers. Struthers says he had nothing to do with fixing the price at $35,200. If he had not, who had? There were only the two contracting parties, and if it was not Struthers it must have been King who fixed this price. Yet King says he did not fix the price at this figure. All Struthers will say upon the question of price is that he was to get the property at the same price at which Niblock & Tull were on February 15, 1913, selling Dunmore property, and that he was to be protected out of this price to the extent of $2 a foot frontage. There is no evidence of what Niblock & Tulle's selling price was on February 15, or any other date. Struthers says, again, arrangements were made with King that he and Munro were to be protected to the extent of $2 a foot frontage. King says that Struthers was to pay him $28,550 for the property, and as long as he got the cash payment of $9,400 which Webster owed him on the alleged prior purchase of the lots by Webster, he, King, was not concerned

MAN.
K. B.
STANLEY
v.
STRUTHERS.
Curran, J.

with what cash payment Struthers received on his sale to the syndicate.

King further says that Webster agreed on the price of $31,000, at which King would sell the property for him, and it would not make any difference to him, King, what price Struthers put in the agreement of sale to Munro. He says he first learned what this price was when Struthers brought the agreement to him to sign, meaning the agreement between Webster and Munro, which was subsequently surrendered. King admits that ke knew of the $2 a foot arrangement, and that that amount was to come out of the price named in the Webster and Munro agreement; and also that Struthers was loading the property with an additional $4,200, as he supposed with the consent of his associates or of the syndicate, and that the syndicate were paying this much more for the property.

The evidence shews that the members of the syndicate did not know the whole truth about this matter. Struthers told them that he was getting only $1 a foot. It is upon this evidence that I am expected to properly decide the question of Struther's agency.

The only conclusion I can reach is that Struthers was not the agent of King. I think King agreed to sell the property to Struthers or his nominees or associates at the price of $31,000, of which $9,400 was to be paid in cash. Though some understanding was reached for a profit or commission to Struthers and Munro of $2 a foot frontage, I cannot find that King was to be responsible for this $2 a foot or agreed to pay it. The remedy apparently lay with Struthers, and was in his own hands by adding this profit to the price to be paid by the syndicate. Why this $2 a foot was discussed with King at all I do not know. There is no explanation offered. In some unexplained way this $2 a foot profit was commuted at $4,200, which is the amount that was added to Webster's selling price of $31,000, making up the gross price the syndicate was to pay of $35,200.

Upon this state of facts I do not see how it can be contended that Struthers was King's agent. Each man was apparently acting for himself and not one for the other, and consequently King was in no way responsible for any statement or representations Struthers might make to the plaintiffs.

We next find that Struthers, with the assistance of Munro, later on, after the interview between King and Struthers on the railway train, formed a syndicate composed of the individual plaintiffs and W. R. Lavery, J. J. Kilgour, S. Cook and C. F. J. Jackson, to purchase the lands in question from King for the sum of $35,200, of which $13,600 was to be paid in cash and the balance of $21,600 in two equal consecutive yearly payments with interest. An agreement of sale to evidence this purchase was duly entered into between King as vendor and Munro as vendee representing the syndicate, though this fact is not stated in the agreement.

This is the sale that Struthers negotiated or arranged with King in connection with which I have been discussing the question of Struthers' agency and the payment of the $2 a foot frontage profit or commission.

The purchase price in this connection, $35,200, included the $4,200 as the amount agreed upon for Struthers' profit or commission, whichever it may be called, on arranging the sale for the syndicate. Struthers proceeded to collect from the members of the syndicate, and got $11,600 towards the cash payment. As, however, he had to pay King only $9,400, the amount so collected was more than sufficient, and the surplus he retained himself on account of his commission or profit. This surplus, $2,200, he divided with Munro, and payment of the remainder of the $2,000 was arranged later, when the syndicate had become incorporated as the plaintiff company, by allotting to Struthers and Munro each $1,000 of stock in that company.

At some stage of the negotiations—just when does not appear—the syndicate decided to seek incorporation in the Province of Alberta. This was done, and on the 25th of March, 1913, the plaintiff company was duly incorporated under the laws of the Province of Alberta, with powers, amongst a multitude of other things, to purchase or otherwise acquire and hold and dispose of lands without limitation as to locality. By mutual consent of the syndicate and other interested parties, the outstanding sale agreement with Munro was surrendered to King and cancelled, and Munro quitted claim his interest thereunder to the defendant King for the purpose of enabling King to enter into an agreement of sale for these lands direct to the plaintiff company. This was done by Ex. 2, which is the agreement sought in this action to be rescinded and set aside on the ground of fraud.

MAN.

K. B.

STANLEY v. STRUTHERS.

Curran, J.

It is to be noted that the date of this agreement is February 15, 1913, which is prior to the date of the incorporation of the plaintiff company. I assume that the agreement was drawn up in advance but not actually executed until the plaintiff company had become incorporated. The price and terms of payment are the same in Ex. 2 as in the agreement with Munro. This document is properly executed by the plaintiff company as purchaser, and the receipt of the cash payment of $13,600 is by the vendor King acknowledged. It is apparent ,therefore, as between the contracting parties, that this agreement was treated as if regularly entered into, and as between the plaintiff company and Struthers the price was assented to, for we find that the company allotted stock to Struthers and Munro to make up the deficiency that existed between the cash subscriptions of $11,600 and the cash payment to be made to King of $13,600.

I find, therefore, that the slate had been wiped clean of all dealings with the property prior to the execution of Ex. 2.

The statement of claim alleges that Ex. 2 was induced by certain false and fraudulent representations made by the defendant Struthers as King's agent to the plaintiffs. The evidence does not bear this out. It discloses that whatever representations were made were so made, not to the plaintiff company, but to certain of the individual plaintiffs, but not to all of them. Four of the original members of the syndicate, as before stated, are not parties to this action and are not before the Court. They make no complaint, and must be held, I think, to be satisfied with their purchase. It is also to be noted that only nine of the individual plaintiffs were put in the witness box to voice their complaints against the *bona fides* of the sale, and these nine gave different statements as to what was represented to them by either Struthers or Munro, as the case might be, when they were individually solicited to take an interest in the syndicate to purchase the lands in question.

It is clear, then, that no representations whatever, whether true or false, were made to the plaintiff company by either King or Struthers to induce that company to enter into the agreement, Ex. 2, sought to be rescinded. It appears that the plaintiff company voluntarily entered into this agreement at the instigation of those who were acting for it and for the syndicate members.

The plaintiff company is a separate entity from the individual plaintiffs, and now holds in its own right as a corporation the lands in question. What ground of complaint has it, therefore, to ask to be relieved from the burthen of this purchase? Can it avail itself of fraud alleged to have been practised on some of the syndicate members, and to urge that Struthers' fraud, even if proved, is a ground for rescission? I do not think so. It seems to me the plaintiffs, on their own shewing, both by the form of their pleading and by their evidence, have put themselves out of Court, so far as the plaintiff company is concerned. I must dismiss the action, therefore, of the plaintiff company with costs.

Next, what status have the individual plaintiffs to ask for rescission of the agreement between King and the plaintiff company? They are not parties to that agreement and have no legal or equitable interest under it. It is not shewn that the plaintiff company was a trustee for them when entering into this agreement. Whatever legal rights or interests they may formerly have had under the Munro agreement in the lands in question, those are now gone, for that agreement, with the knowledge and consent of all parties, was surrendered to King and the land re-conveyed by Munro to King. It seems to me that even if the separate representations to individual plaintiffs as testified to by those plaintiffs who were called as witnesses were made and were false, these cannot now be made a ground for rescission, either by the plaintiff company or the individual plaintiffs, separately or together. In any event, all of the syndicate members are not complaining; four of them are electing to stand by the purchase. How, then, can restitution be made without the concurrence of these four? If the plaintiff's action is maintainable in its present form, which I hold it is not, these four parties must join in the action and unite with the others in complaining of the alleged fraud, and ask that the conveyance be set aside.

I hold that the individual plaintiffs have no status to maintain this action, and their action must also be dismissed with costs.

I express no opinion as to the truth or falsity of the representations alleged to have been made to the nine plaintiffs who have testified. The evidence is so conflicting that I should find great difficulty in reaching a right conclusion. It is not necessary that I should do so in the view I take of the status of the plaintiffs.

MAN.

K. B.

STANLEY v. STRUTHERS.

Curran, J.

It seems to me that if the plaintiffs have any real grievance at all, which I much doubt, it can only be redressed by way of action for damages for deceit, and that no case for rescission has been made under the facts and circumstances as here disclosed.

The statement of claim will accordingly be dismissed with costs to both defendants.

I will now deal with the counterclaim of the defendant King. The agreement in question, Ex. 2, contains a proviso that in the event of default being made in payment of principal or interest the whole of the unpaid purchase money shall become due. The instalment of principal money and interest which fell due on February 15, 1914, has not been paid. Payment has been demanded of the plaintiff company, and the default still exists. In virtue of such default the whole of the balance of the purchase money has become due and payable, and the defendant King, by his counterclaim, asks for judgment for this amount. He is entitled to this, and there will be judgment for the defendant King upon the counterclaim for the sum of $21,600, with interest at 6% from February 15, 1913, and in default of payment within six months, foreclosure of the plaintiff company's interest in the lands in question may be had according to the usual practice of the Court and the agreement of sale cancelled.

The recent Moratorium Act does not apply, as the lands which are the subject of the agreement in question are not situate within the Province of Manitoba.

There will be a reference should it appear that there are any subsequent encumbrancers.

The defendant King will also have the costs of the counterclaim. The costs will include all proper examinations for discovery on the part of the successful parties.

Action dismissed.

B. C.

S. C.

ANDERSON v. FULLER.

British Columbia Supreme Court, Morrison, J. March 15, 1915.

1. DAMAGES (§III F—145)—MEASURE OF—DECEIT.

In an action for deceit on the sale of lands, a proper measure of damages is the amount paid over by the plaintiff in consequence of his dealings with the defendant with interest and a reasonable sum for time, labour and wages expended by the plaintiff on the property which was practically worthless for the purpose for which it was sold.

Statement

ACTION for deceit.

J. McD. Mowat, for plaintiff.
Sir C. H. Tupper, K.C., and *Head*, for defendant.

MORRISON, J.:—The plaintiff is an illiterate, confiding farmer. Having been attracted by a conspicuous advertisement in a newspaper, inserted by a firm of real estate agents, with whom the property had been listed by the defendant, pointing out to intending purchasers the alluring opportunity opened for acquiring the farm in question, he interviewed the agents, who, as they now say, and as the plaintiff also repeats, confirmed the representations therein made as coming from the defendant. The plaintiff and his wife proceeded to the farm and there met the defendant, from whom they made some prudent, precautionary inquiries. He told them the dykes were efficient; that the land was properly underdrained, and that it would yield a yearly crop of 400 tons of hay. This reiteration by the owner satisfied them on those essential points, and in due course they consummated the purchase. Before so doing there were preliminary negotiations as to price, the amount of deposit to be made, and the commission to be paid the agents. The defendants would not agree with the real estate agents either to pay the commission or guarantee it, so it was arranged, in order to safeguard them in that respect, that the agreement of purchase should be made out direct to them by the defendant, the area so conveyed to contain some 131 acres odd, and that they, in turn, should agree to convey to the plaintiff the 100 acres within the dyke. The odd acres were outside the dyke and for farming purposes really valueless. This outside land was to be held as security for the commission on the sale. At the same time—a part of the same transaction—the necessary transfer of the 100 acres was made to the plaintiff by the agents. He took possession in the fall of 1911. That winter season was a dry, frosty one, and no serious defect in the dykes evinced itself. The succeeding season the land only yielded some 280 tons of hay, and in the fall and winter of 1912-13 high tides occurred and the place became badly flooded. The dykes proved inadequate, and the season of 1913 crop was much less than the previous year. They gave way to such an extent that the services of a dredge were engaged, and altogether the place became unfit practically for hay cultivation. In addition to this, the underdraining, if any,

B. C.

S. C.

ANDERSON v. FULLER.

Morrison, J.

tell very far short of what was represented. The plaintiff made complaints and protests, and the defendant seems to have assured him that remedy in some form would be forthcoming. Ultimately he assured the plaintiff that he was about getting rid of the agents, in which event he would then deal with him exclusively, and by implication, if not by direct assurance, led the plaintiff to consider that, as between them, he could be protected. In this regard the defendant told the plaintiff that he was about to take legal proceedings against the agents, and that he, the plaintiff, would, in consequence, necessarily be served with a "summons," but not to mind that circumstance, as it was merely a bluff to get the agents out of the way. The defendant issued a writ in a foreclosure suit, a copy of which was duly served upon the plaintiff. Very shortly thereafter the defendant saw the plaintiff, and asked him if he had been served with the "summons," and, upon being told that such was the case, he again told the plaintiff not to take any notice of it, not to take any steps in the matter whatever. The plaintiff, relying upon what the defendant thus told him, did nothing. In due course the suit proceeded without resistance from the agents, of course, nor from the present plaintiff, because he was lulled to sleep by the defendant herein, and the usual orders for foreclosure were made. The plaintiff was notified that he must quit possession, and, finally, upon threat to put in the sheriff, he did quit possession. There were several interviews between the plaintiff and defendant and also between the plaintiff and defendant's solicitor, who were acting *bonâ fide* throughout under instructions from the defendant, but I deem those of minor importance, and, in reality, supporting the view that the plaintiff was utterly at the defendant's mercy. He confidently and honestly entered into this transaction. He gallantly, though vainly, strove to make the best of what began to dawn on him was a bad bargain, into which he had put, for him, a very large amount of hard-earned money—in fact, all he had. He was ready, according to his limited understanding, to remain with the place to the last, and did remain until threatened with ejectment.

The outcome has been that the plaintiff has parted with some $13,000, about $11,000 of which the defendant retains, as well as the land. For this state of affairs, brought about substan-

tially, as I have baldly recited, there must be some adequate remedy.

The material representations made to the plaintiff by and on behalf of the defendant were that the land would yield 400 tons of hay annually; that the dykes were sufficient to protect the land from the waters without; and that the underdrains were sufficient. A dyke is like a chain, in that it is no stronger than its weakest part. That, until it is subjected to the supreme test of the highest reasonably anticipated water, no reasonably careful inspection just before purchase can disclose the fatal defect. As to the underdrains, it seems to me obvious that a purchaser is justified in relying upon the owner's representations respecting them. The plaintiff impressed me from his appearance and his quiet, respectful, frank demeanour on the witness stand as being an unsuspicious, susceptible individual, quite unready to cope with enterprising, eager men, such as those with whom he was dealing in this matter.

I think the defendant, within whose province it was to know those particular facts, was under a duty to exercise care in giving the plaintiff the information which determined his course. "A common form of dishonesty is a false representation fraudulently made, and it was laid down that it was fraudulently made if the defendant made it knowing it to be false or recklessly, neither knowing nor caring whether it was false or true. That is fraud in its strict sense:" *Nocton* v. *Ashburton* (*Lord*), [1914] A.C. 932, 83 L.J.Ch. (H.L.) 784, *per* Lord Chancellor, at 794. The defendant kept on deceiving the plaintiff, and now attempts by raising the plea of estoppel to protect himself from the consequences. From the impression at the trial created by the respective parties, I do not think there is any element of estoppel in the case. I think one proper measure of damages is the amount paid over by the plaintiff in consequence of his dealings with the defendant, with interest, as well as a reasonable sum for time, labour and wages expended on the place. There will be judgment accordingly with costs.

Judgment accordingly.

SASK.

S. C.

GREGORY v. GREAT WEST LUMBER CO.

Saskatchewan Supreme Court, Haultain, C.J. May, 1915.

1. JUDGMENT (§ II A—60)—GOODS SEIZED UNDER EXECUTION—INTERPLEADER—SECOND SEIZURE MADE AFTER FIRST INTERPLEADER ISSUE DECIDED—EXECUTION IN SHERIFF'S HANDS—SECOND EXECUTION CREDITOR NOT MADE PARTY TO FIRST INTERPLEADER.

Res judicata cannot be set up to bar the claimant of goods seized under execution in respect of an adverse decision in an interpleader issue with another execution creditor where the second seizure in question although in respect of the same chattel was not made until after the first interpleader issue was decided and where the execution creditor under whose execution the sheriff made the second seizure had not been made a party to the first interpleader although his execution was then in the sheriff's hands.

Statement

TRIAL of an interpleader issue.

H. Y. MacDonald, K.C., for plaintiff.

W. W. Livingstone, for Great West Lumber Co.

Sparling, for Stobart, Sons & Co.

Haultain, C.J.

HAULTAIN, C.J.:—On October 3, 1913, a writ of *fi. fa.* against the goods of J. A. Gregory was placed in the hands of the sheriff of the judicial district of Battleford. This writ was issued in the suit of the Canadian Moline Plow Co. against J. A. Gregory and others. Under this writ the automobile, the subject of the present issue, was seized by the sheriff. On November 4 the plaintiff, Mrs. Gregory, claimed the automobile as her property, and on November 7 the Moline company notified the sheriff that it disputed Mrs. Gregory's claim. On November 12 interpleader proceedings were begun by the sheriff, by notice of motion of that date.

The motion came on for hearing by the Local Master on November 18, and was adjourned to December 16, to allow cross-examination of Mrs. Gregory on her affidavit filed in support of her claim. On December 16 the adjourned motion was disposed of, and an order barring Mrs. Gregory's claim was made.

The Stobart company execution was issued on October 28, and placed in the sheriff's hands on the same day, and the Great West Lumber Co. execution was issued on December 17, and placed in the sheriff's hands on the same day.

On January 26, 1914, the Moline Plow Co. execution was settled or withdrawn, and the automobile, which had been released to Gregory on his bond to the sheriff, was immediately taken in execution by the sheriff, under the writs of the defendants on this issue. Mrs. Gregory again made claim to the

automobile and the sheriff interpleaded, and the present issue was agreed to by the parties. There are two questions raised by the issue: 1. Was the automobile, at the time of seizure (January 26, 1914), the property of the plaintiff? 2. Has the plaintiff's claim to the automobile, as against the defendants, "been already tried, barred and dismissed by the order of December 16 so as to be *res judicata*"?

The plaintiff's claim in the former proceedings was that the automobile was her property, and the order of December 16 disposed of her claim in the following words: "It is ordered that the claim of the claimant to the goods seized herein be barred and dismissed."

On the evidence submitted, in my opinion, the plaintiff must recover on the second question. Under a plea of *res judicata* it must be shewn that the same point has been decided between the same parties. It was urged by counsel for the defendant Stobart company that the Moline Plow Co., the defendant on the first issue, represented a class, that is, all execution creditors of J. A. Gregory, and that any number of that class may properly plead *res judicata*. I cannot give effect to that contention. If the Stobart company had been made a party to the former issue, as it should have been, the present question could not have arisen.

The former claim by the plaintiff was not made until November 7, 1913, while the Stobart company execution was in the hands of the sheriff on October 29. For some reason or other, which does not appear, the Stobart company was not a party to the first issue. The fact that the property in question was not seized under the executions of the present defendants until after the first issue was decided seems to me to settle the question. If the first issue had been decided in favour of Mrs. Gregory, the defendants would not be bound by that decision, and that, to my mind, effectually disposes of the question of *res judicata*.

I find, however, against the plaintiff on the first question. The evidence in support of Mrs. Gregory's ownership of the automobile was very unsatisfactory, and shews a most remarkable state of affairs as regards the management of her business by her husband. It *might* have been intended that the automobile was to be bought for her and on her account, but the whole transaction was conducted by the husband, who afterwards used

SASK.

S. C.

GREGORY v. GREAT WEST LUMBER CO.

the machine, paid for its upkeep and repairs, and took out a license as owner under the Vehicles Act (ch. 38 of the Statutes of Saskatchewan, 1912). There will be judgment, therefore, for the defendants, with costs of and incidental to the issue.

Judgment for defendants.

ALTA.

S. C.

HOWSON v. CITY OF MEDICINE HAT. YUILL v. CITY OF MEDICINE HAT.

Alberta Supreme Court, Walsh, J. January 7, 1915.

1. INJUNCTION (§ I J—84)—MUNICIPALITY—EXPENDITURES—USE OF PUBLIC FUNDS—VALIDITY.

A municipal council may be enjoined from acting upon a resolution passed for the making of expenditures which could be legally made only on the passing of a by-law voted upon and passed by the burgesses.

Statement

ACTION to quash a by-law and for other relief.

W. J. O'Neail, for the plaintiffs.

I. C. Rand, for the defendants.

Walsh, J.

WALSH, J.:—The resolution of which the plaintiffs complain contemplated the expenditure of money for purposes which can only be lawfully accomplished under force of a by-law to which the burgesses have given their assent. This much is clear from a reading of sec. 3 of Title XXI. of the city charter which is the only provision of the charter conferring any power in this respect upon the council. It is admitted that the only by-laws in existence which justify the defendants in the action of which the plaintiffs complain are by-laws 346, 370 and 418, all of which received the necessary assent of the burgesses and were finally passed by the council. Each of these by-laws authorizes the borrowing of a certain sum of money, the first of them "to pay for widening, improving and grading certain streets," not naming them, and each of the other two "to pay for grading and gravelling streets and purchasing road construction plant and machinery."

The council under the impeached resolution has expended $6,000 in the purchase of land and proposes to make other large expenditures in the purchase of certain other land for the purpose of opening up a new road leading into the city over it and over certain other land shewn as a street on registered plans and in the construction of this road. I do not think that any of these

by-laws can be relied upon to support this resolution or the action taken and proposed to be taken under it. By-law 346 certainly cannot, for a very essential part of the territory through which this proposed road is to run was not then within the corporate limits. Neither of the other two can because each of them is simply an authority for spending money on grading and gravelling streets, a vastly different thing from acquiring land on which to lay out a street and opening out as a public highway what was theretofore but a street on paper, a street shewn on a registered plan with no previous acceptance on the part of the corporation of the offer or dedication of it as a highway thereby shewn. The only authority, therefore, for what the defendants have done and intend to do is the resolution itself which is a manifestly inadequate authority in the face of the provision of the charter to which I have referred providing for the exercise of the council's powers in this respect only by a by-law approved of by the burgesses.

I think that the plaintiffs as ratepayers and electors of the city are entitled to maintain such an action as this. Sec. 1 of Title XXIV. expressly confers upon any elector the right to apply to quash any by-law or resolution of the council for illegality. That is exactly what this action is brought for coupled with an additional claim for relief based upon and incidental to the alleged illegality. It is true that this section gives only this right to move to quash and does not in terms extend that right to the bringing of an action, but it is to my mind a recognition of the right of an elector to invoke the aid of the Court to undo an illegal act committed by the council.

I am unable to understand why it was thought necessary to institute two actions to accomplish the end which the plaintiffs seek to gain. The plaintiffs in each action are practically the same and the same solicitors represent them. Both actions are founded upon the same illegality. One seeks a declaration that the resolution in question is illegal and that the defendant corporation be restrained from buying any more land under it and from paying out any more money either in the acquisition of additional land or in road construction. The other simply asks that the individual defendants consisting of those aldermen of

ALTA.

S. C.

HOWSON v. CITY OF MEDICINE HAT.

YUILL v. CITY OF MEDICINE HAT.

Walsh, J.

the city by whose votes this resolution was passed be restrained from passing any further resolution for the construction of the road in question and from doing any other act looking to the payment out of money in that behalf. If this claim for relief was properly made, as to which I have my doubts, I can see no reason why it could not have been made in the other action. The actions were tried together and there is absolutely no dividing line between the evidence applicable to one of them and that applicable to the other. The same remark applies to the mayor's examination for discovery which was taken at the one time in the two cases. I direct that the action be consolidated and that in the consolidated action judgment go declaring the resolution in question illegal and restraining the defendants from further acting upon it and that the defendant corporation do pay the plaintiffs their costs as of one action.

Order accordingly.

ALTA.

S. C.

BURNS v. HILLS.

Alberta Supreme Court, Stuart, J. February 26, 1915.

1. MARRIAGE (§ IV B—57)—ANNULMENT OF—INFANCY—LACK OF PARENT'S CONSENT.

Under the law of Alberta an action does not lie either by the girl's parent or by herself to annul her marriage at the age of sixteen under a marriage license obtained by the husband on a false and fraudulent affidavit as to her age and a ceremony performed without the parent's consent, and this although the marriage had never been consummated.

Statement

APPEAL from an order of the Master granting an application made by the defendant to strike out the statement of claim because it discloses no cause of action. A second ground on which the motion was based was that the Court had no jurisdiction to entertain or try the action.

James Short, for the plaintiff.

H. P. O. Savary, for the defendant.

Stuart, J.

STUART, J.:—The plaintiff is an infant suing by her father as next friend and asks the Court to declare that a certain marriage solemnized between her and the defendant is null and void on the ground of the absence of consent of the father.

The learned Master granted the application and struck out the statement of claim upon the first ground, holding that the

ALTA.

S. C.

BURNS v. HILL.

Stuart, J.

absence of consent did not render the marriage null and void. He did not consider it necessary to deal with the second ground taken in support of the application.

I have examined the matter with care and I have been quite unable to discover anything more than can usefully be said beyond what is contained in the reasons given by the Master. An attempt was made to raise a distinction between the words of the English statute interpreted in *R.* v. *Birmingham*, 108 E.R. 954, and those of our Marriage Ordinance, but I cannot see any reason for making any real distinction and even taking the words of the form in schedule B as being really part of the Ordinance even then becomes no stronger than those of the English statute, and *R.* v. *Birmingham* still applies.

I think, therefore, the appeal must be dismissed with costs on the first ground and that it is unnecessary for me to consider the question of jurisdiction. The result is that under the law of this province, if a young girl only sixteen years of age is induced to get married without the father's consent to a man who has obtained a marriage license by a false and fraudulent affidavit as to her age, and although the marriage has never been consummated by a physical union (as I understand to be the fact here) still neither the parent nor the infant has any legal redress and there exists no possible method except a statute of the Dominion Parliament of undoing what has been done. The parties are man and wife and must remain so through life unless such an Act is obtained. Other provinces have taken measures to provide a remedy and I humbly commend the situation to the consideration of the authorities.

Appeal dismissed.

HOWARD v. MILLER.

IMP.

P. C.

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

1. SPECIFIC PERFORMANCE (§ I E—31)—REALTY CONTRACTS—EFFECT OF DOWER INTERESTS—INTEREST OF NON-REGISTERED GRANTEES—ADMISSIBILITY OF CONTRACT OF SALE.

The purchaser's interest under a contract of sale registrable under the B.C. Land Registry Act, 1906, ch. 23 in the register of charges, is only such an interest in the lands as is commensurate with the relief which equity would give by way of specific performance; and his contract with the registered owner of an indefeasible fee will not be effective as against a claim under a valid but unregistered deed

IMP.
P.C.
HOWARD
v.
MILLER.

admitted by the vendor whereby her title was reduced to a claim for dower and the fee belonged of right to another whose title was shewn in answer to the purchaser's action for specific performance; sec. 75 of the Land Registry Act made the deed inadmissible in disproof of the purchaser's title to a charge under his contract, but it remained properly admissible on the question of the extent to which specific performance ought to be granted under that contract.

[*Miller and Nicholson* v. *Howard*, May 28, 1914, Supreme Court of Canada, reversed.]

2. VENDOR AND PURCHASER (§ I A—1)—RIGHTS AND LIABILITIES OF PARTIES—ENFORCEMENT OF CONTRACT—SPECIFIC PERFORMANCE.

The trusteeship resulting from a contract for sale of lands under the rule that the vendor is as to his interest in the lands a trustee for the purchaser subject to a lien for the purchase money, is limited to cases in which a court of equity would grant specific performance.

Statement

APPEAL on an action for specific performance of an agreement for sale.

Owen Thompson and *V. Laursen*, for appellant.

E. P. Davis, K.C., and *Hon. M. M. Macnaghten*, for respondents.

The judgment of the Board was delivered by

Lord Parker.

LORD PARKER:—In this case the plaintiffs claim specific performance of an agreement dated June 1, 1908, and made between the defendant, Mary Jane Sheard, of the one part, and the plaintiff, Miller, of the other part, whereby the defendant, Mary Jane Sheard, contracted to sell, and the plaintiff, Miller, to purchase, some 4.14 acres of land in the Vancouver District in British Columbia. The plaintiff, Nicholson, is made a co-plaintiff as sub-purchaser of the property from the plaintiff, Miller. The defendant Mildred Howard is joined as co-defendant on the ground that she claims an interest in the property adversely to her co-defendant. In their Lordships' opinion this joinder is misconceived and the judgment given at the trial, and confirmed on appeal for specific performance against the defendant, Mildred Howard, and the vesting of her interest in a trustee for the plaintiffs is erroneous and cannot be sustained. There is no equitable principle by virtue of which land can be taken away from the true owner under colour of specific performance of a contract to which he was not a party and which he did not authorise to be made on his behalf. The action should have been dismissed with costs so far as the defendant, Mildred Howard, was concerned.

So far the case presents little difficulty, but there is a more important question which must be decided before this appeal is

IMP.
P. C.
HOWARD
v.
MILLER.
Lord Parker.

finally disposed of. Besides resisting the claim for specific performance as against her, the defendant, Mildred Howard, set up her own title to the property. She was, she said, entitled to it as heiress-at-law of the late Harry Howard, the former husband of the defendant, Mary Jane Sheard, subject, nevertheless, to the dower interest of her mother, the last-named defendant, and she counterclaimed against the plaintiffs and her co-defendant for a declaration to that effect with certain consequential relief. The defendant, Mary Jane Sheard, did not defend the counterclaim, which against her must be taken as admitted. As against the plaintiffs, however, who did defend the counterclaim, the defendant, Mildred Howard, was put to the proof of her title. In order to prove it she put in three indentures. First, she put in an indenture dated August 23, 1893, whereby a certain block of land (of which the 4.14 acres in question formed part), was conveyed to Harry Howard and his wife, the defendant, Mary Jane Sheard, in fee simple, as joint tenants. Secondly, she put in an indenture dated June 14, 1905, whereby Harry Howard conveyed to his wife, the defendant, Mary Jane Sheard, an undivided moiety of the whole block in fee simple, thus vesting the whole block in her. Thirdly, she put in an indenture, also dated June 14, 1905, whereby the defendant, Mary Jane Sheard, conveyed to Harry Howard the entirety of the 4.14 acres in question. The two deeds of June 14, 1905, in fact operated as a partition of the block between husband and wife.

The indentures above referred to, if admissible in evidence, are, in their Lordships' opinion, sufficient proof of the title set up by the defendant, Mildred Howard, but the plaintiffs contend that the second indenture of June 14, 1905, is not admissible in evidence against them, because of the provisions of sec. 75 of the Land Registry Act (ch. 23 of the statutes of the Province of British Columbia, 1906), being an Act consolidating the existing statutes as to the registration of titles to land.

On reference to this statute it will be found that it contemplates and provides for four registers. First, there is a Register of Indefeasible Fees. A certificate of title to an estate so registered is, as long as it remains uncancelled, conclusive evidence against all the world that the holder is entitled to the estate mentioned in the certificate (secs. 15, 16 and 81). Secondly, there is a

IMP.
P. C.
HOWARD
v.
MILLER.
Lord Parker.

Register of Absolute Fees. The registered owner of an absolute fee is to be deemed to be the *primâ facie* owner of the land referred to in the register for such an estate as he legally possesses therein, subject only to such registered charges as appear existing thereon, and to the rights of the Crown (secs. 15 and 24). The certificate of title is not conclusive but only *primâ facie* evidence of the title of the registered owner. It is to be observed that nothing less than a legal fee simple can be registered as an absolute fee. Thirdly, there is a Register of Charges (sec. 25), that is, according to the definition clause (sec. 3), any less estate than an absolute fee, and any equitable interest in land, and any incumbrance, Crown debt, judgment, mortgage, or claim to or upon any real estate.

The registered owner of a charge is to be deemed to be *primâ facie* entitled to the estate or interest in respect of which he is registered, subject only to such registered charges as appear existing thereon and to the rights of the Crown (sec. 29). The certificate of title is not conclusive but only *primâ facie* evidence of the title of the owner of a registered charge.

It is to be observed that an applicant for the registration of a charge has in his application to state the nature of the charge in respect of which he requires registration (Form D in 1st Schedule to the Act), and the register has also to state the nature of the registered charge (Form E, same Schedule).

Lastly, there is, under sec. 116, a register in which are entered copies of all instruments affecting land. The 74th section of the Act provides that no instrument executed after and taking effect after June 30, 1905, and no instrument executed before July 1, 1905, and taking effect after June 30, 1905, purporting to transfer, charge, deal with or affect land or any estate or interest therein (with an immaterial exception) shall pass any estate or interest, either at law or in equity, in such land, until the same shall have been registered in compliance with the provision of the Act; and the 75th section provides that instruments executed before and taking effect before July 1, 1905, transferring, charging, dealing with, or affecting land or any estate or interest therein, unless registered before the said date (with an immaterial exception) shall not be receivable by the Court or any Court of law or any registrar or examiner of titles as evidence or proof of the title of any person to such land as against the title of any person to the same land registered on or after July 1, 1905, except in an action

IMP.
P. C.
HOWARD v. MILLER.
Lord Parker.

before the Court questioning the registered title to such land on the ground of fraud wherein the registered owner has participated or colluded. This section, in their Lordships' opinion, imposes a penalty on non-registration of an instrument by rendering such instrument inadmissible in evidence in certain cases, but has no further operation.

Returning to the facts of this case, it appears that, after Harry Howard's death, the second deed of June 14, 1905, came into possession of the defendant, Mary Jane Sheard, and that on July 30, 1907, she took both the deeds of June 14, 1905, to the Land Registry Office in Vancouver for registration. What happened in the office is obscure, but owing possibly to some misconception on the part of the registrar, the defendant, Mary Jane Sheard, ultimately signed an application prepared by him declaring she was owner of the land in question, and claiming to have it registered in her name in the Register of Absolute Fees, and obtained such registration; the second deed of June 14, 1905, being absolutely ignored, though the registrar had possession of it and ought to have been aware of its effect. In this, if there was no fraud, there was evidently a serious miscarriage, and the plaintiff, Miller, in entering into the agreement of June 1, 1908, to purchase the land in question was, undoubtedly, misled by the register and the certificate of title obtained by the defendant, Mary Jane Sheard.

The agreement of June 1, 1908, was, in their Lordships' opinion, an instrument purporting to affect land, and, therefore, required registration under the 74th section of the Act. When so registered (but not before) it would confer on the plaintiff, Miller, an equitable interest, his title to which would be registrable in the Register of Charges. On the day after the agreement was signed the plaintiff, Miller, lodged an application for the registration of his title to a charge by virtue of the agreement, but in such application he did not, as he ought to have done, state the nature of the interest in respect of which he claimed registration. It is material to consider what this interest really was. It is sometimes said that under a contract for the sale of an interest in land the vendor becomes a trustee for the purchaser of the interest contracted to be sold subject to a lien for the purchase money; but however useful such a statement may be as illustrating a general principle

IMP.
P. C.
HOWARD
v.
MILLER.
Lord Parker.

of equity, it is only true if and so far as a court of equity would under all the circumstances of the case grant specific performance of the contract.

The interest conferred by the agreement in question was an interest commensurate with the relief which equity would give by way of specific performance, and if the plaintiff, Miller, had in his application attempted to define the nature of his interest, he could only so define it. Further, if the registrar had, as in their Lordships' opinion he ought to have done, specified on the register the nature of the interest which he registered as a charge, he could only have so specified it. Had he attempted further to define the interest, had he, for example, stated it as an equitable fee subject to the payment of the purchase money, he would have been usurping the function of the Court, and affecting to decide how far the contract ought to be specifically performed. As a matter of fact the registrar did not, any more than the plaintiff, Miller, attempt to define the interest in respect of which registration was granted. He granted registration, having (their Lordships will assume) first entered a copy of the agreement in the register of instruments under sec. 116, but the register merely shews that the plaintiff, Miller, is entitled to a charge under the agreement on the land in question, and leaves the nature of the charge to be inferred. At most, therefore, the plaintiff, Miller, became the registered owner of an interest commensurate with the interest which, under all the circumstances, equity would decree by way of specific performance of the agreement.

Their Lordships are now in a position to deal with the question as to whether the second deed of June 14, 1905, was admissible in evidence. First, as regards the defendant, Mary Jane Sheard, it was not (having regard to the 75th section of the Act) admissible to disprove the *primâ facie* title conferred on her by her entry on the register as owner of the absolute fee, unless such entry had been obtained by fraud in which she had participated or colluded. But as a matter of fact it was quite unnecessary to adduce the deed as evidence against her at all. She did not defend the counterclaim, thereby admitting the title of the defendant, Mildred Howard, as alleged in the counterclaim, and, further, she had on two several occasions admitted this title before the commencement of the litigation, first in her affidavit for the

purpose of obtaining letters of administration to Harry Howard's estate, and, secondly, in proceedings which she took (apparently at the instigation of the plaintiff, Miller) to have the agreement of June 1, 1908, adopted by the Court on behalf of the defendant, Mildred Howard. These admissions, unless satisfactorily explained, would, in their Lordships' opinion, be sufficient to rebut the *primâ facie* title conferred by registration.

Again, as regards the plaintiff, Miller, it is quite true that by reason of the 75th section, the second deed of June 14, 1905, is not admissible in disproof of his registered title, but if, as their Lordships have pointed out, he is registered only in respect of an interest commensurate with the relief which equity would decree by way of specific performance of the agreement of June 1, 1908, the defendant, Mildred Howard, is not under the necessity of in any way disputing the title in question. She adduces the deed of June 14, 1905, not as disproving the plaintiffs' title, but as a material circumstance which the Court must take into account in deciding the extent to which specific performance ought to be granted. In their Lordships' opinion, therefore, the objection to the admissibility in evidence of the second deed of June 14, 1905, cannot be sustained, and the defendant, Mildred Howard, is therefore entitled to the declaration of her title as alleged in her counterclaim.

The defendant, Mildred Howard, asks also for certain consequential relief by way of rectification of the register and cancellation of existing certificates of title. The Court, under sec. 92 of the Act, has jurisdiction in an action contesting a registered title to make such order as may be just and appropriate under the circumstances. According to this section, before such an action can be brought, the proposed plaintiff should file an issue and give security to the satisfaction of the registrar, and it is possible that the plaintiffs might have obtained a stay of the counterclaim till this had been done. They did not, however, apply for such a stay, nor did they make any objection before their Lordships' Board on the ground that no security had been given and no issue filed. In their Lordships' opinion, therefore, it was open to the Courts below to make and is open to their Lordships to advise His Majesty to make such order under the 92nd section as may meet the justice of the case.

IMP.
P. C.
HOWARD
v.
MILLER.
Lord Parker.

With regard to the relief to which the plaintiffs are entitled in this action, it would be contrary to all principle to order the defendant, Mary Jane Sheard, to convey an interest which she has not got and which she cannot convey. The plaintiffs are, however, entitled to repayment of all moneys paid to her under the agreement of June 1, 1908, with interest at 4 per cent. per annum, and their costs of action (except in so far as increased by the joinder of her co-defendant), and a lien for such moneys, interest and costs on her dower interest in the land in question.

Taking all the circumstances into consideration, their Lordships are of opinion and will humbly advise His Majesty (1) that the orders appealed from should be discharged; (2) that the action should be dismissed with costs throughout as against the defendant, Mildred Howard; (3) that on the counterclaim of the last-named defendant there should be a declaration that notwithstanding the entry on the register she is absolutely entitled to the land in question subject to the dower interest therein of the defendant, Mary Jane Sheard, and that the register should be rectified by striking out the entry of the defendant, Mary Jane Sheard, as owner of the absolute fee in the land in question and entering the defendant, Mildred Howard, as owner of such absolute fee subject to the dower interest of the defendant, Mary Jane Sheard, which dower interest should be entered in the Register of Charges, and that the certificate of title granted to the defendant, Mary Jane Sheard, should be delivered to the registrar for cancellation, and that the plaintiffs should pay the costs of the counterclaim; (4) that the defendant, Mary Jane Sheard, should be ordered to repay to the plaintiffs the moneys already paid by the plaintiff, Miller, under the agreement, with interest at 4 per cent. per annum, and the costs of the action (except so far as increased by the joinder of the defendant, Mildred Howard), and that it should be declared that such moneys, interest and costs are a lien on the dower interest of the defendant, Mary Jane Sheard, in the land in question, and that the registrar amend the certificates of title issued to the plaintiffs so as to conform with this report; and (5) that plaintiffs should pay the costs of this appeal.

Appeal allowed.

BERARD v. BRUNEAU.

MAN.

K. B.

Manitoba King's Bench, Galt, J. April 29, 1915.

1. ADVERSE POSSESSION (§ I K—58)—POSSESSION—ADVERSE OCCUPANCY.

Possession follows the title unless there be an actual adverse occupancy.

[*Pride* v. *Rodger*, 27 O.R. 320; Doe d. *Cuthbertson* v. *McGillis*, 2 U.C.C.P. 124, referred to.]

2. ESTOPPEL (§ III G 2—103)—GRANTOR IN DEED—DENYING OWNERSHIP—LOCATEE PRIOR TO CROWN PATENT—SUBSEQUENT PATENT—EFFECT OF.

Estoppel arises against the grantor in a deed or mortgage of land in respect of his covenants for title from denying that he was the owner of the land at the date of the deed or mortgage, although his title at that time was merely that of a locatee prior to the Crown Patent; in such case a subsequent issue of the patent to the grantor or to his personal representative after his decease feeds the estoppel in favour of the grantee or mortgagee.

[*Bolter* v. *Hamilton* 15 U.C.C.P. 125; Doe d. *Irvine* v. *Webster*, 2 U.C.Q.B. 224, followed.]

3. MAXIMS (§ I—1)—PRESUMPTION OF RIGHT AND NOT WRONG—EFFECT GIVEN TO ANYTHING ESTABLISHED FOR SOME TIME.

It is a maxim of the law to give effect to everything that appears to have been established for a considerable course of time and to presume that what has been done was done of right and not of wrong.

[Doe d. *Murphy* v. *Mulholland*, 2 O.S.U.C. 115.]

Statement

ACTION for the recovery of lands.

W. Madeley Crichton and *R. W. McClure*, for the plaintiff.

W. L. McLaws and *E. M. Beaudry*, for the defendant.

Galt, J.

GALT, J.:—The lands in question in this action consist of portions of lot 39, formerly the south half of the south half of section 21 in the settlement of Rat River, in the 5th Township and 4th range east of the principal meridian in Manitoba.

These lands were owned by the Dominion of Canada until March 13, 1914, when a patent was granted to the defendant Wenceslaws Bruneau in his capacity of personal representative of the late Thomas Bruneau. The transactions which form the subject matter of this action all took place prior to this Crown grant.

At the close of the trial a sketch of the land in question was put in with the consent of counsel on both sides as a superfluous exhibit, marked X, and as it sets forth very clearly the subdivisions of the lands in question, I attach it to my judgment for reference.

The south half of the south half of section 21 is expressed by the patent to be otherwise known as lot 39 of the said settlement, which is not covered by any of the waters of the Rat River

MAN.

K. B.

BERARD v. BRUNEAU.

Galt, J.

as shewn upon a map or plan of survey of said settlement approved and confirmed at Ottawa on October 3, 1889, by William Frederick King for the Surveyor-General of Dominion Lands, and of record in the Department of the Interior, containing by admeasurement 158 acres more or less.

At the commencement of the transactions in question one Thomas Bruneau occupied at least the easterly portion of this lot 39, and was more or less in possession of all the remainder of it. He died on February 3, 1896.

On October 23, 1912, the Assistant Secretary of the Department of the Interior wrote a letter to the defendant's solicitors as follows:—

"Replying to your letter of the 8 instant, I am directed to say that there is no evidence on file in the department that Wens Bruneau is entitled to the land described. It forms part of River Lot 39, Rat River Settlement, which was awarded to the late Thomas Bruneau on certain conditions not yet fulfilled. Mr. Wens Bruneau may be a member of the family, this being the basis of his claim, but these facts will require proof and also a conveyance to him of the interests of the others."

From this it would appear that Thomas Bruneau, during his lifetime, had applied for the patent for the whole lot, but, not having complied with the requisite conditions, no patent had yet issued.

The plaintiff derives his title through documents executed by Thomas Bruneau at a time when the latter claimed to be entitled to the whole of the south half of the south half of section 21. The defendant relies upon his patent and upon the Statute of Limitations.

When the defendant obtained his patent and sought to register his title, the plaintiff filed a caveat, and this action is brought to try the rights therein claimed.

Lot 39 may be subdivided for the purposes of this inquiry into four parcels of land: First, the south-easterly 52 acres, shewn on the annexed sketch, and which admittedly belongs to the Bruneau family; secondly, the parcel of land marked on the sketch in red, consisting of 3 chains measured from the north-easterly corner and thence west to the Rat River, thence north to the boundary of the lot, thence east to the place of beginning; thirdly, 6 acres of land in about the middle of the lot and included on three sides by the Rat River; fourthly, 100 acres, or thereabouts, of land to the west of Rat River.

The plaintiff claims (par. 13) the south half of the south-west quarter, and all that part of the south half of the south-east quarter, situate west of the Rat River in section 21, and that part of the northerly three chains of the south half of the south-east quarter lying east of the Rat River in section 21, all in township 5, range 4, east of the principal meridian in Manitoba.

This description includes the second, third and fourth parcels according to my subdivision above mentioned. The deeds which form the plaintiff's chain of title appear to have been prepared by an inexperienced conveyancer, and the descriptions are inaccurate, but the evidence leaves no room to doubt as to the parcels which were being dealt with by the parties. Having regard to the judgments delivered by the Supreme Court of Canada in *Borland* v. *Coote*, 35 S.C.R. 282, I find nothing in any of the descriptions in this case which cannot be cleared up on the principle applied by the Supreme Court.

The portions of land claimed by the plaintiff are all included in a certain deed made by William Charette to the plaintiff, dated December 21, 1905, registered on December 27, 1905.

Charette's title is derived through a conveyance made by Thomas Bruneau to one Gabriel Lafournaise on May 15, 1880, conveying the three chains above mentioned; and through a mortgage executed by Thomas Bruneau in favour of one Elzear Lagimodiere on May 16, 1884, and registered the same day, whereby Bruneau mortgaged the whole of the south half of the south half of the section to Elzear Lagimodiere, excepting the said northerly three chains.

The deed from Thomas Bruneau of the first part to Gabriel Lafournaise of the second part, dated May 15, 1880, was made in pursuance of the Act respecting Short Forms of Indentures. It is written in french. I would translate the description as follows: "All that certain lot or parcel of land situate and lying in the parish of St. Pierre of the Rat River aforesaid, being that north part of the lot lying in section twenty-one (21) in township five (5), in range four (4) east of the principal meridian, owned by the aforesaid party of the first part, described as follows: Starting from the north-east corner of the lot aforesaid, and thence going south a distance of three chains, thence westerly at a right angle to a point where this line strikes the Rat River at its bank, thence

MAN.

K. B.

BERARD v. BRUNEAU.

Galt, J.

at a right angle to the north limit of the aforesaid lot, and finally from this last point to the place of beginning."

The description set out in this deed from Bruneau to Lafournaise is certainly very defective. But it is identified as being "part of the lot lying in section 21 owned by the party of the first part." So far as I can discover from the abstract and documents, Thomas Bruneau never owned or claimed to own any portion of section 21 except the south half of the south half (now known as lot 39).

The land comprised within the three chains has been so occupied and dealt with by the plaintiff's predecessors in title that there is really no doubt of its actual position along the north-east portion of the south half of the south-east quarter of section 21, lying east of the Rat River.

On March 16, 1882, by deed registered March 17, 1882, Gabriel Lafournaise professed to convey to Philibert Ladouroute three chains, but the description was such as to indicate three chains at the north-east corner of section 21. This defect of description was remedied, or attempted to be remedied, by a confirmatory conveyance from Lafournaise to Ladouroute, dated May 7, 1883, registered May 15, 1883, whereby Lafournaise conveys "that most northerly part of the lot of land situate in section 21 in township 5, range 4, east of the principal meridian, owned by one Thomas Bruneau, the grantor of the said party of the first part, and which most northerly part nay be described as follows, that is to say: Beginning at the north-east corner of the said lot, and thence running south three chains, thence west in a straight line to the Rat River, thence north to the northerly limit of the said lot, and thence back to the place of beginning.

On November 7, 1894, by deed registered September 30, 1895, Ladouroute conveyed to William Charette the north half of the south half, and that portion of the northerly three chains of the south half of the south-east quarter lying east of Rat River, section 21, township 5, range 4, east of the principal meridian of the Province of Manitoba, and containing by admeasurement 168 acres, be the same more or less." This description, involved as it is, at least fixes the three chains parcel as being the northerly three chains of the south half of the south-east quarter lying east of the Rat River.

Charette's title to the remaining portion of the land comprised in his deed to the plaintiff is derived through a mortgage made by Thomas Bruneau to one Elzear Lagimodiere, dated May 16, 1884, and registered the same day. The mortgage is made in pursuance of the Act respecting Short Forms of Indentures, and was to secure the sum of $500. The mortgaged lands are described as, all and singular that certain parcel or tract of land and premises situate, lying and being in the parish of St. Pierre, Rat River, in the County of Carillon, in the Province of Manitoba, and better described as being the south half of the south half of section 21 in township 5, range 4, east, lying on the east side of Rat River. This description corresponds exactly with what is now known as lot 30.

Before tracing what took place in connection with this mortgage, a reference must be made to certain other deeds executed by Thomas Bruneau shortly prior to the date of this mortgage. I note also the dates of registration of these documents, as the parties' rights may to some extent depend upon the dates of registration.

On May 27, 1880, Thomas Bruneau executed a mortgage in favour of James Hutchinson for $350, in pursuance of the Act respecting Short Forms of Indentures, and it was registered on May 28, 1880, but not against the lands in question, owing to an error in the description which was not cured until October 14, 1885.

By deed of April 8, 1884, registered October 28, 1884, Thomas Bruneau conveyed the portion of the lands in question to his son Napoleon Bruneau.

By deed dated June 14, 1884, registered November 25, 1884, Thomas Bruneau conveyed to his wife Adelaide Bruneau a certain other portion of the lands in question.

On June 15, 1885, a bill of complaint was filed by James Hutchinson, Malcolm Hutchinson and Jane Hutchinson, executors of the last will and testament of James Hutchinson, the mortgagee above mentioned, against Thomas Bruneau, Napoleon Bruneau and Adelaide Bruneau, claiming rectification of Hutchinson's mortgage; a declaration that the conveyances to Napoleon Bruneau and Adelaide Bruneau respectively were voluntary, fraudulent and void; payment of the mortgage, and in default

MAN.

K. B.

BERARD v. BRUNEAU.

Galt, J.

foreclosure. On October 14, 1885, the plaintiffs in said action obtained judgment rectifying the mortgage, setting aside the two conveyances, and fixing April 14, 1886, as the period for redemption. The mortgage money not having been paid, a final order in said suit was issued on April 16, 1886.

Lagimodiere was not a party to the Hutchinson action. The deed to Napoleon Bruneau was dated April 8, 1884, but was not registered until October 28, 1884. The Lagimodiere mortgage was registered on May 16, 1884, and would thus take priority to the deeds in question. No argument was addressed to me based upon the possibility of any interests outstanding in Napoleon Bruneau or Adelaide Bruneau. I therefore need say nothing further about these two deeds.

Lagimodiere's mortgage having got into arrear, an action was commenced by him on February 17, 1893, against Thomas Bruneau and the executors of James Hutchinson, for the purpose of obtaining payment of the mortgage money, or in case of default foreclosure. On November 8, 1893, Elzear Lagimodiere obtained judgment, and June 7, 1894, was fixed for payment by the defendants into the Imperial Bank at the city of Winnipeg of the sum of $800.25 to the joint credit of the plaintiff and the Registrar of this Court, and in default it was ordered and decreed that the said defendant do stand absolutely debarred and foreclosed of and from all equity of redemption in and to the said premises; and it was further ordered and decreed that the defendant do forthwith deliver to the plaintiff or to whom he may appoint possession of the lands and premises in question in the cause, or such part thereof as the said defendant may be in possession of. The defendants in that action made default in payment of the amount so found due, but no final order of foreclosure was shown to have been taken out. The default is shewn by one of the bank's officials and by the testimony of both Elzear Lagimodiere and his son.

Elzear Lagimodiere was called as a witness before me. He is an old man with failing memory. He states that Thomas Bruneau never repaid the mortgage money. He left the management of his property many years ago to his son William. Some time after the judgment in the foreclosure action against Thomas Bruneau, William Lagimodiere and his father believed that the father was now the owner of the mortgaged premises. They

both went down and took possession of the lands, as they were advised by their solicitor they could. They remained upon the land two or three days. The Bruneau family were living on the south-easterly portion of the property marked in blue on the principal map, ex. 12, and marked in white (52 acres) on the sketch annexed to this judgment.

William Lagimodiere says: "We went to Bruneau's house. Mrs. Bruneau said, 'Are you coming here to put us out?' My father said, 'I am coming here to settle this matter; I want to sell the land.' She said she wanted to buy the part east of the Rat River. Damasse Bruneau said he knew a party who wanted to buy the piece west of the river. The prices were fixed for the part east of the river where Mrs. Bruneau lived. Later on in the day Mr. Charette came and he bought the part west of the river. All this took place in the presence of Mrs. Bruneau, Damasse Bruneau and some other members of the family." This interview took place on April 12, 1898, and on the same day an agreement was drawn up and executed whereby Elzear Lagimodiere agreed to sell to Damasse Bruneau all that part of the southerly 17 chains of the south half of the south-east quarter of section 21 situate east of Rat River in township 5, range 4, east of the principal meridian in the Province of Manitoba, and also that fraction of the northerly three chains of said south half of the south-east quarter of said section 21 sold by deceased Thomas Bruneau to Gabriel Lafournaise by a deed executed on May 15, 1886. This last date is a manifest error, and should be 1880. (See affidavit of execution and the deed to Lafournaise referred to.) The fraction described in this agreement must be a continuation of the original parcel comprised in the three chains, between the latter and the river. I mark it on the annexed sketch with a black line. No evidence was adduced before me as to the identity or the usefulness of this minute fraction of land, which really seems to form part of the original three chains parcel. It may be that Wensceslaws desired to get a portion or the whole of the 6-acre fraction. But there is no evidence that he did; and this latter fraction falls within the description of lands conveyed on the very same day by Lagimodiere to Charette.

The conveyance to Charette was duly registered, whereas the agreement was not.

MAN.

K. B.

BERARD v. BRUNEAU.

Galt, J.

This agreement was not carried out, but later on Damasse Bruneau agreed with his brother Wenceslaws that the latter might become purchaser instead. This arrangement was assented to, and on January 5, 1900, Elzear Lagimodiere executed an agreement of sale to Wenceslaws of the same land mentioned in the agreement with Damasse. But this agreement was not registered. I therefore take it that Charette obtained the small fraction.

On the same day on which Elzear Lagimodiere and his son visited the Bruneau's, the former agreed to sell to William Charette the south half of the south-west quarter, and all that part of the south half of the south-east quarter situate west of the Rat River of section 21, township 5, range 4, east of the principal meridian, Province of Manitoba. This deed, like all of the others, is drawn in pursuance of the Act respecting Short Forms of Indentures, and was registered on May 26, 1904. The description, so far as it relates to the south half of the south-west quarter, covers one-half of the 6-acre plot, and, so far as it relates to the south half of the south-east quarter covers the other half of said plot.

William Charette was already the owner of the three chains parcel lying immediately to the north of the Bruneau's 52 acres.

By deed dated December 21, 1905, registered December 27, 1905, William Charette conveyed all his property above mentioned to the plaintiff, who has been in possession of it ever since without any interruption by the defendant or by anyone else.

It might, of course, be, and it was contended on behalf of the defendant, that the plaintiff and one or more of his predecessors in title were barred by the Statute of Limitations as against Thomas Bruneau or his representatives: see *Pride* v. *Rodger*, 27 O.R. 320; but I see no ground for the application of the statute in this case.

From the earliest times it has been held that possession follows the title unless there be an actual adverse occupancy: see *Doe d. Cuthbertson* v. *McGillis*, 2 U.C.C.P. 124.

The evidence leaves no room to doubt that at no time since the conveyance by Thomas Bruneau to Lafournaise of the three chains in question was the defendant or his father in actual adverse possession of either the three chains or of any other portion of the lands claimed by the plaintiff herein for such a time as would bar the plaintiff or any of his predecessors in title.

The plaintiff relies for confirmation of his rights upon title by estoppel based upon the covenants in the deed from Thomas Bruneau to Gabriel Lafournaise, and in the mortgage from Thomas Bruneau to Elzear Lagimodiere and the subsequent Crown grant. This argument is supported by a long line of authorities going abck to *Doe d. Christmas* v. *Oliver*, 10 B.& C. 181.

It was argued for the defendant that this doctrine could have no place as regards deeds and mortgages executed prior to the issue of the Crown grant. That this argument cannot prevail appears from one of the earliest and most authoritative decisions upon the subject, namely, *Doe d. Irvine* v. *Webster*, 2 U.C.Q.B. 224, the headnote of which is as follows:—

"Where the nominee of the Crown before any patent issued for the lands on which he was located, by deed poll, conveyed away the lands and all his interest in them; and afterwards the patent was issued in his name, and he then made a second deed to another person; held that the second grantee was estopped by the first deed from claiming the land."

McLean v. *Laidlaw*, 2 U.C.Q.B. 222, is another decision along the same lines. Both of these cases were approved and followed in *Bolter* v. *Hamilton*, 15 U.C.C.P. 125, and have never been dissented from.

In addition to this line of authorities we have the law expressly enacted in the Estoppel Act, R.S.M. 1913, ch. 64, the second section of which provides that

"Covenants for title in any deed of conveyance, deed of mortgage or deed of lease made since the passing of the first Act respecting short forms of indentures or hereafter made, whether such deed be made in pursuance of the Act respecting short forms of indentures or otherwise, shall operate as an estoppel against the covenantor and all persons claiming title under him."

This certainly covers the title to the three chains above mentioned.

Then sec. 3 provides:—

"Each and every deed of conveyance and deed of mortgage made since the fifth day of March in the year 1889, affecting lands for which the patent of the Dominion Government has or had not been issued, in cases where such patent is required, and expressed or purporting to be in pursuance of the Act respecting short forms of indentures, containing all or any of the following covenants on the part of the grantor (or mortgagor, as the case may be), contained in the first column of the first or second schedules to "The Short Forms Act," namely, those numbered 2, 3, 4, 5 and 7 in the said first schedule, and those numbered 5, 6, 7, 8 and 10 in the said second schedule, respectively, shall, in the event of the grantor (or mortgagor, as the case may be), not being actually seized of the legal estate in fee simple of the said lands at the time of the execution of the said deed on account of such patent not

MAN.

K. B.

BERARD v. BRUNEAU.

Galt, J.

having been issued, and subsequently becoming through the issue of such patent seized of said legal estate in fee simple, operate to vest the said legal estate, in fee simple, in the purchaser or mortgagee, as the case may be, or his representatives, heirs or assigns respectively."

The mortgage from Thomas Bruneau to Lagimodiere was dated earlier than the date mentioned in sec. 3 of the Estoppel Act, and Mr. Crichton relied upon this as excluding the application of the statute to the lands included in the mortgage. But, as Mr. McLaws replies, the provisions of sec. 3 have always been the law.

The deeds relied upon by the plaintiff were all made in pursuance of the Act respecting Short Forms of Indentures, and contain the usual covenants.

Finally, Mr. Crichton points out that when the defendant applied for the Crown grant, the plaintiff also communicated with the Department at Ottawa, and set forth his claims to the land, and that the Government, after considering the claims of both parties, awarded the land to the defendant. The learned counsel argued that under such cases as *Bolton* v. *Jeffrey*, 2 O.S. 702, and *Farmer* v. *Livingstone*, 8 S.C.R. 157, it must be assumed that the Crown carefully considered the rights of the different applicants and its decision must be treated as a final judgment in favour of the defendant.

There is more than one answer to this argument. In the first place, the Crown has made the grant expressly to the defendant in his representative capacity, and it doubtless assumed that the defendant would protect the title to any portions of the land granted by Thomas Bruneau, the original locator, for valuable consideration in favour of *bonâ fide* purchasers. And secondly, it is recognized in *Pride* v. *Rodger*, 27 O.R. 320, that even in the case of unpatented lands declaratory relief may, in a suitable case, be given which will work practically the result of a partition of the property subject to the Crown being willing to act upon the judgment of the Court.

Our own King's Bench Act (R.S.M. 1913, ch. 46), sec. 13. (g) and (h), expressly gives the Court of King's Bench jurisdiction to decree the issue of letters patent from the Crown to rightful claimants, and to decree the repeal and making void of letters patent issued erroneously or by mistake or improvidently or through fraud.

I am therefore of opinion that Thomas Bruneau and his representatives are estopped by the covenants in his deed and mortgage from denying that he was the owner of the lands at the date of his deeds; and that the legal estate conveyed by the Crown to the defendant fed the estoppel in favour of the plaintiff. But, it is argued, Lagimodiere had no right to convey the mortgaged premises to Charette because he had no final order of foreclosure.

The first objection is not entitled to prevail, for the following reasons: Firstly, ever since April, 1898, the plaintiff and his predecessors in title have been in undisputed possession of the property. Secondly, the mortgage contained an express covenant entitling the mortgagee to possession on default by the mortgagor and that the foreclosure decree obtained by Elzear Lagimodiere on November 8, 1893, gives him the right to possession. He actually took possession of at least a portion of the property covered by his mortgage in April, 1898. In *Kinsman* v. *Rouse*, 17 Ch.D. 104, Jessel, M.R., held that

possession by a mortgagee of any part of the lands comprised in the mortgage operated as possession of the whole.

The mortgage also contained a power of sale expressed to be on giving one month's notice in writing. It is true that no evidence was forthcoming to shew whether or not such a notice had been given. Still the mortgagee was in possession. He had the power to sell, and he did sell on April 18, 1898, to the plaintiff's predecessor in title. It is argued on behalf of the defendant that there is no ground to suppose that Lagimodiere was selling under his power of sale, and no evidence of fulfilling the condition as to notice in writing.

The first objection is met by the case of *Kelly* v. *Imperial* 11 S.C.R. 516, which shews that when a man makes a sale of his property the purchaser is entitled to rely upon any power or authority which the vendor legally possessed in order to pass the title. In that case the foreclosure proceedings were found to have been defective. In the present case no final order of foreclosure was obtained.

As regards the second objection that no notice in writing of exercising the power of sale was shewn, ought I not, if necessary, to presume that the requisite notice was given? It is laid down

MAN.

K. B.

BERARD v. BRUNEAU.

Galt, J.

in Broom's Legal Maxims, 7th ed., pp. 720, 721, when dealing with the maxim, *Omnia praesumuntur rite et solenniter esse acta*, "It is a maxim of the law of England to give effect to everything which appears to have been established for a considerable course of time, and to presume that what has been done was done of right, and not of wrong. It is a most convenient thing that every supposition, not wholly irrational, should be made in favour of long-continued enjoyment. This maxim applies as well where matters are in contest between private persons as to matters public in their nature." This principle was applied at a very early stage of our Canadian jurisprudence in *Doe d. Murphy* v. *Mulholland*, 2 O.S. 115. Lastly, the same result would follow if Thomas Bruneau, after the judgment of foreclosure, had executed a release of his equity of redemption, in lieu of putting Lagimodiere to the expense of obtaining a final order: see 21 Halsbury, Laws of England, 295. Such a release after so long a length of undisputed possession by the plaintiff's predecessors in title might well be presumed.

The defendant having repudiated the obligations entered into by his father, the original locatee, I do not think the plaintiff was under any obligation, before action, to tender any proportion of the fees paid by the defendant to the Dominion Government for the patent. The plaintiff is not invoking the aid of the equitable jurisdiction of the Court, but only asking for his legal rights. Under such circumstances such cases as *Ruddell* v. *Georgeson*, 9 M.R. 43, have no application.

There will be judgment in favour of the plaintiff with costs, including the costs of and incidental to the caveat and the petition thereupon.

The costs will be taxed without reference to the statutory limit.

Judgment for plaintiff.

ALTA.

S. C.

PARKER v. GRANT SMITH & CO.

Alberta Supreme Court, Hyndman, J. March 1, 1915.

1. MASTER AND SERVANT (§ II A—60)—STRUCTURAL WORKERS—SAFETY AS TO APPLIANCES—NEGLIGENCE.

Structural steel contractors in the erection of a building are properly found guilty of negligence in not providing proper guys or cinch lines or both, for the safety of their workmen on the structure.

Statement

ACTION for compensation for injuries.

ALTA.

S. C.

PARKER v. GRANT SMITH & Co.

M. B. Peacock, for the plaintiff.

C. T. Jones, for the defendant.

HYNDMAN, J.:—After carefully considering the evidence of the witnesses for the plaintiff on the question of negligence (defendants not having tendered any evidence on this point), I am bound to find that the defendants are guilty of negligence or carelessness in not providing proper guys or cinch lines, or both. The evidence is all to the effect that no unusual wind prevailed on this occasion. I think it was the duty of the defendants to see that every precaution was taken to insure the safety of the workmen on the structure, and if they had followed out their usual practice of using cinch straps or lines, in connection with some of the columns which collapsed, I do not think the accident would have happened. The plaintiff was very severely injured, and in fact has been disfigured for life, and it is very doubtful if he will ever recover his proper eyesight. I think $3,000 is fair and reasonable compensation for him under all the circumstances.

Hyndman, J.

There will, therefore, be judgment for the plaintiff for $3,000 and costs.

Judgment for the plaintiff.

CHAPIN & CO. v. MATHEWS.

ALTA.

S. C.

Alberta Supreme Court, Hyndman, J. January 14, 1915.

1. DAMAGES (§ III A—83)—MEASURE OF—SALE OF MACHINERY—DEFECTS—REPAIRS.

Special damages resulting because of the buyer of machinery not being able to do certain work therewith because of defects requiring repair are not recoverable where the seller neither expressly nor impliedly contracted to be bound for such consequences and they did not naturally flow from the agreement of sale.

2. STATUTES (§ II D—125)—RETROACTIVENESS.

The Farm Machinery Act, Alta., is not retroactive in its operation.

[*Benson* v. *International Harvester Co.*, 16 D.L.R. 350, followed.]

Statement

ACTION for the price of machinery.

S. H. Clarke, K.C., for the plaintiff.

James Muir, K.C., for the defendant.

Hyndman, J.

HYNDMAN, J.:—There will be judgment for the plaintiff for the sum of $602.69, being the amount of his claim less $14.50, the price of the rings on piston which I am not altogether satis-

ALTA.

S. C.

CHAPIN & CO. v. MATHEWS.

Hyndman, J.

fied were supplied, and less $109, which I allow under the amendment at the trial as the price at the factory of the defective crank shaft. The judgment will bear interest at the rate of 5 per cent. per annum from November 23, 1911.

With reference to the defendant's counterclaim, after a careful perusal of the exhibits and authorities cited, I have come to the conclusion that it ought to be dismissed. In my opinion, the damages claimed were not in any way contemplated by the parties at the time of entering into the agreement nor do they naturally flow from the agreement. There is no evidence that the machinery in question was purchased so far as any right of the plaintiffs were concerned with the object of plowing any certain or certified piece of land, but was sold in the usual and the ordinary course of business. The damages are to my mind, not the natural and probable result of a breach of the agreement for the reason that the plaintiffs never at any time expressly or impliedly contracted to be bound for such consequences. The defendant Mathews is a very intelligent man and has not in any way been misled or imposed upon nor taken advantage of as to the form of the agreement. Mr. Muir asked me to find that the agreement was unreasonable under the powers conferred by the Farm Machinery Act.

I agree with the decision of Walsh, J., in *Benson* v. *The International Harvester Co.*, 16 D.L.R. 350, that the Act is not retroactive, but even if I were of the opposite view, I still do not think this a proper case for the application of its provisions. The remedy of the defendants, therefore, must be as agreed upon between the plaintiffs and himself as appears by the agreement of May 13, 1910, and as he did not see fit to avail himself of the provisions of the agreement, I do not see how the Court can help him at this stage.

The counterclaim is, therefore, dismissed.

The plaintiff shall have his costs of claim and counterclaim.

Judgment for the plaintiff.

ZARR v. CONFEDERATION LIFE.

SASK.

S. C.

Saskatchewan Supreme Court, Haultain, C.J., Brown and McKay, JJ. March 20, 1915.

1. LANDLORD AND TENANT (§ III D 3—110)—DISTRESS—ILLEGAL—ACTION FOR—AGAINST BAILIFF—NOT AGAINST LANDLORD UNLESS RATIFIED BY HIM.

An action for illegal distress should be brought against the bailiff who committed the act complained of and not against the landlord, unless it be shewn that the latter authorized the wrongful act or sanctioned and ratified it after it came to his knowledge, or unless he chooses to take upon himself without inquiry the risk of any irregularity which the bailiff may have committed and to adopt all his acts.

[*Hascler* v. *LeMoyne*, 5 C.B.N.S. 530, 28 L.J.C.P. 103, referred to.]

Statement

APPEAL from a judgment in an action on a distress warrant.

E. B. Jonah, for appellant.

J. N. Fish, for respondent.

The judgment of the Court was delivered by

Haultain, C.J.

HAULTAIN, C.J.:—Acting under the power of distress conferred on it by a certain mortgage, the defendant issued a warrant of distress to one R. J. Harwood in the following form:—

DISTRESS WARRANT.

To R. J. Harwood, our bailiff in this behalf.

We, Confederation Life Association, do hereby authorize and require you to distrain the goods and chattels of Karolina Zarr, the registered owner of the aftermentioned lands, in and upon the lands and premises situate, lying and being the north-east quarter of section thirty-four (34) in township fifteen (15), and range thirteen (13), west of the Second Meridian, in the Province of Saskatchewan, for the sum of one hundred and eighty (180) dollars, being interest and costs due to us under a mortgage made by John Livingstone McKillop as mortgagor to us upon the said lands and premises, together with your costs, charges and expenses attending such distraining and to proceed for the recovery of the same as the law directs, but you are expressly prohibited from distraining any property other than that of the said Karolina Zarr and from distraining any property not liable to seizure under execution. Dated at Regina, this 4th day of February, A.D. 1914.

CONFEDERATION LIFE ASSOCIATION, *per* "W. J. Walton," cashier and agent, Regina.

Karolina Zarr mentioned in the warrant of distress had purchased the land mentioned from McKillop, the original mortgagee, and had become the registered owner of the land by transfer from McKillop subject to defendant's mortgage. Harwood handed the warrant to one Peter Cooper for execution and some time in April, 1914, Cooper seized two horses belonging to the plaintiff which were on the plaintiff's farm, the north half of

SASK.

S.C.

ZARR v. CONFEDERATION LIFE.

Haultain, C.J.

sec. 5 in township 6, r. 12, west of the 2nd Meridian. These animals were held under seizure for some time and were subsequently released on the instructions of the defendant. Later on the plaintiff brought this action against the defendant and was awarded $440 special damages and $60 general damages by the learned District Court Judge who tried the case. The defendant now appeals. The evidence shews that the so-called distress was made without the authority or knowledge of the defendant. These two horses were the property of the plaintiff and were seized on his farm. As soon as these facts came to the knowledge of the defendant it ordered the horses to be released to the plaintiff. On these facts the defendant is not in my opinion liable for the illegal seizure of the plaintiff's goods. The bailiff was only authorized to distrain on the goods of Karolina Zarr, on the N.W. ¼ of 24-15-13-W. 2nd. The seizure of the goods of another person on other property was absolutely unauthorized and illegal.

An action for illegal distress should be brought against the bailiff who committed the act complained of and not against the landlord unless it be shewn that the latter authorized the wrongful act or sanctioned and ratified it after it came to his knowledge or unless he chooses to take upon himself without enquiry the risk of any irregularity which the bailiff may have committed and to adopt all his acts. 11 Halsbury, 204.

Lewis v. *Read* (1845), 13 M. & W. 834; *Freeman* v. *Rosher* (1849), 13 Q.B. 780, 116 E.R. 1462, 1465; *Haseler* v. *LeMoyne* (1868), 5 C.B.N.S. 530 at 535, 28 L.J.C.P. 103 at 104.

In the last cited case Cockburn C.J. as reported in 28 L.J. C.P. at page 104 made the following observations:—

Where I send a man to distrain and he distrains something else than I authorized him to distrain, I am not liable. But if he does distrain on the things I authorized him to distrain it is then my business to see that he does what is requisite to make it a good distraint of such things and if I do not see to it I am answerable for any irregularity he may commit.

There is a great difference as regards the liability of a principal between the agent doing an authorized act in an illegal manner and the agent doing an act which was not authorized at all. In the first case the principal is liable, in the second, he is not liable.

The judgment, therefore, must be set aside and judgment dismissing the action with costs entered for the defendant. The plaintiff must also pay the defendant his costs of appeal.

Appeal allowed.

CHURCHILL v. McRAE.

SASK.

S. C.

Saskatchewan Supreme Court, Haultain, C.J., Brown, Elwood, and McKay, JJ. March 20, 1915.

1. JUDGMENT (§ II A—60)—CONTRACT OF SALE—LANDS AND CHATTELS INCLUDED—SALE FOR LUMP SUM—JUDGMENT FOR POSSESSION—NO CLAIM FOR RELIEF REGARDING CHATTELS—SECOND ACTION FOR CHATTELS—RES JUDICATA.

Where a contract of sale of lands included also certain chattels and both land and chattels were sold for a lump sum without its appearing how much was to be paid for the chattels, the vendor who recovers judgment for possession of the land in an action to forfeit the payments made and to foreclose the purchaser's interest in the land, and who does not claim in such action any relief as regards the chattels, will be barred by the judgment in such action from claiming the chattels in a second action, the matter having become *res judicata*.

2. JUDGMENT (§ II A—60)—RES JUDICATA—APPLICATION—POINTS ACTUALLY DECIDED UPON—POINTS PROPERLY BELONGING TO SUBJECT OF LITIGATION.

The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[*Henderson* v. *Henderson*, 3 Hare 114, applied.]

Statement

APPEAL from a judgment of Newlands, J.

J. F. Frame, K.C., for the appellant.

J. C. Martin, for the defendant Cowie.

P. H. Anderson, for the defendant McRae.

The judgment of the Court was delivered by

Brown, J.

BROWN, J.:—This is an appeal from a judgment of my brother Newlands.

The plaintiff, by agreement in writing, dated April 1, 1911, agreed to sell to one Storey and the defendant Cowie and their assigns, the North-East ¼—6—and the South-West ¼—7—18—15—W2nd, for the price of $8,000, payable $1,200 at the time of the execution of the contract and the balance in instalments at stated times therein mentioned.

The agreement was in the usual form of such agreements, with a provision that upon payment of the purchase price the defendants were to get title.

There were situate on this land at the time of the sale a number of horses, cattle, pigs and agricultural implements, all of which were included in the agreement under the following

SASK.

S. C.

CHURCHILL v. MCRAE.

Brown, J.

provision: "It is understood and agreed by and between the parties hereto that the consideration hereinbefore mentioned includes also the sale to the purchasers" (here follows a statement of the chattels).

The purchasers, pursuant to the agreement, went into occupation of the premises and took possession and control of the chattels and from time to time made payments on account of the purchase price. By deed of assignment dated September 16, 1912, the purchasers assigned all their interest in the agreement and in the land and chattels to the defendants. The defendants got in default with their payments, and on February 6, 1914, the plaintiff brought an action for the balance then owing under the contract, viz., $4,135.03.

In his statement of claim in said action the plaintiff recites the agreement in question, describing the land and the price and terms of payment, but makes no reference whatever to the chattels. He sets up default and asks for payment of the balance due. In default of such payment he asks that the agreement be cancelled, that he be given possession of the land and that the payments made on account of the purchase price be forfeited to him. There is no reference whatever in the statement of claim to any of the chattels, the claim being framed as if the agreement dealt with the land only.

The defendants did not defend the action and the usual order *nisi* was made and eventually a final order was taken out by which the agreement was cancelled, the interest of the defendants in the land in question was foreclosed, all monies paid under the agreement were forfeited and the defendants were ordered to deliver up possession of the premises. The defendants, pursuant to said order, gave up possession of the premises, but they refused on demand to give up possession of the chattels. The plaintiff brings this action for recovery of the chattels and the defendants *inter alia* raise the defence of "*res judicata.*"

I assume for the purpose of the case that the agreement in question, having reference to both the land and the chattels, is an entire contract as contended for by counsel for the plaintiff and that, under the agreement the defendants could not be re-

SASK.

S. C.

CHURCHILL v. McRAE.

Brown, J.

garded as having the absolute title or ownership of the chattels until the purchase price was paid.

There is nothing in the agreement to indicate how much of the $8,000 was for land or how much for chattels and any payment that was made must be held to have been made on the purchase price of both the land and the chattels.

The defendants, under and by virtue of the agreement and the payments made on account thereof, secured an interest in the land and the chattels to the extent of the payments made and secured the right to absolute title of same upon payment of the balance of the purchase price. Counsel for the plaintiff contends that any rights or interests which the defendants had in the chattels were lost when the agreement was cancelled. I cannot agree with that contention. The defendants secured an interest in the chattels under the agreement and by virtue of their payments, which the mere cancellation of the agreement could not destroy, and especially so in view of the fact that in the action in which the cancellation order was obtained, no mention or suggestion was made that the agreement had anything to do with these chattels.

If the plaintiff had wanted recovery of the chattels and cancellation of the defendants' interest in them, he should have asked for same in his original action and, had he asked for same, it is very probable the defendants would have had something to say. Not having asked for this relief in that action he cannot get it now. The matter is *res judicata*.

In this connection I might quote from the Vice-Chancellor in the decision of *Henderson* v. *Henderson*, 3 Hare, p. 114, where he says:—

> I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but

SASK.

S. C.

CHURCHILL v. MCRAE.

Brown, J.

to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

See also *Serrao* v. *Noel*, 15 Q.B.D. p. 549.

In my opinion, therefore, the appeal should be dismissed with costs.

Appeal dismissed.

ALTA.

S. C.

MUNICIPALITY OF McLEAN v. THE SOUTHERN ALBERTA LAND CO.

Alberta Supreme Court, Harvey, J. January 5, 1915.

1. TAXES (§ I E—45)—MUNICIPAL TAXATION—OCCUPANTS OF GOVERNMENT LANDS.

Lands specifically assigned to a land company under its contract with the Government for the purchase of Dominion Crown lands are subject to taxation of the company's interest therein as an "occupant" under the Rural Municipalities Act, Alta, although the ownership when acquired is to be subject to certain conditions imposed by the Irrigation Act.

Statement

ACTION for taxes.

A. E. Dunlop, for plaintiff.

J. C. Rand, for defendant.

Harvey, C.J.

HARVEY, C.J.:—The plaintiff's claim is for certain taxes assessed against the defendant as occupant of certain lands. The defendant is the purchaser from the Government of Canada of these and other lands by virtue of a certain agreement of purchase assigned to it and certain orders in council confirming the assignment and substituting certain other lands for part of the lands in the original agreement.

The agreement calls only for some three hundred and eighty thousand acres and it is admitted that there is available to satisfy the purchaser in the lands reserved, over four hundred and twelve thousand acres.

It appears that when the substitution was made, a certain area was set aside out of which the remainder to which the defendant is entitled is to be taken. The lands in question do not come within that area, but are definitely specified in the order in council. No question is raised as to any of the said lands being unavailable and it would appear therefore that the defendant is entitled to become the owner of them upon compli-

ALTA.

S. C.

MUNICIPALITY OF MCLEAN v. THE SOUTHERN ALBERTA LAND CO.

Harvey, C.J.

ance with the terms of the purchase agreement. The fact that the ownership when acquired is to be subject to certain conditions imposed by the Irrigation Act does not appear to me to affect the question at issue. It is well settled that the interest of a person in Crown lands may be taxed though that interest may be no more than that of a lessee. It is also perfectly clear by the terms of the Rural Municipalities Act that it is the intention to tax such interests and the defendant comes clearly within the definition of "Occupant" in the Act. I see no grounds therefore upon which it can escape liability, and there will be judgment for the plaintiff for the amount claimed with costs.

Judgment for the plaintiff.

Re FALSE CREEK RECLAMATION ACT.

B. C.

C. A.

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

1. ARBITRATION (§ III—17)—AWARD—ADVANTAGES ATTACHING TO LAND—WHAT ARE—FORESHORE—RIGHT OF ACCESS TO SEA—POWER OF ARBITRATOR—SETTING ASIDE AWARD.

An arbitrator is not entitled to allow in his award in expropriation proceedings, for rights or interests which do not attach to the lands and which cannot be acquired as being advantages that attach to the lands; consequently if the expropriating municipality had obtained grants from the Crown to the foreshore so that a strip of foreshore under such grant intervened between the sea and the claimants' properties, compensation as for a right of access to the sea cannot be allowed such proprietors as if they had direct littoral or foreshore rights, nor can the arbitrator properly consider as a potential value attached to the property, the intention manifested by the municipality before conceding to a railway company rights along its foreshore, to make foreshore grants or leases to adjoining owners so as to enable them to enjoy the right of access to the sea.

[*Re False Creek Arbitration*, 8 D.L.R. 422, 17 B.C.R. 282; *R.* v. *Bradburn*, 14 Can. Exch. 419; *Cedars Rapids* v. *Lacoste*, 16 D.L.R. 168, referred to.]

Statement

APPEAL from an order of Morrison, J., refusing to set aside an award.

Douglas Armour and *J. G. Hay*, for appellants.

Sir Charles Hibbert Tupper, K.C., and *Housser*, for respondents.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—False Creek is an arm of the sea reaching from English Bay into the municipality of the City of Vancouver. By an Act of the Provincial Legislature the muni-

B. C.

C. A.

RE FALSE CREEK RECLAMATION ACT.

Macdonald, C.J.A.

cipality was given power to reclaim portions of its bed and shores, and as incidental thereto to purchase and expropriate certain lands abutting on the arm including the lots which are now in question. The property of the Crown in right of both the Dominion and the Province in the bed and shores of the arm adjacent to these lots was, by authority of various statutes, conveyed to the municipality, to enable it (*inter alia*) to carry out with the Canadian Northern Railway Co. and the Canadian Northern Pacific Railway Co. an agreement respecting railway terminals. Having failed to agree on the price to be paid for the said lots, arbitration was resorted to in pursuance of powers given to the municipality by one of the statutes aforesaid. Mr. Frederick Buscombe was agreed upon as sole arbitrator, and it was further agreed by counsel for each of the lot owners that the evidence with respect to each owner's claim should not be taken separately, but the whole evidence should, to save expense, be taken at once and applied to the different claims as applicable. During the pendency of these proceedings a question of law arose upon which counsel for the municipality desired the arbitrator to state a case for the opinion of the Court, but before the case was stated counsel for all parties agreed upon the point of law and delivered to the arbitrator a letter embodying a statement of it as agreed upon. The question of law had to do with what was called the riparian, but more correctly the littoral rights of the lot owners. The question of law arose by reason of the lot owners' leading evidence to shew that owners of lots abutting on the sea or other navigable waters in the province had generally been recognized by the Crown as having the first equity to acquire the foreshore in front of their lots, and also that there had theretofore been negotiations between the lot owners looking to joint action for the reclamation and improvement of False Creek east of the bridge, being the part of the arm in front of their lots, and it appears to have been contended on their behalf that these were matters which the arbitrator should take into account. This contention, counsel for the municipality opposed, and in the letter above referred to insisted

that the riparian rights of the owners of the various lots in question did not in September, 1912 (the date of notice to treat) include any right to build, dredge or construct any buildings or works as wharves, slips or otherwise below the high water mark.

We want to be perfectly clear that whatever negotiations there were between the owners of False Creek east of the Main St. bridge looking to joint action for reclamation and improvement of False Creek east of the bridge did not as a matter of law confer upon the owners any further or other rights than those they originally had as owners of the lots abutting on the creek.

In this statement of the law, counsel for the owners agreed, and this mode of settling the question of law was acquiesced in by the arbitrator, who then proceeded to make his award.

The appellants moved in the Court below to set the award aside on grounds which may be shortly stated as follows:—

(1) That the arbitrator assumed to adjust the taxes between the parties—a subject not within the submission.

(2) That he exceeded the submission in awarding interest on the sums awarded as compensation, and also in adjusting income derived from the property for the period between the dates of the notices to treat and the date of the award.

(3) That he awarded to himself fees greatly in excess of those to which he was entitled under the Arbitration Act, there being no agreement that he should receive higher fees; and

(4) That he ignored the said statement of the law and included within the boundaries of the lots parts of the foreshore which was not within their boundaries.

The learned Judge whose order is appealed from overruled all these grounds except those relating to taxes, income and fees, and with respect to these items remitted the award to the arbitrator for reconsideration. The defendants contend that the award should not have been remitted, but should have been set aside not only on the grounds which induced the learned Judge to remit it, but on all the grounds above stated.

As to the taxes and income, it is I think sufficient to say that the affidavits filed on the motion below shew that counsel agreed that taxes and income should be adjusted by the parties between themselves. There appears, therefore, to be no reason why the arbitrator should have meddled with them. The fees which the arbitrator awarded to himself are admittedly greatly in excess of those allowed by statute, and as there was no agreement that he should receive higher fees the learned Judge was, I think, right in his conclusion that the arbitrator was in error. It remains to consider the other grounds of appeal which were overruled. I think the arbitrator was in error in allowing interest. There is no statutory or other authority in law for doing so in a

B. C.

C. A.

RE FALSE CREEK RECLAMATION ACT.

Macdonald, C.J.A.

case like this one, nor did the parties agree to interest being awarded.

The remaining question is that raised in the fourth and last ground of appeal; it is based on this paragraph in the award:—

I do not attach much importance to the variation in depth of the lots on the south side of the bridge for the agreement between the city and the owner of lots 1, 2 and 3 in connection with the widening of Main St. by which he was given a quit claim of 120 ft. in depth, practically fixed the depth of this tier of lots at the same line, and there can be little, if any, doubt that the owner of lots 5 and 6 would have made with the city an agreement upon terms no less favourable than this neighbour, the owner of lots 1, 2 and 3 had he been prepared to do so, and all these lots are assessed on the same basis by the city.

As I understand the situation with which the arbitrator was dealing it was this, the municipality took some 14 ft. from the Main St. frontage of lots 1, 2 and 3, and presumably of the other lots in this "tier" for the purpose of widening the street, and gave the owner of lots 1, 2, and 3 a quit claim deed to sufficient of the foreshore to give his lots a depth including this foreshore of 120 ft., presumably their original depth. The arbitrator appears to have thought that because in his opinion the other lot owners might have obtained similar concessions had they asked for them, they were entitled to have their lots valued on the basis of similar concessions though they had never obtained them.

He appears to have ignored the real boundaries other than those of lots 1, 2 and 3, and to have given compensation in respect of them as though they had a depth of 120 ft. including foreshore, which they, to his knowledge, had not. In doing this he has gone beyond the submission, and has fallen into error which must be corrected either by setting aside the award, or by remitting it for reconsideration with instructions to him to confine himself to the real boundaries.

In what I have just said I am guided entirely by what the arbitrator has himself said, or what are necessary implications from what he has said in the paragraph above quoted. Even if I were permitted to look at it we have not before us the whole evidence taken before him. I must accept the facts as stated by the arbitrator where it was open to him to decide what the facts

were. I must, therefore, take it that the owner of lots 1, 2 and 3 acquired some right, proprietary or otherwise, in the foreshore which the city quitted claim to him beyond the interest which he originally had in that foreshore, and beyond the interest which the other lot owners had in the absence of like deeds.

There are, in my opinion, two objections to the arbitrator's conduct with respect to this lengthening of the lots. He has ignored or misunderstood the law as stated in the letter. If the owner of lots 1, 2 and 3 had a proprietary interest, or an interest beyond that which he originally had before the city's quit claim deed was obtained, then in recognizing similar interests in other lot owners which they did not possess, he was violating what counsel had agreed should be the limits of the lot owner's rights. Apart from this, and independently of the letter, he was assuming as being within the boundaries of the lots other than 1, 2 and 3, lands, or interests in lands, which were without their boundaries.

The power given to the Court by the Arbitration Act to remit an award instead of setting it aside was intended to remedy a hardship upon parties to arbitrations which theretofore arose from the want of such power. It is a serious matter to overturn all the costly proceedings of an arbitration if it can, in justice to all parties, be avoided. In this case the error lastly discussed does not affect lots 1, 2 and 3, but only the balance or some of the "tier" of lots referred to by the arbitrator. The error is one which may be easily corrected. As to the error in awarding interest and awarding himself excessive fees, these manifestly can be very easily corrected. The authorities indicate that awards should now not be set aside if remitting them to the arbitrator would appear to the Court to meet the justice of the case.

Counsel for the appellants very properly said, during the argument, that dishonesty could not fairly be imputed to the arbitrator. The submission was that the arbitrator had been guilty of judicial misconduct, but they did not go beyond that and suggest a want of *bona fides*. In these circumstances I think I should be violating sound principles controlling the exercise of judicial discretion if I were to set the award aside rather than remit it to the arbitrator.

B. C.

C. A.

RE FALSE CREEK RECLAMATION ACT.

Irving, J.A.

I would, therefore, sustain the order below, but with the additional instruction to the arbitrator to correct the errors respecting interest and boundaries, and to make his award in the light of what I have said concerning them.

The appellants should have the costs of the appeal.

IRVING, J.A.:—As a rule awards ought not to be set aside except on very strong grounds. The parties having selected their tribunal it is highly undesirable that the Courts should do anything to prevent the decision from being final unless for very strong reasons. In *False Creek Arbitration* (1912), 8 D.L.R. 422 at 426, 17 B.C.R. 282 at 290, I dealt with this at some length. But nevertheless I am satisfied that this award cannot stand. There are, in my opinion, many serious errors in it. I agree with the learned Judge that the arbitrator's fees are not authorized. That error could be cured by remitting it back. A more serious error is that the arbitrator has made a mistake as to the size of the lots, and as to rights which pass with them, and has, therefore, acted *ultra vires*. Further, I think the arbitrator has misdirected himself as to the law relating to the valuation, and that this appears on the face of the award. The principle of compensation under statutory powers is that the owner should receive the market value of his land, that is to say, he is compelled to exchange his lands as they stood before the scheme was authorized—not its value to the taker with the assurance that the property is wanted for an authorized purpose. In fixing that compensation any and every element of value which the lands possess may be taken into consideration in so far as it increases the value, to the owner, but an enhanced value may not be given because of the sanctioning by Parliament of the very scheme for the carrying out of which the compensation is being authorized. You would defeat the principle of compulsory purchase by compensation if by reason of the fact that the land in question is wanted for a public purpose the price is to be increased.

The following passages from the very well expressed award seem to me to indicate where he has entertained a wrong idea as to fixing the compensation:—

There is to be considered primarily that the owner whose property is

being acquired, naturally takes advantage of the necessity of the purchaser to obtain the highest possible price.

If this means, as I think it does, that the railway company's acquisition of the land was one of the necessities that the owners could take advantage of, the arbitrator was wrong. It is but fair to the arbitrator to say that later on he cuts this down, and it is but fair to myself to say that I do not wish to criticize his award as a whole by what he says in his opening; but it seems to me that in that opening is to be found the germ of his wrong going. Then again, he speaks of the "potential" values of this property. I do not question that the present potential value may be a factor, but the potential values may be too remote at this date to enhance the value of the land which at present is practically unproductive. I am inclined to think that under cover of this vague phrase he has reached a conclusion which the present potential qualities of the place cannot support.

Having found that the lands, except two lots, are not revenue producing, and that the sales made in the vicinity are not supported by the earning power of the lots sold, the arbitrator considers the enormous increases in values (without regard to revenue) which have taken place in other parts of Vancouver. On this enormous increase, and the potential advantages, and the increased size and attributes of the lands, he fixes the amount of compensation.

On the ground of economy much may be said in favour of remitting the case to the arbitrator, for reconsideration, but I think, having regard to the protest in the letter of December 12, that the railway company is entitled, if it desires it, to have the award set aside. I would, therefore, allow the appeal and set aside the award.

MARTIN, J.A.:—By the order of the learned Judge appealed from, he referred back the award to the arbitrator to be reconsidered and amended in so far as it deals with "the subject of adjustment of taxes or revenue or both and also in so far as it awards costs and arbitrators fees and expenses.

Martin, J.A.

I think, however, that the adjustment of taxes and revenue were left by agreement of both parties to the decision of the arbitrator; that is the only fair inference I can draw from

B. C.

C. A.

RE FALSE CREEK RECLAMATION ACT.

Martin, J.A.

what occurred and, therefore, the award should not be interfered with on that ground as he was warranted in adjudicating.

As to the arbitrator's fees, I agree that it cannot stand because the arbitrator has, by some oversight apparently, but directly contrary to the provisions of the statute (set out in the tariff in the schedule to the Arbitration Act) awarded himself $5,250, a sum so greatly in excess of what we are informed the statute authorised, viz., only $175 (*i.e.*, for seven days sitting at $25 per day, each sitting to consist of not less than six hours as the tariff directs), that if an award is ever to be set aside on such a ground as amounting to misconduct (using the term in its legal sense only) then this is the case where it might be done. In *Re Prebble and Robinson*, [1892] 2 Q.B. 602, 604, it is said by Lord Chief Justice Coleridge that though whether this amounts to misconduct is "an open question," yet "I am far from saying it might not." I note that the tariff does not make any provisions for remuneration for the time occupied in the preparation of the award which may take a good deal of time, especially in such a case as the present wherein the arbitrator has evidently bestowed much care thereupon.

As to the interest allowed, I think that the award cannot stand in that respect also; no authority justifying it has been cited to us.

If the matter rested here I should be in some doubt as to the course to be adopted because as is said in Redman on Arbitrations at 279:—

> . . . It is conceived that no award will now be set aside for any defect which the arbitrator could cure, but that in all cases it will be remitted to him. Many of such mistakes can now be corrected under the slip section (Arbitration Act, 1889, sec. 7(c).)

But there is this further element, that, I think, with all due deference, the award is, as contended, bad in law on its face, because so far as I can gather from certain discursive expressions the arbitrator has made it on a wrong assumption of the riparian rights of the owners and without giving due effect to the statement of those rights which was agreed to between the parties and submitted to him in writing. He seems, so far as I have been able to extract his exact meaning, to have laid much stress upon the fact that in "common practice" the owners of

property "abutting upon the water" have the "privilege of applying to the Crown for a grant to extend the property affected out to deep water or to an established pier headline and this right or privilege is, I believe, rarely, if ever, withheld where the rights of others are not interfered with." But the whole point on this head is that the "rights of others" would in this case be interfered with because the City of Vancouver is already the owner of the foreshore and bed as grantee from the Crown, and it is inconceivable that in such circumstances the Crown would give landowners, inside their property, the privilege mentioned just as though the Crown had not parted with the bed and foreshore. How could the inside owners ever hope to build on the city's bed and foreshore "out to deep water or to an established pier headline," or otherwise without the city's permission, which not only has not been given but the city is here in opposition to their claim. Nevertheless he estimates this "riparian right or advantage, or whatever it may be termed (as) a very important factor in fixing the amounts awarded to the respective owners," but in my opinion if the rights of the city are properly understood and applied the so-called "advantage" is of so little if any practical value that it ought not to have been seriously regarded, nor can the owners derive any assistance in this relation, if in any, from the use of the words "or interests" on which much stress was laid. There are some observations upon this hope or expectation from the Crown by Mr. Justice Cassels in *The King* v. *Bradburn* (1913), 14 Can. Ex. 419, at 436-41, which was a case where inland lots had become water lots because of certain river improvements by the Crown, but in a non-tidal river and, therefore, the circumstances are different. Even in that case he says, p. 437:—

> It may be a question whether a hope of this kind is an element that should be taken into account.

But the case at bar is a much stronger one because the bed and foreshore had already been granted by the Crown.

There is, at least, one other matter in the award that is open to serious objection, viz., the assumption that the owners of lots 5 and 6 could have made the same, or as favourable an agreement with the city as the owner of lots 1, 2 and 3, who got a quit claim

B. C.
C. A.
RE FALSE CREEK RECLAMATION ACT.

deed from the city and, therefore, should now be treated on the same basis, though in fact they have not got the necessary deeds; but it is unnecessary to consider it because what has already been noticed is sufficient to warrant the award being set aside.

Martin, J.A.

I express no opinion about the amount of the award because we have nothing to do with that, as it was not attacked on that ground nor is there any evidence before us on the point.

Galliher, J.A.

GALLIHER, J.A.:—I would set aside the award without a reference back.

McPhillips, J.A.

MCPHILLIPS, J.A.:—The appeal is one by the City of Vancouver and the Canadian Northern Pacific R. Co. from the judgment and order of the Hon. Mr. Justice Morrison, who upon an application made to set aside the award complained of, refused the application but remitted the award to the arbitrator for reconsideration and amendment as to the subject of the adjustment of taxes or revenue or both and also as to costs and arbitrator's fees and expenses.

The submission entered into was to a single arbitrator, being the claims of a number of owners of land upon False Creek also claiming riparian rights. All the claims were heard together—in fact consolidated for the purpose of the hearing. The award, however, of course, deals in detail with each separate property—the amount in the whole awarded aggregating something over $900,000.

The arbitrator's duty was to proceed to the determination of the value of the lands rights or interests at the date of the service of the notice—which was September 12, 1912—the amount to be paid by the Corporation of the City of Vancouver for the lands riparian, littoral, or foreshore rights or interests to be determined by arbitration pursuant to the provisions of the Arbitration Act.

The corporation of the City of Vancouver was authorized by statute to proceed to expropriate the lands under and by virtue of the False Creek Reclamation Act (ch. 56, 1 Geo. V., 1911), and the lands in question in this appeal are referred to in paragraph 3 of the articles of agreement between the City of Vancouver and the Canadian Northern Pacific R. Co.—as contained in the schedule to the False Creek Terminals Act (ch. 76, 3 Geo.

V., 1913)—being an Act to ratify a certain Agreement between the City of Vancouver and the Canadian Northern Pacific R. Co. and the Canadian Northern R. Co.

It may be said that the effect of the legislation was to authorize the conveyance from the Crown to the City of Vancouver in fee simple free from all restrictions all that portion, lying east of Westminster Ave. (now Main St.) of the lands covered by waters previously conveyed to the City of Vancouver—with some stated exceptions thereout as set forth in sec. 2 of the False Creek Terminals Act. It will be seen by the recital to the agreement as contained in the schedule to the Act that the City of Vancouver had obtained grants from both the Dominion of Canada and the Province of British Columbia to the bed of False Creek lying east of Westminster Ave. (now Main St.) in the City of Vancouver.

It may be said by way of summarizing the facts that it would not appear that any of the lands extended to low water mark, but that in the case of lots 1, 2 and 3—some additional depth was conveyed by the city from and out of the foreshore, but even with respect to these lots it would not extend to low water mark—that is, the proprietorship in the lands did not extend beyond high water mark—save as stated in respect to lots 1, 2 and 3—and even as to these lots—not all of the foreshore, *i.e.*, to low water mark.

Therefore, the facts are that the owners of the lands—all of them—have between them and the sea—the City of Vancouver owning the foreshore—this creates a situation quite unusual and one that calls for serious consideration when the value of the lands is under consideration—if anything is allowed—upon the view that there exists any riparian, littoral, or foreshore rights, interests or rights of access to the sea as referred to in sec. 5 of the False Creek Reclamation Act.

It would appear that when a question arose as to whether any riparian rights were to be considered by the arbitrator and allowed for that the solicitors for all parties without having the matter referred to a Judge of the Supreme Court by way of a stated case—agreed in the terms set forth at pp. 32, 33, 34 of the Appeal Book—that is as set forth in Messrs. Davis & Co.'s letter of December 12, 1913, to Messrs. Tupper & Co.:—

B. C.

C. A.

RE FALSE CREEK RECLAMATION ACT.

McPhillips, J.A.

That the riparian rights of the owners of the various lots in question did not in September, 1912, include any right to build, dredge or construct any buildings or works as wharves, slips or otherwise below the high water mark.

We want to be perfectly clear that whatever negotiations there were between the owners on False Creek east of the Main St. bridge looking to joint action for reclamation and improvement of False Creek east of the bridge did not as a matter of law confer upon the owners any further or other rights than those they originally had as owners of the lots abutting on the Creek.

In my opinion upon the face of the award and appearing at pp. 66, 67 and 68, the arbitrator did not proceed rightly in arriving at the values of the lands in considering the riparian rights and not in accordance with the agreement between the solicitors for all parties.

In fact he proceeded by way of absolute departure therefrom and swept away from consideration the fact that the owners of the lands had between them and the sea the City of Vancouver—*i.e.*, the City of Vancouver had obtained grants from the Crown in the right of the Dominion of Canada and of the Province of British Columbia to the bed of False Creek—and would appear to have valued the lands as if all the owners of the lands were possessed of the right to enjoy the foreshore—as if a lease therefor had issued and the owners were entitled to build upon, occupy and use the land covered by water—being lands vested in the City of Vancouver. In the result it means that the course pursued by the arbitrator calls upon the City of Vancouver in the amount awarded—to pay for land or interests therein not the property of these owners—but the property of the corporation itself and as well for privileges which by the statement of the arbitrator himself the City of Vancouver could prevent the owners from obtaining, as note his language appearing in the award, at p. 67:—

For while the city occupied the position of being able to block or prevent these owners from obtaining their foreshore grant or leases it manifestly was not their intention so to do prior to the agreement with the Canadian Northern Railway, as the weight of evidence plainly shews; and the right of access to the sea from property so centrally situated is in my opinion valuable and has a potential value beyond the figures awarded herein.

It is plain that the arbitrator has proceeded wrongly and took into consideration and allowed to the owners, values which

were not capable of being taken into account and, therefore, the award is in this respect bad on its face. An arbitrator, whilst entitled to value all that which is the property of the owners of the lands and to be expropriated, is not entitled to allow in his award for lands not vested in the owners or for rights or interests which do not attach to the lands and cannot in the immediate or even remote future be acquired as being advantages that attach to the lands.

In my opinion that which was present in *Cedars Rapids Mfg. & Power Co.* v. *Lacoste* (1914), 16 D.L.R. 168 (P.C.), is absent in the present case—as the City of Vancouver owns the land covered by water being the bed of False Creek. Here we have the arbitrator allowing for land not the property of the owners and for possible advantages which it must be seen were impossible.

Lord Dunedin in *Cedars Rapids Mfg. & Power Co.* v. *Lacoste*, *supra*, at 174, said:—

> There was a probability of a purchaser who was looking out for special advantages being content to give this enhanced value in the hope that he would get the other powers and acquire the other rights which were necessary for a realized scheme,

but in the present case the City of Vancouver was already possessed of the ownership of the foreshore lands and the lands covered by water being the bed of False Creek—that being the situation how is it possible to support an award which has been reached by allowing in the values found for lands not vested in the owners—incapable of becoming vested in them and for advantages which the lands did not possess on September 12, 1912, and impossible of being acquired in the future?

What the arbitrator was entitled to do in arriving at values is succinctly set forth by Lord Dunedin at 171 in *Cedars Rapids, etc., supra*:—

> 1. The value to be paid for is the value to the owner as it existed at the date of the taking not the value to the taker.
>
> 2. The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

It is plain that bearing in mind these propositions the arbitrator has palpably erred in allowing values which did not attach to the lands and is in this respect bad in point of law and for this reason alone in my opinion must be set aside.

B. C.

C. A.

RE FALSE CREEK RECLAMATION ACT.

M. Phillips, J.A.

Then we have the further questions of the allowance in the award of taxes, interest, and costs—in my opinion the arbitrator was without jurisdiction in allowing taxes or interest and the award is bad as to both these items—what was to be determined was the value of the lands on September 12, 1912.

The award is bad on its face in allowing and apportioning the costs as is therein set forth and offends against the schedule in the Arbitration Act—dealing with the allowance and disposition of costs—and would appear to be upon an excessive basis even if no tariff existed. In passing I might state that in an arbitration of the magnitude under consideration it might well have been that there should have been some agreement between the parties, but apparently that was not come to.

Counsel for the respondent with great ability contended that the award even if found to be bad on its face and wrong in law in any respect should be remitted back to the arbitrator—but see *Montgomery* v. *Liebenthal* (1898), 78 L.T. 211. It may be said though that this case is an authority for the proposition that even where there has been a mistake in law by the arbitrator that that would not constitute cause for setting aside the award, it is, therefore, with great hesitancy that I have come to the conclusion that in the present case the award should be set aside. I feel constrained, however, to do so upon the ground that the arbitrator exceeded his jurisdiction in the award made allowing for properties, rights, interests and advantages that were non-existent, it not being the case of possible inflated values, a matter with which I am not called upon to pass, nor merely a mistake in law, that is not error confined only to a wrong decision on fact and law, but awarding values unsupportable by any facts and as well erring in law. Whilst it is not misconduct in the sense of any wrong intent, it is misconduct for an arbitrator to proceed in excess of the jurisdiction with which he is clothed and transcend the powers conferred by the statute in pursuance of which only he is entitled to proceed and arrive at his award—it is misconduct in a legal sense—although devoid of all moral culpability: *Re Hall and Hinds* (1841), 2 M. & G. 847. In all proper cases the advice of counsel should be taken and the present case is one in which the arbitrator would have been well to

B.C.

C.A.

RE FALSE CREEK RECLAMATION ACT.

have been so advised (*Re Hare* (1839), 6 Bing. (N.C.) 158; *Goodman* v. *Sayers* (1820), 2 J. & W. 261; *Rolland* v. *Cassidy* (1888), 57 L.J.P.C. 97 at 102), it is preferable though that this course should only be followed with the knowledge and consent of the parties, but this is not obligatory.

Upon the whole I am of the opinion that the award should be set aside; it, therefore, follows that in my opinion the appeal should be allowed.

McPhillips, J.A.

Appeal allowed.

[Appealed to Privy Council, see next case.]

Re FALSE CREEK RECLAMATION ACT.

IMP.

P.C.

Judicial Committee of the Privy Council, Viscount Haldane, L.C., Lord Dunedin and Lord Atkinson. June 3, 1915.

1. DAMAGES (§ III L 4—260)—EXPROPRIATION—ABUTTING OWNERS—RIGHTS IN FORESHORE—VALUATION.

The contingency that owners of lots abutting a river might acquire from the municipality additional ground in the foreshore to extend the depth of those lots in lieu of what had been taken from them in front in a street widening operation, or the owners' chances of getting leave from the Crown to extend some works or pier-head over the foreshore not belonging to the Crown, are too remote and speculative as elements of compensation for the taking of the foreshore for reclamation purposes, and an award based on such valuation is invalid and will be set aside. *The Cedars Rapids, etc., Co.* v. *Lacoste*, 16 D.L.R. 168, [1914] A.C. 569, referred to.]

[*Re False Creek Reclamation Act*, 22 D.L.R. 103, affirmed.]

2. DAMAGES (§ III L 4—267)—EXPROPRIATION—RECLAMATION OF FORESHORE—RIPARIAN RIGHTS OF ACCESS.

The rights of riparian owners of going over the foreshore as a means of access to the sea are elements of valuation in awarding compensation for the taking of the foreshore for reclamation purposes. *Duke of Buccleuch*, L.R. 5 H.L. 418, referred to.

[*Re False Creek Reclamation Act*, 22 D.L.R. 103, affirmed.]

3. INTEREST (§ I D—36)—EXPROPRIATION AWARDS—COMPUTATION OF AMOUNT.

Sec. 7, ch. 56, of the False Creek Reclamation Act, 1911, vests the right to take possession of expropriated lands immediately upon the payment or legal tender of the amount awarded; hence, interest on the amount awarded for land taken thereunder runs from the date of the award, and not from the date of notice fixed by the arbitrator.

[*Re False Creek Reclamation Act*, 22 D.L.R. 103, affirmed.]

4. ARBITRATION (§ III—16)—VALIDITY OF AWARD—EXCESSIVE FEES.

An award which allows an arbitrator fees in excess of the scale allowed by statute must be remitted for correction.

[*Re False Creek Reclamation Act*, 22 D.L.R. 103, affirmed.]

5. ARBITRATION (§ III—17)—AWARD—DISCRETION AS TO REMITTING OR SETTING ASIDE—REVIEW.

The question as to whether an award should be set aside or remitted

IMP.

P. C.

RE FALSE CREEK RECLAMATION ACT.

for reconsideration is one of discretion, and unless that discretion has been obviously misused it will not be interfered with on appeal.

[*Re False Creek Reclamation Act*, 22 D.L.R. 103, affirmed.]

Statement.

APPEAL against a judgment of the Court of Appeal of British Columbia, by which that Court by a majority of four to one reversed a judgment of Morrison, J., and set aside an award pronounced by Frederic Buscombe as sole arbitrator in an arbitration between the parties to the case.

The judgment of the Board was delivered by

Lord Dunedin

LORD DUNEDIN:—The appellants are the owners of certain lots of ground in the City of Vancouver, which front Westminster Ave., and are bounded at the back by an arm of the sea called False Creek. In 1911 an Act was passed in British Columbia entitled the False Creek Reclamation Act, which empowered the corporation of the City of Vancouver to reclaim the False Creek by filling it up, and in connection with this undertaking allowed them to acquire compulsorily *inter alia* the various lots belonging to the appellants. It is unnecessary to set forth the provisions of the statute as it empowered the corporation to serve notices to treat, and to acquire the whole rights of the appellants in the lots specified upon payment of the value of all rights so acquired, with arbitration in default of agreement as to the amount to be paid—all in ordinary form. The parties by agreement appointed Frederic Buscombe as sole arbitrator. He inspected the properties, heard witnesses, and delivered an award, in which he set forth the various elements which he had taken into consideration and awarded certain sums in respect of each of the properties taken.

The appellants applied to the Court of British Columbia for an order to enforce the award on an order of Court. This was met by a motion on behalf of the respondents to set aside the award. These counter motions came to depend before Morrison, J. That learned Judge refused to set aside the award, though remitting it to the arbitrator to deal with some minor matters which need not be mentioned.

Appeal was taken by the first respondents to the Court of Appeal (8 D.L.R. 422), who, by a majority as before stated, set aside the award.

The question before this Board is whether that judgment was right.

The grounds on which the award was set aside were four in number—being all matters which appear on the face of the award and were alleged as follows:—

(1) The arbitrator allowed a value over and above the value of the land taken for the chance which the owner would have had of getting leave from the Crown to extend some *opus manufactum* such as a pier head over the foreshore.

(2) In respect of lots 5 and 6 he valued upon the assumption that they might have got an additional piece of ground behind to make up for what had been taken from them in front in a street-widening operation, whereas, in point of fact, they did not get this additional piece.

(3) The arbitrator allowed interest on the sums awarded from the date of the notice to treat.

(4) The arbitrator awarded himself fees in excess of the scale allowed by the statute.

Their Lordships will deal with these points in reverse order. (4) It is clear that the fees are in excess. This, however, could easily be dealt with by remit. (3) In ordinary cases interest on the price of land taken runs from the date of taking possession. But in this case there seems no room for argument as to when possession was or might have been taken.

Secs. 6 and 7 of the False Creek Reclamation Act (ch. 56 of 1911) are as follows:—

Sec. 6.—In arriving at the value of any lands, rights, or interests expropriated or to be expropriated, the arbitrators shall take the value of the lands, rights, or interests at the date of the service of the notice as hereinbefore provided.

Sec. 7.—Upon payment or legal tender of the amounts so awarded or agreed upon to the person, body corporate, or party entitled to receive it, or upon payment into the Supreme Court of British Columbia of the amount of such compensation under the award or agreement, the lands, rights, or interests so expropriated shall vest in the corporation, and there shall vest in the corporation power to forthwith take possession of the lands or interests the subject of the award or agreement.

It is clear that interest in this case can, therefore, only run from date of award, and not from date of notice as fixed by the arbitrator. This also, however, could easily be set right by remit.

(2) Previous to the events of the arbitration a street widening had been effected, for which ground had been taken on the street side from lots 1, 2, 3, and 5 and 6. All these lots are bounded behind by high-water mark. As part of the arrange-

IMP.
P.C.
RE FALSE CREEK RECLAMATION ACT.
Lord Dunedin

ment for compensation the corporation gave to lots 1, 2 and 3 a piece of the foreshore (which, as will be afterwards set forth, they had acquired from the Crown) sufficient to make the total depth of the lots 120 feet. This was not done as part of the arrangement with the proprietors of lots 5 and 6. It seems, therefore, clear that the arbitrator had no right to award a value based upon the supposition that 5 and 6 might have had a depth of 120 feet, when as a matter of fact they had not such depth. Had he merely said that the value of 5 and 6 per frontage foot was the same as that of the other deeper lots, his view could not have been touched. But he has explained the ground on which he went, and that ground is on the face of it erroneous. This point, however, would only affect the award as regards lots 5 and 6.

(1) This is the only important matter. Their Lordships do not propose to repeat as to the general principles of valuation what was recently said by them in the case of *The Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*, 16 D.L.R. 168, [1914] A.C. 569, the gist of which is quoted by McPhillips, J.A., in the present case. It is evident that while all opportunity of employment for a certain purpose in regard to the position of land to be acquired is to be taken into account, there must come a point where the opportunity becomes so remote as to be negligible.

It is here that their Lordships are constrained to come to the opinion that the arbitrator went wrong.

The lots in question were bounded by the high-water mark. The owners of the lots had no right in the solum of the foreshore. They had the right of going over the foreshore whether covered by water or not, and so obtaining access to the sea. If the arbitrator had only added something to the value of the land itself for that privilege nothing could have been said—that was the principle on which allowance was made in the case of the *Duke of Buccleuch*, L.R. 5 H.L. 418.

But the arbitrator has done more than that. For after dealing with the right of access to the sea, he goes on thus:—

While the riparian rights carries with it no definite legal right to build upon, or extend the property abutting upon the water, to or upon the land under the water, the actual right of access to the water has in com-

mon practice carried with it the privilege of applying to the Crown for a grant to extend the property affected out to deep water, or to an established pier head-line, and this right or privilege, is, I believe, rarely, if ever, withheld where the rights of others are not interfered with.

Now that a proprietor who abutted on the foreshore might apply to the Crown—proprietor of the foreshore, for such a grant may be conceded. But it is quite different if the foreshore does not belong to the Crown. And in this case the foreshore did not belong to the Crown. For by a grant of 1901 the whole of the bed and foreshore of False Creek had been conveyed to the corporation. This grant contained certain restrictions, and was supplemented by an ampler grant in 1911. Now the effect of these grants was to deprive the Crown of the right of the solum. The allowance by the Crown to construct *opera manufacta* is rendered necessary apart from the common law by the provisions of the Navigable Water Protection Act. In respect of these provisions the Department of Public Works has issued regulations dealing with applications for permission to erect such works. One of the regulations is as follows:—

> The applicants must furnish proof that they own or have a sufficient interest in the land or land covered with water upon which the works are to be constructed. It is not sufficient to hold the riparian interests alone, if the work extends beyond the limits of the shore, but a sufficient portion of the harbour, river or lake must also be held by the applicants. The statute has reference to the erection of structures on lands owned by the applicants, and is designed to provide for due protection to navigation. It cannot be used as a means of acquiring title to lands upon which the structure is to be erected.

It seems, therefore, abundantly clear that the appellants here were not *in titulo* to apply to the Government for any permission. To enable them to do so they would first be bound to acquire from the corporation so much of the foreshore and bed of False Creek as was to bear the *opus manufactum*.

Now there is not a tittle of evidence that the corporation would ever have consented to sell. It is obvious that the arbitrator really mistook the true position; for he says in another passage:—

> For while the city occupied the position of being able to block or prevent these owners from obtaining these foreshore grants or leases it manifestly was not their intention so to do prior to the agreement with the C.N.R., as the weight of evidence plainly shews.

IMP.

P. C.

RE FALSE CREEK RECLAMATION ACT.

Lord Dunedin

Now, while he is quite right in considering the situation as it was prior to the agreement with the railway company—or, in other words, the Reclamation Act under which the land is taken from the claimants—yet he is radically wrong when he speaks of the city being able to "block the owners from obtaining a foreshore grant." The Crown could not give a foreshore grant—not because the city "blocked" it, but because the foreshore no longer belonged to the Crown to give. And the right to ask for an *opus manufactum* did not exist except in some one who had the foreshore. That meant conveyance from the city to the claimants, and there is not a jot of evidence to shew that there was a chance of any such conveyance. In other words, their Lordships agree with McPhillips, J.A., who says:—

> The arbitrator has palpably erred in allowing values which did not attach to the lands (taken).

and with Irving, J.A., who says:—

> I do not question that the present potential value may be a factor, but the potential values may be too remote at this date to enhance the value of the lands, which at present is practically unproductive.

These observations are, in their Lordships' opinion, strictly in accordance with the principles laid down in the *Cedars Rapids* case already cited.

Their Lordships are, therefore, of opinion that the award as it is cannot stand. There remains the question of whether it should be set aside or remitted for reconsideration. This seems to their Lordships a question of discretion for the Judges in the whole circumstances of the case, and unless that discretion has been obviously misused they do not feel inclined to interfere with it.

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

MAN.

K. B.

BRODEUR v. ELLIOTT.

Manitoba King's Bench, Metcalfe, J. March 1, 1915.

1. ASSIGNMENT (§ II—20)—EQUITABLE ASSIGNMENT—GARNISHEE AND ASSIGNEE—PRIORITY.

To establish an equitable assignment of a chose in action in priority to garnishment proceedings, it must appear that the alleged equitable assignee had an interest in the fund and not merely some right of action against the creditor whose debt is attached.

TRIAL of issue in garnishment proceedings.

W. B. Towers, and *J. P. Roy*, for plaintiff.

M. G. Macneil, for defendant.

METCALFE, J.:—On March 29, 1912, Elliott recovered a judgment against one Wheatley for $1,600, which remains unsatisfied.

Wheatley is a real estate agent. One R. J. Forrester employed Wheatley to find someone who would exchange a city block for farm property owned by Forrester. Wheatley met another real estate agent named Frith. In casual conversation Frith said he thought he knew of some other agents who had such a block listed. Frith and Wheatley then went to the office of the plantiff Brodeur and, after some negotiations, eventually both Brodeur's principal and Wheatley's principal were brought together. In the negotiations a Mr. Chisholm, another real estate agent, also appeared, and there was mention of a Mr. McKinnon, another real estate agent.

I am not satisfied that McKinnon did any work at all in connection with the negotiations. All Brodeur says about it is, "There was a Mr. McKinnon who could not be ignored."

In any event the principals met and, after completing a preliminary agreement, called it off. Then they met behind the backs of the real estate agents and themselves closed their deal. Then the trouble began. Brodeur sued his principal and forced a settlement. Then he wanted to get something out of Forrester.

He says, and some of the others say, that Wheatley had expressly agreed to divide his commission equally amongst the five. This evidence I refuse to accept. It may be that all these other individuals (none of them appear to be partners) have had some right of action against Wheatley for their services.

It is more than probable that nothing would accrue therefrom unless Wheatley were put in funds.

Turning from the successful issue with his own principal Brodeur, who seems to have been the guiding spirit of them all, says, "Let us sue Forrester." But how? He is advised by his counsel he has no right of action against Forrester; therefore

MAN.

K. B.

BRODEUR v. ELLIOTT.

Metcalfe, J.

why not Wheatley sue Forrester; and so Wheatley was urged to sue for his commission. After the action was commenced Elliott, on October 17, 1913, served a garnishee order on Forrester, the defendant in that action. On May 11, 1914, Wheatley recovered judgment against Forrester for $1,100.

Brodeur, on the same day, took an assignment to himself of the judgment, claiming that he acted for himself and all the other agents. The plaintiff in the issue affirms the moneys owing on the judgment are his as against the defendant Elliott. He relies strongly upon an equitable assignment before the garnishee.

I am not impressed with the truth of the evidence upon which the plaintiff seeks to establish such equitable assignment.

These real estate agents may, and probably have some right of action against Wheatley; but I do not think they had, when the garnishee proceedings were taken, any interest in the fund.

There will be judgment for the defendant Elliott with costs.

Judgment for defendant.

SASK.

S. C.

GOLIGHTLY v. BANNING.

Saskatchewan Supreme Court, Newlands, Brown, and Elwood, JJ. March 20, 1915.

1. NEGLIGENCE (§ I—70)—LIVERY STABLE KEEPER—CONTRACT TO CONVEY—STABLE SUPPLYING DRIVER—DRIVER NEGLIGENT—LIABILITY OF LIVERY STABLE KEEPER.

A livery stable keeper who engages to convey a passenger and supplies the driver as well as the horse and buggy will be liable in damages for the driver's failure to do what a reasonable and prudent driver would have done on approaching a traction engine on the road with knowledge that there was a strong probability of the horse becoming scared and with knowledge that the road at that point was a dangerous one on which to pass the engine, notwithstanding which the driver attempted to pass with the result that the buggy was overturned and the passenger injured.

Statement

APPEAL from the District Court of Prince Albert.

H. Y. MacDonald, K.C., for appellant.

F. W. Turnbull, for respondent.

The judgment of the Court was delivered by

Brown, J.

BROWN, J.:—This is an appeal from the Judge of the District Court of Prince Albert. The defendant, who carries on a livery business at Prince Albert, was engaged to convey the plaintiff to

a point some distance into the country. The mode of conveyance was by horse and buggy, the driver being one Anderson, an employee of the defendant. The plaintiff, apparently, did not know much about horses, but Anderson was regarded as a skilful driver, and the horse and rig furnished were fit and proper for the purpose for which they were being used. Shortly after leaving Prince Albert they came within sight of a large gasoline traction engine on the side of the road, and in the neighbourhood of about 100 yards in front of them. The road at this point was graded rather high in the centre, with steep ditches on either side. I quote from portions of the evidence of several of the witnesses to indicate the circumstances surrounding the accident on which the plaintiff founds his action for damages.

William Golightly, the plaintiff:—

Went along River street, crossed bridge and went along avenue leading up to Great West works, we saw traction engine on this avenue before we turned corner going into this avenue. It might be a hundred yards or more away when first saw it. Just as we got to the avenue the driver stopped rig and said, "I don't know whether my horse will face that or not." I said, "If you have any doubts about it don't attempt it, but go around some other way. I don't want to be thrown out." He said, "I guess it will be all right." Nothing further was said. The horse was restive. He proceeded up avenue on right hand side of road. Engine was on other side of road. The engine was stationary. There was a noise from engine which was working although machine not moving. The horse suddenly seemed to catch sight of engine when 30 or 40 yards away. The horse threw its head to left, turning partly around and the rig with him. The driver pulled on right rein, pulled the horse back, the horse turned completely round to right, pulled wheel over bank and upset rig, throwing both self and driver out.

Edward Gibson, who was in charge of the engine:—

Engine was running throttled down but not moving. There was not much noise. Engineer was tightening bolt in cab. Did not see rig approach. First thing I saw was rig after it had upset, and men in ditch. I was behind engine at time. . . . I have had considerable experience with horses. If driver thought he could manage horses he might get past by keeping tight line on horse. If there was danger in not getting by, the proper procedure would be to call out and have horse led by. This piece of road is dangerous on account of narrowness and ditches on each side.

John C. Stewart, who also was with the engine:—

Road at this point is not wide and has high crown. It is dangerous meeting anything. I have had a lot of experience with horses. I would not have attempted to pass engine on this road with frightened horse.

Russell Anderson, the driver:—

Remember coming to foot of avenue where engine was. I stopped

SASK.

S. C.

GOLIGHTLY v. BANNING.

Brown, J.

there as I thought engine was coming. Saw engine stopped and then went on. Started horse up avenue. On way up Golightly said, "Perhaps we had better get out." I said nothing. When got near engine some little extra noise in engine startled horse and she jumped to left first, then jumped back and turned short around to right. When we started up avenue I took tighter hold of reins and horse went along road with head up.

As a result of the accident which is disclosed by the evidence the plaintiff was severely injured. The trial Judge in his judgment says:—

It seems to me that after having refused to accept the plaintiff's suggestion that he should be allowed to descend, and, knowing, as he must have known, that there was danger to be apprehended from the course which he chose to adopt, he must be held to have accepted the responsibility for any accident that might occur as a result. I must therefore hold that the driver was guilty of negligence by his imprudent conduct, and for this negligence the defendant is liable.

It is clear from the evidence that the road at this point wa a dangerous piece of road to pass on, and must have been so to the knowledge of the driver. It is also clear that in the event of the horse becoming scared an accident was likely to follow, and this, too, must have been known to the driver; and I cannot resist the conclusion that the driver had reason to know that there was a strong possibility of the horse becoming scared in the attempt to pass the engine. Several alternatives were offered, any one of which would have been safer. He could have taken another road, as was suggested; he could have got out and led the horse past the engine, or he could have allowed the plaintiff to get out and walk past. Every case of this character must be determined according to the circumstances peculiar to it. The test of the defendant's liability is, was Anderson under the circumstances negligent? Or, to put it in another way, did Anderson, under the circumstances, in adopting the course which he did, do what a reasonable and prudent driver would have done? The trial Judge has virtually answered that question in the negative, and I am not prepared to say that he reached a wrong conclusion.

The appeal should therefore, in my opinion, be dismissed with costs.

Appeal dismissed.

LOBEL v. WILLIAMS.

MAN.

C. A.

Manitoba Court of Appeal, Richards, Perdue, Cameron, and Haggart, JJ.A. January 5, 1915.

1. VENDOR AND PURCHASER (§ I—1)—RIGHTS AND LIABILITIES—DAMAGES FOR NON-PERFORMANCE—RIGHT OF PURCHASER TO.

Damages can be recovered by a purchaser from his vendor, unless the contract provides to the contrary, for delay in completing the purchase where the delay has been occasioned by default of the vendor, not in consequence of want of or defect in title or in consequence of conveyancing difficulties but by reason of the vendor not having used reasonable diligence to perform his contract.

[*Jones* v. *Gardiner*, [1902] 1 Ch. 191; *Jaques* v. *Millar*, 6 Ch. D. 153, applied.]

2. DAMAGES (§ III A 3—60)—CONTRACT FOR SALE OF LANDS—DEFECT IN TITLE—VENDOR UNABLE TO REMOVE—ABSENCE OF FRAUD.

In the absence of fraud damages are not recoverable where the contract for sale of lands goes off for defect in title which the vendor cannot remove.

[*Bain* v. *Fothergill*, L.R. 7 H.L. 158, referred to.]

3. VENDOR AND PURCHASER (§ I A—4)—PREPARATION AND TENDER OF CONVEYANCE—DUTY OF VENDOR—MANITOBA.

In Manitoba it is the duty of the vendor to prepare and tender the conveyance.

4. VENDOR AND PURCHASER (§ I C—10)—PURCHASER—ENTITLED TO GOOD TITLE BEFORE TAKING POSSESSION—VENDOR LIABLE FOR FAILURE TO TAKE SAME CARE OF PROPERTY AS OWNER WOULD TAKE.

The purchaser is not bound to take possession until a good title has been shown but may hold the vendor liable for his failure to take the same care that a prudent owner would take of his own property until the title has been completed.

[*Foster* v. *Deacon*, 3 Madd. 394, and *Royal Bristol* v. *Bomash*, 35 Ch. D. 390, applied.]

Statement

APPEAL from a judgment of Galt, J.

W. Hollands, for appellant.

A. E. Hoskin, K.C., for respondent.

The judgment of the Court was delivered by

Cameron, J.A.

CAMERON, J.A.:—In this action a few days before the trial the defendant caused to be executed and registered a transfer of the lands in question in Saskatchewan. This has been accepted by the plaintiff, and the claim for $9,050, the exchange value of the lands, has been abandoned. The only relief now asked by the plaintiff, under the amendment to the statement of claim of October 24, 1914, is for a reference to fix the damages sustained by the plaintiff by reason of the delay in furnishing the plaintiff with the transfer to which she was entitled under the agreement.

The agreement was dated February 18, 1913. It was followed, within a few days, by performance on the part of the plaintiff.

MAN.

C. A.

LOBEL v. WILLIAMS.

CAMERON, J.A.

But, owing to circumstances not clearly disclosed, the personal representative of W. B. Nicol (for whom the defendant was acting) did not, though repeatedly requested so to do, convey the lands (agreed to be conveyed by the defendant) until October 17, 1914. This action was commenced July 10, 1914.

The learned trial Judge, in view of the fact that the conveyance or transfer had been made before the trial, dismissed the action.

The general rule is that damages are not recoverable (in the absence of fraud) where the contract goes off through defect in title. This law was laid down in *Bain* v. *Fothergill*, L.R. 7 H.L. 158, affirming *Flureau* v. *Thornhill*, 2 W.Bl. 1078, and overruling *Hopkins* v. *Grazebrook*, 2 B. & C. 31:—

> If a person enters into a contract for the sale of a real estate, knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract: he can only obtain other damages by an action of deceit:
>
> *per* Lord Chelmsford in *Bain* v. *Fothergill*, *supra*, at p. 207.

"This is an exception to the ordinary rule of common law, that where a person sustains a loss by reason of a breach of contract, he is *primâ facie* entitled, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed;" Mayne, Damages, p. 241. (It is to be noted that the doctrine laid down in *Bain* v. *Fothergill* has not been generally accepted in the United States.) But, on that exceptional rule there have been grafted exceptions. One of these is where the contract fails for want of title, but a defect which the vendor ought to have removed and could have removed; or not so much from an inability to make title, but a refusal to do so. See *Engel* v. *Fitch*, L.R. 2 Q.B. 314, affirmed L.R. 4 Q.B. 659, which was not affected by the decision in *Bain* v. *Fothergill* (see Lord Hatherley, at p. 209). There is an understanding that any contract for the sale of real estate may fail for want of title, but no such understanding that it may fail because the vendor does not choose to go to the expense or trouble of performing his part of the contract. In *Day* v. *Singleton*, [1899] 2 Ch. 320, there is to be found a striking example of this.

In *Jones* v. *Gardiner* (1902), 1 Ch. 191, it was held that damages can be recovered by a purchaser from his vendor for delay in completing the purchase, where the delay has been occasioned by

default of the vendor, not in consequence of want of, or defect in, title or in consequence of conveyancing difficulties, but by reason of the vendor not having used reasonable diligence to perform his contract. This decision seems to me decisive on the point. Among other cases referred to in the judgment in *Jones* v. *Gardiner* are *Jaques* v. *Millar*, 6 Ch.D. 153, and *Royal Bristol Permanent Building Society* v. *Bomash*, 35 Ch.D. 390. I refer also to the *dictum* of Turner, C.J., in *Williams* v. *Glenton*, L.R. 1 Ch., at p. 209.

It was urged that the plaintiff by her acts and conduct had waived any rights she may have had to damages. But there is nothing to shew that the plaintiff ever intended to absolve the defendant from performing his part of the contract. The contrary is the case. And as she held the defendant to his contract she cannot be taken as having voluntarily surrendered any of the rights incidental thereto, in the absence of more positive evidence than we have before us.

The point is made that the plaintiff by virtue of the contract became the real owner of the property, and that thereby she became entitled to its possession, and could have taken possession without delay upon execution of the contract, and that, therefore, the defendant cannot be chargeable with damages by reason of the plaintiff's delay in taking possession.

In England, as between vendor and purchaser, the purchase is to be completed when the vendor shews a good title. Thereupon the purchaser prepares a conveyance and tenders the same for execution and tenders at the same time the purchase money. The vendor then executes the conveyance and gives possession to the purchaser: Williams, V. & P. 46. This is the law in this province, except that it is the duty of the vendor to prepare and tender the conveyance.

In the case of an open contract, the time for completion is the time when the vendor shall have shewn a good title: Williams, V. & P. 26. Pending the completion of the purchase the vendor shall retain possession of the property sold, and shall manage and preserve it with the same care as a trustee is bound to use with regard to the property subject to his trust: *Ib.* p. 50. As the result of the purchaser's equitable ownership of the property sold and the vendor's consequent trusteeship for the purchaser, the vendor

MAN.
C. A.
LOBEL
v.
WILLIAMS.
Cameron, J.A.

is bound, while he remains in possession, to take reasonable care to preserve the property in the same condition in which it was at the date of the contract for sale: *Ib.* 512. The vendor is bound to execute at his own expense such repairs as are necessary to preserve the property from deterioration until the proper time for completion of the contract: *Ib.* 513. See *Sherwin* v. *Shakespeare*, 5 DeG. M. & S., at 517. I dealt with some aspects of this subject in *Major* v. *Sheppard*, 18 M.R. 511.

Even where the contract provides that the balance of the purchase money shall be paid on a particular day and that possession shall be taken by the purchaser on that day, it has been held that such possession is intended as may safely be taken: Williams, 516-517. The purchaser is not bound to take possession until a good title has been shewn.

In this case it is true the purchaser might have taken possession, but she was not bound to do so, and it might and would not have been prudent for her to do so. Between February, 1913, and September of last year, the matter was pressed upon the defendant's attention. The defendant was not the vendor, but agent merely for the personal representative of a deceased owner. In my judgment the plaintiff was not bound to take the risks involved in taking possession. The acceptance of the money for grass cut on the premises after action brought was not an act of such consequence as to constitute a waiver with knowledge on her part of its alleged effect, of the plaintiff's rights. The defendant never offered possession and the plaintiff was never in default in any way. It seems to me that the plaintiff has made out a clear case for relief.

In *Foster* v. *Deacon*, 3 Madd. 394, Vice-Chancellor Leach held that, on a sale of certain lands, where the purchaser was kept out of possession by difficulties in the title, even though an offer of *interim* possession was made by the vendor, the vendee was not bound to accept it, and could not prudently accept it. He made a reference to the Master to ascertain what deterioration, if any, the lands had suffered, and to what amount, by unhusbandlike conduct and mismanagement of the lands since the date of purchase. See *Royal Bristol* v. *Bomash*, 35 Ch.D. 390, where the judgment of Fry, J., in *Jaques* v. *Millar*, 6 Ch.D. 159, is quoted and followed on the point of giving damages in addition

to specific performance, and where *Foster* v. *Deacon*, *Phillips* v. *Silvester*, and *Egmont* v. *Smith* are considered and followed on the question of the duty of vendors. (See p. 398.) In *Phillips* v. *Silvester*, L.R. 8 Ch. 172, Lord Selborne states at p. 178: "*It is true that each party is entitled to refuse to alter the possession until the whole contract is completed.*"

In *Egmont* v. *Smith*, L.R. 6 Ch.D. 469, it was held by Lord Jessel that where a vendor of a farm subject to a yearly tenancy finds that the purchase cannot be completed, on the appointed day, and that the tenancy will determine before then, it is his duty, as trustee for the purchaser, to re-let the farm in order to prevent it going out of cultivation.

The duty of the vendor, pending completion, is thus succinctly stated in Williams, at p. 512: "The vendor must take the same care that a prudent owner would take of his own property."

In this case the plaintiff promptly carried out her part of the agreement. She was out of possession of the land agreed to be given in exchange for a year and a half. Had the land been money she would be out of pocket interest on the $9,050 agreed on as its value. On the soundest principles she is entitled to damages for being out of possession of the land in the one case or of the money in the other, which latter damages would be measured by the interest.

I would set aside the judgment appealed from, and direct a reference to the Master, substantially in the terms set out in *Foster* v. *Deacon*, to inquire what loss the plaintiff has sustained by being deprived of the use and occupation of the said lands during the period between the date of the agreement and the date of the transfer, and what damage, if any, has been occasioned to the said lands by reason of the same being unoccupied and uncultivated, and also what deterioration to the buildings and fences thereon, and, if any, to what amount, by the conduct and mismanagement of the said lands and buildings by the defendant during the period aforesaid.

I think the plaintiff is entitled to the costs of this appeal and of the action. The costs of the reference are to follow the result.

It does seem to me a case where the costs of a reference can well be avoided by agreement of the parties. Clearly, if the lands and premises have depreciated as a consequence of the defendant's

MAN.

C. A.

LOBEL v. WILLIAMS.

Cameron, J.A.

delay in making title, then surely the plaintiff, from the point of view of equity and common sense, is entitled to compensation.

It might be suggested that the payment of interest on the exchange value of the lands between the date of the contract and that of the transfer would meet the demands of justice. I can, however, find no authority for adopting interest as necessarily or properly the measure of damages. It might be excessive, or, on the other hand, altogether inadequate. The matter, however, is one susceptible of settlement. But if the parties fail to agree the reference must be proceeded with.

Appeal allowed.

MAN.

K. B.

NELSON v. BAIRD.

Manitoba King's Bench, Metcalfe, J. March 1, 1915.

1. BROKERS (§ I—2)—STOCK BROKERS—MARGINS—RIGHTS AND LIABILITIES.

The broker is protected only in so far as he acts reasonably thereunder, by a clause in bought and sold notes of a grain broker, that he reserves the right in case at any time margins are running out or approaching exhaustion, to close the trades by purchase or sale upon the exchange without calling for additional margins or the giving of further notice.

2. DAMAGES (§ III A—51)—BY AGENT—STOCK BROKER—MARGINS—DIFFERENCE IN PRICES.

Damages for the wrongful closing out of a margin account with grain brokers need not be fixed at the highest or "peak" price on exchange at which the plaintiff on a bought order might have sold during the period for which the transaction should have run.

[*Michael* v. *Hart*, [1901] 2 K.B. 867, criticized; *Michael* v. *Hart*, [1902] 1 K.B. 490, and *Goodall* v. *Clark*, 23 O.L.R. 620, referred to.]

Statement

ACTION for breach of contract.

W. H. Trueman, for plaintiff.

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

Metcalfe, J.

METCALFE, J.:—The plaintiff resides at Netherhill in the Province of Saskatchewan. He is a farmer and cattle dealer. The defendants are brokers operatng on the Winnipeg Grain Exchange. Prior to the transactions over which this dispute arose the plaintiff had, through other brokers, some experience in dealing in "futures" on the Winnipeg Grain Exchange. The plaintiff had also several prior dealings with the defendants as follows:—

June 11/14. Bought 5,000 July Oats—39½. June 23/14. Sold 5,000 July Oats—39¼. July 22/14. Bought 1,000 Oct. Flax—155½. July 27/14. Bought 1,000 Oct. Flax—174¼. July 29/14. Sold 2,000 Oct. Flax—164¼.

It was intended that these transactions should be carried out on the Winnipeg Grain Exchange. In each transaction with the defendants there was sent to the plaintiff either a bought or sold note, as the case required, containing the following provisions:—

We have made the following transactions for your account and risk under the by-laws, rules, regulations and customs of the Winnipeg Grain Exchange of the City of Winnipeg, upon the distinct understanding and agreement between us that the actual receipt or delivery of the property and payment therefor is contemplated and intended, and in the meantime until such receipt or delivery and payment thereof, we reserve the right, in case at any time margins are running out or approaching exhaustion, to close the trades by purchase or sale upon the said Grain Exchange of the City of Winnipeg without calling for additional margins or the giving of further notice."

In the transactions with other brokers similar notes were used.

The negotiations in each case had been carried on through one Myers, a grain agent residing at Netherhill, who, in each case, wired the brokers to buy. The brokers, being furnished with margin, bought, and sent the bought notes.

The terms of the contract must be gathered from the bald instructions to buy and sell; from the acceptance of the employment and these bought and sold notes; and from the surrounding circumstances. The dealings bear the ear-marks of contracts in "futures" with an intention to settle on differences.

On July 30, 1914, Myers wired the defendants to buy 3,000 bushels of October Flax for the account of the plaintiff at a price under 162. Myers at that time knew that large margins were required by the brokers. On the same day one Kierstead wired the defendants to place $1,100 to the credit of the plaintiff. The flax was bought at 158 and on the morning of July 31, the money was carried to Nelson's credit in the defendants' books.

Early on August 3, Nelson wired the defendants to buy

MAN.

K. B.

NELSON v. BAIRD.

Metcalfe, J.

2,000 October wheat. This was bought by the defendants for the account of Nelson at the opening price of 95½.

It was intended by the plantiff that both these purchases should be made on the Winnipeg Grain Exchange on margin. I find that the plaintiff was aware that the margin then required by the defendants for like transactions was 20c a bushel on flax and 10c a bushel on wheat "to be kept good."

The wheat and flax were purchased in the pit of the Winnipeg Grain Exchange by the defendants for the plaintiff for October delivery. Such transactions are daily recorded in the clearing house, and each transaction has to be supported by a margin placed with the clearing house by the broker. At that time the clearing house required from the broker a margin on 20c. a bushel on flax and 10c. a bushel on wheat "to be kept good." Afterwards, throughout each day's proceedings, whenever the prices dropped 2c, the clearing house calls the broker for a further margin. The broker has fifteen minutes within which to settle, and so on each further drop of 2c. at all times daily until the closing of the exchange, and so on from day to day. About this time matters were very unsettled in Europe. The brokers were nervous and apprehensive.

On the morning of August 3, war was declared. Flax opened at 149, or 9c. below the purchase. It fell suddenly to 136. Mr. Botterell says he then gave the order to his floor man to sell the wheat bought that morning and the flax; that the wheat, being saleable, sold first, but that, although they offered the flax all the way down to 129½, there were few sales, and he was unable to sell; that at this time the brokers offering flax all stepped out of the pit, refusing to slaughter it further; that flax then became a little firmer; that he took the first offer he could get and sold this flax 2,000 bushels at 133 and 1,000 bushels at 134.

Except some telegrams to Myers, which are not brought directly home to the plaintiff, there was no notice of further calls.

The defendants seek to justify the absence of notice by setting up the terms of the bought and sold notes, and the extraordinary occasion.

On the morning of August 3, the plaintiff had in the defendants' hands available for margin: Transferred from Kierstead's account, $1,100. Money on hand from past settlements, $63—$1,163.

The defendants decided to close out these deals when flax reached 136. At that time, had an account been struck, it would (excluding all brokerage charges) stand about as follows:—

	Dr.	Cr.
By cash on hand		1,163
To margin on 3,000 flax at 20	600	
To margin on 2,000 wheat at 10	200	
To 3,000 flax at 158	4,740	
By 3,000 flax at 136		4,080
To 2,000 wheat at 95½	1,910	
By 2,000 wheat at 95½		1,910
Short on margins		297
	$7,450	$7,450

The standing required margins being $800, his equity at that time was $503, less brokerage. Unless in the meantime the defendants should have credited the sale of the wheat in the pit, which took place a few moments prior, when flax fell to 129½, this equity would have fallen to $388, less brokerage.

Nelson admits that he knew Myers had received a wire from the defendants that all the Netherhill clients had been sold out. He came to Winnipeg on August 7 and went to the defendants' office. He then saw Mr. Botterell, and asked him if he had been sold out. Upon Mr. Botterell answering in the affirmative, he complained that he had sufficient money on hand to have carried his "trades" and insisted upon his "trades" being reinstated. Botterell refused to reinstate the "trades." Nelson then claimed that in any event there was some $400 coming to him. Botterell, I think, then took the stand that because of the unsettled markets Kierstead's account would not stand the transfer of $1,100, and that consequently, while their books had shewed a transfer of the money, they had transferred back to Kierstead's account the balance standing in their books to Nelson's credit on August 3, after closing out the wheat and flax.

Nelson, being angry, left, and subsequently, on August 9, wrote to Mr. Baird of the defendant firm a letter as follows:—

MAN.

K. B.

NELSON v. BAIRD.

Metcalfe, J.

Dear Sir: I am addressing this letter to you personally in order to get a personal explanation of the treatment I have rec'd from the firm of Baird & Botterell.

On July 30, 1914, I had placed to my credit on your Option Ledger $1,100. I had no open trades prior to that day but had a small amt. to my credit before that. On July 30 I wired to buy 3,000 Oct. Flax and rec'd a wire the same date that your firm had bought 3,000 Oct. Flax at 158. On Aug. 3, I wired to buy 2,000 Oct. wheat under 98c. I rec'd no reply to this wire. I have been away from Netherhill since the 3, but yesterday rec'd a letter from your firm stating that on Aug. 3 you had sold for my acct. 2,000 Oct. Flax at 133 and 1,000 at 134 also that you had bought 2,000 Oct. wheat at 95½ and sold same at 95⅛. Now I want to know on what ground this Flax was sold and why the purchase of the wheat was not wired me. I knew that I had margins enough to cover my flax trade. I do not intend to stand for such treatment as this and shall expect you to place the 3,000 bu. of Oct. Flax back to me at the price you sold it at and hold it for me until I order it sold. Hoping you will attend to this matter at once, I am, Yours truly, (Sgd.) E. C. NELSON.

Mr. Baird, on August 21, responded as follows:—

Dear Sir: Your letter of the 9th inst. was unanswered owing to my absence from the City. On July 31, Mr. Kierstead instructed us to transfer $1,100 to the credit of your account, we transferred only $700 instead of $1,100 as this was all that Mr. Kierstead's account would stand. Your margins on Flax and Wheat were exhausted when we had the panic market, and there wasn't anything else for us to do but close out your account, which we did and reported to you in the usual way. You will appreciate that Flax sold at $1.30 per bushel on the day in question, and there wasn't any time or opportunity for us to get in touch with you to secure additional margins.

We are very sorry that it was necessary to close you out, but we did so under the terms under which all trades are put on with us, and therefore are unable to reinstate your trades as requested. We believe that the above explanation will be satisfactory to you.

Yours very truly,

(Sgd.) BAIRD & BOTTERELL,

Per H. N. BAIRD.

Later, on August 22, 1914, Mr. Baird wrote to Kierstead as follows:—

Dear Sir: We hand you herewith statement of your account, and on the date of transfer from your account to that of Nelson your equities in open commitments would only permit of our transferring $700, as the market took a very sharp break, and therefore the amount of $1,100, which you asked us to transfer was not transferred, as you will note per statement enclosed.

While it is quite true you wired us to transfer the money from one account to another, yet we never accept instructions by wire to transfer money from one account to another, and it was only on receipt of your

letter dated July 30, which was received here August 3, the date of the panic, and on that day the $700 was all that was permitted to be transferred.

We have had a call from Mr. E. C. Nelson, who claims that he made settlement with you on the basis of a transfer of $1,100. While this may be absolutely correct, and we have no doubt but that it is, yet we informed him that we had only transferred $700, and that if there was any more money coming from you to him, that he must look to you for the amount.

During the panic there was no time to communicate with anyone in regard to additional margin, and we had to close out our friends without consideration other than our own interests, and according to the terms under which commitments are taken on by us. We therefore ask you to let us have a cheque for $76.25, which is the debit in your account, and oblige.

Yours very truly,

(Sgd.) BAIRD & BOTTERELL,
Per H. N. BAIRD.

The defendants now admit that the plaintiff is entitled to $406.25 (being the moneys so transferred to Kierstead's account, together with a balance of $6.25) and have paid it into Court.

The following prices for October Flax indicate the trend of the flax market:—

	Open	High	Low	Close
Aug. 3	149	149	129½	140
Aug. 7	145⅛	150½	145⅛	150
Aug. 11	153½	155½	152¼	152¼
Sep. 1	139	140	138	138
Sep. 4	143	143¼	142	142
Oct. 1	120½	121	119½	120
Oct. 28	106	106¾	105¾	106⅜

The following prices for October wheat indicate the trend of the wheat market:—

	Open	High	Low	Close
Aug. 3	95½	97¾	94⅝	96½
Aug. 7	106	110½	105⅜	110
Aug. 8	110	110⅛	105¼	105⅞
Aug. 17	97⅝	98	96½	98
Aug. 31	115	115½	114¾	114⅞
Sep. 4	117½	121	117½	120
Sep. 15	105½	107¾	105½	107¼
Oct. 1	107⅞	108¼	107¼	107¼
Oct. 3	104½	106	104½	105⅞
Oct. 31				116½

The plaintiff, while obliged to accept delivery on October 1, could not compel delivery until the last day of October.

There were two courses open to the plaintiff. He might

MAN.

K. B.

NELSON v. BAIRD.

Metcalfe, J.

treat the contract as rescinded, except for the purpose of bringing an action. He might therefore: (1) Have brought an action for the breach, or; (2) Have refused to treat the contract as rescinded and insisted on his rights thereunder when the time for performance arrived.

He chose the former course, and on September 4 he commenced this action.

Regarding the flax, the plaintiff alleges, in effect, that he paid moneys to the defendants and employed them to buy the flax for 158 per bushel; that the defendants undertook and agreed with the plaintiff, in consideration of such money then paid (and such further sums as might thereafter be required for commission and other charges to protect the defendants from loss in the event of a decline in the price of said flax) that they would retain and keep the said agreement to purchase in good standing and would guarantee the delivery of the flax to the plaintiff in October on payment of the price; that in breach of the said agreement and duty the defendants closed out and cancelled the flax, causing a loss of $747.50, which the plaintiff claims.

Regarding the wheat, the plaintiff alleges a similar contract, and further alleges that at the time the wheat was purchased there was an implied contract that instead of the plaintiff taking delivery in October, the defendants would re-sell the same at any time prior to October 31, 1914, upon being ordered by the plaintiff to re-sell the same and would account to the plaintiff for the profits of such re-sale; that in breach of the said agreement to purchase, and of such implied agreement, the defendants wrongfully closed out and cancelled said wheat contract and wrongfully sold said wheat; that wheat afterwards advanced in price; that the plaintiff could have subsequently resold it at a profit of $500, which sum he claims as damages.

He therefore sues for: Damages for loss on flax, $747.50. Damages for loss of profit on wheat, $500.00—$1,247.50. Moneys paid, $1,100.00—$2,347.50.

These allegations, coupled with the fact that at the trial the plaintiff's counsel complained that the brokers had made no effort to protect his client by "stop orders" and the general

circumstances are persuasive that the plaintiff intended contracts such as were condemned in *Richardson* v. *Beamish*, 13 D.L.R. 400, 21 Can. Cr. Cas. 487, 23 Man. L.R. 306, and in appeal 49 S.C.R. 596, 16 D.L.R. 855, 23 Can. Cr. Cas. 394.

For obvious reasons neither party has raised the point. I think that the brokers, if they acted reasonably, were protected by the bought notes. What was reasonable under the circumstances? I have no doubt the brokers were nervous, apprehensive and excited on that day. Counsel for the plaintiff at the trial produced sheets shewing sales, and says that they disclose no reason for panic; but these sheets, while they shew the actual sales registered, do not indicate the numerous offering bids that must have been made to force flax down to 129½, with practically no sales, nor the many incidents naturally following the news of the declaration of war. I am of the opinion that the event was extraordinary.

It is extremely different looking backward to Judge what was and what was not reasonable. I think that under the circumstances the defendants were justified in selling the flax. I do not think they should have sold the wheat.

The plaintiff's counsel urges that he should have damages at the highest peak, and relies for that proposition on *Michael* v. *Hart* (1901), 2 K.B. 867. In that case the plaintiff in April opened an account with the defendants (stock brokers) and employed them to buy and sell shares for him, depositing with them as security certain shares. Defendants bought and sold various shares for plaintiff. On May 11, it was agreed that certain contracts for the purchase of various stocks for stock exchange settlement of the middle of May should be carried over to the end of May settlement. Defendants contended that agreement was conditional and proceeded to sell. The jury found that the agreement was not conditional and that the sale was in breach of the agreement.

Wills, J., at 869, says:—

> The only matter that I have to deal with in this case is the measure of damages. . . . The defendants further by their contract undertook that they would at any time before the settling day, if directed to do so by the plaintiff, sell the same shares for the plaintiff. This they did not do, but repudiated their contract, and put an end to it. Under those circumstances

MAN.

K.B.

NELSON v. BAIRD.

Metcalfe, J.

it seems to me that the plaintiff is entitled to all the advantages that would have been his or that might have been his if the contract had been carried out. Amongst those advantages was the right to sell the shares whenever he chose during the period over which the transactions were to run, and at different times different prices might have been realized. No doubt the plaintiff would in fact never have realized the best prices that ruled during that period. But I think I am right in saying that the Courts have never allowed the improbability of the plaintiff's obtaining the highest prices to be taken into consideration for the purpose of reducing the damages. The defendants are wrong-doers, and every presumption is to be made against them. In my opinion the plaintiff is entitled to the highest prices which were obtainable during the period during which he had the option of selling.

In appeal, 1902, 1 K.B. at p. 490, Collins, M.R., in delivering the judgment of the Court, says:—

> The general rule, which is laid down with regard to such cases, is that, where there has been what has been called an anticipatory breach of contract going to the whole consideration, it has not of itself the effect of rescinding the contract, for there must be two parties to a rescission. It only has the effect of giving the other party to the contract an option to treat the repudiation of the contract as a definitive breach of it, and thereupon to treat the contract as rescinded, except for the purpose of his bringing an action for breach of it. It gives him the right to do that; but, on the other hand, he may refuse to treat the contract as rescinded, and hold the party repudiating the contract to his obligation when the time fixed for performance arrives.

After discussing *Frost* v. *Knight* (1872), L.R. 7 Ex. 111; *Roper* v. *Johnson*, L.R. 8 C.P. 167; *Brown* v. *Muller* (1872), L.R. 7 Ex. 319, and *Johnstone* v. *Milling* (1886), 1 Q.B.D. 460, the learned Judge, at p. 492 of the report, continues: "In the present case the action was not brought till after the time at which the contract ought to have been performed by the defendants, and the plaintiff, upon notice of the closing of his accounts, distinctly insisted on performance of the contract, and that the defendants' obligation continued up to the date of the settlement. Under these circumstances the defendants' counsel argue that the damages ought to be calculated with reference to the prices of the stocks at the time of the closing of the plaintiff's account, and that, if they are so calculated, there will be no damages, or only nominal damages, and therefore that the plaintiff can only recover nominal damages. I am of opinion that, having regard to the principles laid down by the

authorities to which I have referred, the contention for the defendants on this point cannot be sustained."

"There is yet another alternative measure of damages which was adopted by the learned Judge. . . . With regard to the question, which of these two alternative measures of damages ought to be adopted, if the Court were against the defendants on the first point, after the argument had proceeded some way, the counsel for the parties effected a compromise, leaving the Court to decide only the first point taken by the defendants. We therefore give judgment on that point only against the defendants, leaving the damages to be ascertained in accordance with the arrangement arrived at by the parties."

In *Goodall* v. *Clark*, 23 O.L.R., Clute, J., at p. 620, speaking of *Michael* v. *Hart*, says:—

It seems doubtful if the extreme view laid down by Wills, J., is good law, and suggests that the assessments should be made as though by a jury.

Especially in view of the contract and the special circumstances, I will not allow the plaintiff the highest peak. Whatever the decision of the Court of Appeal might have been upon that point, I do not think the principle applies here.

There will be judgment for the plaintiff for $225 damages, together with the $406.25 in Court.

Had the defendants on August 7 paid that amount to the plaintiff, or had they sent him a statement of his account with a cheque to balance in the ordinary way, perhaps there would have been less trouble.

The plaintiff will have the costs of the action.

Judgment accordingly.

McNIVEN v. PIGOTT.

Ontario Supreme Court, Middleton, J.

1. VENDOR AND PURCHASER (§ I E—29)—RESCISSION OF CONTRACT—RESTITUTION TO STATUS QUO—REMOVAL OF BUILDINGS.

Where a rescission of a contract for the sale of land is sought by a purchaser upon no ground of fraud but upon the inability of the vendor to make a satisfactory title to the land conveyed, it is the duty of the purchaser to make restitution of what he had received under the contract; and where in pursuance of such contract the purchaser removes building upon the land and is unable to make com-

ONT.

S. C.

plete restitution, damages equivalent to the value thereof may be allowed in restitution of the vendor to his status quo.

[*McNiven* v. *Pigott*, 19 D.L.R. 846, 31 O.L.R. 365, reversed.]

McNIVEN v. PIGOTT.

2. VENDOR AND PURCHASER (§ I C—17) — VALIDITY OF TITLE—LAPSED AGREEMENT ESTABLISHING HIGHWAY OVER LAND—EFFECT.

An agreement stipulating the establishment of a highway across a piece of land which had been spent by lapse of time, or an action to remove such agreement as forming a cloud upon the title, does not affect the title to the land as to entitle the purchaser to a rescission of the contract of sale where the vendor is otherwise willing and able to make a good title.

[*McNiven* v. *Pigott*, 19 D.L.R. 846, 31 O.L.R. 365, reversed.]

Statement

APPEAL by the defendant and cross-appeal by the plaintiffs from the report of the Local Master at Hamilton.

The appeal and cross-appeal were heard by MIDDLETON, J., in the Weekly Court at Toronto.

G. Lynch-Staunton, K.C., and *S. F. Washington*, K.C., for the defendant.

W. S. MacBrayne, for the plaintiffs.

Middleton, J.

MIDDLETON, J.:—The facts giving rise to this appeal have already been before the Courts in more than one form. By an agreement bearing date the 12th March, 1913, Pigott, the owner of the lands in question, agreed to sell them to the plaintiffs for $32,500. A good title was to be made within 14 days; in default, the sum deposited was to be repaid, and the offer was to be void, at the purchasers' option. Under the agreement, $2,000 was to be paid as a deposit, $4,000 on the 3rd April, 1913, and the balance remaining after the assumption of certain existing mortgages was to be paid on the 16th June, 1913, that being the date named for the closing of the sale. It is then provided that "we or any of us are to have possession at once of the said lands, to cut down trees, remove fences, clear off all obstacles necessary to put property in good saleable condition, survey and open up street through said property, sell or build on said property." It was also agreed that Pigott should have the free use of the house and 61 feet frontage on Wentworth street, as a dwelling, until the day fixed for closing.

An agreement had been made with Mr. Bell, the owner of the adjoining lands, looking to the opening up of a street across

both parcels. It was assumed that this agreement was spent by the lapsing of the time mentioned in it. The solicitor acting for both parties did not regard it as any defect in the vendor's title, and he told the purchasers that the title was satisfactory. Thereupon they entered into possession of the land and took down fences, removed hedges, and laid out a road which, it was contemplated, should be made through the property for the purpose of profitable subdivision.

Acting in perfect good faith and with a view to a profitable subdivision and sale of the land, the purchasers pulled down and removed a stable and some outbuildings upon the property. These were stone buildings, which, the Master has found, were worth $2,000.

Mr. Bell gave notice that he did not assent to the view above indicated as to the effect of his argument, and he claimed to have the right to open up the street that that agreement contemplated across the Pigott land, notwithstanding the lapse of the time-limit contained in the agreement. This frightened the purchasers, and they declined to carry out the agreement, although they paid the second instalment on the purchase-price.

An application was made under the Vendors and Purchasers Act, which was heard by the Chief Justice of the King's Bench, and he refused to force the title upon the purchasers, thinking that the agreement constituted a cloud upon the title: *Re Pigott and Kern*, 12 D.L.R. 838; (1913), 4 O.W.N. 1580.

This action was then brought to rescind the agreement and to recover back the purchase-price paid.

Thereafter, for the purpose of clearing up his title, Pigott brought an action against Bell. The result of this action was a declaration that the Bell agreement was spent, and formed no cloud upon Pigott's title. The judgment in that action, *Pigott* v. *Bell* (1913), is reported in 5 O.W.N. 314.

The present action afterwards came on for trial before the Chief Justice of the King's Bench, who decided in Pigott's favour; but his decision was reversed upon appeal, the Appellate Division on the 12th May, 1914, *McNiven* v. *Pigott*, 19 D.L.R. 846, 31 O.L.R. 365, determining that the plaintiffs were entitled to rescind the agreement by reason of what had taken place, and

ONT.
S. C.
McNIVEN
v.
PIGOTT.
Middleton, J.

a refund of the amount paid on account of the purchase-price was ordered. The Court also directed the defendant to pay the plaintiffs their costs of investigating the title to the land in question, and referred it to the Master to take an account of the damages, if any, over and above these costs, to which the plaintiffs are entitled by reason of the defendant's failure to make title under his contract; and also to determine the damages, if any, that the defendant is entitled to by reason of the plaintiffs' dealings with the lands and premises.

Upon the reference, the plaintiffs claimed to be entitled to recover as damages the profits, or some sum to represent the profits, which would have accrued to them if the defendant had had a good title. They also claimed to recover an amount paid to a surveyor for work done in laying out a subdivision of the lands and the costs of litigation with this surveyor. The defendant claimed to be entitled to recover as damages the value of the buildings, etc., destroyed and removed by the plaintiffs.

The Master has disallowed the claims of both parties, save that he has allowed to the defendant the sum of $75 as representing the amount received by the plaintiffs from the sale of the salvage from the buildings removed. The Master has assessed at $1,200 the damages that the plaintiffs are entitled to receive if in the result their claim should be upheld. He has in like manner assessed the defendant's damages, if he is entitled to succeed, at $2,000. This, I understand, includes the $75.

Both parties now appeal from the Master's report.

Dealing first with the defendant's appeal, the plaintiffs' action was in effect, and possibly in substance, for rescission of the contract, not upon the ground of any fraud, but upon the ground of the inability of the defendant to make what is deemed a satisfactory title to the land to be conveyed. In this case, and possibly also in the case of fraud (see *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, [1899] 2 Ch. 392), there can only be rescission and the restitution to the plaintiff of that which he has paid under the contract, upon the terms that the plaintiff himself make restitution of that which he has received, so that the parties may be restored to the positions in which they respectively were before the contract. If, either from the plaintiff's

ONT.
S. C.
McNiven v. Pigott.
Middleton, J.

own act or from misfortune, the plaintiff is unable to make restitution, he cannot rescind. This statement is, I think, justified by what is said in *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317, at p. 338; *Hogan* v. *Healy* (1877), Ir. R. 11 C.L. 119; *Clarke* v. *Dickson* (1858), E.B. & E. 148; *Rees* v. *De Bernardy*, [1896] 2 Ch. 437, at p. 446.

Manifestly in this case, owing to the destruction of the buildings, the plaintiffs cannot make complete restitution. This point does not seem to have been dealt with by the Appellate Division; but, if I understand the decision aright, the reference as to damages awarded to the defendant must be taken to be a reference to ascertain by how much that which the plaintiffs return falls short of complete restitution. Taking this view of the case, the defendant's right to receive the $2,000 ascertained by the Master as being the value of his buildings which were destroyed, seems plain. As already stated, the $2,000 should be deemed to include the $75 already awarded.

Turning to the plaintiffs' appeal: in *Flureau* v. *Thornhill* (1776), 2 W. Bl. 1078, the principle is laid down that a contract for sale of land is merely upon condition, frequently expressed, always implied, that the vendor has a good title. If the vendor has no title or a defective title, and is acting without collusion, the prospective purchaser is entitled to no satisfaction for the loss of his bargain.

In *Hopkins* v. *Grazebrook* (1826), 6 B. & C. 31, this rule was modified. There, the vendor held out the estate as his own, well knowing that he had no title.

In *Bain* v. *Fothergill* (1874), L.R. 7 H.L. 158, *Hopkins* v. *Grazebrook* was overruled, and it was laid down that the rule in the earlier case must be taken to be without exception, unless the plaintiff could shew sufficient to entitle him to recover damages in an action for deceit.

In the meantime, in the case of *Engel* v. *Fitch* (1868-9), L.R. 3 Q.B. 314, L.R. 4 Q.B. 659, another principle had been established. It was there held that by the contract of sale the vendor had undertaken to use his best endeavours to make a good title, and where the failure to make a good title arose not from his

ONT.
S. C.
McNIVEN v. PIGOTT.
Middleton, J.

inability, but from his unwillingness to implement his undertaking, special damages might be recovered.

In *Bain* v. *Fothergill*, it is quite plain that the law laid down in *Engel* v. *Fitch* was left undisturbed.

In *Day* v. *Singleton*, [1899] 2 Ch. 320, this principle was applied, and damages were awarded where the executor of a vendor induced a lessor to refuse his assent to the assignment of a lease; this being a deliberate breach of his contract to convey.

In *Lehmann* v. *McArthur* (1868), L.R. 3 Ch. 496, a landlord, of his own motion, unreasonably and improperly refused his assent. It was argued that the vendor was at fault, in that he did not resort to law to compel the landlord to assent; but the holding was that, although the vendor was bound to do all that was in his power to carry out his contract, his obligation did not compel him to litigate with the landlord.

Clergue v. *McKay* (1903), 6 O.L.R. 51, is an example of the type of case in which substantial damages may be awarded. There the vendor deliberately precluded himself from making a title, by selling to another, in fraud of his earlier contract.

Here it is plain, as the result of the litigation with Bell, that the defendant's title was at all times good. It is not suggested that there was any collusion or any deliberate failure on his part. Although Pigott ultimately brought an action to get rid of whatever cloud Bell's unwarranted claim cast upon his title, he was not bound to do this. It was beyond his obligation under his contract with the plaintiffs.

The result is, that the plaintiffs' appeal fails, while the defendant's appeal succeeds, and costs will follow the event.

A motion was made at the same time upon further directions. If the plaintiffs desire to carry the matter further, this is premature; but, if there is no intention to litigate further there should be judgment for the return of the balance of the purchase-money after deducting $2,000, and the defendant should have the costs of the reference and of the motion for judgment.

Judgment accordingly.

McNIVEN v. PIGOTT.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee, and Hodgins, JJ.A., and Lennox, J. March 15, 1915.

1. VENDOR AND PURCHASER (§ I E—29)—CONTRACT — REPUDIATION OF — RESTITUTION OF PROPERTY IN SAME CONDITION—ALTERATION MADE BY CONSENT OF BOTH PARTIES.

Inability of the purchaser on repudiating the contract of sale to make restitution of the property in the same condition as when he received possession will not form a defense to a claim for the rescission of the contract where the alteration to the property has been made pursuant thereto and therefore with the consent of both the parties; so where the contract provided that possession might be taken at once and that the purchaser might proceed to cut down trees and make demolitions to put the property in saleable condition and lay out streets thereon and the purchaser proceeded in the exercise of this privilege in good faith and before notice of the fact that trouble was likely to arise in regard to the title, the vendor will be entitled to receive from the purchaser on the sale falling through for a defect in the title only the amount received by the purchaser from the sale and salvage of the buildings demolished over and above the costs of the removal and not the value of the buildings prior to the demolition.

[*Rankin* v. *Sterling*, 3 O.L.R. 646; *Addison* v. *Ottawa Auto., etc. Co.*, 16 D.L.R. 318, 30 O.L.R. 51, referred to; *McNiven* v. *Pigott*, 22 D.L.R. 141, 33 O.L.R. 78, varied.]

Statement

APPEAL by the plaintiffs from an order of MIDDLETON, J.

I. F. Hellmuth, K.C., and *W. S. MacBrayne*, for the appellants.

G. Lynch-Staunton, K.C., and *S. F. Washington*, K.C., for the defendant, respondent.

The judgment of the Court was delivered by

Hodgins, J.A.

HODGINS, J.A.:—Appeal from the judgment of Middleton, J., varying the Master's report by allowing $2,000, the value of buildings destroyed and removed by the plaintiffs. As to another branch, the appeal was dismissed on the argument, and judgment was reserved upon the plaintiffs' main appeal.

The learned Judge's view now is that the judgment pronounced by the Appellate Division, and reported in 19 D.L.R. 846, 31 O.L.R. 365, necessarily involved *restitutio in integrum* or its equivalent. Hence he allows $2,000, the value of the respondent's buildngs as they stood when the contract was entered into, rather than $75, the amount received by the appellants from the sale of the salvage from the buildings over and above the cost of removal.

ONT.

S. C.

McNIVEN v. PIGOTT.

Hodgins, J.A.

This, however, is not the case. No claim was made by the respondent that the appellants were not entitled to rescission because they had removed the buildings, or that, if granted, they must fully compensate the respondent for the value of the buildings removed. It is hardly likely that the experienced counsel who then acted for the respondent would have overlooked that point, especially as it would have answered a double purpose, namely, as shewing, if unexplained, an acceptance of the title (*Margravine of Anspach* v. *Noel* (1816), 1 Madd. 310; *Commercial Bank* v. *McConnell* (1859), 7 Gr. 323; *Wallace* v. *Hesslein* (1898), 29 S.C.R. 171); and as affording a practical bar to rescission, unless full restitution could be be made.

However that may be, the point was not argued before the Court, and its judgment did not rest upon that view of the respondent's rights.

The contract itself probably affords the explanation. It provided that possession might be taken at once, and leave was given to the appellants to take possession at once and "to cut down trees, remove fences, clear off all obstacles necessary to put property in good saleable condition, survey and open up streets through said property, sell or build on said property."

From the evidence taken before the Master, it appears that the buildings were removed when both parties were under the impression (which apparently the respondent and the learned Judge below still retain) that the respondent had a good title, and before knowledge that a claim under the Bell agreement was being actively asserted. What was done was, therefore, not only in pursuance of the terms of the contract, but in good faith and before notice, not or course of the existence of the Bell agreement, but of the fact that trouble was likely to arise therefrom. Inability to make *restitutio in integrum* is held to be a bar only as against the party by whose acts the property has been changed or depreciated: *Phosphate Sewage Co.* v. *Hartmont* (1877), 5 Ch.D. 394; *Rees* v. *De Bernardy*, [1896] 2 Ch. 437, 446. I have found no case where it forms a defence when the alteration has been made pursuant to the contract, and therefore is something consented to by both parties.

In *Head* v. *Tattersall* (1871), L.R. 7 Ex. 7, it was decided that, while the buyer of a horse, which, by the contract, he could return if it did not answer the description, must return it in the same state in which it was bought, that right was subject to any of those incidents to which the horse might be liable, (1) either from its inherent nature, or (2) in the course of the exercise by the buyer of those rights over it which the contract gave.

The vendor is bound to hold the property for the purchaser after the contract is entered into: *Clarke* v. *Ramuz*, [1891] 2 Q.B. 456. Neither he, nor the purchaser, if let into possession by contract, can change it, but they may agree to any modification of their strict rights. If, where the vendor is asserting a good title, and, pending completion, he and the purchaser are willing that the latter should begin to make improvements, or deal with it so as to make it different from what it originally was, the reason for the rule does not seem applicable. If the contract goes off, the purchaser may lose his expenditure (*Rankin* v. *Sterling* (1902), 3 O.L.R. 646); but the vendor certainly cannot complain if he gets the property back, together with any benefit which in its altered condition has come to the purchaser as the result of the agreement or pursuant to the terms of the contract. See *Addison* v. *Ottawa Auto and Taxi Co.*, 30 O.L.R. 51.

The reference as to damage, if legally recoverable, was confined to what was claimed in the pleadings, namely, loss and damage caused by reason of the appellants not carrying out the contract, and because the respondent had been unable to meet obligations contracted in expectation of receiving the purchase-price for the property; but the reference has been proceeded with under the idea that the value of the buildings was a possible element of damage. That, however, must be assessed under the real circumstances of the case, and not upon the view that the appellants had improperly altered the condition of the property, which is contrary to the fact.

Hence the allowance of the $75, being the profit made by the appellants, was the proper measure of damages, and is that

ONT.
S. C.
McNIVEN v. PIGOTT.
Hodgins, J.A.

which must have been in the contemplation of the parties, having regard to their contract.

The appeal should, therefore, be allowed with costs, and the damages reduced to $75. There should be no costs in the Master's office nor in the Court below to either party, as in the result success has been divided throughout.

It may be proper to observe that the respondent admits that at the former trial he said that the demolition of these buildings was in pursuance of the agreement, though he now indicates that he so answered without going fully into it. Speaking of the plans used by the appellants when applying to the council to get consent to the proposed streets upon the property in question, the respondent, in answer to the question, "If either of these plans were adopted for the sale of this property, it would be necessary to remove the buildings that you have mentioned?" says, "If any one chose the one method instead of the other, they would have to move the buildings to carry the other one out;" and when further pressed upon the same point he adds, "Yes, according to either of those plans, yes." Schultz, who confirms this, says that a rough sketch-plan made by the respondent would involve the same result, though the respondent is not willing to admit this.

Appeal allowed in part.

B. C.
S. C.

BAIRD v. THE COLUMBIA TRUST CO. THE COLUMBIA TRUST CO. v. BAIRD.

British Columbia Supreme Court, Morrison, J. January 11, 1915.

1. TRUSTS (§ I D—24)—RESULTING TRUSTS—HOW ARISEN.

A resulting trust is one in which the person in whose favour the trust arises is the person who provided the property or equitable interest vested in the person bound by the trust.

Statement

ACTION for salary and commission and cross action for an accounting.

F. McDougall, for plaintiff.

Ritchie, K.C., for defendants.

Morrison, J.

MORRISON, J.:—These two actions, in which the issues are practically the same, were ordered to be tried together.

Broadly, the plaintiff claims that in his agreement with the

defendants he engaged on the footing of a commission plus salary, and not, as contended for by the defendants, on the basis of advances against commission to be earned. I find that the agreement was as claimed by the plaintiff.

He then proceeds with the particulars of his claim under some four headings or arrangements, the first of which has to do with the sale of shares in the A. B. C. Elevator and Wharf Company, Ltd. The real dispute thereunder arises over the application of Mr. Helyer for shares. I think the claim respecting these shares should be allowed.

The second is as to the sale of commercial cars. I think, again, he is entitled to a commission under this head as claimed. There will be a reference to ascertain the proceeds of the sales. The only charges to be deducted are those for freight. The third arrangement deals with the Buttimer Building. Mr. McDougall contended that a resulting trust was created in this transaction, and he claims a declaration accordingly. I cannot agree with that contention. A resulting trust is one in which the person in whose favour the trust arises is the person who provided the property or equitable interest vested in the person bound by the trust. I do not think the facts in this case respond to that definition.

I think his alternative claim should prevail, and I find he is entitled to the sum of $1,500.

As to the rest of his claim, I do not allow numbers 3, 5, 6, 7 and 8 of the statement of claim. The counterclaim is dismissed with costs.

Judgment accordingly.

TIDY v. CUNNINGHAM.

B. C.
S. C.

British Columbia Supreme Court, Morrison, J. January 14, 1915.

1. GAS (§ IV A—16)—ESCAPE OF—INJURIES FROM—LIABILITY.

The owner of a gas works in connection with which gas pipes are laid under city streets is not liable for the escape of gas without his knowledge through the breaking of a street gas pipe by a third party not under his control, the consequence of whose act the defendant could not reasonably have anticipated.

[*Rickards* v. *Lothian*, [1913] A.C. 263, 278; *Charing Cross* v. *London Hydraulic*, 83 L.J.K.B. 1352, [1914] 3 K.B. 772; *Rylands* v. *Fletcher*, 3 H.L. 330, referred to.]

Statement

ACTION for damages.

B. C.

S. C.

TIDY v. CUNNINGHAM.

Morrison, J.

J. Hampton Bole, for plaintiff.

W. J. Whiteside, K.C., for defendant.

MORRISON, J.:—The defendant, who owns or controls a gas works in the city of New Westminster, is duly authorised by that city to carry on those works, and is empowered to lay pipes, etc., for the supply of gas to patrons. The pipes laid pursuant to these powers were properly laid, and the one in question was so laid within a comparatively recent period, and, at the time material to this matter, was in good sound condition. Through no negligence on defendant's part, this pipe sustained a clean fracture, and, in consequence, gas escaped, which found its way to the surface of the street under which the pipe is laid and into the flower shop of the plaintiff, whereby he claims he sustained the damage complained. Just about the time plaintiff discovered gas in and about his premises, the street in question was being repaired or altered or improved by a contracting company for the corporation of the city of New Westminster, and had utilized a heavy steam roller in the performance of their work. In carrying on the work in question, it seems the surface of the street had been taken away either wholly or partially and new material laid down, and at certain stages the steam roller was used over the *locus in quo*. After complaint by the plaintiff to the defendant, both parties drew the city council's attention to the fact that gas was escaping, and, after some considerable time, the street was opened up, when the fracture was discovered. I find that the fracture was caused without the knowledge of the defendant by a third party over whom the defendant had no control and the consequence of whose act the defendant could not reasonably have anticipated: *Nichols* v. *Marsland*, 2 Ex.D. 1, Bramwell, B., and *Box* v. *Jubb* (1879), 4 Ex.D. 76, Kelly, B., both quoted by Lord Moulton in delivering the judgment of the Privy Council in *Rickards* v. *Lothian*, [1913] A.C. 263, at 278-9. Their Lordships agree with the law as laid down in the judgments above cited, and are of opinion that a defendant is not liable on the principle of *Fletcher* v. *Rylands*, L.R. 1 Ex. 265; on appeal, *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, for damages caused by the wrongful act of third parties.

I find there was no negligence on defendant's part, and, if there was a nuisance, it was not caused by the defendant. I

think that "nuisance," as applied to this case, may be taken in the restricted sense referred to by Lord Sumner in the recent case of *Charing Cross, etc., Electricity* v. *London Hydraulic Power Co.*, 83 L.J.K.B. (C.A.) at p. 1914. The present case, I venture to say, is stronger than the illustration there put, inasmuch as there is no act of the defendant jointly operating to cause the break in the pipe. The above case, as regards the question of nuisance, turns on the fact that the nuisance was caused by the defendant.

The action is dismissed. *Action dismissed.*

DANDY v. THE NATIONAL TRUST CO. LIMITED.

Alberta Supreme Court, Simmons, J. January 14, 1915.

1. EXECUTORS AND ADMINISTRATORS (§ IV A—80)—CLAIMS AGAINST ESTATE—PRESENTATION AND PROOF OF—CORROBORATION.

Where the transactions between the plaintiff and the deceased were separate, each giving rise to a separate cause of action, corroboration in regard to one transaction is not corroboration in regard to the other as against the estate of the deceased person in an action to establish an agency and to recover an alleged secret profit as to both transactions.

[*Cook* v. *Grant*, 32 U.C.C.P. 511; *Re Ross* 29 Gr. 385; *Voyer* v. *Lepage* (1914), 19 D.L.R. 52, affirming 17 D.L.R. 476, referred to.]

Statement

ACTION to recover against an administrator an alleged secret profit made by deceased.

Alex. Stuart, K.C., for plaintiff.

H. H. Parlee, K.C., for defendant.

Simmons, J.

SIMMONS, J.:—The defendant is the administrator of the estate and effects of Joseph Robinson, late of Vermillion in the Province of Alberta.

In April, 1911, the plaintiff purchased from said Robinson the north-east quarter of section 33, township 49, range 6, west of the fourth meridian in the Province of Alberta, at the price of $3,200, and in June, 1911, the plaintiff purchased from said Robinson the south-east quarter of said section at the price of $2,880.

The plaintiff says that in regard to the purchase of the north-east quarter Robinson represented to him that the land was owned by a friend of Robinson's in the United States, and that he, Robinson, could purchase it for the plaintiff cheaper than any one else could do, and at the plaintiff's request the said Robinson agreed to act as the agent of the plaintiff in making the said purchase.

ALTA.

S. C.

DANDY v. THE NATIONAL TRUST CO. LTD.

Simmons, J.

The plaintiff says that the said Robinson then purchased the land direct from the C.P.R. Co., the owner, at the price of $2,640, and made a fraudulent profit thereby of $560.

The plaintiff alleges that the south-east quarter was sold to the plaintiff by the said Robinson under similar misrepresentations and a secret profit of $480 was thereby obtained by the said Robinson.

The plaintiff claims from the administrator the return of said moneys so fraudulently obtained.

At the trial the plaintiff satisfied me as to the truth of the allegations above set out. This is a case, however, where, pursuant to sec. 12 of the Evidence Act of Alberta, ch. 3, 1910, the statements of the plaintiff must be corroborated in some material part.

In regard to the purchase of the north-east quarter I find sufficient corroboration to satisfy the statute.

The said Robinson purchased this quarter section from the C.P.R. Co. on May 26, 1911, for $2,640, under an agreement in writing with the company of that date.

On August 5 Robinson executed a quit claim of this land to the plaintiff, and on September 9, 1911, he executed an assignment to the plaintiff of the contract to purchase from the railway company.

Mr. Morrison, a barrister at Vermillion, acted for both parties in the preparing and execution by the parties of the said documents. He says there was a delay in obtaining the approval of the railway company to the said assignment due to an execution registered against Robinson.

On April 1, 1912, Robinson made a statutory declaration to the effect that in purchasing said north-east quarter he did so as the agent of the plaintiff. In view of his statutory declaration there is no explanation for the contract between Robinson and the railway company, and it is obvious that if his statutory declaration is true this contract should have been made between the plaintiff and the railway company.

Mr. Morrison says he understood from the instructions he got from Robinson that the plaintiff was purchasing direct from Robinson. Robinson has made a statutory declaration that such was not the case, but that he had no interest in the transaction

beyond his usual agency commission, but he does not state the amount of the commission.

In regard to the south-east quarter I am not able to find in the documents or in the evidence of Morrison any corroboration. They were separate transactions, each giving rise to a separate cause of action and corroboration in regard to one transaction is not corroboration in regard to the other: *Cook* v. *Grant*, 32 U.C.C.P. 511; *Re Ross*, 29 Grant 385; *Voyer* v. *Lepage*, 19 D.L.R. 52, December, 1914.

The plaintiff is therefore to have judgment for $560 and interest at 5% from May 26, 1911, the date of purchase of said lands, and costs.

The defendant company to have its costs paid out of the estate.

Judgment accordingly.

WEIR v. HAMILTON STREET R.W. CO.

Ontario Supreme Court, Mulock, C.J.Ex., Hodgins, J.A., and Sutherland and Leitch, JJ.

STREET RAILWAYS (§ III B—29)—DANGEROUS PLACING OF TROLLEY POLE—ABSENCE OF GUARDS—COLLISION.

A street railway company empowered by its Act of incorporation to erect poles on a street, so as not to impede public travel, will be liable in damages for injuries to a vehicular traveller resulting from a collision of a motor car with one of the trolley poles that had been shifted from its uniform position at the side of the street to the devil's strip, without any lights to guard it at night.

Statement

APPEAL by the defendants from the judgment of LATCHFORD, J.

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

H. Howitt, for the plaintiffs, respondents.

Sutherland, J.

SUTHERLAND, J.:—An appeal from the judgment of Latchford, J., in an action tried by him with a jury at Toronto on the 21st April, 1914. The action arose out of a motor car accident in the city of Hamilton on the night of the 23rd May, 1913. In the car at the time were the plaintiff Robert Weir, the owner thereof, and the other plaintiffs, namely, his daughter Gladys and James Cowan Kent and Caroline Kent.

The car ran into an upright pole of the defendant company in King street, and was damaged and its occupants injured.

ONT.

S. C.

WEIR v. HAMILTON STREET R.W. CO.

Sutherland, J.

The plaintiffs alleged that the pole "had been negligently placed, maintained, and left unguarded and unlighted in the travelled portion of King street, by the defendants, so as to constitute a dangerous trap for passers-by."

The defendant company pleaded that they were not responsible in law for any injuries sustained or damages suffered by the plaintiffs; that the pole had been placed in its position by the order, under the supervision, and to the satisfaction of the Municipal Corporation of the City of Hamilton, and that the plaintiffs could have avoided the accident by the exercise of ordinary care.

The defendant company had delivered a third party notice to the Municipal Corporation of the City of Hamilton, and by an order of the Master in Chambers, dated the 9th December, 1913, the latter were ordered, within seven days from the service of the order, to deliver to the plaintiffs and the defendants respectively a defence or statement of points upon which they would rely at the trial, and given liberty to appear by counsel thereat in the usual way and for the usual purposes. In pursuance of such order, the municipal corporation delivered a defence setting forth that they would rely upon the defence of the defendant company, and denying all negligence on their part.

At the trial the action was dismissed without costs as regards the plaintiffs Kent. The jury, in answer to questions, found the defendants guilty of negligence, in that "the trolley poles should have been placed in a uniform position along the entire thoroughfare;" and that the plaintiffs could not, by the exercise of reasonable care, have avoided the accident; and they assessed the damages at $735 and $300 respectively for the plaintiffs Robert and Gladys Weir.

The poles of the defendant company, at the point where the accident occurred, were erected upon King street, one of the streets of the municipality. The plaintiff Robert Weir, who was driving the car, was not familiar with the locality, and the night was rainy and misty. The car had been driven along James street, and at the corner of King street turned easterly along that street, proceeding along the south side thereof, which

under ordinary circumstances would be the proper side for the driver to take.

On the south side of King street, the two tracks of the defendant company were, on account of the gore or park in the street, located much nearer to the south than to the north side, and between them there was the usual devil's strip of about 5 feet in width. The car was being driven so that the wheels on the north side ran along the devil's strip and those on the south side between the rails of the south track, and it was travelling at about 12 or 13 miles an hour, when suddenly it came in contact, at a point about 75 feet east of the intersection of Hughson street, the next street east of James street, and King street, with a trolley pole which had been placed there on the devil's strip, and was the first of a series of poles along that strip in front of the gore.

It appears that along King street, up to the point where the car came in contact with the pole, the travelled portion of the street was not obstructed by trolley poles, as they were erected at the side of the street. It appears also that to any one well acquainted with the condition of the street at that point there was ample space on the north side of the tracks for motor cars and other vehicles to pass one another without difficulty.

Under these circumstances, the defendant company appeal on the following grounds: (1) that the case should have been taken from the jury, there being no scintilla of evidence which could in law be construed as negligence on the part of the defendants; (2) that the "negligence found by the jury is not in law negligence on the part of the defendants, and that, on the answers of the jury and on the evidence adduced at the trial, judgment should have been entered for the defendants;" (3) that the trial Judge erred in directing the jury that "if the municipality was liable as a matter of law for an accident caused if it had erected the trolley pole, then as a matter of law the defendants, the Hamilton Street Railway Company, might also be held liable;" (4) that the defendants, in placing the poles in the manner indicated in the evidence, "acted in pursuance of the statutory authority delegated to the City of Hamilton, and, the provision as to the position of the poles being directory and

ONT.

S. C.

WEIR v. HAMILTON STREET R.W. Co.

Sutherland, J.

not permissive, the defendants could not be responsible for any damages resulting therefrom;" and (5) that the "finding of the jury negativing contributory negligence on the part of the plaintiff Robert Weir is perverse and against the weight of evidence."

After a careful perusal of the evidence, I am unable to see that the finding of the jury that there was no contributory negligence on the part of the plaintiff Robert Weir can be considered perverse, or should be disturbed, or the case on this ground sent back for a new trial.

I think, in the light of the evidence, the finding of the jury as to the defendants' negligence amounts to this, that it was negligence on their part, instead of continuing their trolley poles in a uniform position at the side of the street along the highway, to shift or change them in front of the gore or park to the devil's strip, and so in the way of vehicular traffic that the result was to create a trap.

In my opinion, to leave a pole erected in such a place unlighted at night was to create a dangerous nuisance.

I think the placing of a pole in the position and condition in which this was might well be considered by the jury to be an obstruction to the highway and an act of negligence, and that the trial Judge could not have taken the case away from the jury.

The defendant company were incorporated under an Ontario statute of 1873, 36 Viet. ch. 100, and thereby authorised to construct their railway upon and along such streets in Hamilton as the council of the city by agreement might authorise, and subject to by-laws made in pursuance thereof, "and to construct and maintain all necessary works, buildings, appliances, and conveniences connected therewith" (sec. 7), and "to make and to enter into any agreement or covenants relating to the construction of the said railway . . . the location of the railway, and the particular streets along which the same shall be laid," etc. (sec. 15).

The city, by sec. 16, was authorised to pass by-laws "for the purpose of carrying into effect any such agreements," etc. The company applied to the municipality for leave to locate and con-

struct their lines in the city, and an agreement was entered into and a by-law passed to give effect thereto.

At the time of the accident, by-law No. 624, passed on the 26th March, 1892, was in force. It recites that previous by-laws had been passed in the years 1873, 1882, and 1888, conferring certain rights and privileges on the defendant company, subject to the conditions therein contained. It also recites that the previous by-laws provided that the cars of the railway company should be drawn by horses and mules only, and that the company were desirous of constructing an electric railway, and it had been agreed that the previous by-laws should be repealed and previous agreements terminated.

Clause 1 gave authority to the defendant company to construct an electric street railway "and to erect all necessary poles and wires," etc.

Clause 2 mentioned the streets to which the permission and authority should extend, King street being one named.

Clause 2 provided that all poles should be "placed on the side of the street, except on King street between Hughson and Mary streets, where they shall be placed between the tracks" (no doubt on account of the gore), "and all poles of the company shall be placed in such manner as to obstruct as little as possible the use of the streets for other purposes."

Clause 31 provided that "all works of construction and repair . . . . shall be placed under the supervision and to the satisfaction of the city engineer."

The poles were put up by the defendant company after being "located" by the city engineer.

Reference was made during the argument to the Street Railway and Municipal Acts in force at the time of the incorporation of the company, and subsequent amending or repealing Acts. But in none of them have I been able to find any express or explicit authority given to a municipality to erect or authorise any other corporation or person to erect a pole in the nature of an obstruction on the travelled portion of a highway. Nor do I find any such authority in the defendant company's Act of incorporation. At common law there was no such right. "It is a nuisance at common law either to neglect any legal duty

ONT.
S. C.
WEIR
v.
HAMILTON STREET R.W. CO.
Sutherland, J.

in respect of a highway, or to hinder or prevent the public from passing freely, safely, and conveniently along it," etc.: Halsbury's Laws of England, vol. 16, p. 151. "Whether an obstruction . . . amounts to a nuisance is a question of fact for the jury:" p. 152. "The following are instances of acts which may be found to be nuisances: . . . to erect, without statutory powers, telegraph or other posts in the soil of a highway:" pp. 153, 154; citing *The Queen* v. *United Kingdom Electric Telegraph Co.* (1862), 31 L.J.N.S. M.C. 166.

The municipality is by statute required to keep its highways in repair, and can in a civil action be made to answer in damages for an injury sustained in consequence of its failure to do so.

When the defendant company have placed on the travelled portion of a highway a pole in such a position that a jury has found it to be an act of negligence, it is incumbent on the company, I think, to shew some express statutory warrant for its maintenance in that position. I am of opinion that the company have failed to do so, and that the judgment appealed from must stand.

But, even if such warrant can be considered to be given or properly inferred from any of the acts referred to, it could not, I think, be deemed to extend further than this, that poles could only be erected in such a position when all needed precautions were taken to safeguard the public, as, for example, by lighting them at night. Here the evidence, before us is that no red or other light was upon the pole. Reference to *Geddis* v. *Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430, 455, 456; *Metropolitan Asylum District Managers* v. *Hill* (1881), 6 App. Cas. 193, 208.

Reference was made upon the argument to cases in which the question of the right of the Bell Telephone Company to erect poles in municipalities was in question. That company was incorporated under a Dominion Act of Parliament which gave it exceptionally wide powers.

In *Bonn* v. *Bell Telephone Co.* (1899), 30 O.R. 696, it was held that "a telephone company having permission by its Act of incorporation to erect poles on the streets of towns and incor-

porated villages, so as not to interfere with the public right of travel, is not relieved from liability for damages when it plants the poles on the highway in such a way as to become an element of danger to the public, although, as required by the Act of incorporation, the poles are planted under the supervision of the municipality."

In *Atkinson* v. *City of Chatham*, 26 A.R. 521, it was held, affirming the judgment of the trial Judge, that a pole placed in the travelled portion of the highway was an illegal obstruction thereon, causing it to be out of repair within the meaning of the Municipal Act. Maclennan, J.A., at p. 522, says: "*Primâ facie* it was an unlawful obstruction and nuisance upon the street, and having stood there for four years, with the knowledge of the city corporation, they must be held liable for the accident, unless they are able to shew that it was placed and maintained where it stood by competent authority." And at p. 524: "The public right is to travel upon and use the street with safety; therefore, the poles must be placed along the side or sides, so as to give the public the largest possible degree of safety, consistent with their existence; anything short of that is not a compliance with the legislation. . . . I think it is very evident that it was a dangerous obstruction where it stood, and that it would have been very much less dangerous if placed near the sidewalk, instead of being within eleven and a half feet of the centre of the street. . . . Inasmuch, therefore, as the pole was placed in a dangerous position, when it might have been placed in one much less dangerous, it follows that the city are responsible for the accident, because it was their duty to remove it." And Moss, J.A., at p. 528, says: "But for the company's Acts of incorporation" (the company being the Bell Telephone Company) "43 Viet. ch. 67 (D.) and 45 Viet. ch. 95 (D.), the erection or placing of poles anywhere on the highway would have been an obstruction and a public nuisance: *Regina* v. *United Kingdom Electric Telegraph Co.*, 9 Cox C.C. 137 and 174."

In this case of *Atkinson* v. *City of Chatham*, the plaintiff succeeded at the trial, the trial Judge having found upon the evidence that the accident was caused by the plaintiff's sleigh

ONT.
S. C.
WEIR
v.
HAMILTON
STREET
R.W. Co.
Sutherland, J.

coming in contact with the telephone pole, and without any contributory negligence on his part. The trial Judge also held that the pole had been erected under the supervision of the proper officer of the defendant company, and the city corporation was liable, but was not entitled to indemnity from the Bell Telephone Company, which had been brought into the action as a third party, the city corporation claiming indemnity from it. The Court of Appeal dismissed the appeal of the City of Chatham from the judgment as regards this plaintiff, but allowed its appeal as against the Bell Telephone Company, and directed that judgment for indemnity be entered in its favour in this respect.

An appeal was taken to the Supreme Court of Canada, and its judgment is reported, *Bell Telephone Co.* v. *City of Chatham*, 31 S.C.R. 61, reversing the judgment of the Court of Appeal, on the ground that "a person driving on a public highway who sustains injury to his person and property by the carriage coming in contact with a telephone pole lawfully placed there, cannot maintain an action for damages if it clearly appears that his horses were running away and that their violent, uncontrollable speed was the proximate cause of the accident."

I refer also to *Toronto Corporation* v. *Bell Telephone Co. of Canada*, [1905] A.C. 52; *Senhenn* v. *City of Evansville*, 140 Ind. 675; *Attorney-General* v. *Barker* (1900), 16 Times L.R. 502, at p. 504.

The power of a Provincial Legislature and of a municipal corporation to interfere with a public highway is a limited one. It does not go the length of authorising something to be done which will endanger the safety of the travelling public and create a common nuisance. As erected and maintained, this obstruction was dangerous to those lawfully using the highway as the plaintiffs were doing when the accident occurred. It was, therefore, a common nuisance and a violation of the criminal law. No statutory enactment of a Provincial Legislature or by-law of a municipal corporation could, under these circumstances, give it legal sanction.

I think the appeal fails on all grounds, and must be dismissed with costs.

MULOCK, C.J.Ex., concurred.

LEITCH, J., being ill, took no part in the judgment.

HODGINS, J.A., dissented.

Appeal dismissed.

ONT.

S. C.

WEIR v. HAMILTON STREET R.W. CO.

MORGAN v. DOMINION PERMANENT LOAN CO.

CAN.

S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff and Anglin, JJ.

1. FRAUDULENT CONVEYANCES (§ VIII—40)—MARRIED WOMAN—FRAUD OF COMPANY'S AGENT — MISREPRESENTATION — ESTOPPEL — "NON EST FACTUM."

A married woman who by the fraud of the company's agent is innocently induced to sign mortgage papers in favour of the company and a direction to pay the proceeds of the loan to such agent in respect of property which she did not own but which was transferred into her name without her knowledge by such agent in pursuance of his fraudulent scheme to obtain money from the company in excess of its value through a false valuation and an application in the name of another, is not estopped from repudiating liability under the mortgage under a plea of *non est factum* and of claiming that she was led to believe that the documents she was signing were of an entirely different character, by her failure to personally inspect and read over what she was signing; under such circumstances she was under no duty to protect the company from possible frauds by its own agent.

[*Dominion Permanent* v. *Morgan*, 4 D.L.R. 331, 17 B.C.R. 366, reversed.]

Statement

APPEAL from the judgment of the Court of Appeal for British Columbia, 4 D.L.R. 331, 17 B.C. Rep. 366, reversing the judgment of Gregory, J., at the trial, and cross-appeal from the same by the company, respondents.

The judgments now reported contain a full statement of the circumstances of the case and the questions raised upon the present appeal.

Livingston, Garrett, King & O'Dell, for the appellant.

Cowan, Ritchie & Grant, for the respondents.

Fitzpatrick, C.J. Davies, J.

FITZPATRICK, C.J., and DAVIES, J., dissented for reasons given in writing.

Idington, J.

IDINGTON, J.:—The respondent is a building society which was incorporated in 1890 under the Ontario Act respecting building societies and has since carried on its business in Toronto and shortly after its incorporation created a branch board in Nanaimo, in British Columbia, through which certain deal-

CAN.

S. C.

MORGAN v. DOMINION PERMANENT LOAN CO.

Idington, J.

ings in question herein were had upon which this action by respondent against Caroline Morgan, wife of the appellant Thomas Morgan, and said Thomas Morgan is founded.

The statement of claim alleges that Caroline Morgan made an application in writing, on August 9, 1894, to said company for an advance of $1,500 to be secured by mortgage on certain real estate in Nanaimo falsely and fraudulently representing that the said land was worth $1,200 and buildings thereon were worth $1,900 and that she had paid $1,200 for said land though she well knew the said land was under $500 in value and had no buildings thereon.

It is further alleged therein that, on March 28, 1895, she signed a statutory declaration by which she falsely and fraudulently represented to the plaintiff: —

(a) That she had been in continuous and undisputed possession of the said lots and every part thereof since on or about the 1st day of November, 1894.

(b) That the various buildings described in her said application for a loan were erected wholly upon the said lands.

(c) That the said lots and building (house), were only charged or encumbered by an amount of $1,000 due for lumber on or used in such house and to be paid out of such loan of $1,500—from plaintiff, whereas the facts were that the defendant, Caroline Morgan, never had been in possession of said lots nor was there any building erected thereon or any money due or accruing due by the said defendant for lumber in connection with any building or otherwise in relation to said lots.

Then Thomas Morgan is charged with being well aware of the making such false and fraudulent representations and purpose thereof and for the purpose of participating in the moneys to be advanced was a party to all said false and fraudulent representations.

It is further charged that they for the purpose of carrying out their fraudulent scheme procured one John Daniel Foreman, the appraiser of the respondent, to make the false and fraudulent statement in a statutory declaration of August 10, 1894, that

the said lots were worth, exclusive of buildings, in cash $1,200, and that the buildings then completed were worth in cash $1,900, and that the property would bring at a forced sale in cash at that time $3,000, both of said defendants well knowing that the said land was worth less than $500 and had no buildings whatever erected thereon.

The statement of claim alleges respondent advanced the sum of $1,500 and has thereby suffered damages.

It is further alleged that Caroline Morgan executed a mortgage on said land and thereby covenanted to pay the mortgage.

Relief is prayed against both Morgans on the ground of fraud, and alternatively against Caroline Morgan on her covenant in the mortgage.

These charges were denied by the statement of defence and it was further alleged therein that:—

In or about the year 1894 she purchased from William K. Leighton, agent of the plaintiff company, at the city of Nanaimo, in the Province of British Columbia, certain shares in the plaintiff company and signed, or believed she signed, applications for or other documents in connection with the purchase of these shares. If the signatures of Caroline Morgan appended to the alleged mortgage and relative statutory declaration were made by her (which the defendants deny), they were made in mistake or fundamental error, under the belief that she was signing documents in connection with the purchase of these shares and with no purpose or intention of signing the alleged mortgage or relative statutory declaration.

On the issue thus raised the parties went to trial before Mr. Justice Gregory, who accepted the evidence of the defendants as substantially correct and, by his opinion judgment, reports most favourably on the demeanour, integrity and intelligence of Caroline Morgan, but less favourably upon the intelligence and manner of Thomas Morgan yet accepting him as a truthful witness.

He accordingly dismissed the action with costs.

Thereupon the respondent appealed to the Court of Appeal for British Columbia. That Court, Mr. Justice Irving dissenting, allowed the appeal as against Thomas Morgan, but dismissed it against his wife and he now appeals here and respondent cross-appeals as against them both.

The appellant Thomas Morgan was asked in the witness box to write his wife's name and he did so. There was no other specimen of Morgan's handwriting placed before the Court. There was no expert evidence of any kind called. No expert opinion of any kind was given by any of the witnesses called.

The application which the statement of claim makes the basis of the action charging fraud against Mrs. Morgan was produced and shewn him and he denied ever having seen it or signed the name "Caroline Morgan" thereto. The application for shares in the respondent company was also shewn him and he also

CAN.

S. C.

MORGAN v. DOMINION PERMANENT LOAN CO.

Idington, J.

denied ever having seen same or signed the name of Caroline Morgan thereto.

The Court of Appeal using and acting upon their own knowledge of handwriting as a result of the comparison of that single specimen of Morgan's writing of the name "Caroline Morgan," with the signatures to said applications, has come to the conclusion that he signed his wife's name to said applications.

The only extended opinion of those concurring in the result is the judgment delivered by Mr. Justice Galliher, who deals with the matter as follows (4 D.L.R. 331 at 334):—

> As to the husband, Thomas C. Morgan, I entertain no doubt whatever that he signed the name "Caroline Morgan" to Exhibit 1, Application for Loan; and Exhibit 2, Application for Shares; and that he was from the beginning a party to the fraud practised against the company.
>
> Considering that he swears that he never saw any of these papers until years afterwards, I place no credence whatever in his testimony.
>
> Looking at Exhibit 1, Application for Loan, we find some twenty questions answered, including value of building, description of buildings, amount due on same, rental value, etc., buildings which never existed on the premises. One would indeed need to be credulous to assume that he signed this document and knew nothing of its contents. It is as deliberate and brazen a piece of fraud as could be perpetrated and I find the evidence fully connects Thomas C. Morgan with it.

Mr. Justice Martin in a brief note suggests it is only after some hesitation he allows the appeal. The Chief Justice gave no written opinion.

Considering that the claim made is based upon the allegations of false and fraudulent misrepresentation of this man's wife as above set forth, and that he is only charged with knowingly aiding her therein, and that she is exonerated by the Court of Appeal; that there was no application to amend the pleading so framing the action, and no suggestion of amendment; that the notice of appeal gave as one of the grounds thereof that the learned trial Judge should have found both defendants party to the fraud alleged in the statement of claim, I most respectfully submit the foregoing conclusion is erroneous in law.

If the charge had been made that he had conspired with others than his wife to commit the alleged frauds or that by forging and use of the forgery of his wife's name he had accomplished same, I might be able to understand such a conclusion of law, but as the record stands, I cannot.

I also submit, for the reasons I am about to give, that, in law and fact, the conclusions reached are quite unwarranted.

The learned trial Judge, who heard the evidence and saw and heard these defendants and gave credit to their story, ought not to have been reversed, especially in such a case as this, involving thereby a finding of gross fraud and perjury, where there are no collateral facts or circumstances or fundamental facts regarding matters in dispute upon which the Appellate Court so reversing can with absolute confidence and assurance rely and feel they are not mistaken. I respectfully submit mere skill in comparison of handwriting when used upon a single bit of handwriting, where a man failed to spell his wife's Christian name correctly, is hardly such a stable foundation to build upon.

Let us, only dealing just now with the appeal of Thomas Morgan, look first at broad, salient features of the story with which we have to deal and see whether in it there is any inherent probability of its justifying such a finding as the Court of Appeal has reached, and later deal with the minor details relied upon in argument for respondent.

The local board of respondent was organized with one Leighton (who seems to have done a mixed sort of business of insurance, brokerage, and in short general agency) as secretary. He later is spoken of as treasurer, and sometimes as agent. He no doubt managed or was the active man in managing all the business of the respondent in that Nanaimo district. It would seem from a book produced which he was given by respondent to keep therein track of subscriptions for shares and payments thereon, that he got subscriptions for shares in the respondent company from a great many people and received money thereon and no doubt transmitted much, if not all, as in duty bound, to the respondent.

This seems to have been opened in the end of 1890, shortly after the local board was constituted, and a number, if not all, of the directors on that board were among the first subscribers for shares.

The appellant says he was solicited by one Williams, a clerk of Leighton, to take shares in said company, and that he finally, but when he is unable to say, assented and told him to have

CAN.

S. C.

MORGAN v. DOMINION PERMANENT LOAN CO.

Idington, J.

them "taken out" as his expression is, in his wife's name. Williams, some years later, left for parts unknown and (up to the trial) had not since been found. Leighton, still later, is sworn by a clerk of his, who succeeded Williams, to have been much worried over some crooked dealings he had got into, either through Williams or otherwise, and ultimately died of brain disease in an asylum.

One cannot help suspecting that the terse description sworn by Morgan to have been used by one Andrews in respondent's employment, when investigating this matter and hearing Morgan's story, fits the office managed by Leighton:—

Andrews says, according to this:—

That is a rotten combination over there.

There is another case just similar to that happened George Thompson, and they can't find George Thompson.

Andrews, who was in Court, and heard what Morgan swore to, was not called to contradict him.

I assume Leighton and Williams were both most dishonest men and given to practices such as this case indicates beyond a shadow of doubt they were guilty of in relation to the loan in question. The applications for shares and for loan were apparently filled up by Williams. Mrs. Morgan's name is signed thereto in a handwriting clearly not hers. I should say it was signed by this man Williams—if I were to permit myself to use my impression received from a comparison of handwriting.

They were dated August 9, 1894. At that time Leighton had a vacant lot which he had acquired in the previous June from one Roberts, who had mortgaged same to another company for $300.

It was the description of this lot which was inserted in the application for loan. The application represented it to be improved in the manner set forth in the statement of claim. Neither the appellant nor his wife had then, or at any previous time, any real estate of any kind.

An appraiser's certificate of valuation of this property was made at the foot of the application for loan by one John D. Foreman, a member of the said local board from its beginning, representing its value as stated in the application and certifying

to the good character and credit of Caroline Morgan, the applicant.

This was in the form of a statutory declaration taken before said A. S. Williams, a notary public, who had also subscribed as witness to the signature "Caroline Morgan" signed to the said applications.

These applications, so supported, were at once forwarded to the respondent at Toronto, and a stock certificate for fifteen shares, dated November 1, 1894, was issued, but never delivered to Mrs. Morgan, or any one for her.

The payments therefore were to begin December 1, 1894. Whether she paid from that date as contemplated by this certificate, or when, is not clear. It is clear, however, that Leighton in whom was the title to the vacant lot to the extent of an equity of redemption therein subject to the mortgage for three hundred dollars, by deed purported to transfer the lot as if free from mortgage to said Williams on January 7, 1895, in consideration of $350.

One Peto, who witnessed this deed, I imagine possibly another employee of Leighton, seems to have made the affidavit of execution only on March 28, 1895, before E. M. Yarwood, of whom we will hear more presently.

What purpose this conveyance to Williams was intended to serve puzzles one, for on January 18, 1895, he conveys by deed of that date to Caroline Morgan for the consideration of $225 same land, but subject to a mortgage of $300 to the British Columbia Land and Investment Agency made February 8, 1893.

The deed is witnessed by Leighton, who makes the affidavit of execution before the same Mr. Yarwood on March 28, 1895. That seems to have been a busy day for Mr. Yarwood, for it was on the same day Mrs. Morgan is alleged to have called and executed the mortgage in question, the transfer of her shares aforesaid as a further security for the loan, and the order upon respondent to pay Leighton the proceeds of the loan; taken the statutory declaration by her that she was the absolute owner of said lands and had been in possession since December 1, 1894; and testified to a number of other curious palpable lies as facts. All these instruments are of that date and subscribed by Mr. Yarwood as the attesting witness or notary public taking them.

CAN.

S. C.

MORGAN v. DOMINION PERMANENT LOAN CO.

Idington, J.

And there is still another thing he is supposed to have done the same day, as a notary public, that is to certify that she appeared before him and being first made acquainted with the contents of the annexed instrument (*i.e.*, the mortgage), and nature and effect thereof, acknowledged same, etc., and that she executed without fear or undue influence of her husband, etc.

Then on April 6, 1895, the deeds from Roberts to Leighton, from Leighton to Williams and Williams to Mr. Morgan, were, I infer from the account of Yarwood & Young rendered Leighton, and other evidence, registered by that firm.

Why the registration was delayed till that time is unexplained. But it does appear by the report of Mr. Yarwood to Leighton that he must have had entrusted to him the completion of the title and must have either paid no attention to what he was doing when taking the alleged declaration of Mrs. Morgan and certifying as he did as to her execution of the mortgage, or he would, as solicitor for the respondent, have found ample reason for further inquiry as to a good many things, for example, how the company could be making a loan of fifteen hundred dollars on a property passing from one party to another at such prices as evidenced by the deeds, and that no one had in fact paid off the prior mortgage, though a discharge had been got and withheld from registration.

As he ventured as witness to explain this first, by saying he did not read or observe that, and had nothing to do with it, and further, by saying it was a building society loan, I may, parenthetically as it were, remark that this attitude of Mr. Yarwood towards his duty and the facts suggest how easy it was for him to fall a victim to the fraudulent arts and devices of Leighton, a practised master of fraud.

But above all he certainly should not have permitted Mrs. Morgan to have taken the statutory declaration of which as the solicitor concerned on behalf of respondent he may be supposed, indeed presumed to have known the import and purpose and the consequences of its falsity.

And applying the test of the account he made out against her, yet never sent her but delivered to Leighton, he was her solicitor and owed her a special duty as such. I am far from

assuming that he was intending at any time to make himself a party to a deliberate fraud, but I do think the fair inference from all he says and the contents of these documents is that he simply signed because of his confidence in Leighton. If he had discharged his duty, she never could have been induced or trapped into signing these documents.

It is quite possible though attesting the documents by his signature, he merely took the word of Leighton that they were all right, and signed accordingly. She says she never saw him but saw his partner (who is not called), and signed in his presence, what she was told was an application for shares. She never was told, she says, anything else. Though she refers to Mr. Young as reading the documents, I do not think any one of experience will take this in its literal sense. No one seems to have at the trial pressed her to explain exactly what she meant by his reading and we must use our common sense. She was entirely without experience in business matters. And, though a woman of education and intelligence, as the learned trial Judge reports, any one of experience knows how little many such persons appreciate what they are doing in dealing with business matters entirely foreign to the limited sort of education unfortunately given too many of her sex.

We must then ask ourselves if it is really conceivable that she could knowingly have made a false statutory declaration, as Yarwood is made to certify she did take before him, if she had really had the document read to her. The learned trial Judge who had the best opportunity, by seeing and hearing her, and thus of knowing whether she was likely or not to make such a false declaration, has decided in no uncertain terms that in his opinion she would not.

I have read her depositions on examination for discovery and her evidence at the trial and come to a similar conclusion. We must bear in mind that she was giving evidence some fifteen years after all this had transpired and may be mistaken in many details, but she knew she never had any such property or any dealings for a loan of this character, and had but one thought in regard to any business relations with Leighton and respondent and that was the subscription for shares in respondent company

CAN.

S. C.

MORGAN v. DOMINION PERMANENT LOAN CO.

Idington, J.

to be paid for in small monthly instalments, and that after paying for some years thereon, she had agreed to transfer same to Leighton and he was to repay by similar small monthly payments $200 therefor, in consideration of her so transferring.

This, she says, led her to signing another document in the presence of Mr. Planta. A document is produced which seems to bear her signature and of the date she indicates as about the time when she supposed she was transferring her shares to Leighton. This document is an agreement for the extension of time for payment of the mortgage and is attested by Planta, then a clerk in Leighton's office. Again we have one Norris, now dead, a brother-in-law of Leighton, and a notary public, signing a certificate of her having acknowledged it in his presence. She says she never saw him on any such occasion, and never heard of any such mortgage or proposed extension. She does say, however, that from about that time till some time after she had moved to Vancouver, which would be the same year I think, Leighton continued to make his payments to her which were sometimes collected by her brother in Nanaimo.

Planta, who is called by the respondent, seems to have no definite recollection of this extension agreement, but identifies his signature as witness thereto. He, however, corroborates her as to the collection by her brother from Leighton of the monthly payments just referred to. That seems to me a very strong circumstance corroborative of her whole story. Indeed, twist and turn the case round in any way, it seems fatal to respondent's contention of her knowingly joining in a fraud. Then we find the duplicate copy of the extension agreement turns up, not in her hands, but where Leighton's custody of it left it to be found and whence it was produced and given her or some one for her shortly before the trial.

Now in all these years there is only one communication from the respondent company to her, and that is a brief note of March 9, 1898, which she denies ever getting and which is as follows:—

> Your policy for $1,500 expires on April 9th, and must be renewed with the company selected by this Association. Kindly call on Mr. W. K. Leighton for complete application form and pay him the premium.

Instead of the insurance being renewed by her going to

Leighton, or he to her, we are told by Planta of its having been renewed by an application not signed by her, but by him for her when he was in Leighton's office and would have done so under his instructions though evidently suspecting or having reason to suspect its fraudulent character. It is hardly likely with this sort of suspicion of his master that he would have forgotten seeing Mrs. Morgan in relation thereto if any occasion therefor as the notice indicates.

The Morgans were still living in Nanaimo when this was done. Can we in face of her sworn denial and a not impossible explanation by her, fairly and properly assume that because she signed the declaration of March 28, 1894, she must be held to have committed a deliberate fraud? And as a necessary consequence hold that her whole story is a tissue of perjury? If she deliberately and knowingly took that false declaration she must have done so for a fraudulent purpose and if she committed such a fraud, she could not forget it and must be following it up now with perjury, and all that for a share in a sum of eleven to twelve hundred dollars to be divided amongst three or four, for that would be all that was left after paying the prior mortgage and expenses.

Sometimes one gets so disgusted with the standard of truth and honest dealing too often adopted by some passing as reputable people as to be possessed of wide awake suspicions. I am not prepared for my part to carry it so far as to brand this woman to be presumed to be from all we can learn, most highly respectable and honest, as guilty of gross fraud and perjury. It would be my legal duty if trying her for such offences with no more evidence than there appears here to at once direct her discharge.

As to whether she was so negligent as to be liable I will deal with that presently. But before leaving this subject of her being guilty of fraud, I must point out it is all based on what if anything is mere negligence. What should we think if Mr. Yarwood, for example, had been joined as defendant, and a trial Judge had found him, because of obvious oversights a party to the fraud which might have been averted by greater care? For my part I think the one proposition is just as monstrous as the other and both unfounded. And when we reflect that he and

CAN.

S. C.

MORGAN v. DOMINION PERMANENT LOAN CO.

Idington, J.

all others, save possibly the clerks in his employ, had unbounded faith in Leighton, it is easy to comprehend how such bold swindles as involved here were accomplished. Such a man, eager and bent upon his fraudulent purpose, watches his opportunity, day by day and month by month, to seize the occasion when those to be dealt with, are, by over-confidence in him, lulled into security and as it were, put asleep, and put off, or seized when off their guard.

Those inclined to doubt the feasibility and success of such ventures unless helped by the criminal connivance of those claiming to be mere victims and thereby led to charge them with being accessories to fraud, should reflect for a moment upon the innumerable cases of patent-right swindles which led to a change in the law governing notes founded on the consideration of an interest in a patent; and the well known syndicate swindles; and perhaps above all on the too common cases of those wretched breaches of trust on the part of those doing a business that controls the money of other people. Inexperienced people at each new disclosure of such cases, marvel at the boldness and adroitness of him perpetrating the fraud and the incredible, or almost so, stupidity of those enabling the swindler to secure signatures to almost anything. But we know, if experienced, that all such victims are by no means stupid or ignorant, indeed are often keen business men. Again, we must use our common sense and accept the assistance of the trial Judge in all such cases. It seems to me for the foregoing reasons that the claim against Mrs. Morgan on the grounds of fraud taken in the statement of claim must fail and with it must fall the claim against the alleged accessory.

But the Court of Appeal finds he signed the applications and, though she did not, she is in some way to be held guilty of being a party to the fraud.

Is there any tangible ground upon which that can rest? Why should he even if to be presumed a rascal, deliberately contrive to put his young innocent wife into such a position? I pressed counsel for respondent on this and got in reply no suggestion that will for a moment in light of other facts wear even a plausible appearance. It is said he was under some obligation to Leighton.

He denied in his examination for discovery signing said applications and told what that obligation to Leighton was. He gave details of how the latter came about. He had sometime before these occurrences got Leighton to indorse his paper for $2,790 at the bank, to be paid off by monthly payments of $103 a month, and says he paid accordingly and gave Leighton $400 for this use of his name as surety.

I have no doubt the respondent's solicitor, who heard this story, accepted it as perfectly true, or we should have found some effort to discredit it by producing evidence from the bank to destroy it.

The statement of claim alleges that his motive was to participate in the proceeds of the fraud and there was thus afforded a fine opportunity to have investigated and if true, proven it at the trial with the double effect of shewing he did participate and that he was not truthful in his story as to his relation with Leighton.

It is urged he was a tailor in narrow financial circumstances. Granted that, for argument's sake, is every tailor under such conditions to be presumed a rascal? Or that he is ready to become such and so stupid in his rascality as to bring quite needlessly into his scheme his wife and thereby, whilst using her as a tool thereof, to multiply the dangers of discovery.

Why should the deed of this vacant lot owned by Leighton not have been made to Morgan and he give the necessary mortgage? I can conceive of Leighton not desiring to proffer such a loan in his own name, but why must he use Mrs. Morgan's? Again, why if Morgan's financial needs were the mainspring of these acts now in question, should the negotiations have dallied along from the 9th of August till the latter half of April?

Counsel at first suggested in answer to this inquiry there must be three monthly payments of instalments on stock before a mortgage could be taken. But his junior, also general solicitor for respondent, better conversant with the usual mode of dealing, frankly and properly admitted this was not an obstacle, for these small payments could be made at one time in advance and the borrower be recouped by proceeds of the loan. Indeed, there is no explanation possible for this delay upon the theory

CAN.
S. C.
MORGAN v. DOMINION PERMANENT LOAN CO.
Idington, J.

that Morgan's necessities were the moving causes or one of the chief parts thereof.

It is quite conceivable that Leighton having an unregistered deed of the lot, hesitating how to use it to his best advantage, could frame such a scheme and be very uncertain step by step, just how he was to accomplish his purpose, and thus might, hesitating, delay and bide his opportunity of proceeding safely, and hence let the matter drift along. We have not that data furnished us to do more than surmise, though I fancy respondent ought to have got and presented much of it to see how this man's surroundings shaped his actions.

We have enough proved in this case to establish conclusively that Leighton was, from the start which began with inducing Foreman to certify to a false report of valuation and the rest of the board or three of them recklessly to stamp it with approval, a somewhat accomplished adept in fraudulent practices.

Even if the man be dead, no sentiment should restrain or restrict us in our purely scientific inquiry. The honour of the living is at stake.

It is said we have no other instance proven against him. Do we need any? No one as a rule goes to pieces (to use expressive slang) morally speaking in a day. The internal evidence in this case demonstrates the process of moral decadence had progressed very far in his case before his undertaking the work of the 9th and 10th of August, 1894. His character is indelibly disclosed in the preparation of the applications of the former date now in question, and the Foreman report and indorsement thereof of the latter date. The Court was not sitting to investigate his career, and it might have been difficult under the pleadings for defendants to have got in general evidence relative thereto, but we have the curious side light given by Mr. Andrew's statements to Morgan already adverted to as given by the latter and allowed by respondent to go uncontradicted or unexplained.

Then to complete Leighton's connection with the matter, we find a sham sale by the respondent company to a relative of his under the power of sale in the mortgage without serving the usual notice or even sending a letter to the mortgagor.

The mortgage provided this could be done, but it also provided for the inexpensive service of a notice by registered post.

One cannot help thinking it was a very harsh and ill-considered proceeding. But it is very obvious it was all contrived by Leighton, who represented he had a man ready to buy at the price needed to realize the debt. All this is but another illustration of the strange power this man Leighton exercised over all he came in contact with. That brings me to consider the claim made alternatively to hold Mrs. Morgan liable on the covenant in the mortgage. That is presented in two ways. In the first place it is said her ignorance of what she was doing was not of that character which would entitle her to succeed under a plea of *non est factum*.

I think the evidence of herself and husband, if believed (as the learned trial Judge and I believe it), is just of that kind which has many times been held as a complete answer by way of such plea to the action upon the deed. I have already written at such length demonstrating my view of the facts of which I conceive a right understanding of the utmost importance herein, that I do not propose to labour with the law bearing thereupon. That is in such a case well settled unless we are to re-open the question and limit as has been suggested by high authority, such a defence under such circumstances as set up here to the illiterate, and deprive the literate and educated people entirely of such a defence in cases where they could have read what they signed, but failed to do so.

With great respect, I submit, the doing or trying to do so would start anew a dangerous discussion and help the rascals to prey upon honest people.

The next way in which the claim is presented on this basis of liability independent of active fraud is that Mrs. Morgan was negligent and thereby misled respondent.

It seems to me that if she was negligent, that negligence, if any, was induced solely by the acts of those representing the respondent and ostensibly in the the course of executing the business of respondent; and that in such case it cannot be heard to complain.

Certainly Leighton was held out by respondent, whatever it

CAN.

S. C.

MORGAN v. DOMINION PERMANENT LOAN CO.

Idington, J.

chose to call him, as its agent, and so also were the solicitors who procured by the direction of Leighton the execution of the documents she signed.

Under such circumstances respondent can have no recourse against her.

The very document upon which reliance is placed shewed upon its face, when regard was had to the deeds under which she claimed, that it was palpably false and should have misled no one.

If she trusted too implicitly to others, then those others seem to have been as blindly trusted by the respondent. I think it has no ground to complain.

In parting with this case I may be permitted to say that in all cases of this character it is generally possible to demonstrate, by reference to collateral facts and attendant and surrounding circumstances, when thoroughly investigated, whether the accused has been guilty of fraud as charged or not, and I regret that so many clues, leading to such disclosures and light as such circumstances and collateral facts might afford, have been entirely neglected.

I have already pointed out one of these in relation to the charge of appellant's hope of participation in the fruits of such frauds as committed and there are many of minor import in the path of such an inquiry.

The facts that no steps were taken to adduce expert evidence in relation to the disputed signatures though they were denied in the examinations for discovery, and thus respondent warned in time, suggests a grave suspicion that those then concerned for respondent certainly did not think it worth while as likely to maintain respondent's contention.

It may be answered respondent had a right to rely on the rule of law entitling Judges at trial to compare the writing of the genuine with the disputed. Experience teaches that such a proceeding is most hazardous. Even when the most scientific means have been applied by expansion of the letters and measurement of the angles and all implied therein mistakes are not unknown. When the facts of the case tend to render it extremely probable that the writing denied is genuine, and the denial is rather a mere obstruction in way of completing proof,

it is convenient and beneficial that a Judge may dispose of such a contest by relying upon the rule. But to invoke and rely upon the rule alone against the sworn testimony of those accused, seems to me, I most respectfully submit a denial of justice and what is not generally expected of a learned trial Judge, and especially so, when the party, asking the Court thus to act upon its own expert knowledge, has not exhausted many other most obvious means of testing the veracity of those who have pledged their oath in denial.

I think the frank manner in which counsel for the Morgans invited every probing of matters bearing upon the conduct of his clients, whether technically admissible or not, might have been relied upon to have facilitated the investigation of the bank accounts of Morgan, even without forcing the bank to exhibit its books at the trial.

The facts that no one ever asked him to vote or pay taxes in respect of the property ought alone to have stood as a barrier in plaintiff's way of claiming any benefit therefrom in absence of more investigation than mere books in a municipal office.

The appeal ought to be allowed with costs here and in the Court below, the cross-appeal of respondent dismissed with costs and the judgment of the learned trial Judge restored.

DUFF and ANGLIN, JJ., concur.

Duff, J.
Anglin, J.

Appeal allowed with costs; cross-appeal dismissed with costs.

NELSON V. GAGNON.

B. C.
C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, Galliher, and McPhillips, JJ.A. May 7, 1915.

1. VENDOR AND PURCHASER (§ I E—27)—RESCISSION OF CONTRACT—MISREPRESENTATION—MATERIALITY.

In order to operate as a ground for rescission of a contract for the sale of land misrepresentation made by the vendor as to the quality of the land such as that the lots were "high and dry," must have been the inducing or effective cause of the buyer entering into the agreement of purchase.

[*Sweeney* v. *Coote*, [1907] A.C. 221, *United Shoe Manufacturing Co.* v. *Brunet*, [1909] A.C. 330, referred to.]

Statement

APPEAL from a judgment of Macdonald, J.

S. S. Taylor, K.C., for appellant.

G. E. McCrossan, for respondent.

B. C.

C. A.

NELSON v. GAGNON.

Irving, J.A.

MACDONALD, C.J.A., dissented.

IRVING, J.A.:—Two points have been argued before us, the first as to the value of surrounding lots. The learned trial Judge has found the defendant's agent's representations on that point were not untrue. His finding of fact can be supported by the evidence, and therefore we ought not to interfere.

The second point is that the agent represented the lot was "high and dry." The Judge has found that he used that expression, and that the lots are high and dry in a relative sense. If that was all the plaintiff had to prove I would allow the appeal, but in an action of misrepresentation you must also prove that the misrepresentation complained of operated on the mind of the purchaser to bring about the purchase. Whether it did or not is a question of fact—an inference of fact to be drawn from the conduct and statements of the witnesses putting it forward: *Smith* v. *Chadwick* (1884), 53 L.J.Ch. at 875; *Sweeney* v. *Coote*, [1907] A.C. The learned Judge on this point has found that the representation did not bring about the sale. In his opinion the sale was brought about by the plaintiff's expectation of making a profit by a re-sale in consequence or as a result of the expected development of Lulu Island into a large city, an anticipation which was to be realized by the construction of dock-yards and other shipping facilities in the neighbourhood of the lot in question. On this point the learned trial Judge had a better opportunity of forming his opinion as to the witnesses' varying statements, and I cannot say that he arrived at a wrong decision. The plaintiff endeavoured by his statement to make him believe that he would not buy such a lot under any circumstances, but the learned Judge refused to give effect to this contention.

I would dismiss the appeal.

Martin, J.A. (dissenting)

MARTIN, J.A., dissented.

Galliher, J.A.

GALLIHER, J.A., agreed that the appeal should be dismissed.

McPhillips, J.A.

MCPHILLIPS, J.A.:—This is an appeal from the decision of the Honourable Mr. Justice Macdonald directing that judgment be entered for an instalment due in respect of an agreement for the sale of land, and dismissing the counterclaim for rescission and damages, founded upon alleged misrepresentations. I do not find it necessary to allude in detail to the evidence adduced

at the trial, as I fully and entirely agree with the conclusion arrived at by the learned trial Judge upon the facts, and I also am of the opinion that his judgment is right applying the law to the facts of the case. It is amply proved that the defendant Nelson entered into the purchase of the land as a matter of speculation, influenced by the potential features of the neighbourhood for business purposes; that is, the likelihood of great harbour improvements, the establishment of factories and other developments. It was not the acquisition of the land for other purposes. It is idle to advance the contention that the land was to be *high and dry*—save relatively so—and the evidence—keeping in mind the locality—establishes that the land sufficiently satisfies any representation made. I cannot accede to the view that the defendant Nelson was unaware of the general topography and the situation of the land in question. Apart from this, the land cannot be in any way said to be situate in low, wet, peat lands.

The leading case upon the subject which requires attention upon this appeal is *United Shoe Manufacturing Co. of Canada* v. *Brunet*, [1909] A.C. 330, and at pp. 338 and 339, Lord Atkinson, delivering the judgment of their Lordships of the Privy Council, discusses the considerations which must be given attention, and the facts which must be proved, *i.e.*:—

> (1) that the representations complained of were made; (2) that they were false in fact; (3) that when made were known to be false, or were recklessly made not knowing whether false or true; (4) that by reason of the complained of representations the contract was entered into; (5) that within a reasonable time from the discovery of the falsity of the representations election was made to avoid the contract.

Now, have these facts been established in the present case? In my opinion they have not. The representation chiefly relied upon, and the only one which needs consideration, is, that the land in question was high and dry. As I have previously pointed out, in my opinion, upon the facts of the case, and taking all the surrounding circumstances into consideration, the truth of this representation has been established; but if I should be wrong in this, then it can be said that it was not this representation complained of which was the inducing cause of the entry into the contract. The inducing and propelling cause was undoubtedly that which the defendant Nelson apparently very frankly stated to his own counsel—the question and answer being fully set out

B. C.
C. A.
NELSON
v.
GAGNON.
McPhillips, J.A.

in the judgment of the learned trial Judge—and what appealed to the defendant Nelson was the likely increase in value consequent upon the development going on in the way of harbour improvements and business advantages—that is, the suitability of the land for factory or business purposes, not the utilization of the land for purposes other than the purposes that neighbouring lands could be put to. I cannot satisfy myself that the defendant Nelson in entering into the contract only did so upon the faith of the representation that the land in question was high and dry, or that he would not have given his assent to the contract unless in that belief. Therefore, to the extent that there was such representation, and to the extent that it might be possible to say it was false—if there be disregard of the locality and the defendant Nelson be credited with want of knowledge thereof—then upon the facts the representation was not the effective cause of the defendant entering into the agreement. In *Smith* v. *Kay* (1859), 7 H.L. 750, Lord Wensleydale, at p. 776, said:—

> Fraud gives a cause of action if it leads to any sort of damage; it avoids contracts only where it is the ground of the contract and where unless it had been employed, the contract would never have been made.

In *Attwood* v. *Small* (1835), 6 Cl. & F. 232, Lord Lyndhurst, at p. 395, said:—

> Where representations are made with respect to the nature and character of the property which is to become the subject of purchase affecting the value of that property and those representations afterwards turn out to be incorrect and false to the knowledge of the party making them a foundation is made for an action in a court of common law to recover damages for the deceit so practised and in a court of equity a foundation is laid for setting aside the contract which was upon a fraudulent basis.

The facts, however, of the present case do not warrant it being held that the representation complained of was the inducing or effective cause of the defendant Nelson entering into the agreement, and this Court is not embarrassed as the Court of Appeal was in *Smith* v. *Land and House Property Corporation* (1882), 28 Ch.D. 7, as here the learned trial Judge has held that the purchaser did not purchase on the faith of the representation. There it was otherwise, Fry, L.J., saying, at p. 17:—

> The second question is whether the purchasers purchased on the faith of that representation. The learned judge has found that they did. On that question I feel the same difficulty as Lord Justice Bowen and on the evidence as read before us I should have felt inclined to come to the conclusion that the covenant was not induced by that representation; but as

B. C.

C. A.

NELSON v. GAGNON.

Mr. Justice Denman, who saw and heard Alderman Knight, was satisfied with his evidence, I cannot give my voice for reversing his decision.

In the present case Mr. Justice Macdonald saw and heard the defendant Nelson, and was satisfied that the agreement was not induced by the representation complained of, and no case has been made out by the appellant such as would warrant the disturbance of the judgment of the learned trial Judge, and we ought not to differ from his conclusion.

M. Phillips, J.A.

It follows, therefore, that in my opinion the appeal should be dismissed. *Appeal dismissed.*

DEVITT v. MUTUAL LIFE INS. CO. OF CANADA.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Riddell, Latchford and Kelly, JJ. March 22, 1915.

1. INSURANCE (§ III H—155)—PREMIUM NOTES—NON-PAYMENT OF—FORFEITURE OF POLICY.

The defense that a promissory note, made by the assured and not paid at maturity, was "given for any premium or part thereof" within the meaning of another clause in the policy, although it was in fact made in part renewal of an earlier note which was given in part payment of a premium, will bar recovery on the policy and need not be pleaded specially. 33 O.L.R. 68, reversed. *McGeachie v. North American Life Assurance Co.*, [1894] 23 Can. S.C.R. 1482, followed.

2. INSURANCE (§ III A—49)—LIFE INSURANCE—LOAN ON POLICY—CASH SURRENDER VALUE.

The "cash surrender value" clause of a life insurance policy, providing for non-forfeiture in the event of default in payment of any premium if the cash surrender value should exceed the amount of such premium, means the cash surrender value mentioned in the table of guaranteed loan and surrender values followed in another clause in the policy; that the insurer has the right to fix the surrender value for the purposes of the policy at the end of every year; and that the surrender value fixed at the end of any one year continues to be the surrender value until increased at the end of the next year, according to the table. 33 O.L.R. 68, reversed.

3. INSURANCE (§ III C—55)—LIFE INSURANCE—SURRENDER VALUE—INTERPRETATION OF CLAUSE.

The clause "surrender value in cash" in a life insurance policy means the amount of money or its equivalent which the insurer could afford to pay to be rid of an existing policy, and is synonymous with "cash surrender value"; and the word "available" therein further used does not mean "existing," but contemplates a condition that can be taken advantage of. 33 O.L.R. 68, reversed.

Statement

APPEAL by the defendants from the judgment of BRITTON, J.

G. H. Watson, K.C., for the appellants.

R. S. Robertson and *J. A. Scellen*, for the plaintiff, respondent.

Riddell, J.

RIDDELL, J.:—This is an appeal by the insurance company from the judgment of Mr. Justice Britton. The facts as stated

ONT.

S. C.

DEVITT v. MUTUAL LIFE INSURANCE CO. OF CANADA.

Riddell, J.

in the learned Judge's reasons for judgment, 33 O.L.R. 68, are as follows:—

Ernest F. Carlson, in his lifetime, of Edmonton, Alberta, effected an insurance upon his life with the defendants for the sum of $2,000, and received a policy for that amount, dated the 28th day of March, 1910. Carlson died on the 2nd day of February, 1914, at the city of Los Angeles, State of California. The plaintiff obtained letters of administration of the estate of Carlson, and has brought this action to recover the amount of the said policy. The defendants plead as a defence that the plaintiff did not, nor did any person on his behalf, furnish or deliver to the defendants proofs of the death of the assured. To this defence the plaintiff says that such proofs were in fact delivered, but they were unnecessary, as the defendants denied their liability and repudiated the plaintiff's claim. The plaintiff did put in formal proofs, upon blanks, furnished by the defendants of the death of Carlson, but not until after the commencement of this action. All the facts were well-known to the defendants before action, and before the denial by the defendants of their liability. The denial of liability, under the circumstances disclosed, was a waiver of formal proofs of death. The main defence is, that there was, at the time of the death of Carlson, an unpaid loan to the deceased upon the policy, and an unpaid part of the premium due the 1st of April, 1913, and, by reason of these debts, the policy became void.

The first matter for consideration is the meaning of the expression "cash surrender value" in clause 9; and, in order that that clause may be fully investigated, I here copy from the policy the clauses which should be borne in mind. The clauses I take from the original policy, not from the alleged copies furnished for the use of the Court. These are not copies, and the labour of examining the original has been thrown upon us:—

7. Cash loans. At the end of the third and any subsequent year, provided all premiums have been paid as required, in the absence of statutory or other restrictions, the company will grant to the person or persons entitled, a loan for the amount shewn in the following table, deducting therefrom all previous

loans (if any) and interest thereon, together with any other indebtedness to the company.

9. Non-forfeiture. If, at any time of default in payment of any premium on this policy after it has been in force for three years, the cash surrender value (less any indebtedness) shall exceed the amount of such premium (whether yearly, half-yearly or quarterly), this policy shall not lapse, but shall continue in force for the time covered by the said premium. At the end of the said term or succeeding terms, upon the maturity and default of subsequent premiums, if the cash surrender value (less any indebtedness) is sufficient to pay the premium then due, or a premium for a period of not less than three months, this policy shall be continued in force until the end of such period, when, however, it will lapse and the company's liability cease, unless the succeeding premium be paid in cash within the thirty days' grace. All premiums in default, with interest at six per cent. compounded yearly, shall be a first lien and charge against the policy.

10. Surrender values. At the end of the third and any subsequent year during which full premiums have been paid, or within thirty days thereafter, on the surrender and discharge of the policy, provided there be no indebtedness to the company, the surrender value in cash or non-participating paid-up assurance, as shewn in the following table, shall become available to the assured or legal beneficiary. If there be any indebtedness to the company, it shall be deducted from the cash surrender value; or, if paid-up assurance be applied for, it shall be for a sum reduced in the like proportion.

GUARANTEED LOAN AND SURRENDER VALUES.

End of Year.	Cash Surrender Value.	Cash Loans See Condition No. 7	Paid-up Assurance.
3	$ 68	$ 62	$ 300
4	94	84	400
5	122	110	500
6	150	134	600
7	182	164	700
8	214	192	800
9	248	224	900

ONT.

S. C.

DEVITT v. MUTUAL LIFE INSURANCE CO. OF CANADA.

Riddell, J.

End of Year.	Cash Surrender Value.	Cash Loans See Condition No. 7	Paid-up Assurance.
10	284	256	1000
11	330	296	1100
12	376	338	1200
13	440	396	1300
14	510	458	1400
15	586	528	1500
16	638	574	1600
17	690	620	1700
18	744	670	1800
19	802	722	1900
20	958	862	Paid-up

It is admitted that if "cash surrender value" means the same thing in clause 9 as in the table, the plaintiff's case must fail on this point.

"Surrender value" is a well-recognised expression in life assurance. It means the amount of money or its equivalent which the company could afford to pay to be rid of the existing policy. Actuarially, it is a function direct of the amount of the policy, inverse of the probability of life and the amount of the premium. (Of course the amount of the premium is itself in practice a function direct of the amount of the policy and inverse of the probability of life; but there is no necessary fixed relation, and every company decides the amount for itself). So far the amount is capable of calculation within reasonably narrow limits.

But there are other elements which must be considered by an assurance company. As a matter of business the proposition must be made attractive. The company which offers the largest "surrender value" will, *cæteris paribus*, get the largest business; but at the same time surrenders are to be discouraged—every surrender reduces the amount of outstanding insurance, and the advertisement becomes the less alluring. It is human nature to follow the crowd, and the "largest company" is apt to get the most insurance. An assured liberally dealt with on surrender is likely to be a friend; one dealt with in a penurious spirit is a potential enemy. Many such considerations the wise insurance man must bear in mind. The effect has not been

tabulated and cannot be tabulated without an enormous number of observations, if at all. Any one with a fair knowledge of the theory of probabilities and practised in mathematical calculation could readily, with available tables of mortality, etc., figure out the theoretical "surrender values," but the psychological element is obscure, and every company may differ from every other in its estimate of its significance. Accordingly, every company must be permitted to determine its own "surrender value;" this may or may not agree with that of any other company.

Notwithstanding Mr. Robertson's very clear and cogent argument, I think this company has fixed the surrender value of this policy for all purposes. The policy has a table giving the "cash surrender value" at the end of each year, and it would require very strong considerations to authorise us to hold that when the same words are used in clause 9 they mean something else. No such considerations exist. The argument based upon clause 10 does not, I think, lead to the conclusion desiderated by the plaintiff.

In the first place, while in one part of the clause the words are not the same, being "surrender value in cash" instead of "cash surrender value," the difference is trifling and the meaning identical. There is nothing to shew that any difference of meaning was intended. Again, the very expression "cash surrender value" is used in the latter part of the clause, clearly synonymous with "surrender value in cash" in the earlier part.

But it is said that the table was only for the purposes of clauses 10 and 7. I do not find anything which so indicates; and the fact that the "surrender value in cash" is "available to the assured or legal beneficiary" only "at the end of the third or any subsequent year during which full premiums have been paid or within thirty days thereafter," does not assist the contention now under consideration.

"Available" does not mean "existing." It means "in such a condition as that it can be taken advantage of." In *Brett* v. *Monarch Investment Building Society*, [1894] 1 Q.B. 367, the balance existed in fact, although it was not available. In *Birchall* v. *Bullough*, [1896] 1 Q.B. 325, the unstamped bill existed

ONT.
S. C.
DEVITT
v.
MUTUAL
LIFE
INSURANCE
CO. OF
CANADA.
Riddell, J.

and was made use of to refresh a witness's memory, although the statute said that it should not be "available for any purpose whatever;" but it could not be used itself, *i.e.*, could not be taken advantage of to prove the receipt of money: *Ashling* v. *Boon*, [1891] 1 Ch. 568. The profits existed in fact and would help to make a future dividend, although they were not "available for dividend" in *In re Crichton's Oil Co.*, [1902] 2 Ch. 86.

Remembering that the company must be the sole judge of surrender value, it is perfectly justified in making that surrender value arbitrarily increase at any particular time and at any interval. It may cause it to increase day by day, month by month, year by year, quinquennially, decenially. I think the company here has fixed the surrender value for the purposes of this policy, increasing at the end of each year (after the third). The surrender value so fixed at the end of any one year continues to be the surrender value until it is increased. The assured cannot always avail himself of it. It is not "available" to him if he allow the thirty days to elapse, but it exists nevertheless and exists at the amount fixed by the company. If during the thirty days the assured desires cash, he has a right to demand and to receive it; if he lets that period go by, he cannot—it is no longer available to him so that he can realise on it without the consent of the company. If he applies at any other time, the company may refuse, and the matter will become one of contract *ultra* the policy.

On the facts of this case, I do not think that the plaintiff can succeed under the terms of clause 9 of the policy. (It is to be remarked that in the copies furnished to the Court this is headed "Automatic Non-Forfeiture;" the word "Automatic" does not appear in the original, and any argument based upon it falls to the ground).

Then the defendants rely upon clause 3, and upon the clause at the bottom of page 2 (page 3 in the copies furnished to the Court). Clause 3 in the policy reads thus: "3. Termination and revival. If any premium or written obligation given therefor be not paid when due (except as provided in the clause respecting non-forfeiture hereinafter contained), or if the interest on any loan secured by this policy remain in default until

such loan and the accrued interest thereon capitalised annually amount to its cash surrender value, the policy shall be void and all liability of the company thereon shall cease; but it may be revived by the company within twelve months from the date of lapse, on satisfactory evidence being furnished of the good health and habits of the assured and on payment of arrears."

(In the copies, so called, furnished to the Court, the claim is somewhat different *ad fin.;* but the difference is not of consequence here.)

The added clause reads (so far as material): "And I further agree . . . that the principles and methods which may be adopted by the company for the determination and apportionment to such policy, of any surplus or profits, shall be and are hereby ratified and accepted by and for every person who shall have any claim under such policy . . . and I further agree that if a promissory note or other written obligation be given for any premium or part thereof, and be not paid at maturity, the assurance granted and policy issued on the application shall not be in force, and the operation thereof shall be suspended while such default in payment continues, but I am nevertheless to be liable upon such obligation to the full amount unpaid thereon; and upon payment as aforesaid during my life and good health, and before the lapse of the policy by efflux of time, the policy shall again acquire force."

It is contended for the plaintiff that the latter clause is not pleaded; and strictly that is so. But the plaintiff sets up the policy and sues on it; and the Supreme Court of Canada in *Lake Erie and Detroit River R.W. Co.* v. *Sales* (1896), 26 S.C.R. 663, decided that, where the plaintiff's claim is explicitly on a contract, all the terms of the contract may be taken advantage of by the defendant without special plea. See p. 677. There is no change in the rules of pleading affecting this question since that decision; and I think the objection not well taken.

But, even if such a plea should have been specifically set out, the defendants should be allowed so to plead; and, in case the matter is to go further, they would be wise to amend their defence accordingly. Since the Judicature Act, defendants have been held to their pleadings generally in two cases only:

ONT.

S. C.

DEVITT v. MUTUAL LIFE INSURANCE CO. OF CANADA.

Riddell, J.

first, when the other side would be taken by surprise; and, second, when the defendant was considered to have declined to avail himself of a defence which would amount to a valid and sufficient answer to the demand and waived his right to insist upon that defence. *Quilibet potest renunciare juri pro se introducto.* Here the facts relied upon are specially pleaded, and it cannot be suggested that the plaintiff is taken by surprise or that he could better his case by evidence; and it is plain from the pleading in other respects that the defendants never intended to waive any defence based upon the added clause.

The real defence on the point is, that a note for $15.25, made by the assured, dated the 7th July, 1913, at three months after date, was not paid at maturity. This note, the defendants say, was given for part of a premium; and its non-payment at maturity, the defendants claim, furnishes a complete bar to the plaintiff's demand.

That the note was made by the assured and that it was not paid at maturity, is admitted; and, if the defendants can make it come within the words in the added clause "given for . . . any part" of "any premium," I think they should succeed.

All the material facts appear from the documents. A premium becoming due on the 28th March, 1913, the assured writes on the 16th April, 1913 (exhibit 4), with a money-order for $25 as part payment of the premium, and asks the company to send him "a note for sixty days for the balance," which he agrees to sign and return. A note (exhibit 5) for $30.50, at two months, is sent him; this he signs at Vancouver on the 24th April, and returns to the company. Clearly this note was given for part of the premium; it was sent to the assured in answer to a request from him to send him a note "for the balance" of his premium then due. When this note was not paid at maturity, the company, I have no doubt, could have declared that the policy "shall not be in force;" and, if the assured had died without change of circumstances, the policy would not have been payable.

But there was a change. The assured by letter (exhibit 6) of the 30th June, 1913, asks, "Will you kindly renew my note for $30, due June 24th, for two months." The company decline

but say (exhibit 7), they "will accept an extension note when one-half and interest is paid; therefore if you forward to us $15.55 we could extend the balance for you for a period of three months. Enclosed herewith you will find a note on the company's form which you could complete for $15.25 and return to us together with an order for $15.55. This will keep your insurance in full force. Kindly let us hear from you by return mail so that your assurance will not lapse. . . ." The note was signed and returned with the money-order to the company, who write acknowledging receipt of "your favour enclosing money-order for $15.55, covering one-half of your note which fell due on the 24th June, and a note for the remainder. You will herewith . . . find enclosed the old note." This note for $15.25 it was which was never paid, and the non-payment of which is claimed by the defendants as furnishing an answer to the plaintiff's claim.

The mere receipt of the money-order and a note to satisfy the remainder of the April note would not be of consequence as a waiver of the right to declare the policy not in force; the added clause specifically provides for the liability of the maker continuing although the policy is no longer in force. But the statement that the money-order and the note would keep the insurance in full force is conclusive of waiver, and indeed the defendants do not contend to the contrary.

It seems to me that the real state of affairs is this. The company had the right in June to declare the policy at an end (at least *sub modo*); for their own purposes, laudable enough no doubt, they prefer to make a new bargain with the assured quite outside of the policy: "You pay to us $15.25, and 'this will keep your insurance in full force.'" The assured agrees, pays his money and sends his note; and I cannot see why this is not a perfectly good contract on the part of the company to keep the "insurance in full force." But the contract can scarcely be read as keeping the policy in full force other than on its terms. And it does really nothing more than specifically to agree to what the law would enforce without specific agreement. The plaintiff does not seem to be advanced by this agreement beyond what the defendants concede.

ONT.
S. C.
DEVITT
v.
MUTUAL LIFE INSURANCE CO. OF CANADA.
Riddell, J.

Were it not for authority binding upon us, I should be inclined to hold that the April note was paid, and the new note was not one which came within the added clause.

The mere taking of a new note for the amount of a former is not in itself payment of the old one: Falconbridge on Banking and Bills of Exchange, p. 577; Maclaren on Bills of Exchange, 3rd ed., p. 320; if the holder retains the original, the presumption is that it is to continue to exist: *Ex p. Barclay* (1802), 7 Ves. Jr. 596. As is said by a very eminent Lower Canadian Judge (I translate): "If B. (the maker) intended to make a novation, he should have required G. and F. (the payees) to send him the first note:" *per* Stuart, J., in *Noad* v. *Bouchard* (1860), 10 L.C.R. 476, at p. 477. Here the note was given up, and, no doubt, destroyed. The company have never claimed that it continued in existence as a security after their sending it to the assured; they do not set it up in their pleadings or base any defence on its non-payment.

The delivery up of the former note has often, if not universally, been considered strong evidence of novation: Parsons on Notes and Bills, 2nd ed., vol. 2, p. 203; Daniel on Negotiable Instruments, 6th ed., paras. 1266, 1266a; and where, as in this case, the new note is given for a smaller amount, the conclusion is well-nigh irresistible: 7 Cyc. 1012, para. *b*.

Everything here points to an intention to consider the new note and the money-order as payment of the note of April.

The new note then was not precisely a "written obligation given" for "any premium," and so does not come precisely under the terms of clause 3. Nor, as I should have thought, is it "a promissory note or other written obligation . . . given for any premium or part thereof" under the added clause. It was given in part payment not of any premium but of a note, itself given in part payment of a premium. We should interpret a policy of insurance with reasonable strictness against the company which puts it forward and whose language it contains —more especially when forfeiture is claimed as the result of another interpretation. But it would seem that authority binds us to hold the contrary.

McGeachie v. *North American Life Assurance Co.*, 23 S.C.R.

148 (*S.C.*, 22 O.R. 151, 20 A.R. 187), is mainly relied on. In that case, in the insurance policy there were two clauses: (1) a clause like that in the present case: "if a note . . . be given for the first or a subsequent premium or any part thereof, and if the same be not paid at maturity, it is agreed that any insurance or policy made on this application shall thereupon become null and void, but the note . . . must nevertheless be paid" (22 O.R. at p. 155); and (2) "if any premium note, cheque, or other obligation given on account of a premium, be not paid when due, this policy shall be void, and all payments made upon it shall be forfeited to the company" (22 O.R. at p. 158). The first note, $31.10, was renewed with interest by a renewal note, and that with interest by another. The assured sent, before maturity, a payment of $10, and gave a new note for the balance, which, when due, was renewed for one month, the old note being cancelled and returned to the maker. The last note not being paid, the company demanded payment by a letter which reached the post office of the assured the day he died, and he never received it. Payment was tendered by his representatives and refused; and action was brought. Street, J., held that the last note was given for a part of the first premium, and dismissed the action on the strength of the condition (1) above. This was reversed by the Divisional Court, Armour, C.J., and Falconbridge, J. (now Chief Justice). The right to declare the policy void on the default in payment of the first note was admitted, but the conduct of the company in taking renewals and demanding payment was considered a waiver of the forfeiture. In the Court of Appeal, Hagarty, C.J.O., and Burton, J.A. (afterwards Chief Justice), do not mention the clause upon which they base their judgment. Since the only clause justifying the company in demanding the payment of the note is the former of the two above set out, and both these learned Judges consider the fact that the company did demand payment no waiver under the circumstances, it is fairly clear that they must have been considering that former clause. Mr. Justice Osler speaks of the latter clause only, but (20 A.R. at p. 194) he says, "the . . . default in payment of the obligation given for the premium, and a call for its payment, which

ONT.
S. C.
DEVITT
v.
MUTUAL LIFE INSURANCE CO. OF CANADA.
Riddell, J.

never came to the knowledge of the insured"—clearly indicating that, in his opinion, the last note was "given for the premium." Mr. Justice Maclennan, while he thought that "the second and subsequent notes were not given on account of a premium, as the first was, but in payment of the antecedent ones . . . ," upon reflection, thought "it would be putting too narrow a construction upon the language of the condition to hold that the subsequent notes were not also given on account of a premium." And at p. 197 he says: "By the terms of the contract he" (*i.e.*, the company's agent) "could demand payment of the note whether the policy was void or not." By the terms of only the first mentioned clause, and not those of the latter, could the agent demand payment of the note, and it must be taken that the learned Judge considered that the last note was given, not only "on account of" the premium, but for a premium or some part thereof. Accordingly, the Court of Appeal must have considered, in a case on all fours with the present, that the note given to make up the balance of a note given for a premium, after crediting a cash payment, was itself given for part of a premium. It is true that in the Supreme Court a different terminology was under consideration (23 S.C.R. at p. 150), and the company relied upon the latter condition. But we are bound by the judgment of the Court of Appeal; and, if any distinction is to be drawn, it should be by a higher Court.

The policy was therefore not "in force" at the time of the death of the assured, and the plaintiff cannot succeed.

The appeal should be allowed and the action dismissed with costs. As to costs of the appeal, in the case of *Re Stinson and College of Physicians and Surgeons of Ontario* (1912), 27 O.L.R. 565, a Divisional Court refused all costs (but one counsel fee) to a successful appellant when the material furnished was incomplete; such a course is *à fortiori* when the material furnished is incorrect. I think the same order should be made in this case.

We were informed that what the defendants want is a judgment on principle, and not so much to prevent the payment of the policy; probably they, having such a judgment, will now pay the policy. The circumstances of the case are very peculiar:

and payment, under such circumstances, would probably not be set up as a precedent.

FALCONBRIDGE, C.J.K.B.:—I agree.

LATCHFORD, J.:—Two questions were raised upon this appeal. For the appellants it was argued that the promissory note for $15.25 falling due on the 10th October, 1913, and not paid, was within the provision rendering the policy void "if any premium or written obligation therefor be not paid when due (except as provided in the clause respecting non-forfeiture hereinafter contained)." The note was in fact in part renewal of a promissory note for $30.50, which, with $25 in cash, had been given in payment of the annual premium of $55.50 due on the 1st April, 1913. If the policy was not void by reason of the non-payment of the note for $15.50, the plaintiff is entitled to recover.

On the part of the plaintiff it is contended that, even though the note for $15.50 is considered as given "for" the premium, the provision as to non-forfeiture prevented the policy from becoming void.

In *McGeachie* v. *North American Life Assurance Co.*, the application provided that the policy should be void if a note or other obligation given "for" the first or a subsequent premium was not paid at maturity. In the policy itself was a condition that if any premium note . . . given "on account of" a premium was not paid when due the policy should be void. At the trial before Street, J., the question appears not to have been so much whether a second and subsequent notes were given "for" or "on account of" the premium, as the first note was given; but whether the defendants had waived their right to consider the policy void. On appeal to a Divisional Court the policy was treated as voidable only at the election of the insurers, and it was held that they had by their conduct elected to continue the policy in force: judgment of Armour, C.J., 22 O.R. 151, at p. 163. In the Court of Appeal, 20 A.R. 187, the judgment of the Divisional Court was reversed and that of Street, J., at the trial, restored, on the ground that the insurers were not bound, on non-payment of the note, to do any act to

ONT.

S. C.

DEVITT v. MUTUAL LIFE INSURANCE CO. OF CANADA.

Latchford, J.

determine the risk. The policy became void upon non-fulfilment of the condition, and no act on the part of the company was necessary to shew that the company had elected to avail itself of the forfeiture. Maclennan, J.A., in dealing with the question whether the unpaid note was given "on account of a premium"—a point which he thought might make a difference—said (p. 195): "The second and subsequent notes were not given on account of the premium, as the first was, but in payment of the antecedent ones, or at least in lieu of them. Upon reflection, however, I think it would be putting too narrow a construction upon the language of the condition to hold that the subsequent notes were not also given on account of a premium. We cannot truthfully, making a fair and reasonable use of language, say that they were not given on account of a premium. It is evident that all the notes were given for that and nothing else."

The language of the contract in the present case is slightly different, in that the word "therefor" is used instead of "for" and "on account of" in regard to a written obligation given for a premium. But it would, I think, be an unreasonable refinement to say that the note for $15.50 was not given "for" the premium that was unpaid. It was not given for anything else.

There remains the question as to the operation of the clause regarding non-forfeiture.

If the words "cash surrender value," in the clause of the policy providing against forfeiture, mean, as the learned trial Judge considered, a cash surrender value ascertainable actuarially at the date default occurred in the payment of the note for $15.50, the policy was in force at the death of the assured, and the plaintiff is entitled to recover. If, on the other hand, the words mean, as the defendants contend, the cash surrender value stated in the table of surrender and loan values, which became available to the assured at the end of the third year—the 1st April, 1913—the action must fail.

It is to default in the payment of a premium, and not of a note or other obligation given for a premium, that the non-forfeiture clause applies. The time of such default depends

ONT.

S. C.

DEVITT v. MUTUAL LIFE INSURANCE CO. OF CANADA.

Latchford, J.

on whether the premium is payable "yearly, half-yearly, or quarterly." It was at "the *end* of said term"—in this case, at the end of the yearly term, the 1st April, 1913—that upon maturity and default the non-forfeiture clause become operative. The policy was to be continued to the end of the "term" or "period" thus begun, when it was to lapse and the company's liability to cease, unless the premium for the succeeding term or period (in this case one year) was paid within the thirty days of grace.

Effect cannot, in my opinion, be given to the non-forfeiture clause, unless regard is had to the table which fixes the cash surrender and loan values as of the end of each term. It is only at the end of such terms that the premiums became due, and only at such times and not at any intermediate time that the non-forfeiture clause operated to save the rights of the assured.

I therefore think the appeal must be allowed with costs.

Kelly, J.

KELLY, J.:—The first question to be determined is, what is the meaning of "cash surrender value" used in the "privileges and conditions" which form part of the contract of insurance on which the action is brought? The learned trial Judge treated the matter as if cash surrender value accrued from day to day; he says, "the defendants have fixed it as a growing amount *de die in diem*." If that is the correct view, the cash surrender value on the 10th October, 1913, the date of maturity of the $15.25 promissory note representing the balance of premium due on the 1st April, 1913, would not be $68—the sum stated in the table as of the end of the third year of the term of the policy— but that sum, plus an additional sum accrued to the 10th October, on a consideration of the sums named in the table as of the end of the third and fourth years respectively.

But is that the correct principle on which to determine cash surrender value at any given time? The policy does not say so; it fixes $68 as the amount at the end of the third year, and is silent as to any increase until the end of the fourth year is reached, when an increase over that at the end of the preceding year is distinctly made. Cash surrender value is fixed by the

ONT.

S. C.

DEVITT v. MUTUAL LIFE INSURANCE CO. OF CANADA.

Kelly, J.

company, and their determination of it is specifically embodied in the contract of insurance. The policy contains not a word from which the conclusion may be drawn that the increase in the amount of cash surrender value should be otherwise than at the end of each of the specified years. If the company had intended that the assured should have the benefit of an accrual from day to day, or that before the end of the current year the cash surrender value was to be other than that expressly fixed as of the end of the preceding year, apt language to that effect, in a contract no doubt deliberately and most carefully drawn, would have been employed.

The wording of the policy is the language of the company itself, and must be taken most strongly against it. This is the view expressed by Lord St. Leonards in *Anderson* v. *Fitzgerald* (1853), 4 H.L.C. 484, where he says (at p. 507): "It" (the policy) "is of course prepared by the company, and if therefore there should be any ambiguity in it, must be taken, according to law, more strongly against the person who prepared it." Reading the policy even in the light of this decision, I cannot give to it the effect claimed for it by respondent. I know of no authority giving it that effect.

The other chief ground of defence is, that the $15.25 promissory note was given for part payment of the premium which fell due on the 1st April, 1913, and, not having been paid at maturity, the assurance ceased to be in force. This contention is based on the term of the policy that "if a promissory note or other written obligation be given for any premium or part thereof, and be not paid at maturity, the assurance granted and policy issued on the application shall not be in force, and the operation thereof shall be suspended while such default in payment continues, but I am, nevertheless, to be liable upon such obligation to the full amount unpaid thereon; and upon payment as aforesaid during my life and good health and before the lapse of the policy by efflux of time, the policy shall again acquire force." The respondent is at issue with the appellants on the effect of the note being overdue, and argues that it cannot be considered as a note given for premium or part of premium, but in satisfaction of the balance unpaid on the note of

$30.50, which was given for part of the premium due on the 1st April, 1913.

The question thus raised came squarely before the Supreme Court of Canada in *McGeachie* v. *North American Life Assurance Co.*, 23 S.C.R. 148, an action on a policy which contained a condition that if any premium, or note, etc., given therefor, was not paid when due, the policy should be void; it was held that where a note given for a premium was partly paid when due and renewed, and the renewal was overdue and unpaid at the death of the assured, the policy was void. That authority is binding here.

The cash surrender value, as defined above (less the loan indebtedness admittedly due by the assured), did not exceed—it did not equal—the amount of the overdue premium, and the policy was not kept in force by virtue of the non-forfeiture clause. That circumstance is fatal to the respondent's position.

I am unable to hold that what took place after the maturity of the note was a waiver of the breach of the condition so as to keep the policy alive.

The appeal, in my opinion, should be allowed with costs.

Appeal allowed.

CROZIER v. TREVARTON.

Ontario Supreme Court, Boyd, C.

1. LANDLORD AND TENANT (§ III D—99)—RIGHTS AND LIABILITIES OF PARTIES—RENT—APPORTIONMENT—AFTER RETAKING POSSESSION—R.S.O. 1914, CH. 156.

The statute R.S.O 1914, ch. 156, sec. 4, declaring all rent to accrue from day to day and to be so apportionable has changed the common law rule by which rent was not due in respect of an intermediate broken period; and under the statute the landlord may recover rent up to the time when he re-entered on his acceptance of the tenant's surrender when the latter gave up possession and gave the landlord notice to that effect.

[*Hartcup* v. *Bell*, Cab. & El. 19, and *Elvidge* v. *Meldon*, 24 L.R. Ir. 91, followed; *Hall* v. *Burgess*, 5 B. & C. 332, distinguished.]

2. LANDLORD AND TENANT (§ III D—99)—SURRENDER OF TENANCY—LIABILITY FOR RENT—NOTICE OF RE-LEASE.

Where the landlord is notified by his tenant that the latter has given up the demised premises, and the landlord desires to preserve his claim against the tenant under the lease and at the same time re-let, he should notify the tenant that he is re-letting on such tenant's account.

[*Walls* v. *Atcheson*, 3 Bing. 462, referred to.]

ONT.

S. C.

CROZIER v. TREVARTON.

Boyd, C.

ACTION for damages for breach of a covenant.

F. Arnoldi, K.C., for the plaintiff.

H. S. White, for the defendant.

BOYD, C.:—The defendant, being a mason by trade, undertook to lease the farm in question from the plaintiff, who is a lawyer, through the medium of the plaintiff's brother, who is also a lawyer. The farm was sadly out of repair, and the house was uninhabitable, and an agreement was drawn by the plaintiff's brother, acting also for the defendant, by which provision was made for doing various repairs and betterments on the land. This agreement was kept by the plaintiff—no copy furnished the defendant, though he says he repeatedly applied for a copy—and it is now lost. The only evidence is, that the lease is in conformity to that agreement, as stated by the plaintiff and his brother, as against the statement of the defendant that it is not so drawn. My strong impression is, that the defendant was to do or to have done much more work than is admitted by the plaintiff, in many parts of which he (the defendant) was to render service as a mason, and for which he expected and understood he was to be paid or to have it allowed on the rent. This is confirmed by the fact that he gave a detailed account of his services and outlay to his solicitor from time to time as furnished and made. By the terms of the lease he was to get full possession on the 1st November, 1906; but the farm was then in possession of another tenant, Conlin, who paid rent to the plaintiff down to the 1st March, 1907. Not till that date did the defendant get full possession, and thereafter he went on to make the house habitable. He is corroborated in this by the former tenant—who did not live on the place. He expended according to Ebbels' account, $109.20 in betterments, and he also paid others for work done on the building, etc., the sum of $59.89. He kept possession from March, 1907, till about October, 1908, in all one year and seven months, and paid rent in July, 1908, to the extent of $125. The lease was for ten years at $250 for the first and second years. He was losing money in the place—found it impossible to live there, and vacated possession and went back to his former abode, and so notified the landlord by letter.

There was no personal communication between the parties—

the brother was the medium in respect to the doing of the work and ordering supplies and so on.

The landlord, without any word of any kind to the tenant, entered into possession in April, 1909, and rented the place then to a tenant, and afterwards, in the same *ex parte* manner, to three other tenants, till finally he sold the place in September, 1912.

The only letter, he says, he sent to the defendant was on the 30th November, 1908, after the place had been vacated, claiming as due under the lease $389. For some unexplained reason, the plaintiff in his pleading says that all rent was paid up to the 1st November, 1907, and to the 1st May, 1908. The first item of his detailed claim is for half a year's rent due the 1st November, 1908, a month after the defendant had left the farm. Under the circumstances and considering the situation and capacities of the parties, I declined to allow an amendment of this.

The chief claim is for damages for non-payment of rent down to the sale of the farm in 1912. This claim fails clearly upon the facts of this case. The plaintiff, being notified that the place was vacant and that the defendant had left, accepted that surrender by reletting the farm in April, 1909. That transaction operated as an eviction of the defendant, in the absence of notification to the contrary given to the defendant. The plaintiff might have preserved his claim under the defendant's lease by proper warning, such as that he was reletting on the former tenant's account, given to the defendant—but he undertook to enter on and lease the farm to others, to the extinction of the defendant's term of years.

The law is well-settled on this head by the case of *Walls* v. *Atcheson* (1826), 3 Bing. 462, cited and relied on in Halsbury's Laws of England, vol. 18, p. 549.

Not so clearly settled is the point as to how much rent the defendant must pay. His actual occupation was one year and seven months, and before the next gale-day (May) the plaintiff had rented the farm to the new tenant. Under the common law the rent was not due for any intermediate broken period, and the rent accruing would have been forfeited by the re-entry before the gale-day. That is laid down in *Hall* v. *Burgess* (1826), 5

ONT.

S. C.

CROZIER v. TREVARTON.

Boyd, C.

B. & C. 332, also cited in Halsbury (vol. 18, pp. 480, 486). But it is said, and the better opinion appears to be, that the Apportionment Act has changed this result: so that rent is held to be payable *de die in diem*, and so apportionable as to the broken period.

There is dearth of direct decision, but the situation is thus treated in Halsbury's Laws of England, vol. 18, p. 480, note (*h*): "Formerly where the reletting took place between two rent days, the landlord could not recover the rent from the previous rent day up to the reletting; but apparently the rent would now be apportionable for this purpose." That volume was published in 1911. In 1914, Foa's last (5th) edition of his Landlord and Tenant puts the point more decidedly (see pp. 117, 118): "Where a tenant left on a quarter day without notice, and the landlord let the premises to another tenant during the following 'period,' no rent could be recovered for the time up to such fresh letting." By virtue of the Apportionment Act "it is thought that rent could be recovered down to such reletting, although that reletting would amount to an eviction" (p. 118).

The case of *Hartcup & Co.* v. *Bell* (1883), Cab. & El. 19, accepted and followed by the Irish Court in *Elvidge* v. *Meldon* (1888), 24 L.R. Ir. 91, seems to justify the conclusion that the clause in the Apportionment Act (as it now appears in R.S.O. 1914, ch. 156, sec. 4), making all rent to be regarded as accruing due from day to day, enables the landlord to collect, and renders the tenant who has withdrawn liable to pay, rent up to the time when the landlord puts in a new tenant. In such a case the old tenancy is determined by operation of law except when the reletting by the landlord is on the tenant's account, and the latter has notice to that effect. The defendant should in fairness pay for his actual occupation, about a year and seven months, and also for the period between his going out and the incoming of the new tenant, for which I would fix as a fair amount the sum of $520.00

Deduct from this cash paid....$125	$125.00	
Work done, etc., as noted by Ebbels	109.20	
And cash paid for work as by receipts put in	59.89	$294.09
		$225.91

Judgment for the plaintiff for $225.91. Costs to the plaintiff on the lower scale. Costs of defence on the higher scale, to be deducted from what is due for claim and costs to the plaintiff; and let the balance be paid to the plaintiff.

Judgment for plaintiff.

ONT.
S. C.
CROZIER v. TREVARTON.

McCALLUM, HILL & CO. v. IMPERIAL BANK OF CANADA.

SASK.
S. C.

Saskatchewan Supreme Court, Lamont, J.

1. LANDLORD AND TENANT (§ II E—35)—ASSIGNMENT—COVENANT NOT TO WITHOUT LEAVE.

A lessee's covenant not to assign without leave is broken only by a legal assignment for the entire residue of the term.

[*Gentle* v. *Faulkner*, [1900] 2 Q.B. 267, followed.]

2. LANDLORD AND TENANT (§ II D—30)—LEASE—FORFEITURE—SUBLETTING—REFUSAL OF LESSOR TO CONSENT TO—OBJECTIONABLE BUSINESS.

If a valid and binding assignment of the term is made without the lessor's consent being asked for although the lease contains a covenant that the lessee "will not without leave assign or sublet, the lessor undertaking that his consent will not be arbitrarily withheld," the effect is to enable the lessor to forfeit the lease and to repossess the premises; but if, before a valid and binding assignment is made (*ex gr.*, the delivery of an assignment held in escrow pending the negotiations to obtain the consent) the consent of the lessors is requested, the refusal of such consent can only be justified if the proposed assignee or the business he is to carry on is found to be objectionable.

[*Bates* v. *Donaldson*, [1896] 2 Q.B. 241; *Barrow* v. *Isaacs*, [1891] 1 Q.B. 417; *Eastern Telegraph* v. *Dent*, [1899] 1 Q.B. 835, referred to.]

3. LANDLORD AND TENANT (§ II E—35)—ASSIGNMENT COVENANT THAT LESSOR WILL NOT ARBITRARILY WITHHOLD CONSENT TO—EFFECT OF.

The effect of a clause in a lease that the lessor will not arbitrarily withhold his consent to an assignment of the term which the lessee has covenanted not to make without his leave is not to impose an obligation on the lessor to give his consent, but in case it is unreasonably withheld to release the lessee from the obligation of the covenant and to enable him to assign without the lessor's consent.

[*Andrew* v. *Bridgeman*, [1907] 1 K.B. 198; *West* v. *Gwynne*, [1911] 2 Ch. 1, followed.]

Statement

TRIAL of ejectment action.

Action dismissed.

J. F. Frame, K.C., and *J. A. Cross*, for plaintiffs.

J. A. Allan, K.C., for defendants.

Lamont, J.

LAMONT, J.:—This is an action of ejectment by the plaintiffs to recover possession of the premises known as lots 22 and the northerly six feet of lot 23, in block 284, in the city of Regina. The said premises were, by an indenture of lease bearing date

SASK.

S. C.

McCALLUM, HILL & Co. v. IMPERIAL BANK OF CANADA.

Lamont, J.

March 24, 1904, leased to the defendants the Imperial Bank of Canada by G. T. Marsh, the then registered owner, for a term of 10 years, with an option of renewal for a further term of 5 years. The rent reserved was $150 per month. The lease contained the following clause:—

And the said lessees hereby covenant with the said lessor that they will not, without leave, assign or sublet, the lessor undertaking that his consent will not be arbitrarily withheld.

On April 27, 1911, Marsh transferred the said lands to the plaintiffs, who became the registered owners thereof. In 1912 the defendants the Imperial Bank, who had erected bank premises of their own and had decided to occupy these premises, were approached by the defendant, the Merchants Bank of Canada with a view of taking over the lease of the premises in question. The Merchants Bank made an offer of $370 per month for the premises. On September 7, 1912, the manager of the Imperial Bank at Regina wrote the plaintiffs as follows:—

I beg to advise you that it is our intention to lease our old bank premises to the Merchants Bank of Canada upon the following terms of rent, $370 per month, and disposal of the fixtures, vault door, etc., at a price of $2,500. If you care to take over the lease upon these terms, please advise us.

There does not seem to have been any reply to this letter, but it is admitted that there were numerous interviews between the Regina manager of the Imperial Bank and the several members of the plaintiffs' firm, in which, according to the evidence of J. A. Wetmore, he verbally requested the plaintiffs' consent to the assignment of the lease, but the plaintiffs took the position that it had been agreed between them and Marsh when they purchased the property that Marsh would obtain the surrender or termination of the lease, and that therefore they could not consent to any assignment thereof. The Imperial Bank caused an assignment of their lease to be prepared and executed both by themselves and their co-defendants, but they did not then deliver it to the Merchants Bank. On October 9, 1912, the Imperial Bank wrote the plaintiffs as follows:—

We send herewith duplicate of original assignment of lease dated September 25, 1912, from this Bank to the Merchants Bank of Canada of the premises at present held by us under lease from G. T. Marsh, and which, we understand, now belong to you. In this connection we would refer to

our manager at Regina's letter to you of September 7, 1912, intimating our intention to lease the premises to the Merchants Bank. We shall be glad if you will return the lease to us with your consent to assignment endorsed thereon or contained in a separate letter.

The plaintiffs got this letter on October 14. On October 15 the Merchants Bank took possession of the premises. On October 22 the plaintiffs wrote to the Imperial Bank as follows:—

Our consent to the assignment of lease by your Bank to the Merchants Bank of Canada should have been requested before, and not after, the assignment was actually made and possession taken by the assignees. We must therefore decline to recognize or acquiesce in the assignment in any way. We also beg to notify you that in view of your breach of covenant against assignment we will in due course take such action as we may be advised.

On November 5 the bank replied to this letter and pointed out that the assignment to the Merchants Bank had not yet been delivered, but that it still remained in escrow pending the granting or refusal of the plaintiffs' consent, also stating that if that consent were refused the bank proposed taking the position that the consent was arbitrarily withheld within the meaning of the lease. The plaintiffs refused consent. On December 1, the Imperial Bank wrote to the plaintiffs' solicitors that the bank proposed to complete the assignment of the lease to the Merchants Bank by delivery of the assignment. This was accordingly done. The plaintiffs then brought this action.

For the plaintiffs it was contended that the assignment of its lease by the Imperial Bank without the plaintiffs' consent constituted a breach of the covenant not to assign without such consent which enabled the plaintiffs, under sec. 83 of the Land Titles Act, to re-enter and take possession of the premises. For the defendants it was contended that, as the plaintiffs admitted that the Merchants Bank was unobjectionable as a tenant, the consent to the assignment was arbitrarily withheld, and that therefore they had a right to assign without such consent.

The covenant of the lessees in this case was that "they will not without leave assign or sublet" the leased premises. This covenant is only broken by a legal assignment for the entire residue of the term: 18 Hals. 576. In *Gentle* v. *Faulkner*, [1900]

SASK.

S. C.

McCALLUM, HILL & CO. v. IMPERIAL BANK OF CANADA.

Lamont, J.

2 Q.B. 267, Lord Justice A. L. Smith, in dealing with a similar covenant, at 273 and 274, said:—

> The covenant does not relate to the parting with the possession of the demised premises, but simply to the assigning or underletting of them. It is not said that the defendant has underlet the premises. It is said that he has assigned them. What, then, is the meaning of the covenant not to assign the demised premises? In my judgment the meaning is not to execute a legal assignment.

Mere letting into possession is not a breach of the covenant. There must be a valid and legal assignment of the term. The Imperial Bank executed a legal assignment, but did not deliver it to the Merchants Bank until December 1. Prior to this, and in fact prior to giving possession, they had requested the plaintiffs' consent, which was not given. The question then is, was the omission or refusal of the plaintiffs to give the consent a breach of the undertaking not to withhold consent arbitrarily, and, if so, did that entitle the bank to validly assign the term without such consent? In *Bates* v. *Donaldson*, [1896] 2 Q.B. 241, the lease contained a covenant by the lessee not to assign without license, such license not to be unreasonably withheld. The lessee desired to sell the term, and offered it to Bates, the lessor, for £400. He wanted the premises, but did not offer to pay the £400, whereupon the lessee assigned the term to the defendant without Bates's consent. Bates brought action to recover possession. Mathew, J., who tried the action, came to the conclusion that the defendant was unobjectionable as a tenant, and that therefore the plaintiff's consent was unreasonably withheld, and he dismissed the action. In appeal, Kay, L.J., said:—

> The only question which it is necessary to consider is whether, in the circumstances of this case, the refusal was reasonable within this covenant. . . . . The lessee had a right to assign without his (the lessor's) permission if he withheld it unreasonably. Was it reasonable to refuse without making an offer to buy for himself? If he had answered the request for permission by saying, "I was in treaty with you to buy, and was ready to give the price you asked, and I now offer it to you," the case might have been different, but that, at least, he ought to have done. He did nothing of the kind.

And A. L. Smith, L.J., at 247, said:—

> Now, what is an unreasonable withholding of permission within the meaning of this clause? It is conceded by counsel for the plaintiff that if a tenant was desirous of assigning to a friend, it would be unreasonable

for the lessor to withhold his assent, for the purpose of breaking the lease, but it was said, if it was not to a friend, but to a stranger, and the lessor was willing to pay what the lessee wanted, and as much as he could get from a stranger, it was not unreasonable to withhold his consent in order if possible to break the lease, if he wanted the premises for himself. That is not my reading of the clause. It is admitted that there is no case in the books which covers the present. Now when the lessor granted the lease he parted with his interest in the premises for the entire term. The tenant during that term can assign to any respectable or responsible assignee, in which case the lessor is bound not to unreasonably withhold his permission. It is not, in my opinion, the true reading of this clause that the permission can be withheld in order to enable the lessor to regain possession of the premises before the termination of the term. It was in my judgment inserted *alio intuitu* altogether, and in order to protect the lessor from having his premises used or occupied in an undesirable way or by an undesirable tenant or assignee, and not in order to enable the lessor to, if possible, coerce a tenant to surrender the lease so that the lessor might obtain possession of the premises.

Counsel for the plaintiffs relied upon two decisions, that in *Barrow* v. *Isaacs*, [1891] 1 Q.B. 417, and that in *Eastern Telegraph Co.* v. *Dent*, [1899] 1 Q.B. 835. In these cases it was held that where the lessees assigned or sublet the premises in forgetfulness of their covenant not to do so without leave, and therefore without asking for the lessor's consent, the Court could not relieve them from the effect of their assigning without consent. These authorities are undoubted law, but, in my opinion, they have no application to the facts of the case at bar. In these cases a legal assignment was made without any notice to the lessors or the asking of their consent. In the case at bar not only is this not so but, on September 7th, the Imperial Bank notified the plaintiffs of their intention to assign and offered the premises to the plaintiffs on the same terms as they subsequently obtained from the Merchants Bank. Then, between September 7 and October 14, the manager of the Imperial Bank had verbally requested the plaintiffs' consent to the assignment. By the letter of October 9, they requested this consent in writing. At this time the assignment, although executed, had not become operative as it had not been delivered; it was being held pending the consent or refusal of the plaintiffs; and it was not until the absolute refusal of the plaintiffs to give their consent that the assignment was delivered and became a valid and bind-

SASK.

S. C.

McCALLUM, HILL & Co. v. IMPERIAL BANK OF CANADA.

Lamont, J.

ing assignment. There is no similarity between these facts and those which existed in the cases relied upon by the plaintiffs' counsel, and the principle of these cases is not applicable here. The clause in the lease against assigning without leave was put in for the lessors' protection, to assure the asking of his consent before such assignment was made. This enables him to ascertain whether or not the proposed assignee would be objectionable as a tenant, or the business which he would carry on on the premises be undesirable. The clause in the lease providing that the lessors' consent would not be arbitrarily withheld was put in for the protection of the lessee, to enable him, if the lessor refused his consent, to the assignment of the term to an unobjectionable assignee to complete such assignment without that consent. If a valid and binding assignment is made without the lessor's consent being asked for, the lease is forfeited and the lessor has the right to repossess the premises, as was held in *Barrow* v. *Isaacs, supra*, and *Eastern Telegraphs* v. *Dent, supra*. But if, before a valid and binding assignment is made the consent of the lessors is requested, the refusal of such consent can only be justified if the proposed assignee or the business he is to carry on upon the premises is found to be objectionable. The effect of the clause not to withhold consent arbitrarily is, not to impose an obligation on the lessor to give his consent, but, in case it is unreasonably withheld, to release the lessee from the obligation of the covenant and to enable him to assign without such consent: *Andrew* v. *Bridgeman*, [1907] 1 K.B., at 198; *West* v. *Gwynne*, [1911] 2 Ch. 1. In the present case the proposed assignee was unobjectionable as a tenant, and the business proposed to be carried on was exactly the same as that which had been carried on by the Imperial Bank, the original lessors. The withholding of their consent by the plaintiffs was therefore, in my opinion, arbitrary and unreasonable, and the Imperial Bank was justified in completing the assignment without their consent.

The action will therefore be dismissed with costs.

Action dismissed.

BROCKLEBANK v. BARTER.

ALTA.

S. C.

Alberta Supreme Court, Scott, Stuart, Beck and Simmons, JJ.

1. CONTRACTS (§ I E 5—95)—CONTRACT COMPLETE ON FACE—INCOMPLETENESS—ORAL EVIDENCE—ADMISSION OF—TERMS OF INSTRUMENT—INCONSISTENCY.

Although a writing appears on its face to constitute a complete contract in itself, it may by oral or other evidence be shewn to constitute only a part of the real contract; the terms of the instrument may be inconsistent with the real agreement which may be proved by oral or other evidence, but the giving of the instrument in that form may be consistent with the true agreement.

[*Eaton* v. *Crooks*, 3 A.L.R. 1, applied.]

2. WITNESSES (§ III—58)—CORROBORATION—ALBERTA EVIDENCE ACT, 1910—ORAL TESTIMONY OF CLAIMANT.

The "evidence" of the claimant which requires corroboration under sec. 12 of the Alberta Evidence Act, 1910, 2nd session, ch. 3, in order to recover against the estate of a deceased person means the oral testimony of the claimant.

Statement

APPEAL to vary the judgment of Harvey, C.J.

Appeal allowed.

A. H. Clarke, for the plaintiff, appellant.

A. A. McGillivray, for the defendant, respondent.

Scott, J.

SCOTT, J., concurred with BECK, J.

Stuart, J.

STUART, J.:—I think this appeal should be allowed. Upon reading the documents I am unable to see how any question of credibility of witnesses could have been involved at all. There is the letter from Brocklebank to Travis of the 18th., there is the contract signed on the 19th, and there is the letter from Travis to Brocklebank on the 20th. In such a matter I think the occurrences should be treated as practically contemporaneous. If a man signs a large contract which requires great care and consideration at ten o'clock and goes away but bethinks him of something in about an hour or so and hurries back to the other party saying that something had been overlooked and the other party quite willingly considers it, as any honourable man would, and writes a letter fixing it up instead of going to the trouble of altering the formal contract surely it should be treated as a proceeding simultaneous with the signature of the contract and surely the letter should be treated as attached to and forming part of the contract. Of course it will be a question in each case as to where you should draw the line but

ALTA.

S. C.

BROCKLEBANK v. BARTER.

Stuart, J.

I think in this case the fact that the letter was not signed till next day should make no difference. The one letter, that of Brocklebank, was signed the day before the contract, it was received by Travis before the contract was signed, he knew that Brocklebank was signing upon the condition mentioned in the letter and the next day he wrote confirming this and assuring Brocklebank that he was fully protected. I am with respect unable to see how there can reasonably be suggested any meaning but one to this letter. It means beyond all doubt to my mind this, "Your contract does not cover the work of bringing all concrete up to the sidewalk level." I think the matter should be treated just as if Travis had endorsed this on the contract or on the specifications.

Any statement Brocklebank may have made to the Credit Foncier Canadien cannot alter this and could only create an estoppel in their favour.

The appeal should be allowed with costs, the judgment below varied and increased by adding thereto the sum of $4,513.50 and the plaintiff should have judgment for his costs of the action.

Beck, J.

BECK, J.:—This is an appeal from the decision of the learned Chief Justice at the trial without a jury in which he found $588.50 owing to the plaintiff who now appeals for the purpose of having the judgment in his favour increased by the sum of $4,513.50.

The defendants are the executors of the will of the late Jeremiah Travis, for whom the plaintiff contracted to erect a building. The contract is dated April 19, 1911. Mr. Travis had previously—on October 27, 1910—obtained a contract from the Foster Cartage Co. for the excavation and concrete work for the building in question. It is admitted that this earlier contract covered substantially only the exterior walls of the basement and these to the height only of 9 feet, above the level of the basement floor.

Prior to the execution of the contract between the plaintiff and Mr. Travis of April 19, 1911, the plaintiff put in a tender dated March 13, 1911, offering to do the work and supply the materials according to plans and specifications for $117,993.

and another alternative tender dated March 18, 1911 for "a commission of 9 per cent. on an estimated cost of $105,922.49."

The architects' estimate of the cost of the whole work was $115,000 including the Foster Cartage contract, which amounted approximately to $5,000, leaving the estimated cost of the work to be done by the plaintiff approximately $110,000. It is admitted that both these tenders covered all the work of construction not covered by the Foster contract, that is, all above the concrete walls brought up to a height of 9 feet from the level of the basement floor but including certain concrete work on the interior of the basement.

About April 10, Mr. Travis met the plaintiff and told him that his tenders were too high and the matter was discussed to some extent. Then on April 17, Mr. Travis telephoned to the plaintiff asking him to meet him the next morning in Mr. Mapson's office. This was not the architects' office and the architect was not present at the meeting. The plaintiff and Mr. Travis accordingly met in Mr. Mapson's office on the morning of April 18. As a result of the conference at the meeting the plaintiff took away the plans and specifications and subsequently on the same day wrote Mr. Travis the following letter:—

Hon. J. Travis, April, 18th, 1911.
Calgary.

Dear Sir:—

After carefully going into the proposition submitted to me by you this morning, I have decided to accept your offer on the following conditions.

1st. The Foster Cartage Company to bring all concrete up to the level of the sidewalk; and

2nd. You to pay all wages fortnightly and all accounts on the first of every month for material supplied and work done.

3rd. You to furnish all gravel for the completion of the building.

4th. You have already taken out a permit.

5th. You to go with me to the dealers and assist me to buy as cheaply as possible for cash.

In consideration of these concessions, I will accept your offer of $100,000 for the erection of your block; these concessions amount to $10,573.50. If this proposition meets with your approval phone me and I will meet you at Mr. Mapson's office as suggested by you at 10 o'clock to-morrow.

The plaintiff explains that—as circumstances surrounding the writing of this letter—not much headway had at that time

ALTA.

S. C.

BROCKLEBANK v. BARTER.

Beck, J.

been made with the Foster contract; no walls had been constructed and the excavation was not completed; the Foster company's men were at work; the gravel taken from the excavation could be used for the concrete work but the Foster company were hauling it away, what they did not need for concrete for the fulfilment of their contract; the level of the sidewalk was about 2 ft. 6 inches above the height of 9 ft. to which the Foster company were to erect the walls; it being apparent that owing to the Foster company having to erect forms for the construction of the 9 foot walls and having sufficient gravel on the land they could carry the walls 2 ft. 6 inches higher at much less than any one else; and Mr. Travis contemplated arranging with them to do the additional work necessary to enable the plaintiff to start his work at the level of the sidewalk.

The plaintiff says that Mr. Travis accepted the proposition contained in his letter of April 18, at the conference on April 19, and that then they went from Mr. Mapson's office to the architects' office and signed the contract on April 19.

The plaintiff further says that on the morning of April 20, he said to Mr. Travis personally that he did not think the contract protected him as fully as it should and that on the same day he again spoke to Mr. Travis by telephone to the same effect with the result that Mr. Travis sent him the following letter:—

R. A. Brocklebank, Esq., Calgary, April 20th, 1911.
Contractor.

Dear Sir:—

In reference to our conversation this morning it was clearly understood that I was to furnish all the gravel required for concrete work to be done by you, above the foundation. Mr. Bates omitted to have this inserted in the contract as I mentioned to him the Foster Cartage Co. were to leave enough gravel there for the completion of the building, and if there is not enough left I will charge it to their account.

In reference to the other matters referred to in your letter of the 18th, as this work does not come under your contract I think you are already protected.

Of the five items of the plaintiff's letter of April 18, the 2nd is substantially in the formal contract; the 3rd is specifically mentioned in Mr. Travis' letter of April 20; the 4th is intended to make it clear that the owner and not the contractor is to bear the expense of the building permit; the 5th, suggests a

sort of an enforceable agreement or understanding which it was to the interest of both parties to carry out.

This leaves only the 1st item—the only one referring to "work" strictly speaking, though the furnishing of the gravel was apparently considered to be "work" and possibly, too, the other items, for Mr. Travis in his letter of April 20, first says he will supply the gravel and then says: "In reference to the other matters referred to in your letter of the 18th, *as this work does not come under your contract* I think you are fully protected." It is at all events clear to my mind that Mr. Travis by his letter of April 20 accepted to the full extent the conditions proposed by Mr. Brocklebank's letter of the 18th as the conditions upon which he would execute the formal contract.

In effect, so far as work and material were in question, Mr. Brocklebank said to Mr. Travis: "If you will (1) furnish all the necessary gravel for the concrete work and (2) will bring the structure up to the level of the sidewalk, so that my contract shall apply only to the structure above the level of the sidewalk, I will sign the formal contract, plans and specifications without putting the architect to the trouble of altering any of these documents;" and Mr. Travis in effect said, "agreed." Assuming that the parties did in fact so agree, it would be a monstrous thing if the law or any rule of evidence were such as to make it impossible for either party to prove that the formal contract was not the entire contract but merely an item of another and wider contract. But in *Eaton* v. *Crooks*, 3 A.L.R. 1, in a judgment in which the rest of the Court concurred, I shewed by reason and authority that no law or rule of evidence excluded such proof. I there said:—

> A writing, although on its face it appears to constitute in itself a complete contract, may, by oral (or other) evidence be shewn to constitute only a part of the real contract, and in some cases, to be more specific, to be merely a means adopted by the parties to carry their real agreement into effect. If the latter be the purpose there may be an apparent inconsistency by reason of a writing stating a false relationship between the parties as a convenient means of carrying into effect their real purpose.
>
> . . . The *terms* of the instrument (may be) inconsistent with the real agreement, which may be proved by oral (or other) evidence; but the *giving* of the instrument *in that form* (may be) not inconsistent, but in accordance with the true agreement.

ALTA.

S. C.

BROCKLEBANK v. BARTER.

Beck, J.

In my opinion therefore the evidence of the real agreement between the parties was unquestionably properly admitted and the effect of it is not ambiguous or doubtful but quite clearly establishes the plaintiff's contention by the letters of April 18, 20, interpreted in the surrounding circumstances.

I think sec. 12 of the Alberta Evidence Act, (ch. 3 of 1910, 2nd. sess.) has no application. That section prevents one recovering against the personal representatives of a deceased person "*on his own evidence*," unless such evidence is corroborated by some other material evidence. That surely means on his own *oral* evidence. Here the plaintiff's case is established, in my opinion, by documentary evidence.

I think too, that the learned Chief Justice would have come to the same conclusion both upon the facts and the law had he not probably from the aspect which one or other of the counsel at the trial put upon the case, had it in his mind that the terms of the agreement outside the formal contract were being sought to be proved by oral evidence, with the letters merely by way of corroboration.

In the result I think the appeal should be allowed with costs. The judgment below increased by the sum of $4,513.50, the total amount of the judgment to be at interest of 5 per cent. per annum from the commencement of the action and there being a declaration of a Mechanics' Lien in the usual form and the plaintiff should have his costs below.

SIMMONS, J., concurred with BECK, J.

Appeal allowed.

CAN.

EX. C.

Re VULCAN TRADE-MARK.

Exchequer Court of Canada, Cassels, J.

1. TRADE-MARK (§ III—10)—ASSIGNABILITY OF.

A trade-mark cannot be assigned in gross.

[*Gegg* v. *Bassett*, 3 O.L.R. 263, approved; *Smith* v. *Fair*, 14 Ont. R. 736, referred to.]

2. TRADE-MARK (§ VI—30)—REGISTRATION OF—OWNERSHIP.

The applicant for registration in Canada of a trade-mark must be the proprietor of same.

[*Partlo* v. *Todd*, 17 Can. S.C.R. 196, and *Standard Ideal* v. *Standard Sanitary*, 27 Times L.R. 63, referred to.]

3. TRADE-MARK (§ IV—16)—INFRINGEMENT—DEFENSES — DISCONTINUANCE OF USE.

An intention to abandon as to Canada a trade-mark used by a foreign firm in a world-wide business is not to be inferred from a lapse of ten years between shipments made to Canada prior to an application in Canada to register the mark.

[*Monson* v. *Bochm*, 26 Ch.D. 398, referred to.]

4. TRADE-MARK (§ VI—30)—REGISTRATION—WHEN TITLE ACCRUES — INFRINGEMENT—ACTIONABILITY.

Registration of a trade-mark under the Trade Mark and Design Act, Can., confers no title to the mark, but is a pre-requisite to the right to bring an action under the Act; and rectification of a registered general trade-mark may be ordered by the Exchequer Court so as to exclude a conflicting specific mark in prior use by another firm and sought to be registered by the latter firm where the general mark was not applied by its owners to the line of goods covered by the specific mark until the dispute arose as to its use on such goods.

[*Auto Sales Gum* v. *Faultless Chemical Co.*, 14 D.L.R. 917, 14 Can. Exch. R. 302, and *Re Noelle*, 14 D.L.R. 385, 14 Can. Exch. R. 499, referred to.]

Statement

PETITION to have certain trade-marks registered. The facts upon which the application was based are stated in the reasons for judgment.

J. F. Edgar, for petitioners.

J. A. Ritchie, for objecting parties.

R. V. Sinclair, K.C., for Minister of Agriculture.

Cassels, J.

CASSELS, J.:—The present petitioners, styled in English the Vulcan Match Manufacturing Co., presented a petition to have it declared that they are entitled to have placed on the Register of Trade-Marks, three specific trade-marks set out in the petition. The prominent feature of the alleged trade-marks is the word "Vulcan" as applied to matches.

It is important to refer to the application which is as follows:—

I, Joseph E. Quintal, of the City of Montreal, in the district of Montreal, and Province of Quebec, one and on behalf of the firm of N. Quintal et Fils, carrying on business in the said City as wholesale importers of wines, liquors, cigars, groceries, etc., do hereby furnish a duplicate copy of a general trade-mark in accordance with secs. 4 and 9 of the Trade-Mark and Design Act, which I verily believe to be the property of the said firm, on account of its having been the first to make use of the same. The said general trade-mark consists of the word "Vulcan" which can be printed in any form of type on labels, wrappers or packages, or be stamped, branded, or stencilled in any way on goods manufactured and sold by the said firm.

It appears from the evidence that it is usual for those en-

CAN.
EX. C.
RE VULCAN TRADE-MARK.
Cassels, J.

gaged in the wholesale grocery business to sell as part of their stock in trade, matches. It is important, however, to bear in mind that no reference to matches is made in the application—and later on I will point out that, as far as the evidence shews, no matches labelled with the word "Vulcan" were in reality sold by the respondents with the label "Vulcan" until about the time of the trouble between the respondents Bergeron, Whissell & Co., the assignees of N. Quintal et Fils, and the petitioners.

It would appear that about December 16, 1910, the petitioners asked the firm of Bergeron, Whissell & Co., for a consent for the registration by the petitioners of their specific trade-marks.

The petitioners pray:—"(a) That the entry in the Register of Trade-Marks, of the said general trade-mark "Vulcan" by N. Quintal et Fils, be expunged, or (b) That the said entry be varied by limiting the said general trade-mark "Vulcan" to a specific trade-mark applicable to the manufacture and sale of a class or classes of merchandise of a particular description other than matches." . . .

It is clear from the evidence, that these petitioners—The Vulcan Match Manufacturing Co.—have been carrying on a most extensive business in matches, at all events as far back as the year 1870. Their business has been a continuous one. Their trade-mark, a prominent part of which is the word "Vulcan" was registered in England as far back as the year 1880, and in the United States as far back as the year 1883. A list of the places, and the dates of registration, are annexed to the evidence taken under the commission.

As early as 1882 shipments of matches by the petitioners having the trade-mark "Vulcan" on the boxes were sent to Canada. There were further shipments in June, 1885. Subsequent shipments were made in August, 1895, in September, 1895, in October, 1895, in November, 1895, and in February, 1896. . . .

In the case of *Mouson & Co.* v. *Boehm*, 26 Ch.D. 398, the judgment of Chitty, J., is very pertinent—the facts in this case

being much stronger against any idea of abandonment than in that case.

At the trial before me, Mr. Dandurand, a member of the firm of Bergeron, Whissell & Co., gave evidence. He sets out a great number of articles in which the firm have dealt in and to which the trade-mark "Vulcan" was applied. He is asked in regard to matches, and he states:—

"Q. And for some years you have used the word 'Vulcan' in connection with matches, as I understand? A. Yes.

"Q. For the last three or four years? A. Yes."

This testimony was given on January 13, 1914. The last three or four years, if taken back would mean to the years 1910 or 1911, later on in cross-examination the question is put to him:—

"Q. The first time you recollect the word 'Vulcan' being applied to matches was since 1907? A. Yes.

"Q. There is no doubt about that? A. No doubt, they were selling matches apparently continuously.

"Q. Then you remember getting labels made since 1907? A. Yes by our own firm.

"Q. For your own firm? A. Yes.

"Q. These labels, such as the ones you produced here, they were made since 1907? A. Yes.

"Q. And those were the first Vulcan labels that you recollect seeing for matches? A. Yes.

"Q. You never saw any Vulcan labels for matches before that? A. Never

"Q. Never? A. No.

"Q. And you had those made since 1907. When would it be—1911? A. About three years ago.

"Q. About 1911? A. Three or four years ago."

The importance of this evidence, in my opinion, is its bearing on the question of alleged abandonment. I have called attention to the fact that in the application for registration of the trade-mark in 1894, matches are not stated as part of the business; and as the word "Vulcan" was applied to matches by the respondents only within three or four years, it is not reasonable to impute to the applicants any intentional assent to

CAN.
EX. C.
RE VULCAN TRADE-MARK.
Cassels, J.

the rights of the respondents to use this word as a trade-mark as against the rights of the petitioners.

It always has to be borne in mind that the registration under the statute confers no title. It is merely a pre-requisite to the right to bring an action.

I am of opinion that these petitioners are entitled to have their three trade-marks registered, and I so adjudge.

The question that remains to be determined, namely, how the registered trade-marks of the respondents is to be dealt with is one of difficulty. The trade-mark of the respondents, as I have mentioned, is a general trade-mark.

In the case of *Re Auto Sales Gum and Chocolate Company*, 14 D.L.R. 917, 14 Ex. C.R. 302, I considered the question of the jurisdiction of this Court to vary or rectify a trade-mark. In a later case of *Re Gebr Noelle's Application*, 14 D.L.R. 385, 14 Ex.C.R. 499, I have given my views as to the difference between a general trade-mark and a specific trade-mark.

On the trial before me Mr. Edgar read a portion of the depositions of Mr. Joseph Dandurand on his examination for discovery. Mr. Dandurand stated:—

"Q. You have consented to the registration of 'Vulcan' as a trade-mark by others, have you not? A. Yes Sir.

"Q. On payment of a consideration? A. Yes, on a certain consideration."

The attention of the respondents had not been called to the effect a sale to others of the right to use the trade-mark might have on the validity of the trade-mark. See *The Bowden Wire Co.* v. *The Bowden Brake Co.*, 30 R.P.C. 581. . . .

Nice questions would arise as to whether the law as applied in England, apply under our Canadian statute to a general trade-mark. I thought it fair to the respondents that they should have liberty to file an affidavit setting out dates of any assignments and consideration received for such assignment. It now appears that any sales made by the respondent firm of the right to use the word "Vulcan" were in regard to articles of manufacture not covered by their trade-mark—according to the views I have expressed in the case referred to of *Gebr Noelle's Application*. I have received a communication from the

counsel of the petitioners to the effect that they do not desire to have the trade-mark of the respondents expunged except so far as applicable to matches. I would be very loth to declare that the trade-mark of the respondent should be expunged from the register *in toto*. The consent of the petitioners assists in relieving me from having to so decide.

The Canadian statute differs materially from the English Act.

In *Smith* v. *Fair*—a decision of the late Vice-Chancellor Proudfoot, 14 O.R. 736, there is a dictum which would rather indicate that the Vice-Chancellor's view was that there must have been evidence of prior user in Canada. He also apparently is taken to have held that, under our statute a trade-mark might be assigned in gross. This is merely a dictum and it was held the other way in the case of *Gegg* v. *Bassett*, 3 O.L.R. 263, by Lount, J. I have no hesitation in adopting the view of Mr. Justice Lount. It is thoroughly in accord with the opinions of the English Judges. It is quite true that the Canadian statute permits an assignment of a trade-mark, but it would be contrary to all rule applicable to trade-marks if a mark could be assigned to somebody who would use it upon goods neither manufactured nor sold by the owner of the trade-mark. It would have the effect of leading to misrepresentation. I may say in passing that the *Berliner* case, referred to in *Smith* v. *Fair*, is a case of passing-off. If the judgment on appeal cited by Proudfoot, V.C., is looked at it will appear that it was not decided on the ground of infringement of trade-mark.

In *Spilling* v. *Ryall*, 8 Ex. C.R. 195, the late Mr. Justice Burbidge guards himself against expressing any opinion as to what might be the result were the goods of the owner of the prior trade-mark in the United States placed upon the Canadian market.

The late Mr. Low, Deputy Minister of Agriculture, as far back as 1888, in two cases, namely, *Bush Manufacturing Co.* v. *Hanson*, 2 Ex. C.R. 557; *Groff* v. *The Snow Drift Baking Powder Co.*, 2 Ex. C.R. 568, expressed his views on the question. His opinion apparently being that the applicant must be the pro-

CAN.
EX. C.
RE VULCAN TRADE-MARK.
Cassels, J.

prietor of the trade-mark the world over in order to entitle him to ownership of the trade-mark.

In tracing the Canadian statutes there does not appear to be any substantial difference between the Trade-Marks Act at present in force and the earlier Acts. The present statute provides that the Minister may from time to time, subject to the approval of the Governor-in-Council, make rules and regulations and adopt forms for the purposes of this Act respecting trade-marks and industrial designs, and such rules, regulations and forms circulated in print for the use of the public shall be deemed to be correct for the purpose of this Act.

The earlier statute of 1872 practically is the same. The form approved pursuant to the terms of the statute is that, "I hereby request you to register in the name of..... a general trade-mark, which I verily believe is mine on account of having been the first to make use of the same, etc. I hereby declare that the said general trade-mark was not in use to my knowledge by any other person than myself at the time of my adoption thereof."

I do not find in any of the forms given under any of the preceding statutes any limitations confining such use to Canada. I mention this because in one case a reference was made to the fact that the Commissioner had accepted the application which, on its face, stated that there was no knowledge of user in Canada.

Under section 11 of the Trade-Marks Act, it is provided that the Minister may refuse to register any trade-mark, if he is not satisfied that the applicant is undoubtedly entitled to the exclusive use of such trade-mark.

The applicant for registration of the trade-mark must be the proprietor. The case of *Partlo* v. *Todd*, 17 S.C.R. 196, deals with the question in an exhaustive manner. Reference may also be made to the case of the *Standard Ideal Co.* v. *The Standard Sanitary Manufacturing Co.*, 27 T.L.R. 63, where the Judicial Committee of the Privy Council dealt with the same question.

I have pointed out that the English statute differs from the Canadian statute. Prior to the statute in England of 1875, the Courts there adopted what is usually styled the "three trade-

marks'' rule. This seems to have been based upon an order of the Comptroller, or the other official who had charge of the matter.

In two cases, *Re Walkden Aerated Waters Application*, 54 L.J.Ch. 394, and *Re Hyde & Co.'s Trade-Mark*, 54 L.J. Ch. 395, the late Master of the Rolls, Jessel, has explained the reason of this rule.

Under the English Act an applicant can apply for a trade-mark for the particular articles under each class. There are a long series of decisions in the English reports in which applications were made for registration of trade-marks, which would embrace all the articles mentioned in the particular class—and where the applicant for the registration although obtaining the registration failed to use the trade-mark in respect to one or other of the particular articles. The Courts in England have in such cases rectified the register by expunging from the trade-mark register the particular article not so used. For instance, in *Re Hart's Trade-Mark*, 19 R.P.C. 569, ''Condensed Milk'' was covered by the registration but not used. The register was amended by striking out ''Condensed Milk'' from the register.

Hargreaves v. *Freeman*, 3 Ch.D. 39; *Anglo-Swift Condensed Milk Co.* v. *Pearks*, 20 R.P.C. 509, and *Edwards* v. *Dennis*, 30 Ch.D. 454, and in numerous other cases, a limitation has been imposed upon the trade-mark excluding from its scope articles which might have been covered.

On the whole, having regard to the facts of the case, I will direct that the general trade-mark be limited by excluding therefrom the use of the word ''Vulcan'' as applied to matches. The respondents will not be injured to any great extent, as the correspondence shews they were willing to sell the right to the present petitioners for a camparatively small sum.

I think the respondents are liable to pay the costs of the petitioners, and I so order. I give no costs for or against the Minister of Agriculture.

Judgment accordingly.

CAN.

S. C.

LAMONTAGNE v. QUEBEC RAILWAY, LIGHT, HEAT AND POWER CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin and Brodeur, JJ.

1. NEGLIGENCE (§ I A—1)—CAUSING DEATH—SUPPORT—RIGHT OF ACTION.

A legal right of action for negligence causing death under art. 1056, C.C., is not taken away from an ascendant of whom the deceased was not the "only support" in the terms of articles 3 and 15 of the Workmen's Compensation Act, Que., 9 Edw. VII., ch. 66, R.S.Q., 1909, arts. 7323 and 7335; such ascendant if only partially dependent upon the deceased may still maintain an action under art. 1056 C.C.

[*Lamontagne* v. *Quebec Ry., L. H. & P. Co.*, 23 Que. K.B. 212, reversed.]

2. STATUTES (§ II A—96)—CONSTRUCTION; MISTAKE OR OMISSION OF — LEGISLATURE; INTENT.

A statute such as an Employers' Liability Act, should not, upon any assumption or presumption of mistake or omission on the part of the legislature in the expression of its intention, be treated as extinguishing rights of action which it does not expressly or by necessary implication abrogate.

[*Commissioners* v. *Pemsel*, [1891] A.C. 531, 549; *Cowper Essex* v. *Acton Local Board*, 14 A.C. 153, 169, applied.]

Statement

APPEAL from the judgment of the Court of King's Bench, appeal side, Q.R. 23 K.B. 212, reversing the judgment of the Superior Court, district of Quebec, entered by Lemieux, C.J., on the verdict of the jury at the trial, and dismissing the plaintiff's action with costs.

Choquette, Galipeault, St. Laurent, Metayer & Laferté, for the appellant.

Bédard, Lavergne & Prévost, for the respondents.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—The plaintiff, appellant, who was, as he alleges, partially dependent for his support upon a son killed when in the service of the corporation, defendant and respondent, brought this action under article 1056 of the Quebec Civil Code.

It is admitted that the accident which resulted in the death of the deceased comes within the definition of sec. 1 of the Act, but secs. 15 and 3 of the Act, now arts. 7335 and 7323 of the R.S. Quebec, are relied upon in support of the contention that the right of action which the plaintiff undoubtedly had under the Code is barred.

It is obvious that the remedy given in cases like this against the employer by the Civil Code is taken away from the persons mentioned in sec. 3 of the Act, who are (*a*) the surviving con-

sort, (*b*) the children under a certain age, and (*c*) *the ascendants of whom the deceased was the only support at the time of the accident*. But the question here is: Can the plaintiff who admittedly does not come within this enumeration of representatives entitled to recover under the Act, being only *partially dependent* upon the deceased, maintain this action? Or, in other words, is the action which the plaintiff undoubtedly had under art. 1056 of the Civil Code barred by the joint operation of secs. 3 and 15 of the Act?

The Act was evidently intended to fix in those accident cases to which it applies the conditions of liability, the amount of compensation and the method of apportionment among those entitled to its benefits, and to that extent it may be considered as exclusive. But the question remains: The plaintiff not belonging to any one of the enumerated classes specifically dealt with, is it possible to hold that by necessary intendment his admitted right of action was taken away?

Assuming the Civil Code to be merely a statute, it has been in force for a long time and the principle of the special article upon which the plaintiff relies was part of the law long before the enactment of that Code. It seems, therefore, reasonable that the recent Act should be construed consistently with the Code if it is possible to do so. The ordinary rule of construction is that "if two statutes can be read together without contradiction or repugnancy or absurdity or unreasonableness, they should be so read."

Those who are partially dependent upon the injured employee are left to their remedy under the Code, their right to recover continues subject to the obligation to prove that the accident was attributable to an "offence or quasi-offence of the employer" and to hold that this class is to be entitled to the benefit of the Act in the absence of express terms, would be to legislate for a case which the legislature has not thought proper to provide for. In a word the plaintiff bases his claim upon the Code and to defeat that claim the defendant relies upon a statute which makes no provision for this particular case. To maintain its defence the Court must add to the Act a provision which it does not contain.

Art. 12 C.C., provides that when a law is doubtful or ambi-

CAN.

S. C.

LA-MONTAGNE v. QUEBEC RAILWAY, LIGHT, HEAT AND POWER CO.

Sir Charles Fitzpatrick, C.J.

guous it is to be interpreted so as to fulfil the intention of the legislature and to attain the object for which it was passed. Here the language of the statute leaves nothing to doubt or to uncertainty. The only question is: Are we, under the pretence of giving effect to what is alleged to be the intention of the legislature, "a common but very slippery phrase," to supply what is clearly an omission in the statute. As I said before, that is not interpretation but legislation.

On the whole, I am of opinion that the Act may be and should be construed to mean that those whom the deceased did not support entirely are left to their action under the Code, they must prove fault on the part of the employer and also the extent to which they have been prejudiced in a pecuniary way by the death of the deceased. There seems to be good reason for the distinction because of the uncertainty which exists in the case of those only partially dependent as to the quantum of their right. The case is not free from doubt, but I think, all things considered, it is impossible to say that the statute has, by implication, taken away a vested right of action when it is possible to so construe it as to leave that right subsisting.

[Reference to *Clark* v. *Molyneux*, 3 Q.B.D. 237, at p. 243; *Blue* v. *Red Mountain Railway Co.*, [1909] A.C. 361, at pp. 367 and 368; *Barthe* v. *Huard*, 42 Can. S.C.R. 406, at 410.]

As to the question of the amount of the verdict I would have been disposed to follow the rule laid down in *Taff Vale Railway Co.* v. *Jenkins*, [1913] A.C. 1, at p. 5.

> When once you have got it that there was evidence to go to the jury, and that there was a principle on which it could proceed of taking into account any reasonable prospective pecuniary advantage to the parents, then, unless the verdict is so perverse and against the weight of evidence that it cannot stand, it is not for the Court to interfere.

But I defer to the opinion of my colleagues and agree to a new trial unless the appellant accepts a reduction in the amount of damages awarded. (See *Barthe* v. *Huard*, 42 Can. S.C.R. 406.)

The appeal should be allowed with costs in this Court, but the opinion of the majority is that the amount of damages awarded is so grossly excessive there must be a new trial (costs of first trial to abide the event), unless the plaintiff agrees that the verdict should be reduced to the sum of $1,250, in which case

there would be judgment for that amount with costs of the trial and of this Court.

DAVIES, J., dissented.

IDINGTON, DUFF and ANGLIN, JJ., for reasons given in writing were of opinion that the appeal should be allowed with costs, and the judgment of the trial Judge restored.

BRODEUR, J., dissented.

Appeal allowed with costs.

CAN.

S. C.

LAMONTAGNE v. QUEBEC RAILWAY, LIGHT, HEAT AND POWER CO.

LECKY v. CARMAN.

SASK.

S. C.

Saskatchewan Supreme Court, Haultain, C.J., Lamont, Brown and Elwood, JJ.

1. PLEADING (§ I G—50)—BUILDING CONTRACTOR—MISTAKE—BUILDING ENCROACHING ON OTHER PROPERTY—TITLE FURNISHED—WAIVER.

Where the building contractor, by his own mistake, encroached upon adjoining property with the building, an agreement between the contractor and the owner of the building that the former would procure and furnish to the owner a title to the strip of land encroached upon will, if carried out, operate as a waiver of an objection on that score.

APPEAL in an action on a building contract.

Statement

J. A. Allan, K.C., for appellant, defendant.

H. Y. MacDonald, K.C., for respondent, plaintiff.

HAULTAIN, C.J., and LAMONT, J., concurred with ELWOOD, J.

Haultain, C.J. Lamont, J.

BROWN, J.:—I have perused the judgment of my brother ELWOOD in this case, and concur in the result which he has reached. I do not wish to be understood as assenting to the proposition that the plaintiffs were entitled at any time to recover any part of their contract-price in the face of the fact that the building was partly erected on property which did not belong to the defendant. This matter was, however, fully remedied before trial, and I concur in the view that what took place between the parties in the way of remedying this defect constituted a waiver of the objection.

Brown, J.

ELWOOD, J.:—The evidence in this case shews that at the time that it was arranged between the plaintiff and the defendant that the building in question should be erected there was no definite sum arrived at as to the cost of the building. The learned trial Judge found that the arrangement was that the plaintiff should be paid the cost of labour and material, plus 10%. No definite

Elwood, J.

SASK.

S. C.

LECKY v. CARMAN.

Elwood, J.

arrangement was arrived at as to when the payment should be made, but the practice adopted was for the plaintiff, at the end of each month, to render a statement of the work and material furnished during the month, and add thereto 10%. No objection was apparently made to this; and on these statements so rendered, payments from time to time were made by the defendant to the plaintiff, aggregating $32,278.05. When the plaintiff was first told to go ahead with the building, the defendant contemplated that it should be one-storey. This was subsequently changed to two storeys, and from time to time alterations were made. When the building was finally completed it was found that it encroached to the extent of one half-inch on an adjoining lot. Objection was made to this, and it was arranged between the plaintiff and the defendant that the plaintiff should procure a title in the defendant's name to this one half-inch. Prior to the commencement of the action a quit claim deed to the defendant was procured for this one half-inch, and after the commencement of the action, before the trial, a transfer was procured to the defendant for the half-inch. It was contended on behalf of the appellant that the contract to erect the building was an entire one, and, the building having encroached upon the adjoining lot, the plaintiff was not entitled to commence an action until it had procured to the defendant the title to the adjoining half-inch. In Hals., vol. 3, p. 182, I find the following:—

> An entire contract means one where the entire fulfilment of the promise by either party is a condition precedent to the right to call for the fulfilment of any part of the promise by the other.

Under the circumstances of this case I am of the opinion that this was not an entire contract, that the understanding of the parties was that the plaintiff should, at any rate at the expiration of each month, be entitled to receive from the defendant payment for the labour and material furnished plus 10% thereof, and that under those circumstances the plaintiff could from time to time recover from the defendant these payments as they accrued due; that the remedy of the defendant, if any, would be an action for what damages the defendant might sustain in consequence of the encroachment on the adjoining property. On the question of entire contract I would refer to the notes to *Cutter* v. *Powell*, 2 Smith's L.C. (11th ed.), p. 1, and to the case of *Roberts* v. *Havelock* (1832), 3 B. & Ad. 404, referred to at p. 19. In any event, I am

of the opinion that if the contract was an entire one there was a waiver created by the agreement between the plaintiff and the defendant that the plaintiff should furnish the defendant the title to the half-inch in question. The objection which the defendant was making all along was that the charges for the material, work and labour were excessive, and he wished the correctness of those amounts investigated. The other contention on behalf of the defendant is that the contract was one for the erection of a building at the cost thereof plus 10% of such cost, with the sum of $40,000 as the maximum. The learned trial Judge has found on the evidence that the intention of the parties was not to limit the amount to $40,000. There was abundant evidence to justify such finding; and without going into the evidence I might point out that the contract which was sent to Mr. Carman to sign did not limit the amount. It is quite true Mr. Carman did not sign that contract, but he had it before him, he saw what construction the plaintiff was putting on the understanding between the parties, he made no objection to this, and as late as November 18, 1913, he wrote a letter to the plaintiff, and he did not anywhere take the position that the contract price was limited to $40,000. That letter, to my mind, is totally inconsistent with the contention of the defendant that the contract was so limited, but is entirely consistent with the contention that the sum of $40,000 was a mere estimate.

The trial Judge having found the contract to be one which was not limited to $40,000, and there being evidence to justify such finding, I do not think that finding should be disturbed.

The result, in my opinion, is that the appeal should be dismissed with costs. *Appeal dismissed.*

REX v. HAYNES.

Supreme Court of Nova Scotia, Townshend, C.J., Graham, E.J., and Meagher, Longley and Ritchie, JJ.

1. TRIAL (§III E 5—260)—HOMICIDE—INSTRUCTION TO JURY—PRISONER'S LETTER REQUESTING FALSE ANSWER TO ENQUIRY—EXPLAINING POSSESSION OF MONEY.

On the trial of a murder charge the construction of a letter written by the accused and placed in evidence is for the Judge and not for the jury, and where the letter itself is a request to make false statements in aid of his defence, the trial Judge may tell the jury that they should take into consideration the prisoner's action in endeavouring to manufacture evidence to mislead the Court by concocting the scheme as disclosed in his letter, to account for the money found on him.

N. S.
S. C.
REX
v.
HAYNES.

2. TRIAL (§ III E 5—261)—CRIMINAL CASE—INSTRUCTION—INACCURACY IN JUDGE'S CHARGE—PREJUDICE.

A slight inaccuracy in the Judge's charge to the jury in referring to certain evidence as having been given at the preliminary enquiry whereas it was in fact given at the trial itself, and the depositions at the preliminary enquiry were not then put in as evidence, but the preliminary enquiry was referred to in the testimony, will not constitute a ground for setting aside a conviction, where the inaccuracy could not have prejudicially affected the prisoner.

Statement

CROWN case reserved. The prisoner was indicted for the murder of Benjamin Atkinson by the grand jury for the county of Cape Breton and was tried before Drysdale, J., and a petit jury and was convicted.

Application was made to the learned Judge to reserve a case for the opinion of the Supreme Court *en banc* on a large number of grounds, and after hearing counsel he declined to reserve any question except as to whether in the charge as a whole there was misdirection in law. Subsequently, on further application he amended the case reserved so as to include the following grounds:

1. Whether the direction in regard to circumstantial evidence, viz.: "You have certain proved facts and you ask yourself what is the reasonable inference from these facts and you act on that opinion" was correct, and whether such direction was lacking in completeness and liable to mislead the jury?

2. Whether the direction that "Mrs. Atkinson, at the preliminary trial, when Haynes was accused of murder, goes on the stand and swore that she never saw him again until he arrived in Sydney, and when faced with the telephone girls," was not incorrect and calculated to mislead the jury?

3. Whether the direction that "the letter written to Dolly Bownds is a crime in itself" was correct and was not liable to mislead the jury?

4. Whether the direction that he (Haynes in writing the letter to Dolly Bownds) was concocting a scheme to account for money found on him was correct and was not calculated to mislead the jury?

5. Whether the direction that an alibi means proof of absence of the accused at the time the crime was committed was correct?

6. Whether the direction that alibi here means proof of the accused being here in Sydney at the hour he is alleged to have committed the crime is correct and was not calculated to mislead the jury?

7. Whether the direction, "you have certainly to take into account his action of making false testimony in this," was correct, and was not asserting as a proven fact what it was solely the province of the jury to determine?

The material portions of the evidence are set out fully in the judgment of Graham, E.J.

A. D. Gunn and *B. W. Russell*, for the prisoner.

S. Jenks, K.C., Deputy Attorney-General, and *D. Hearn*, K.C., for the Crown.

N. S.
S. C.
REX
v.
HAYNES.
Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—The learned trial Judge, having amended the reserved case so as to be satisfactory to the Court and counsel on both sides, I deal with the questions reserved for the opinion of the Court in their order.

The first point, as to whether the trial Judge's direction in respect to circumstantial evidence was complete, and whether it might have misled the jury, was not seriously argued before us, as indeed it could not be after perusing the whole charge which completely disposes of any such ground.

As to the second, the reference to Mrs. Atkinson's testimony at the preliminary hearing when the depositions were not in evidence, it is a sufficient answer that the same evidence was given at the trial before the Court and jury when Mrs. Atkinson admitted that she had made false statements, to which the Judge referred, the only difference being that she did not say it "when faced with the telephone girls," but this omission in no way affected the evidence as given at the preliminary investigation, and at the trial before the Court. The learned Judge, in stating the fact, merely erred in saying at the preliminary trial, instead of the trial then proceeding. It could in no way have prejudicially affected the prisoner, as the whole importance of the evidence was, in both trials or hearings, she had stated a fact which she admitted afterwards was not true.

The third and fourth points are practically the same, whether the trial Judge was correct in saying that the letter written to Dolly Bounds was a crime in itself and that Haynes, in writing the letter, was concocting a scheme to account for money found on him.

Taking the whole facts in evidence I should say that the comments of the learned Judge on this letter were perfectly in order, and the observation, such as any Judge should have made on this trial. That the prisoner had written the letter after his committal to jail on the charge of this murder was not in dispute, and no one could read its contents without seeing at once that he was concocting a scheme to mislead the Court on his trial, and the fact of his attempting to do so, was, the Judge stated, a crime in itself. There could be no doubt as to the object of the letter, as it tells its own tale, and, as pointed out, was an important

N. S.

S. C.

REX v. HAYNES.

Sir Charles Townshend, C.J.

factor in the trial which the learned Judge properly placed before the jury. Moreover, the construction of a written document, except in cases of libel, is for the Judge and not the jury.

As to the 5th and 6th grounds, whether the Judge properly instructed the jury on the question of what is meant by proof of an "alibi," I am quite unable to appreciate the difficulty suggested. The defence, in proof of it, was, that the prisoner was in Sydney at the time the crime was committed. The learned Judge, instructing the jury as to what an "alibi" consisted of, says:—

"An alibi means proof of the absence of the accused at the time the crime is supposed to be committed, satisfactory proof that he is in some place else at that time." Then he adds, that in this case it means proof that he was in Sydney at the hour he is alleged to have committed the crime. This was the very contention of the prisoner, and he brought witnesses to prove such was the case, surely it was his duty to instruct the jury exactly as he did, and no misconception could exist among intelligent men as to the meaning of proving an alibi.

The last point made is hardly worthy of notice, and was not particularly urged, but I should remark that it was eminently proper that the Judge tell the jury that in coming to a conclusion, they should take into consideration the accused's action in making false testimony, that is, endeavouring to manufacture evidence to mislead the Court.

For all these reasons, I am of opinion that the accused is not entitled to a new trial on any of the grounds set forth, and that the conviction should be affirmed.

Graham, E.J.

GRAHAM, E.J.:—This is a case reserved upon a conviction of murder.

The body of Benjamin Atkinson, the deceased, was found on McQueen's road, about five miles from Sydney.

The evidence tends to shew that he received a blow on the head with a stone, which caused his death. The stone and pools of blood and his false teeth were found in the woods some sixty-four feet from where the body was found on the road and the theory of the Crown is, that it was brought there to lend plausibility to the appearance of an accidental death.

I am quite satisfied that it was not an accidental death. The medical experts shew that.

It appears that the deceased had driven out from Sydney to Front Lake on this road that afternoon, and having taken supper with his wife and his brother-in-law, who were camping out there, and two others, he was returning to Sydney alone in his carriage. A short time after he left, one Duncan Rory McQueen met the horse and carriage on the road, the reins dragging, but no one in the carriage. Two persons drove out to see if there had been a accident and the horse shied as he came to the body of the deceased, lying partly on the road, dead.

The next step in the proof as to whether it was the defendant who killed the deceased, depending almost wholly on circumstantial evidence, is more perplexing. The defendant was acquainted with the deceased's wife and brother-in-law, who had met him abroad and, in fact, he had come to Sydney at their instance.

I shall deal with this evidence as it is quoted in the summing up.

At any rate he had been out in the locality of the camp on two or three different occasions. Near to the place where the pools of blood were found, were found some bits of paper, which turned out to be the cover of a magazine with the name of Goodwin upon it. Goodwin had left this magazine in his room at a lodging house in Sydney, and the defendant also had a room in the same lodging house.

Then after the prisoner was arrested, a fragment from a wasp's nest was found attached to a pair of trousers of his, and out at the locus there were the remains of a wasp's nest.

I have read the evidence of Bryant, and I am not myself very well persuaded from the mode of the production by him of the fragment from the wasp's nest that the connection between it and the trousers can be absolutely depended upon. But, of course, that is for the jury.

But the most damaging circumstance is, that when the prisoner was arrested, there was on his person the sum of $110, and for some time before this he had been borrowing small sums of money, and he cannot give any account for the possession of this money. In fact, it must have struck him as a very suspicious

N. S.
S. C.
REX
v.
HAYNES.
Graham, E.J.

circumstance against him, because he took part in a scheme which would account for the acquisition of this money and the scheme failed.

He wrote what is called the Dolly Bounds letter to Los Angeles in California, and it was returned by the Chief of Police at that place to the Crown Prosecutor. It is as follows:—

My dear Dolly,—I am in a whole lot of trouble, and was arrested on August 28th, as a *murder* suspect in this *place*. I was (never) so surprised in my *life* and just because I was walking several times in that part of the country. You know why I left L. A. and why I wanted to get away as far as possible. I had intended coming back on the 29th or leaving here on that date, and now this terrible charge was placed against *me*. Dollie, before my God, I did not have anything to do with *this*, and as I am away from friends and no money, I am locked up in the *county jail* and the days are awfully long, and you know, dear, how I worry. I am nearly crazy. You know, dear, we have been the best of friends for twelve years, and we were true friends at that, and our meeting in L. A. again was sweet to me, and, Dolly, I know you will do anything in your power for me, as far as you *can* and I am going to ask you one now, and it is wholly within your power to help me to get clear of this, and what I want you to do is this. If anyone should write and ask you if you sent me any money, say *yes*, you sent me $150 by letter and I should have received it about the 17th or 18th of August, and that you mailed it to me in *"bills,"* and *did* not *register it*, and if they ask you what kind of bills, 10's and 20's, and that you sent it from Seattle and that it was *Canadian money*.

I don't think they will ask you what kind of money, but be prepared if they do.

The reason of all this is, they think this man was murdered and that I was *hired* to do it.

It is about killing me, dear, and if you can aid me this *much* I can make my case pretty clear. Won't you do this for *me, dear,* for *God's sake* help me this much. I am about crazy with this *jail*. You know I would not harm a *kitten* and I never spoke ill of anyone in my life, and as soon as you receive this please wire my attorneys here at this place. I have retained them in the case and I believe they are the *best there is*, and as soon as you receive this send a night letter to them saying that you have received a letter (they will write you, too) and that it was all O.K. Please do this, Dollie, and you will *help save me*, and I have every confidence in you and know you will, and that will be all there is to do. For I had nothing to do with this in the world. Also you can say if you are asked that I called you such *pet* names *as* Teen or *Patsy* and *Baby Doll*, won't you? I will send you or have the attorney send you, a transcript of the *evidence*. Also newspapers so you will know as soon as they receive a reply from them. They will want to know where to address a letter when I write you *again*. Don't forget the wire and send it "collect."

God bless you, dearie, for I am depending on you. So good-bye, from yours anxiously, Mantalico Fred.

If you think it *wise* you may call upon Miss Style, of Chas. A. McKelcry.

207 Citizens' National Bank, L.A. Use your own judgment. Best work fast.

Address, Langille & Maddin, barristers, Sydney, Nova Scotia. Send all correspondence to me through them with an envelope enclosed addressed to me.

The Crown, in order to shew a motive for the killing by the defendant, use the possession of this money by him in two ways. First, the counsel contended that the killing was committed for obtaining money. But I think that theory is very weak. On the deceased's person, when he was found, his brother-in-law Maddin found, besides the watch in his hip pocket, $130 odd dollars in bills, and some change, in one of the trousers pockets Lowden, the undertaker, also found "in one bunch" in the left-hand front pocket of his trousers $395 and in his watch pocket $25.

But there is a second suggestion as to his acquisition of this, and that is that there were improper relations between Mrs. Atkinson and the prisoner and that he was paid the money by her to kill her husband.

This is the way in which the learned Judge at the trial put this suggestion to the jury.

Mrs. Atkinson was next called and told a story some parts of it somewhat extraordinary. Nevertheless I will read what I have taken:—

"Live in Sydney. Ten or twelve years here. I know the prisoner. Met him. Was introduced to me by Mrs. Darnell. I met him several times in San Francisco. Had conversations with him about a mine. He told me what his business was—mining. My brother was a mining man and I got interested. We had a talk about selling stock in a mine. Mr. Haynes and his partner came to Marshfield in Oregon."

The substance of that is, that she met this man in California and then again in Marshfield, Oregon. Then she went to Brandon, a suburb or something like that, two or three hours from Marshfield.

"I got advice from Mr. Laing about the mine and did not buy. Then some oil business came up. It was talked about. About first of April left San Francisco and about first June left Marshfield. Haynes and I were to sell stock, met Haynes next in Winnipeg. This side of the Rockies, getting well into Canada now. Met him at the Royal Alexandra hotel. I had a brother there. It was in June I was in Winnipeg. Haynes was there before me. Came about same time. My brother Charlie lives in Winnipeg. My brother William was taking up lands in Winnipeg. Oil business in Brandon. It was at my suggestion Haynes came to Sydney. I arrived at Sydney about the 27th of July. I stayed in Stellarton. I knew Haynes was here ahead of me. I telephoned to him from New Glasgow in July. I called him at the Central Office."

N. S.
S. C.
REX
v.
HAYNES.
Graham, E.J.

This is testimony I can't make out. I don't know whether you can or not. This woman met this man in San Francisco, in Marshfield, and had business transactions with him at these places and then in Winnipeg. Then at the preliminary when this man was charged with murder, she goes on the stand, and there, under solemn oath, swears that she never saw him again until she arrived in Sydney. Then when faced with the telephone operators, those people from New Glasgow, she comes back and tells us she forgot it. Although the man is charged with murdering her husband, practically came across the continent—and still she says she forgot she met him in New Glasgow. This is a statement impossible to believe. What it means I know not. You will have to take it. "I said to call him at the 'Queen.' I can't say how I knew he was there. I recommended the 'Queen' to him. I said nothing about a key when telephoning. I telephoned him about a land boom at New Glasgow. I saw Haynes about it in New Glasgow. I met him at 11 a.m. in New Glasgow. I was not alone in his presence. He stayed in New Glasgow. I stayed at my old home a week or a few days anyway. He was staying in our house when I came home. I had conversation with him in my house. There was nothing further about oil business here. I did not know he was in the house. I heard about the picking of the locks and spoke to him. When I was in New Glasgow I did not know where he was going. The very first time I spoke to him in the house was perhaps the first or second day. I said to him he was the big man they were talking about, picking locks. He asked me did I want him to leave the house without clearing himself. I told him he had better go. Haynes told me that he did not touch the locks and asked me if I believed it myself. He went. I spoke to him in the hall after, when he came back for his mail. He left a day or two after. I was sick for a day or so after I came home. I called him once at the Y.M.C.A. He wrote asking for his mail. I only called him once or twice before I went out camping. I never saw Haynes out there. My little girl and Miss Dixon were out with my husband the day of his death. This was the first year we camped out at Front Lake. After the death of Mr. Atkinson I did not see this man. Had no letters from him. Mr. Atkinson left alone. When he drove out I came behind up to John McQueen's. I did not see the remains out there. . . . I went out the road the 15th of August after coming into town."

I omit the cross-examination read to the jury.

Later the learned Judge said:—

You will have to look at the whole situation. It is said there is no motive here. It was argued before you that the motive was not proved. The motive is a material part of the Crown's case, of course, and the motive you very often draw from inferences under the proved circumstances. It is said that this man met this woman and that their relations were such that he desired to get rid of the husband even by taking his life. The charge has gone so far that it has taken formal shape in the way of an information against this woman, which has been dismissed. It has been suggested that the relation between these people was such that he desired to get rid of Atkinson, even by the taking of his life. Now, of course, that is a motive. It is also said that he robbed him. If he did he

N. S.

S. C.

REX v. HAYNES.

Graham, E.J.

missed a lot of money. And it is said that he killed him for money. You can only speculate about this motive theory. It is somewhat extraordinary that she met him in New Glasgow and on the preliminary hearing she did not remember that, she could not forget that. I do not believe she forgot it. But she comes back and makes a clean breast of it after she is faced here by the New Glasgow people, and she then says that she did not see him and he came up. They are associated in New Glasgow. She comes home and finds him quartered in the house, in her own hotel. Trouble has arisen and she tackles him at once, tells him he has to go. He goes to the other hotel across the street; and the very day after she moves out to Front Lake settlement, this man begins to frequent the road. It is evident that she moved out and took charge of the tent on the 5th of August. There is a body of testimony, that on the 6th, 7th, 9th, 10th, and 12th, almost every day after Haynes was out in that vicinity and out on the road sometimes under the guise of a wrong name. Nevertheless, he was out there, loafing in that district. Of course, it is suggestive that whenever the woman moved out, he followed. We don't know what their relations were. You will have to speculate about it.

Mrs. Atkinson was a witness called by the Crown.

On her evidence thus given depends the whole case of improper relations between her and the prisoner, and what is a long step from the existence of improper relations—the payment of money to him to kill her husband or even the killing of her husband. It may be said that is for the jury. True, they may suspect improper relations, but there is no evidence from which improper relations could justifiably be inferred. It will not do to put up a person as a witness, and then say, because that witness has told an untruth, everything denied is untrue, and, therefore, the affirmative must be true, although there is no evidence of the affirmative. And as to the payment of any money by Mrs. Atkinson to the prisoner, there is no evidence whatever to support it. A paramour receiving $150 from the wife to kill the husband in addition to the gratification of his passions is rather an unusual thing.

I think, with deference, that the jury should have been warned that those inferences were not properly deduceable from the evidence in the case.

Crime is never committed without motive, and hence, on the trial of a person charged with crime, it is always competent to give evidence shewing the motive which induced the criminal act. Where the crime is clearly proved and the criminal positively identified, it is not important to prove motives. But when the

N. S.

S. C.

REX v. HAYNES.

Graham, E.J.

case depends on circumstantial evidence and the circumstances point to any particular person as the criminal, the case against him is much fortified by proof that he had a motive to commit the crime. But, I think, that there is a failure on the part of the Crown to prove motive in this case and that it was put to the jury as if there was legitimate proof.

But I believe that this point is not open owing to the way in which the case has been amended at the instance of the Court above requiring specific points to be stated.

The point as stated is as follows:—

Whether the direction that Mrs. Atkinson, at the preliminary trial when Haynes was accused of murder, goes on the stand and swore that she never saw him again until he arrived in Sydney, and when faced with the telephone girls, was not incorrect and calculated to mislead the jury.

It may be that what the learned Judge stated to the jury was not literally before him in the evidence, but I think the effect of the evidence before him justified his interpretation.

This is the stenographic report of the evidence: Mrs. Atkinson (page 305) says:—

Q. You telephoned to him? A. Yes, sir.

Q. From where? A. From New Glasgow. I thought of that before and spoke to counsel before and I thought I should go to Mr. Hearn and tell him about it, and he said he could correct it.

Q. What did you want to correct? A. They asked me if I had any communication with this man and I said no.

Q. I think you could have gone to Mr. Hearn if you wished. You say that when you made that statement that you had no communication with Haynes after you left Winnipeg until you saw him in Sydney that you were mistaken? A. Yes.

Q. And that you did telephone him from New Glasgow? A. Yes, sir. It was in July.

Q. Anything very urgent that you wanted to telephone him? Where did you call him up at? A. I tell you when I got to New Glasgow; there is quite a boom on in New Glasgow.

Q. Where did you call him up at? A. I called him up at the Central office. . . .

Q. I suppose you heard the evidence of the telephone girls at New Glasgow? A. Yes, sir.

Q. That you were talking to him about a key? A. There is nothing about a key in the evidence.

Q. There is nothing about a key in the evidence? A. In our message.

Q. They were mistaken? A. Absolutely, there was no conversation about a key.

Later, she said her niece was with her at New Glasgow, that

the prisoner came there at 11 o'clock, they talked over the business of property in New Glasgow and he returned to Sydney at five o'clock, and she went to her former home at Westville, and afterwards returned to Sydney.

However, this evidence clearly referred to what she had formerly said at the preliminary examination. Mr. Hearn, it is shewn, was the magistrate. "Being faced with the telephone operators" clearly refers to their evidence formerly given. It is true it may have been in another preliminary examination, as the defendant's counsel contend. But if that was so, it has not been shewn to us in this case. The learned Judge followed what was stated. It is not shewn that there is anything which can be called a misstatement of fact to the jury.

In respect to the letter written by the prisoner to Dolly Bounds at Los Angeles, to induce her, if an inquiry was made of her to state a falsehood, viz., that she had sent him the money, which would account for the possession of it by him, the learned Judge, in the summing up, spoke of it as a crime in itself and also as a scheme to account for money found on him and also as making false testimony. The prisoner's counsel complains of this. I am not sure that the writing of this letter was an indictable offence. It was not the fabrication of evidence nor was it an inducement to Dolly Bownds to directly fabricate evidence, she being at Los Angeles and not in any way a probable witness. It rather was an attempt to induce her to throw any police officer, or detective, at Los Angeles, making inquiry of her off the scent, by telling a lie to him. But it was reprehensible and might have led to a crime and, I think, its characterization by the learned Judge, whether technically correct or not, was not very extreme, and the prisoner would not be prejudiced thereby. Its use for the purpose of indicating a presumption that a prisoner, who would do that, might be guilty of the crime charged is usual. Taylor on Evidence, secs. 116, 117.

I do not agree with the interpretation of the letter which the prisoner's counsel contends for, namely, that she may have actually sent him the money and he is refreshing her memory as to the transaction. The part asking her to say she was up near the Canadian boundary, which would account for the possession

N. S.

S. C.

REX v. HAYNES.

Graham, E.J.

of Canadian bills which, by the way, was the kind of bills he had in his possession, indicates that he was asking her to indulge in fiction.

A juror asked the learned Judge for an explanation as to the meaning of an alibi. I think the explanation and the illustration quite sufficiently apt. The criticism that it required proof of presence elsewhere at the same identical moment that the crime was committed is far fetched.

In my opinion, the specific questions reserved for our consideration must be answered in a sense unfavourable to the prisoner as I have indicated.

Meagher, J.

MEAGHER, J., said that the jurisdiction of the Court on a reserved case was statutory and the case could not be enlarged or anything imported into it, but it must be accepted as presented. With reference to the questions raised he thought that there was nothing in them and that the case reserved must be quashed and the conviction affirmed.

Longley, J.

LONGLEY, J., concurred that the application must fail.

Ritchie, J.

RITCHIE, J.:—Haynes has been convicted of the crime of murder, and the learned trial Judge has reserved a case.

The first question is:—

> Whether the direction that Mrs. Atkinson, at the preliminary trial, when Haynes was accused of murder, goes on the stand and swore that she never saw him again "until he arrived in Sydney and when faced with the telephone girls" is not incorrect and calculated to mislead the jury.

This reservation is made in the language submitted to the learned Judge by counsel. We were told at the bar that the point desired to be raised was that as a matter of fact there was no evidence in this case that Mrs. Atkinson was "faced with the telephone girls."

I am of opinion that it is not open to the Court to adjudicate upon this question because there is no statement in the reservation as to whether or not there was evidence that Mrs. Atkinson was confronted with the telephone girls. I do not think the Court has jurisdiction to travel outside the reserved case in search for facts, the evidence is not made part of the case. That, however, would not be the proper course. The correct practice is for the Judge to state the effect of the evidence in the reservation.

In *The King* v. *Cohon*, 6 Can. Cr. Cas. 393, the learned Chief Justice of this Court said:—

> I may add in conclusion, that it is not competent for the Judge below to submit such a question as the last, whether there is any legal evidence to sustain the conviction and send up the whole evidence for us to review. He may state the effect of evidence given to sustain a certain charge or give the material part of it, and reserve a question as to its sufficiency in point of law to convict, but it certainly was never contemplated that he could send up the whole body of evidence, and asks if that evidence is sufficient to convict.

In *The Queen* v. *Giles* (1894), 31 C.L.J. 33, the form of reservation was as follows:—

> Having regard to the evidence and the provisions of the said sections and also the provisions of section 204 of the said Code, ought the defendant to have been convicted?

Chancellor Boyd said:—

> We cannot agree to proceed in this case. It must be remitted to the Judge to be restated. The Judge must find the facts and specify the questions of law as to which he is in doubt and reserve for our own judgment.

I also refer to *The King* v. *Fortier*, 7 Can. Cr. Cas. 423.

If I could see any possibility of prejudice to Haynes by the direction complained of, I would be in favour of remitting the case to the learned Judge for amendment, but I see no such possibility. The sole point which was being made to the jury in that part of the charge here complained of was, that it was impossible to believe that Mrs. Atkinson had forgotten that she met Haynes in New Glasgow.

I entirely agree that it is not possible to believe that statement, and I cannot see that the remark about the telephone girls could in any way prejudice the prisoner, entirely apart from it, the fact remains, that she did swear that she had forgotten as to the meeting with the prisoner in New Glasgow, and that was the thing which the Judge was, as I think, properly drawing the attention of the jury to.

In regard to the other points reserved, I am of opinion that none of them are well taken. It is not necessary for me to add anything to that which the learned Chief Justice has said in regard to them.

Conviction affirmed.

B. C.

C. A.

CHARLESON v. BYRNE.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. April 21, 1915.

1. MANDAMUS (§ I A—4) — WHEN MAY ISSUE — EXISTENCE OF OTHER REMEDY.

The court should exercise its discretion by refusing a writ of mandamus where there is an alternative remedy which is equally convenient, beneficial and effective.

[*Sisters of Charity* v. *City of Vancouver*, 44 Can. S.C.R. 29, referred to.]

2. MANDAMUS (§ I D 2—37) — ASSESSMENT OF TAXES — COMPELLING REVIEW OF.

A mandamus should not be granted to review the confirmation of a property assessment by the municipal court of revision unless the court is satisfied that the decision of the lower court was not made *bonâ fide* or was not based upon matters which it could legally take into consideration.

3. TAXES (§ III B 2—125)—ASSESSMENT—VALUATION—DECLINED VALUES.

If the condition of land values in a city are abnormal in that there is practically no market because of the collapse of a real estate boom, the assessor must endeavour to fix the value for assessment purposes on a normal footing under a statute which directs that property shall be estimated at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor. (*Per* Macdonald, C.J.A.)

Statement

APPEAL from a judgment of Hunter, C.J.B.C.

Ritchie, K.C., for appellant.

Joseph Martin, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—For several years prior to 1913 what in popular parlance and in the evidence is called a "*real estate boom*" dominated the inhabitants of the city of Vancouver. Land values, population, building and municipal works and improvements increased enormously. Two or three years ago the inevitable happened. The bubble burst and the pendulum swung to the opposite extreme.

In these circumstances the assessor was called upon to assess the lands within the city under section 38 of the Vancouver Incorporation Act, 1900, which reads as follows:—

All ratable property shall be estimated at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor, the value of the improvements, if any, being estimated separately from the value of the land on which they are situated.

He assessed the land in question in this appeal at $136,500 and the building at $18,500. Mr. Charleson the owner, complained to the Court of Revision that the land was assessed be-

yond its actual cash value and offered evidence in support of his complaint. The Court of Revision, after taking time to consider, confirmed the assessment. Mr. Charleson then applied for a mandamus to compel the Court of Revision to rehear the complaint and to adjudicate thereon according to law. The submission of Mr. Martin, his counsel, was that the Court of Revision had ignored section 38. Affidavits of all the members of the Court of Revision who had adjudicated on the case were filed. Each deposed that the Court had proceeded on the footing of the said section. Nevertheless the learned Judge ordered the writ of mandamus to issue, and from that order the city has appealed to this Court.

The assessor is by law required to make oath to the correctness of his roll, *i.e.*, that he has made his assessment in accordance with law and that I must take it he did in this case.

Putting aside technical objections to the order appealed from and to the appropriateness of the form of relief sought, which, in the view I take of the merits of the case, I am not called upon to consider, I come to the important question involved in this appeal. It is not denied by Mr. Martin that if the members of the Court of Revision, honestly applied their minds to the decision of the case on the footing of said section 38, no court of law can interfere. The order appealed from can only be upheld, if at all, on the ground boldly taken by Mr. Martin that the Court of Revision deliberately and dishonestly ignored section 38 and upheld the assessment on extraneous grounds, and did not in law adjudicate at all, but only pretended to do so.

The only evidence upon which he can ask us to infer that there was no real adjudication of Mr. Charleson's complaint, is that of Mr. Nicholls, an assistant assessor. Mr. Nicholls took part in the cross-examination of Mr. Charleson and his witnesses and at the close was called to the witness-box by Mr. Martin and asked if he would pledge his oath to the truth of the remarks and opinions expressed by him during such cross-examination, which he did.

Speaking of the valuation of Mr. Charleson's lands Mr. Nicholls said:—

B. C.

C. A.

CHARLESON v. BYRNE.

Macdonald, C.J.A.

It is merely the present value of what the future will be; and again: My contention is, I am saying your future value is not $150,000, it is a great deal more; and again: We attempted to make the figures what they would be in a normal town, in a normal time. Our highest assessment is $2,650 (per foot). We say that is a fair normal figure. An Alderman: Q. You took into account the present conditions? A. Not the war. We tried to equalize the assessment and put it up to the council what general reduction they could make. The council do not contend we could sell that property at that price to-day.

By section 38 the legislature endeavoured to fix a basis upon which assessment should be made. What the land would fetch at the moment at a forced sale is not the test. I think the assessor should look at the past, the present, and into the future. His view-point should not be different to that of a solvent owner not anxious to sell, but yet not holding for a fictitious or merely speculative rise in price.

The assessment in question is on a valuation of $2,300 per front foot. There is evidence that at the height of the boom adjacent land of about the same relative value sold at $4,000 per front foot. At the time of the valuation complained of all these lands were practically unsaleable. There was no market. It was not suggested that this condition of things will continue indefinitely though there may be a wide divergence of opinion as to how long it will prevail. Is then the assessor to shut his eyes to the past and the future and to fix the value on the axiom that a thing is worth what you can get for it? When these lands had a fictitious selling value of $4,000 per foot, the assessor, if he believed the value to be fictitious, could not honestly and in compliance with section 38, assess them at that figure. It is not the speculative value but the actual cash value which must rule, and that, in my opinion, is what the assessor honestly believed to be its worth in cash under normal conditions. Conversely, if the conditions are abnormal in the opposite direction, that is to say where there is no market, he must no less than in the first example endeavour to fix the value on a normal footing.

Mr. Martin contends that rentals are the most trustworthy criterion of value, and that applying that test his clients land is over-assessed. But this contention does not advance us any. The conditions which affect the selling market also affect rentals.

B. C.

C. A.

CHARLESON v. BYRNE.

Macdonald, C.J.A.

This is made plain in the evidence in which it is conceded that rentals have dropped to about one-half of their former level.

While Mr. Charleson puts the value of his land at less than $100,000, yet, in answer to a question by his counsel, he said that he would be willing to sell the land and the building, which together are assessed at $155,000 to the city for $150,000, which may have indicated to the Court of Revision that he was not willing to sell for less than that figure. In other words, it was worth more than he could get for it under existing abnormal conditions. To that extent at least his ideas coincide with those of Mr. Nicholls.

With the soundness of the Court of Revision judgment we have nothing to do, but only with the honesty in this transaction of its members, and on a view of the whole case I find nothing to warrant the order appealed from.

In my opinion the appeal should be allowed and the order set aside with costs here and below.

Irving, J.A.

IRVING, J.A.:—The respondent, Mr. Charleson, is the owner of two lots situate at the corner of Granville and Robson streets, in the city of Vancouver, and was assessed in respect thereof, under the Vancouver Incorporation Act, 1900, for the year 1915 on the basis that the value of the property was $155,000, the land having been valued by the assessor at $136,500, and the building thereon at $18,500.

Mr. Charleson, feeling that he had been overcharged in the Roll, complained to the Court of Revision and the Court of Revision after hearing his evidence as well as that of Mr. R. C. Procter, who has been in the real estate business in Vancouver for the last seven years, of Mr. Ames, also connected with the real estate business, and the evidence of Mr. Nicholls, an assistant to the city assessor, reserved their judgment and some days afterwards confirmed the assessment.

Mr. Charleson then applied to and obtained from the Chief Justice of the Supreme Court an order for a writ of mandamus directed to hear the appeal in the manner provided in section 38 of the above recited statute, which is as follows:—

All ratable property shall be estimated at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor, the

B. C.
C. A.
CHARLESON
v.
BYRNE.
Irving, J.A.

value of the improvements, if any, being estimated separately from the value of the land on which they are situate.

The respondent's complaint is that the Court of Revision in refusing his appeal and sustaining the said assessment, I quote from his affidavit, "Never considered the evidence offered by me as establishing the value of the said property for assessment purposes as provided in sec. 38." From the opening remarks of Mr. Joseph Martin made to the Court of Revision on February 26, 1915, when he read to the Court sec. 38, it is clear that the Board must have appreciated that it was on that sec. that the appellant relied.

On the hearing of the application by the learned Chief Justice eight affidavits were read in which eight of the 13 aldermen pledged their oaths to the effect that they had carefully weighed the evidence given before the Court of Revision and after consideration they had honestly and impartially reached the conclusion that the actual value of the lots and improvements, as the same would be appraised in payment of a just debt from a solvent debtor, was substantially the amount found by the assessor and that in the event of their being required to reconsider the same question on the same evidence, they would reach the same conclusion.

When the appeal came on to be heard before this Court we ruled that the order was a "final order" within the Rule; but Mr. Martin admitted that the personnel of the council had been changed since March 10, the day on which the Court of Revision had given judgment, by the election to the council of a new alderman and the argument proceeded on that basis.

The writ of mandamus is a high prerogative writ and it issues to the end that justice may be done in all cases where there is a specific legal right and no specific legal remedy for enforcing such right: *Re Wathan* (1884), 12 Q.B.D. at 478, 53 L.J.Q.B. 229, or where, although there may be an alternative legal remedy, yet such mode of redress is less convenient, beneficial or effectual: *Rex* v. *Bank of England* (1819), 2 B. & Ald. 620. Where the alternative remedy is equally convenient, beneficial or effective, a mandamus will not be granted. This is not a rule of law but a rule regulating the discretion of the Court

in granting writs of mandamus: *Re Barlow* (1861), 30 L.J.Q.B. 271.

In the case of the *Sisters of Charity of Providence* v. *The City of Vancouver*, 15 B.C. 344, 44 S.C.R. p. 29, the point there involved was raised by certiorari, but it was doubted in the Supreme Court of Canada whether that was the proper method of procedure. In trying to ascertain the exact ground on which a refusal of a certiorari would be based, I have come across a case, *Rex* v. *King* (1788), 2 Term. R. 234, where it was held that certiorari would not lie to remove assessments to the land tax, because to remove them would result in delay and occasion grave public inconvenience. This case gives point to the limitation of the right to appeal specified in sec. 56. I shall not rest my decision on the ground that mandamus is not the proper remedy. The decision of the Court of Appeal in *Rex* v. *Stepney Borough* (1902), 71 L.J.K.B. 238, looks as if mandamus was the proper remedy if the Court of Revision had neglected to consider the case in accordance with the standard laid down by sec. 38. For the purpose of this judgment I will assume that it was the proper and only remedy without so deciding. The basis of my decision is that there was no solid reason for believing that the Board was guided by evidence of extraneous matters in reaching a conclusion which was quite properly open to it acting in observance of the statute.

Parliament has seen fit to commit to the council sitting as a Court of Revision, the duty of revising, equalizing and correcting the assessment roll, and it has constituted the mayor and aldermen, of whom five shall form a quorum, judges for that purpose who shall meet and try all complaints in respect thereof. The Court is authorized to take evidence on oath, and an appeal is given from the decision of the Court of Revision to a Judge of the Supreme Court (sec. 56) but this appeal is limited to the question whether the assessment in question is or is not equal and ratable with the assessment of other similar property in the city having equal advantage of situation against the assessment of other property of which no appeal has been taken.

In addition to the sworn testimony, the members of the Court of Revision are permitted to use their own judgment as

B. C.
C. A.
CHARLESON
v.
BYRNE.
Irving, J.A.

men of affairs, *per* Idington, J., in the *Sisters' Case* (1910), 44 S.C.R. 29, at p. 36. In our own Courts we have recognized this privilege, and the Court is entitled to assume that the assessor's rating is presumably correct and quite well warranted by the statute, *per* Idington, J., at p. 36.

At the hearing before the Court of Revision the respondent expressed himself satisfied with the assessment of the improvements at $18,000.

Mr. Charleson gave evidence that this property which had been assessed in 1914, for land, $107,250; building, $18,500; total, $125,750; and for 1915, land, $136,500; building $18,500; total $155,000. His claim was that the rents of the day determined the value of property and as there had been heavy falling off within the last few years, from 33 per cent. to 50 per cent., the property was over-assessed according to its present value to-day. He admitted that the property was well situated on the best street in Vancouver and that property on that street in the neighbourhood of his lots had been held at $4,000 a front foot.

In reply to the question as to the assessment on the property on the basis laid down in sec. 38, Mr. Charleson said: "I am willing to sell that property to the city for $150,000." He then proceeded to say that, tested by rentals, the property would not be assessable for anything like that sum. Having regard to the price placed upon it by himself and the powers entrusted to the members of the Board to use their own judgment as men of affairs, I say it is impossible to say that there was not evidence which would justify them in coming to the conclusion they did.

The assessment for 1914 does not concern us at present. The views of the Court of Revision for 1914 cannot control the members of the Court in 1915 on a question of fact. In an application for a mandamus, the Supreme Court does not sit as a Court of Appeal. If the Court of Revision, acting in a judicial temper, fairly and in good faith tackles the problem put before them, they have done their duty even if they have made a mistake, and a writ of mandamus should not be allowed. It would

B. C.

C. A.

CHARLESON v. BYRNE.

Irving, J.A.

be only a cloak to disguise an appeal, notwithstanding the limitation in section 56.

The learned Chief Justice, in reaching the conclusion that the Court of Revision had acted in defiance of section 38, had to consider the evidence given before the Board and the affidavits of the 8 aldermen. In regard to the duty of an appellate or reviewing Court considering evidence, we are told that great weight must be attached to the conclusion reached by the Court which has seen and heard the witnesses. That principle presupposes that the Court is honestly endeavouring to do right.

After jury trials, we have verdicts set aside because there was no evidence upon which the jury could find a verdict, and we have verdicts set aside on the ground that they are against the weight of evidence—such a verdict that a jury reviewing the whole of the evidence reasonably could not properly find: *Metropolitan* v. *Wright*, 11 App. Cas. 152, 55 L.J.Q.B. 401. Lord Halsbury put it this way:—

> If reasonable men might find the verdict which has been found, I think no Court has jurisdiction to disturb a decision of fact which the law has confided to juries, not to Judges.

In a recent case *Lendrum* v. *Ayr Steam Shipping Co.* (1914), 84 L.J.P.C. 1, on appeal to the House of Lords to Scotland, the decision of an arbitrator under the Workmen's Compensation Act was being canvassed. The arbitrator's finding had been upset by the Court of Session of Scotland and a difference of opinion existed in the House of Lords. Three supported the arbitrator and two the Court of Session. Lord Loreburn said in part:—

> When the question is whether or not an arbitrator as a reasonable man could arrive at a particular conclusion, I find that in some instances Courts have held that he could not, while some of the judges have actually agreed to the conclusion. That is my position to-day. I hope that I am a reasonable man, and if I had been the arbitrator I would have come to exactly the same conclusion on the facts which he has found. I think the moral is that we should regard these awards in a very broad way and constantly remember we are not the tribunal to decide. I shall always be slow to say that no reasonable person could think differently from myself.

Lord Shaw said:—

> Had I been the arbitrator, had the noble Earl on the woolsack been the arbitrator, had Lord Parmoor been the arbitrator, we should each of us

B. C.
C. A.
CHARLESON
v.
BYRNE.
Irving, J.A.

have reached the same conclusion as that reached by the arbitrator in this case. Had either Lord Dunedin or Lord Atkinson been the arbitrator they would have reached an opposite conclusion. I grant freely that we are all reasonable men and that as such each of us is willing to concede of the others that the conclusions which were respectively reached on the same facts although quote opposite conclusions, are such as may be reached by a reasonable man. I ask myself what right have we to deny similar treatment to the arbitrator appointed by the legislature to determine the facts in the first instance.

I think the principle taught in this case is respect for and toleration of the opinion of others. In such a case as this, where we are called upon to review the action of the Court of Revision, we should take a broad view of the evidence and of the right of the members of that Court to form their opinion and to refuse a mandamus unless we are satisfied they acted without *bonâ fides*.

The affidavits filed by the eight aldermen are unanswered. There was no cross-examination thereon, and, although Mr. Martin before us plainly charged the deponents with falsehood, I am not prepared to accept that view or that they misconducted themselves in the Court of Revision. The observation of Mr. Justice Duff as to our duty to assume, unless there is solid reason for otherwise deciding, that the Court of Revision followed the statute in the discharge of their functions is very much in point. I think that irrespective of these affidavits we would be bound to decide against Mr. Charleson on the authority of the *Stepney* case where the Court of Appeal expressed the opinion that if there was any evidence before them that the council had exercised its own discretion the mandamus should not be allowed to issue.

Mr. Martin relied on *Rex* v. *Adamson* (1876), 1 Q.B.D. 452, L.J.M.C. 46. That was an application for mandamus to magistrates who had refused to issue a summons to certain persons charged with conspiring to break the peace at a meeting held by sympathisers of the claimant in the *Tichborne* case. The evidence of the breach of the peace was plain and of an organized arrangement beforehand to disturb the meeting, but the magistrates who filed affidavits, in refusing to issue the summons, thought that the persons applying for it were applying in such a manner as to disentitle themselves from the law. The

order for the mandamus was made with hesitation on the part of Blackburn, J., with some perplexity by Cockburn, C.J. The case is authority for the principle that the decision of a case by a judicial body on evidence of extraneous conditions is ground for mandamus. See also *Rex* v. *London County Council* (1915), 31 Times 249.

But the vital difference between that case and this is to be found in the affidavits filed in opposition to the application. There the magistrates said they thought they would not, acting in the interests of the community, be justified in granting summonses for conspiracy. Here we have affidavits saying that the magistrates recognized and were governed by sec. 38 as establishing the standard of valuation and that they are not convinced by the evidence of Mr. Charleson this witness.

They have heard all that was offered to them, including extraneous matters urged by the assistant assessor in, as he supposed the interest of the city, but their determination of the appeal was founded on section 38.

I would allow the appeal.

MARTIN, J.A., dissented. Martin, J.A. (dissenting)

GALLIHER, J.A., agreed with IRVING, J.A. Galliher, J.A.

McPHILLIPS, J.A.:—It is settled law that where there is cast upon any authority a duty of a public nature—that duty must be discharged and in default, recourse may be had by way of mandamus to compel its performance, yet it is to be well remembered that it is only in the case where the inferior tribunal, clothed with jurisdiction to hear and determine the matter, has failed to exercise the jurisdiction—that this remedy may be invoked—and when granted it cannot be in the way of directing that the jurisdiction be exercised in any particular manner—that is, *mandamus* is only available where it is plain that there has been no exercise of the jurisdiction conferred. McPhillips, J.A.

In the present case an appeal was taken to the Court of Revision sitting in pursuance of the provisions of the Vancouver Incorporation Act, 1900, and it is contended that there was refusal to hear and determine the appeal in the manner provided.

B. C.

C. A.

CHARLESON v. BYRNE.

McPhillips, J.A

The next step taken was the application for a *mandamus*—which coming on before the Honourable the Chief Justice for British Columbia (Hunter, C.J.), resulted in an order absolute for a *mandamus* being granted—directing that the Court of Revision do proceed to hear the appeal with regard to the assessment of lots 1 and 2, block 63, subdivision of lot 541 in the city of Vancouver, being appeal No. 107 in the manner provided for in section 38 of chapter 54 of the Statutes of British Columbia for 1900 being the Vancouver Incorporation Act and amendments.

It is from the order absolute granting a *mandamus* that the appeal is brought, and it would follow that the appeal should be dismissed if it is apparent upon the facts that there was failure to exercise the conferred jurisdiction—a jurisdiction which must be discharged—upon the other hand if there was no such failure—and the Court of Revision did examine into the appeal brought before them and did exercise their judgment in proper compliance with the statute, then the appeal should be allowed.

Upon consideration of the evidence adduced before the Court of Revision, it, in my opinion, was ample to admit of that body arriving at a decision—in the proper exercise of the statutory duty imposed—and that was to determine whether there had been any overcharge in the assessment, that being the ground of appeal.

The Court of Revision was entitled at the outset to rely upon the assessment as being made in pursuance of the statutory provisions as contained in the Act—the onus being on the party complaining to adduce evidence of overcharge—and that onus, in my opinion, was not satisfactorily discharged—it cannot be said that upon an appeal to the Court of Revision—matters are to be looked at as if no assessment had been made and that then and there all considerations that led up to the assessment should be a matter of enquiry—if so the duties of the tribunal might be said to be interminable—rather that the assessment is assumed to be proper—subject, of course, to displacement if the ground of complaint is established—vide sections 38, 49, 50 and 54 of the Act.

The Court of Revision in the main—in the present case—

had merely to determine whether the land of the respondent had been assessed at too high a sum—and in arriving at their decision as to this a great amount of evidence was led directed to establish that no proper assessment had been made in pursuance of section 38 of the Act, *i.e.*, the assessment as made was not the actual cash value of the land as it would be appraised in payment of a just debt from a solvent debtor.

It is not my purpose to, in detail, make reference to or analyze the evidence. I content myself in stating that there was evidence before the Court of Revision upon which they could arrive at the conclusion at which they did arrive and that was the confirmation of the assessment.

I cannot, with all deference to the forceful argument of the learned counsel for the respondent, accede to the view that there is a total absence of evidence upon which the cash value of the land may be ascertained.

It is, of course, not the province of this Court to enter into the question of values—and upon this point I would refer to the following language of Robertson, C. J., *In re Dickson and the Municipality of Galt*, 10 U.C. (Q.B.) 395:—

> It was rather pressed upon us, however, at the conclusion of the argument, that although there are several reasons which disable us from making these rules for mandamus absolute, it would be satisfactory, and might be extremely useful, if we were to express our opinion upon the soundness or unsoundness of the principle on which the Court of Revision under the assessment law acted in these cases, in estimating the actual value of the real estate of these several applicants. Upon consideration, we feel it more proper to forbear intimating any opinion that we may have formed on that point.

It being my opinion that the Court of Revision did proceed to hear the appeal and were seised of evidence sufficient in its nature to determine the appeal as advanced by the respondent and did decide the question—the granting of a *mandamus* which is appealed against—was wrong—as it is in effect the compulsion to rehear an appeal already decided which is not to be admitted—Abbott, C.J., in *The King* v. *The Justices of Monmouthshire* (1825), 4 Barn. & Cress. 844, 849 (8 C. Dowl. & Ry. 334, 28 R.R. 478) said at p. 849:—

> I think that the rule for a mandamus ought to be discharged. It appears that, in this case, the Court of quarter sessions have given their

B. C.

C. A.

CHARLESON v. BYRNE.

McPhillips, J.A.

judgment. This Court is not a Court of errors from that Court; it may compel the Court of quarter sessions by mandamus to proceed to hear and decide the appeal; but when they have so determined it, this Court cannot compel them to correct their judgment if it appear to be erroneous. It is unnecessary to say whether the judgment pronounced by the Court of quarter sessions was erroneous or not, because we have no jurisdiction to compel them to correct it;"

and it is to be noted that the case was cited and applied in the judgment of Cockburn, C.J. in *The Queen* v. *Overseers of Walsall* (1878), 3 Q.B.D. 457, 468 (47 L.J.Q.B. 710, 716), and by Lord Herschell, L.C., in *Ex parte Evans* (H.L. 1893), (1894), A.C. 16, 20 (63 L.J.M.C. 81, 83)—at p. 20 Lord Herschell said:—

The justices have heard and determined it; here is the record; here is the determination; they may have determined it wrongly. We cannot interfere upon this application.

Rex v. *Adamson* (1875), 1 Q.B.D. 201, was strongly relied upon by the learned counsel for the respondent as being a case where a *mandamus* issued. It is to be noted, however, that in that case it was held that the magistrates had not considered the evidence and given a decision upon it—a case not, in my opinion, similar to the one we have now before us—in that here there has been a hearing, the evidence has been considered, and a decision has been given upon it. *Rex* v. *Adamson*, *supra*, was referred to by Farwell, L.J., in *Rex* v. *Board of Education* (1910), A.C. 165, at p. 180, and in applying the decision to the case under consideration said:—

Further, they have by answering a question not put to them and avoiding any answer to the real question declined jurisdiction: see the judgment of Cockburn, C.J., in *Rex* v. *Adamson*.

And further, in his judgment, at p. 181, said:—

Further, if the Board did not proceed on a mistaken assumption of the law, but deliberately discharged it either on the question of the construction of the Act or on the entire want of evidence, then I should be of the opinion that they have been guilty of misconduct so flagrant as to make it impossible for their decision to stand.

In the present case that has not occurred which so forcefully presented itself to Farwell, L.J.—here there was no declination of jurisdiction—no entire want of evidence—but a determination upon consideration of the Act and the evidence adduced. *Rex* v. *Board of Education*, *supra*, went on appeal to the House

of Lords under the name of *Board of Education and Rice* (1911), A.C. 179, and the decision of the Court of Appeal (1910) 2 K.B. 165, was affirmed. Lord Loreburn, L.C., at p. 182, said:—

> The Board is in the nature of the arbitral tribunal and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon the fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus or certiorari.

In my opinion, the Court of Revision have, in the present case, acted judicially, and have determined the question which they were required by the Act to determine and the present case is not one calling for remedy.

Some argument was addressed to the question of the futility of the proceedings were the order for the issue of a mandamus to stand—upon this subject a case that may be usefully looked at is *Rex* v. *Bonnar* (1903), 14 Man. R. 467. It was there held that the issue of a mandamus to the Revising Officer under the Manitoba Election Act, R.S.M. (1902) at 52, as asked for should be refused as it would be fruitless and futile as the Revising Officer and the Board of Registration were *functi officio*—*Rex* v. *Bishop of London* (1743), 1 Wils. 11; *Rex* v. *Bishop of Exeter* (1802), 2 East 466; and *Rex* v. *Bateman* (1883), 4 B. & Ad. 553, were referred to and followed.

It therefore follows that, in my opinion, the appeal should be allowed and the order absolute for the issue of a *mandamus* should be set aside, the appellants to have the costs here and the Court below.

Appeal allowed.

VON MACKENSEN v. DISTRICT OF SURREY.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and McPhillips, JJ.A. April 6, 1915.

1. HIGHWAYS (§ IV A 1—120)—FAILURE TO REPAIR—INJURIES TO TRAVELLER —LIABILITY OF MUNICIPALITY.

Where a statute vested in a municipality the public roads within its boundaries and empowered the municipality to repair, but did not purport to impose a duty to repair nor to create a liability on failure to repair, the municipality is not liable in damages for injuries sustained by a person driving on the road through its lack of repair, where the non-repair was due to non-feasance only as distinguished from misfeasance.

[*Macpherson* v. *Bathurst*, 4 A.C. 257; *Cowley* v. *Newmarket*, [1892]

B. C.
C. A.

VON MACKENSEN v. DISTRICT OF SURREY.

Macdonald, C.J.A.

A.C. 345; *Geldert* v. *Pictou*, [1893] A.C. 524; *Sydney* v. *Bourke*, [1895] A.C. 433, 64 L.J.P.C. 140; *Vancouver* v. *McPhalen*, 45 Can. S.C.R. 194, distinguished.]

APPEAL by defendant from the judgment of Clement, J.

E. P. Davis, K.C., for appellant.

F. J. McDougall, for respondent.

MACDONALD, C.J.A.:—The judgment appealed from awards the plaintiff damages against the defendant, an incorporated district municipality, for personal injuries which he sustained when thrown from his waggon, owing, as he alleged, to the want of repair of the Jericho road, a highway within the boundaries of the defendant municipality. Counsel for the defendant put aside all other grounds of appeal and asked the Court for judgment on the broad and, to the defendant, important ground of its liability or non-liability for non-repair of the road in question.

The facts upon which the question is to be decided are not in dispute. The Jericho road, half a mile of which only is in Surrey, was made by a few settlers for their own convenience in reaching another road nearby. It was declared in 1875 by the province to be a public road. The defendant was incorporated in 1882. By the Municipal Act the possession and control of public roads are vested in the municipality in which they are situate, subject to any rights reserved by the dedicator. No such rights are in question here. Therefore, in 1882 the possession of that part of the Jericho road within the defendant's boundaries became vested in the defendant. There is no statutory provision affecting this case other than the one vesting the roads in the municipality and sec. 53, sub-sec. 176, of the Municipal Act, which enables the municipal council to pass by-laws "for establishing, opening, making, preserving, improving, repairing, widening, altering, diverting, or stopping up roads, streets, etc.".

After 1882, the settlers aforesaid continued to do some work on the Jericho road within the municipality without interference by defendant. They put down "puncheon" (another name for corduroy) at the place where the plaintiff met with his injuries. The defendant was not consulted nor did it interfere in this work. It did nothing towards the construction, maintenance or repair of that part of the road on which the plaintiff received his injuries,

B. C.

C. A.

VON MACKENSEN v. DISTRICT OF SURREY.

though it caused some repairs to be made on the road at some distance therefrom.

The plaintiff's case, therefore, is founded upon the failure of the defendant to exercise the enabling powers given by said sec. 53, sub-sec. 176. The complaint is that the defendant did nothing to improve or repair that part of the road in question; not that it did something which in the result brought about the plaintiff's injuries.

Macdonald, C.J.A.

Unlike the special charter of the city of Vancouver in question, in *The City of Vancouver* v. *McPhalen* (1911), 45 S.C.R. 194, the Municipal Act casts no duty on municipalities controlled by it to repair the roads, the possession of which were by law vested in them.

Having regard to the facts above recited and to the statute governing this case, I am unable to distinguish it from *Municipal Corporation of Sydney* v. *Bourke* (1895), A.C. 433, and must, therefore, allow the appeal and dismiss the action.

Irving, J.A.

IRVING, J.A.:—This is an appeal from Clement, J., who found in favour of the plaintiff on the ground that the municipality did not take care of the artificial works so as to prevent the highway becoming a nuisance.

He bases his judgment on the reasons of Mr. Justice Duff, set out at p. 213 of the report of *City of Vancouver* v. *McPhalen* (1911), 45 S.C.R. 194.

In all cases the first question which arises is what duty is imposed on the defendants, and what duty have they broken?

It is admitted that there is no complaint of positive misfeasance against the corporation, and, in particular, it is admitted that the box drain was built by the settlers; but it is said this place was a trap, and that the case turned on the fact that the highway was a nuisance, amounting to misfeasance, and that the plaintiff was entitled to maintain an action.

The defendants were incorporated in 1882. The road in question had been gazetted by the provincial government in 1875.

The defendants within the last five years employed one Hughes to repair the road, but apparently the place that needed it most, the portion where the accident took place, was left untouched by the contractor.

The road at this part was built by the settlers 25 years ago,

B. C.

C. A.

VON MACKENSEN v. DISTRICT OF SURREY.

Irving, J.A.

without authority from anybody; about 18 years ago a corduroy was laid on top of the road by the settlers. About three years ago a settler (Grant) removed a portion of this corduroy or puncheon. It was at or about this place where the accident took place, in a stretch of road of about 30 feet. Money had been expended by the defendants on the road, but not on the part in the neighbourhood of this 30 feet.

By sec. 370 of the Municipal Act (ch. 170) possession of all public roads is vested in the municipality. This "vesting" only goes so far as is necessary for the particular powers conferred. The enactment by the legislature that a highway shall be vested in a municipal corporation is to be construed as a means of protecting the highway by attributing ownership so far as consistent with public rights. It is a convenient way of getting rid of all claims in respect of dedicating owners or owners of land fronting on the highway.

The statute ch. 170 authorizes, sec. 53, sub-sec. 176, the council to pass by-laws for "establishing, opening, making, preserving, improving, repairing, widening, altering, diverting, or stopping up roads . . . or other public thoroughfares," but the Act does not contain a section such as was inserted in the Act under consideration in the *McPhalen* or *Cooksley* cases.

This sec. 53 (176), in my opinion, is merely empowering.

I do not contrast it with sec. 371, because I am not prepared to say, without argument, how far that section obliges a municipality to open, maintain and repair a road.

The statute, ch. 170, does not give any right of action to a person injured through non-repair or otherwise.

The right of action, then, must depend on the common law.

We have been referred to a number of cases. The defendants before us do not argue contributory negligence or that they were without notice of the state of the road, but rely on the authorities, in particular on *Sydney* v. *Bourke*, for their exemption from liability.

Wallis v. *Assiniboia* (1887), 4 Man. 89: Plaintiff failed because the statute, which said the municipality should be charged with the maintenance of the road, did provide that the municipality should be liable civilly or criminally.

Macpherson v. *Bathurst* (1879), (J.C.) 4 App. Cas. 256: The

plaintiff, whose action was dismissed at the trial, succeeded before the Privy Council because the hole torn by reason of their negligence amounted to a nuisance for which they were liable to indictment and also as a corollary to their liability to indictment to an action by any one sustaining direct and particular damage for such misfeasance. The Act imposing on the municipality "the care, construction and management of public roads" was not passed upon by the Privy Council.

Cowley v. *Newmarket* [1892], A.C. 345: The plaintiff (whose action was dismissed at the trial) failed. The place complained of had been constructed years before the accident by Captain Maclin, without the leave of the local authority. There was no misfeasance on the part of the defendants. The fact that the footway was by statute "vested" gave the plaintiff no right of action.

The ruling in *Macpherson* v. *Bathurst*, *supra*, as to an action lying wherever an indictment would lie, was questioned by Lord Herschell, p. 354.

The plaintiff failed because the statute did not give an action.

Geldert v. *Pictou* [1893] A.C. 524: The plaintiff (who succeeded at the trial) failed. The approach to the bridge was out of repair, through the non-feasance of the defendants. The House of Lords held that the transfer to the municipality of the obligation to repair did not, of itself, render the corporation liable to an action in respect of mere non-feasance. It required words indicating an intention on the part of the legislature that liability should be imposed.

In the opinion it was pointed out that the *Bathurst* case turned on misfeasance.

Sydney v. *Bourke*, [1895] A.C. 433. The plaintiff (who succeeded at the trial) failed before the Judicial Committee. The charge was non-feasance, a failure to make repairs in a road built by the defendants. The defendants were held not liable (*a*) because no liability was expressly imposed on them by statute, nor (*b*) had the legislature imposed on them a duty for the breach of which the person injured had a right of action.

The statute in question "vested" in the council all the streets, and empowered it to repair them, but did not purport to impose a duty to repair.

B. C.

C. A.

VON MACKENSEN v. DISTRICT OF SURREY.

Irving, J.A.

Their Lordships then dealt with the *Macpherson* v. *Bathurst* case, and pointed out the facts of the case, which I have already incorporated in the description of that case, and said that the *Bathurst* case did not depend on the question whether the municipality was liable to an action in respect of non-repair.

Other matters were referred to, and it was said, in effect, that the *Bathurst* judgment, which must be read with great care, was rightly decided on the ground that it was a case of misfeasance, that is to say, of having caused a nuisance for which they could be indicted, and, therefore, an action would lie.

But in respect of non-repair, as in the *Cowley* case, an action would not lie, although an indictment might lie.

Campbell v. *City of St. John*, 33 N.B. Rep. 131, on appeal to the Supreme Court of Canada (1896), 26 S.C.R. 1. The plaintiff failed at the trial and before the Supreme Court of Canada. I shall deal with only one phase of it. The case was one of non-feasance, neglect to repair an asphalt road the corporation had laid down. The Court was of opinion that, assuming the city was bound as a duty towards the public to repair, the plaintiff had no right of action. The foregoing is a statement of all the cases cited before us, with the exception of the cases of *Cooksley* v. *City of New Westminster* and *McPhalen* v. *City of Vancouver*, but, before dealing with those cases, I shall draw attention briefly to other cases in our British Columbia Courts. *Lindell* v. *Victoria* (1894), 3 B.C. 400: Drake, J., held the city of Victoria not liable under the Municipal Act of 1892, sec. 104, sub-sec. 90. *Smith* v. *Vancouver* (1897), 5 B.C. 491: Davie, C.J., held the city of Vancouver guilty of misfeasance in building an 8 ft. sidewalk with a 2 ft. drop at the end, where it met a 4 ft. crossing. *Gordon* v. *City of Victoria* (1897), 5 B.C. 553: Davie, C.J., dismissed the action thinking the case was one of non-feasance. *Patterson* v. *Victoria* (1897), 5 B.C. 629: The majority of the Court thought that the case disclosed acts of misfeasance, more misfeasance than in the *Bathurst* case. *Lang* v. *Victoria* (not reported below), which followed the *Patterson* case, and the *Patterson* case were carried to the Privy Council, where the decision appealed from was upheld, and where certain other points raised by the city were held not open to the defendants. *Cooksley* v. *Corporation of New Westminster* (1909), 14

B.C. 330, was, in the opinion of the full Court, a case of misfeasance, and came within the *Bathurst* case. The statute governing it imposed on the corporation the duty of keeping the street in repair.

Then came *McPhalen* v. *Vancouver* (1911), 15 B.C. 367, and on appeal to the Supreme Court of Canada (45 S.C.R. 194) founded on a different statute to that under consideration in this case. The case against the city was one of non-feasance, and the city held liable as the duty to repair was created in mandatory and imperative language.

The result of these cases is that the plaintiff failed in every instance of non-feasance, except in the *McPhalen* case, and the latter turned on the language of the statute.

The learned trial Judge held that the defendants were liable because they did not prevent the road being a nuisance, irrespective of the question whether the road under the care of the municipality was originally constructed by them or not.

With deference to the learned Judge, that ground seems to me to ignore the explanations of the *Bathurst* case given in the subsequent cases.

I would allow the appeal.

Martin, J.A.

MARTIN, J.A.:—It appears that the road in question, called the Jericho road, was originally made, about 25 years ago, by certain settlers, at their own expense, to get access to their homesteads, and it runs east and west, crossing the boundaries of the municipalities of Surrey and Langley, about half a mile of it being within the limits of the defendant municipality, which lies to the west of Langley, and was incorporated in 1882. Though the road was gazetted as a "public highway" on May 22, 1875, no work or money has been done or expended by the defendant corporation on that eastern end of it which lies within 300 yards of the Langley boundary, but it has done work to the extent of $202.20 since 1889 for repairs on the other and western portion of the said half-mile of road, starting from the Latimer road and working east. We were not informed at all about that part of the road to the east of the boundary, within Langley, doubtless because it has no bearing on the case. The accident occurred at a spot about 100 yards from the Langley boundary, in a shallow depression or mud hole, where water collected in the

B. C.

C. A.

VON MACKENSEN v. DISTRICT OF SURREY.

Martin, J.A.

rainy season, and, therefore, what is locally called "puncheon" (meaning cedar slabs, usually about 8 to 10 feet long and 6 inches thick) had been laid by the settlers across the depression for a distance of about 20 feet to facilitate crossing it, and a certain amount of ditching both side and transverse (box drain) has been done in an unsuccessful attempt to adequately drain off the water, which ditches formed part of the road itself. The road was originally only a bush track, and now may fairly be described as a rough but passable side road. After a careful perusal of all the evidence, I should not, having regard to the surrounding circumstances and country side roads in general, describe the place in question as dangerous in the true sense at the time of the accident, which took place between 11 and 12 a.m. It openly and palpably called for careful driving, because the puncheon had largely drifted away, and the water and mud were about a foot or a foot and a half deep to a firm footing, but there was nothing in the sense of a trap or any concealed danger. However, assuming that it was a dangerous place and that the defendant, with due notice thereof, did not choose to exercise its admitted power to repair it, what is its liability?

There is no statutory obligation to repair this highway (*cf.* Municipal Act, ch. 170, sec. 53, sub-sec. (176), and sec. 371), as it is not a boundary road. It is to be noted that sec. 370 only rests the "possession" of public roads, etc., in the municipality, and not the roads themselves, as in *Municipal Council of Sydney* v. *Bourke* (1895), 64 L.J.P.C. 140, (1895) A.C. 433; but, in the view I take, this makes no difference in the present circumstances. No question of a nuisance arises, in my opinion, for non-repair cannot be transformed into a nuisance merely by so styling it, and the defendant cannot be indicted for nuisance, as it did nothing and committed no breach of a statutory duty. There is no greater duty cast upon the defendant to improve or repair this road under the powers conferred by sub-sec. (176) than there was to open or make it originally, or later to widen or stop it up: all these are "matters left absolutely to the discretion and judgment of the council," and the words are "empowering only," as was said in *Sydney* v. *Bourke*, from which I am unable to distinguish this case. To escape from the *Sydney* case, it was suggested that the case at bar is, in reality, one of misfeasance, but I am quite unable to see in what respect it

can be so considered, because the defendant herein merely allowed the easterly portion of the road to remain in a rough state or gradually get worse, while repairing the western portion to a certain extent. The *Sydney* case goes, I think, to this extent, that, even if the defendant had originally properly put in the "puncheon" at the hole in question, and then allowed it to fall into disrepair, it would not be liable for the consequences of such non-repair. What was done in *Borough of Bathurst* v. *Macpherson* (1879), 48 L.J.P.C. 61, 4 A.C. 256 (*viz.*, the digging of an open drain 2 to 4 feet deep and 5 feet wide along the side of a highway) was explained and held in the *Sydney* case to be based on the fact "that the defendants had caused a nuisance in the highway," just as "the owner of land adjoining an highway has been held liable to an action if he digs a hole so close to the highway as to create a nuisance to passengers lawfully passing along it." Their Lordships go on to say that some of the dicta in the *Bathurst* case

> can scarcely be supported, in view of the more complete discussion which the subject has subsequently undergone. But they do not affect the authority of that case, for the decision rests on grounds independent of them. The conclusion being arrived at that the defendants had caused a nuisance to the highway for which they could be indicted, it cannot be doubted that it was properly decided that the action lay.

Is this Court to hold that, if a municipality, under no obligation to repair, properly builds an asphalt road, but decides not to repair it and lets it gradually wear down to such a state that a hole appears in it which is dangerous to traffic, thereupon the locus becomes a nuisance for which the municipality is answerable? I think not. But, on the other hand, if a municipality undertakes, quite apart from any obligation, to repair a street and does so in a negligent manner, by, *e.g.*, leaving a sidewalk in an unsafe condition after the repairs were ostensibly finished, then it is liable for misfeasance for causing such "a dangerous nuisance": *City of Halifax* v. *Tobin* (1914), 50 S.C. 404.

It follows that the appeal should be allowed.

McPHILLIPS, J.A.:—This is an appeal in a negligence action in which Mr. Justice Clement, sitting without a jury, found in favour of the plaintiff, and assessed the damages for the personal injuries sustained by the plaintiff at $350, and awarded costs on the County Court scale.

McPhillips, J.A.

B. C.

C. A.

VON MACKENSEN v. DISTRICT OF SURREY.

McPhillips, J.A.

The plaintiff, a resident of Port Kells, B.C., whilst driving on the Jericho road, within the municipality of Surrey, was thrown from the vehicle in which he was driving, owing to the disrepair of the road, and suffered personal injuries therefrom—the point where the accident took place was about 100 yards west of the boundary line between the municipality of Surrey and Langley. The municipality was incorporated in the year 1882; the road upon which the accident occurred was gazetted as a provincial highway on May 18, 1875.

The admitted facts would appear to be that the road was first opened up by the settlers of the district, some 25 years before the trial of the action, and about 18 years ago the settlers built the road as at present existing—that is a corduroy road, otherwise known as a puncheon road—with timbers or poles laid across the travelled way, and such was the condition when the road was brought within the municipal boundaries; no municipal organization existed at the time of the original construction of the road nor existed at the time the corduroy road was constructed, and no work was at any time done by the appellants upon the road at the point where the accident occurred, although some work was done at some other point, but it was not alleged nor contended that any work done by the appellant had caused or in any way contributed to the accident.

The road had become defective—some of the timbers or poles were washed out, leaving spaces of some 12 to 18 inches, and the road was difficult of travel—a wheel of the vehicle struck or was caught in one of the timbers or poles in the road, and the plaintiff was thrown out upon the road and sustained the injuries complained of.

The learned counsel for the appellant, in his very forceful and able argument, presented the case for the appellant in this way:—That the appellant had not imposed upon it any statutory or other duty to repair the road; that the fee simple in the roads or highways are not vested in the municipality, but the possession thereof only; that the repair of the roads or highways, the opening up of same or the taking of them over, is a matter of absolute discretion in the municipality; and that no action was sustainable for non-repair or liability for the injuries complained of; and relied strongly upon *The Municipal Council*

of Sydney v. *Bourke* (1895), 64 L.J.P.C. 140, contending that it was the decisive case and was conclusive upon the question to be determined upon the facts of this present case, and was an authority which demonstrated the impossibility of the judgment herein appealed from being sustained by this Court, and, I may say—in fact, I am constrained to say—that with this very high authority, holding, as it does, and a decision which is absolutely binding upon this Court, that, in the absence of a duty or liability being imposed by an Act of the legislature, the mere non-repair of a road does not entitle a person injured by reason thereof to sue the municipality.

It is apparent that no such duty or liability such as would be necessary to create the duty or obligation is imposed upon the municipality by the provisions of the Municipal Act (ch. 170, R.S.B.C. 1911, 2 Geo. V.).

There is no indication of the intention of the legislature to impose any such liability as contended for; it is true that the possession of public roads is vested in the municipalities, sec. 370 reading as follows:—

> The possession of every public road, street, bridge, lane, square, or other highway in a municipality, except such as have been taken and held possession of by any person in lieu of a public road, street, bridge, lane, square, or other highway laid out by him without compensation therefor, shall be vested in the municipality, subject to any rights in the soil which the persons who have laid out such road, street, bridge, lane, square, or other highway may have reserved.

It is true there is power to make, alter and repeal by-laws having relation to streets, bridges and roads; but, in respect to the road in question, nothing has been proved shewing that any such steps were taken by the municipality having reference to the road in question, sub-sec. (176) of the Municipal Act reading as follows:—

> For establishing, opening, making, preserving, improving, repairing, widening, altering, diverting, or stopping up roads, streets, squares, alleys, lanes, bridges, or other public thoroughfares, and for establishing, opening, making and using quarries and gravel-pits for the purpose of acquiring material for making or repairing roads, streets, or highways within the boundaries of the municipality or the jurisdiction of the Council, and for entering upon, expropriating, breaking up, taking, or using any real property in any way necessary or convenient for the said purposes without the consent of the owners of the real property, subject to the restrictions contained in Part XV. of this Act:
>
> Every by-law passed under the provisions of this sub-section shall,

B. C.

C. A.

VON MACKENSEN v. DISTRICT OF SURREY.

McPhillips, J.A.

before coming in effect, be published in the Gazette and in some newspaper published in the municipality, or if no newspaper is published in the municipality, then in a newspaper circulating in the municipality.

After the said publication a certified copy of the by-law, accompanied by an application of the municipality for registration of the title acquired by the said expropriation proceedings and the usual fees, shall be filed in the Land Registry Office of the district in which the land affected by the by-law is situate.

We do not find that express statutory requirement to repair which was present and adverted to by Mr. Justice Duff in his elaborate and admirable judgment in *City of Vancouver* v. *McPhalen* (1911), 45 S.C.R. 194, at p. 217.

In view of the very careful attention which the point in question in this appeal received at the hands of the learned Judges of the Supreme Court of Canada, in *City of Vancouver* v. *McPhalen*, *supra*, it is not necessary to review the authorities at length, but only to point out the line of differentiation which exists between that case and this, and that is that it is a decision which only determines that, where there is a statutory duty imposed to keep the highways in repair and adequate means by statute have been provided enabling it to perform its obligations, persons suffering injuries by reason of such omission may sue and recover compensation, although no right of action is by statute expressly provided, unless the statute itself or the circumstances attendant upon its enactment repels any such inference of liability.

Therefore, in my opinion, *The City of Vancouver* v. *McPhalen*, *supra*, relied upon by the learned counsel for the respondent, cannot be held to be a decision helpful to him in the present case.

Counsel for the respondent, in a careful review of the *ratio decidendi* of *Sydney* v. *Bourke*, *supra*, endeavoured to distinguish the effect of that decision in its bearing upon the present case, in that, in the case before the Privy Council, it was admitted that the highway on which the accident occurred was originally constructed quite properly, but that in the present case, although the municipality did not construct the road, it took it over, allowed it to continue, and had let a contract for work upon a portion of the road—not, however, at the point in question—and that the facts would support an action for misfeasance.

I have no hesitation in coming to the conclusion that the facts, as proved in the present case, cannot, even on the most elastic construction, be held to in any degree substantiate an

action for misfeasance; it could only be one of mere non-feasance, and that was really the action which was tried, and, in my opinion, the present case is concluded in the appellant's favour by the decision of their Lordships of the Privy Council in *Sydney* v. *Bourke*, *supra*—the municipality is in no way answerable for non-feasance. Also see *Lambert* v. *Lowestoft Corporation* (1901), 70 L.J.K.B. 333, (1901) 1 K.B. 590; *Maguire* v. *Liverpool Corporation* (1901), 74 L.J.K.B. (C.A.) 369, (1905) 1 K.B. 767.

It, therefore, follows that, in my opinion, the judgment of the learned trial Judge should be reversed, the action dismissed with costs, and the appeal to this Court allowed.

Appeal allowed.

CANADIAN NORTHERN ONTARIO R. CO. v. SMITH.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin and Brodeur, JJ.

1. ARBITRATION (§ IV—40)—RAILWAY COMPANY — APPEAL — MOTION TO QUASH—JURISDICTION.

An appeal from the King's Bench, Quebec, to the Supreme Court of Canada, dismissing a motion by a railway company for appointment of arbitrators on an expropriation, on the ground of the insufficiency of the notice to treat under the Railway Act, Can., will be quashed when it neither appears on the record nor by affidavit, under sec. 49 of the Supreme Court Act, Can., that the matter in controversy amounts to the sum or value of $2,000.

[*Turgeon* v. *St. Charles*, 15 D.L.R. 298, 48 Can. S.C.R. 473, referred to.]

Statement

MOTION to quash an appeal from a decision of the Court of King's Bench, appeal side, Province of Quebec, affirming the ruling of a Judge in the Superior Court, District of Montreal, who dismissed an application for appointment of arbitrators in expropriation proceedings under the Railway Act.

Perron & Co., for the appellants.

Casgrain, Mitchell & Co., for the respondents.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—This is a motion to quash for want of jurisdiction. The facts are as follows:—

The C.N.R. Co., appellant, took proceedings under the Dominion Railway Act to expropriate a parcel of land in the parish of St. Laurent, Province of Quebec. Notice was given to the registered owners of the lot, but not at first to the respondent Smith, who had a ten-years' lease of the property. Later, on becoming aware of the lease, the company served another copy

CAN.
S. C.
C.N.
ONTARIO R. CO.
v.
SMITH.
Sir Charles Fitzpatrick, C.J.

of the original notice on the owner and on the lessee declaring its intention to amend the notice of expropriation by putting Smith "*en cause*." The amount originally tendered by the company was $25,000, and this amount was not changed by the amended notice shewing the intention of the petitioner not to increase the amount of its original offer on account of the claim of the lessee.

On the petition made by the owner to a Judge of the Superior Court, to appoint an arbitrator under sec. 196 of the Railway Act, Smith appeared to contest the right of the company on many grounds, the important one being that he, as lessee, was entitled to be served with a special notice and to have a special arbitration as to his compensation. This right the company denied.

The petition came on for hearing before Mr. Justice Beaudin, who found that Smith was entitled to a special notice and arbitration under the Railway Act, independently of the arbitration of the land-owner. His judgment was affirmed on appeal by the Court of King's Bench. The company now appeals to this Court and have deposited their security in the Court below. Smith moves to quash on the following grounds:—

1. That the judgment in the Court below was interlocutory and related only to a matter of procedure;

2. There is no evidence that the amount involved exceeded $2,000;

3. That the controversy does not relate to title of land;

4. That the judgment of the Court below was a judgment *persona designata* under special jurisdiction conferred by the Railway Act and there is no appeal.

Reference was made at the argument to *Turgeon* v. *St. Charles*, 15 D.L.R. 298, 48 Can. S.C.R. 473, but that case has no application. It was there decided that a petition by a curator to a Judge in Chambers under the Quebec Abandonment of Property Act was a judicial proceeding within the meaning of that term in 46 or 37 (*a*) of the Supreme Court Act. However that may be, it seems to me obvious that the words, "suit, cause, matter or other judicial proceeding," in that section refer exclusively to civil proceedings which fall to be determined by the provincial Courts and Judges in the exercise of their ordinary jurisdiction in civil matters.

CAN.

S. C.

C.N. Ontario R. Co. v. Smith.

Sir Charles Fitzpatrick, C.J.

Here the Judge to whom the application was made under the Dominion Railway Act was, it is true, a Judge of the Superior Court of the Province, but for the purposes of that application his jurisdiction was "special and peculiar, distinct from, and independent of any power or authority with which he is clothed as a Judge of that Court." The Act conferring jurisdiction upon him provides all necessary materials for the full and complete exercise of such jurisdiction in a very special manner, wholly independent of, and distinct from, and at variance with, the jurisdiction and procedure of the Court to which he belongs (secs. 194, 195, 196, 197 *et seq.*, Railway Act). As to appeal, see sec. 209. Paraphrasing what the Chief Justice said in *Valin* v. *Langlois*, 3 Can. S.C.R. 1, at 33, 34, I would say:—

> Reading these special provisions in connection with the Railway Act, and what has been said of the Act generally, I think it is not arriving at a forced or unnatural conclusion to say that Parliament intended to confer upon provincial Judges in Dominion railway expropriation matters an exceptional jurisdiction with a special procedure and with all materials for exercising such jurisdiction, and having nothing in common with the provincial courts; that these Judges and Courts were merely utilized outside their respective jurisdiction to deal with this purely Dominion matter.

The case comes clearly within the rule in *C.P.R. Co.* v. *Little Seminary of Ste. Thérèse*, 16 Can. S.C.R. 606; *St. Hilaire* v. *Lambert*, 42 Can. S.C.R. 264; *Toronto, etc., Railway Co. and Hendrie, In re*, 17 P.R. (Ont.) 199; *Cie du Chemin de fer de Montréal et Sorel* v. *St. Vincent*, M.L.R. 4 Q.B. 404.

I am entirely at a loss to understand how this case ever reached the Court of King's Bench, but as it comes to us from that Court and assuming that we have no power to inquire on this application into the proceedings resulting in the appeal below, I am of opinion that the case does not come within secs. 46 or 37 (*a*) of the Act.

Motion to quash granted with costs.

Davies, J.

Davies, J.:—I concur with Mr. Justice Anglin.

Idington, J.

Idington, J.:—I agree with the result reached by the Chief Justice.

Duff, J.

Duff, J.:—The jurisdiction created by sec. 196 of the Railway Act is not, I think, a jurisdiction given to the Superior Court or County Court as the case may be, but to the Judge or Judges of those Courts. In other words, when acting under that section the Judge does not exercise the powers of the Court as such but the

CAN.
S. C.
C.N.
ONTARIO R. CO. v. SMITH.
Duff, J.

special powers given by the Act. From the refusal of the Judge on an application under sec. 196 to appoint arbitrators no appeal would lie to the Court of King's Bench or to this Court.

Mr. Rinfret appreciated this and argued that the contestation was an independent proceeding instituted in the Superior Court for the purpose of restraining proceedings not in the Superior Court, but before the Judge acting as *persona designata*, and that it was from the judgment in this independent proceeding that the appeal was taken to the Court of King's Bench.

I have examined the proceedings carefully and my conclusion is that beginning with the petition under sec. 196 all the proceedings have been treated by the parties and by all the Judges before whom they have come as proceedings in the Superior Court. However that may be, the contestation has been most certainly treated as part of the proceedings instituted by the petition, and whether one holds that they were in the Superior Court or before the Judge *extra muros*, the result is the same. If the first, then the Court of King's Bench was obviously right in dismissing an appeal from a judgment in proceedings not only misconceived, but incompetent; if the second, no appeal lay to the Court of King's Bench against a judgment given in proceedings under sec. 196 and none lies to this Court.

It is true that the objection that the judgment of the Court of King's Bench was obviously right does not go to the jurisdiction of this Court. But appeals have been quashed *in limine* where they most certainly have failed as being manifestly without foundation, and this practice is beyond doubt a beneficent one. It is hardly necessary to observe that no appeal lies from a *considerant*.

I may add that collecting as best I can the effect of the words "matter in controversy . . . amounts to the value or sum of $2,000" from the various pronouncements in which Judges of this Court have professed to elucidate them, I am not convinced that the somewhat erratic course of decision permits me to hold that the condition of jurisdiction supposed to rest upon those words has been satisfied.

Anglin, J.

ANGLIN, J.:—While adhering to the view expressed by my Lord the Chief Justice, in delivering the judgment of the Court in *Finseth* v. *Ryley Hotel Co.*, 43 Can. S.C.R. 646, and to what I

CAN.

S. C.

C.N. Ontario R. Co. v. Smith.

Anglin, J.

stated in *Turgeon* v. *St. Charles*, 15 D.L.R. 298, 48 Can. S.C.R. 473, at 483, as to the scope of sec. 37 (*a*) of the Supreme Court Act, I am nevertheless of the opinion that the respondent's motion to disallow the security filed by the appellant must succeed. If the proceeding before us is in the nature of a "judicial proceeding" within the purview of that section, "the matter in controversy" does not

> involve the question of, or relate to, any fee of office, duty, rent, revenue, sum of money payable to His Majesty, or any title to lands or documents, annual rents or other matters or things where rights in future might be bound.

There is nothing in the record to shew that the compensation which the respondent claims he should receive for the expropriation of his interests in the lands taken by the appellants "amounts to the sum or value of $2,000." Nor has any attempt been made under sec. 49*a* of the statute (3 & 4 Geo. V., ch. 51, sec. 5) to establish by affidavit that "the matter in controversy" amounts to that sum or value.

The motion should be granted with costs.

Brodeur, J.

Brodeur, J., concurred with Davies, Duff and Anglin, JJ.

Appeal quashed with costs.

WRIGHT v. THE KING.

CAN.

Ex. C.

Exchequer Court of Canada, Audette, J.

1. Brokers (§ II B—10)—Real estate brokers—Compensation — Customary commissions.

   In ordinary business transactions where the parties have not settled the salary (remuneration) of the mandatory, the salary, under Quebec law depends upon the usage of the place where the transaction took place or upon the equitable determination of the judge.

2. Evidence (§ VI A—515)—Oral evidence — Admissibility — Quebec practice.

   An admission by the Crown, in its plea to a petition of right, claiming commission on an option obtained for the Crown; that the option was obtained by the suppliant, and that while some remuneration should be paid it had not been fixed, and that the claim was excessive, is a "commencement of proof in writing" which will, under Quebec law, let in oral evidence under article 1233 C.C.P.

Statement

Petition of right for the recovery of money alleged to be due as a commission on the purchase of property.

The facts are stated in the reasons for judgment.

CAN.

EX. C.

WRIGHT v. THE KING.

Audette, J.

W. D. Hogg, K.C., for the suppliant.

F. J. Curran, for the respondent.

AUDETTE, J.:—The suppliant brought his petition of right to recover the sum of $6,000 as representing his remuneration, in the nature of a commission of 1½ per cent. on the purchase of a piece of land made by him at the request of and for the Crown.

In the autumn of 1907, the suppliant was telephoned to and asked to come to the Custom House, at Montreal, where he met the Collector of Customs, Mr. White, who asked him to procure for the Crown, if possible, an option for the property in question which was required for Customs purposes. The suppliant then took the necessary steps and began negotiating for the option, which after some delay occasioned by the owners, he succeeded in securing. . . .

Then the suppliant and the Commissioner of Customs met at the Custom House and the latter authorized Mr. Wright to purchase, and asked him about his commission, and the suppliant replied that 2½ per cent. was the customary commission, adding that he was not a regular broker, and that he would leave that part with the Commissioner to deal with as it deserved. . . . The suppliant pursuing his negotiations with the owners, at the request of the Commissioner of Customs, had the option altered and made for $402,000, instead of a cash transaction at $400,000. . . .

As a result of these transactions the suppliant, after a period of over 6 years, is seeking by his petition of right to recover the sum of $6,000 as a remuneration for such services. It has been established both by the suppliant's and the respondent's evidence, that the customary remuneration payable to a real estate broker under the present circumstances, would be 2½ per cent. and the suppliant is now claiming 1½ per cent.

The business was well handled and Mr. White said he sought the services of the suppliant because he knew him as having had a large experience in real estate and that it was a better policy to deal through him, than through a real estate agent; because he feared if it became known, the property would go up. In that view the collector is corroborated by witness G. Hyde, a

large real estate dealer of Montreal, who said the suppliant did better than a real estate broker. . . .

The suppliant has taken the necessary steps and gone to the necessary trouble incidental to negotiations for such a transaction at the request of the proper officer of the Crown, duly vested with the proper authority, and who does not deny it, has accordingly a right to a reasonable compensation for such steps and trouble.

There may not have been in this case an express covenant to pay a fixed commission, but from the interview between Mr. McDougall and the suppliant it must be found there was a clear understanding in the mind of both parties that a commission would be paid. . . . The only question which really remains open is the question of *quantum;* but Mr. McDougall has admitted in his evidence that the amount claimed was right and fair. . . .

In ordinary business transactions where the parties have not settled the salary of the mandatory, the salary depends upon the usage of the place where the transaction took place or upon the equitable determination of the Judge.

On this question of *quantum* the evidence clearly establishes that 2½ per cent. is usually paid under such circumstances. The suppliant claims 1½, and the Commissioner of Customs, who is vested with all authority in respect to this purchase, looks upon that claim as fair and reasonable, and the Court agrees with this view. There are some other unimportant questions raised, which in the view the Court takes of the matter it becomes unnecessary to discuss.

There will be judgment declaring that the suppliant is entitled to recover the sum of $6,000 and costs.

Judgment accordingly.

ONT.

S. C.

REX v. TITCHMARSH.

Supreme Court of Ontario, Appellate Division, Mulock, C.J.Ex., Maclaren, Clute, Riddell, and Sutherland, JJ.A.

1. COURTS (§ II A 6—177)—CRIMINAL JURISDICTION — ONTARIO CROWN RULES.

The criminal rules (Ont. Crown rules 1279-1288) as to certiorari passed in 1908 by the Supreme Court of Judicature for Ontario under the authority of Cr. Code, sec. 576, remain in effect as to the "Supreme Court of Ontario" since the reorganization of the former Court so far as they are applicable, although there is no longer a "Divisional Court" to which by Crown rule 1287 an appeal is given by leave.

2. CERTIORARI (§ I A—3)—PROCEDURE—NOTICE OF MOTION SUBSTITUTED FOR WRIT AND ORDER NISI.

It is competent for a Court authorized under Cr. Code sec. 576 to make rules of procedure *inter alia* as to certiorari, to substitute a practice by notice of motion for the former process by writ and order *nisi*.

Statement

MOTION by the defendant, *ex parte*, for a writ of certiorari to remove a criminal conviction into the Supreme Court of Ontario with a view to having it quashed; and appeal from the refusal of the motion.

J. B. Mackenzie, for the applicant.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—Mr. Mackenzie's unflagging industry, in his searches for such purposes, has discovered two matters which, he contends, shew that there has been a serious flaw in the practice prevailing in this Province upon applications to quash convictions for crimes; and, as a consequence of his discoveries, he asks for a reversion to the older practice which prevailed for so many years before, and until, the adoption of the present practice, in the year 1908, under Rules of Court framed, in the first instance, by Mabee, J.

His points are: that no Court, such as that authorised, in sec. 576 of the Criminal Code, R.S.C. 1906, ch. 146, to make Rules respecting the practice in criminal matters, in this Province, now exists; and, therefore, that the Rules made, at the time I have mentioned, have ceased to have any effect; and that sec. 63 of the Judicature Act, R.S.O. 1914, ch. 56, is not applicable to this case, because it deals with convictions made by a "magistrate" only, whilst the conviction in question was made by "Justices of the Peace;" and this point is persisted in, notwithstanding the meaning given to the word "magistrate" in

ONT.
S. C.
REX
v.
TITCH-
MARSH.
Meredith,
C.J.C.P.

the Interpretation Act, R.S.O. 1914, ch. 1, sec. 29 (*m*) and (*r*), and in the Interpretation Act, R.S.C. 1906, ch. 1, sec. 34 (15), because there is an interpretation of the word "Justice" contained in the Criminal Code, under which the conviction in question was made, and that interpretation, whilst it includes a "Police Magistrate," does not include "magistrates" generally: sec. 2 (18).

These contentions seemed, and still seem, to me, to have no weight; but another point forced itself upon me during the argument, a point which seemed to me to be of sufficient weight to require further consideration before disposing of the application.

Regarding the points made by Mr. Mackenzie, it may not be at all necessary, for any general purpose, to repeat that which was said respecting them during the argument; but, so that the applicant may be under no misapprehension, I shall do so.

If the Rules of 1908 were well made, why should they fall, even if there were no Court now competent to make any such Rules? There seem to be but two provisions contained in them that might be affected by such a state of affairs, if it really existed: the first is the Rule numbered 1284, which provides that the motion to quash shall be made to a Judge of the High Court of Justice for Ontario, sitting in Chambers; and the other—Rule numbered 1287—is that which gives a right of appeal, by leave, to a "Divisional Court"—a Court which does not now exist; nor does current legislation: 3 & 4 Geo. V. ch. 50 (D.); touch the point.

There is no reason why the Rules, as far as they are applicable, should not be applied by any Court, in the Province, having power to quash convictions. Why should they cease to have force and effect any more than the Act itself should?

But it is quite erroneous to say that no such body, or that no such Court, now exists: the same body and the same Court exist, with the exception of the "Divisional Court," and they have existed all along, entitled to exercise and exercising the same powers, and performing the same duties: the name has been, in some respects, changed, and the manner of performing

ONT.

S. C.

REX v. TITCHMARSH.

Meredith, C.J.C.P.

such duties, and exercising such powers, has been in some respects varied; but nothing more.

If, however, Mr. Mackenzie were quite right in his contentions, that quite a new Court had come into being, and that there are no Rules, or practice, applicable to it, why should not such Court adopt as its practice the procedure embodied in the Mabee Rules? Until some binding legislation, or Rules, should be enacted, the Court, having jurisdiction to quash, could, and would, necessarily, be obliged to, lay down some mode of procedure. See *Robinson* v. *Bland* (1760), 1 W. Bl. 234, 256, 264.

Upon the other point, there was no need of any deep study of the meaning of the word "magistrate;" nor of the exercise of any ingenuity in a vain endeavour to overcome the plain words of the interpretation enactments; because, obviously, the provisions of the Judicature Act cannot apply to this case. Being a provincial enactment, it can have no effect on procedure in criminal matters; which a motion to quash a conviction of a crime must be; because such procedure comes within the exclusive legislative power of the Parliament of Canada, and is excluded from the legislative power of Provincial Legislatures: the British North America Act, 1867, sec. 91, clause 27; and sec. 92, clause 14.

So that Mr. Mackenzie's points seem to me to be, obviously, quite ineffectual.

But I still have some trouble with the question whether there was any power to make the Rules of 1908.

They were made, in so far as they were to be applicable to criminal matters, under the section of the Criminal Code, now numbered 576, which conferred all such power as was intended to be exercised in making the Rules, in these words: "Every superior court of criminal jurisdiction may . . . make rules of court; . . .—(*b*) for regulating in criminal matters the pleading, practice and procedure in the court, including the subjects of mandamus, certiorari, habeas corpus, prohibition, quo warranto, bail and costs . . . and (*c*) generally for regulating the duties of the officers of the court and every other matter deemed expedient for better attaining the ends of justice and carrying the provisions of the law into effect. . . ."

ONT
S. C.
REX
v.
TITCH-
MARSH.
Meredith,
C.J.C.P.

The general words of the section are, I think, restricted by these words, covering the very subject in question; and, having regard especially to the words, "including the subjects of mandamus, certiorari, habeas corpus, prohibition, quo warranto," I find it difficult to get out of my mind the doubt whether there was power to do more than regulate the existing practice in certiorari proceedings—the doubt whether there was power to abolish the certiorari proceedings altogether, and substitute entirely different proceedings.

Abolition, as well as prohibition, is quite incompatible with regulation: you cannot regulate that which you have destroyed, or even prohibited. This is obvious; the one question is: Do these Rules abolish "*the* . . . procedure in the court"—of "certiorari"?

What certiorari is, is not in any sense uncertain. Every one at all familiar with the practice of the Courts of Law knows that certiorari is, in such Courts, a writ; a writ issued out of a Court of law, having power to grant it, in the name of the Sovereign and tested by the Chief Justice, by virtue of that Court's superintending authority over all Courts of inferior criminal jurisdiction in the Province, for the purpose of a supervision of any of their proceedings which may be investigated in such Superior Court. Except in cases where legislation has provided for an appeal, the writ of certiorari is the only mode by which a revision of proceedings on summary convictions can be had in a higher Court. And "*the* procedure" in certiorari is the procedure begun by, and dependent upon, the writ of certiorari.

To abolish the writ of certiorari is to abolish "certiorari;" and, having regard to the well-known, the unmistakable, meaning of the word, under a practice that has continued for hundreds of years, there can be no manner of doubt that Parliament, in making use of the word "certiorari," intended it to carry that plain meaning: that is made doubly certain by the use of the other technical words associated with it, "habeas corpus," "mandamus," "quo warranto." But the Mabee Rules do not merely abolish the writ, they abolish the whole practice, lock, stock, and barrel, and create another of an en-

ONT.
S. C.
REX
v.
TITCH-
MARSH.
Meredith,
C.J.C.P.

tirely different character and name. Certiorari is gone, in all cases such as this.*

No reasonable person, having a knowledge of the subject, would contend that power given to regulate the practice on the subject of writs of habeas corpus in criminal cases, conferred power to abolish the writ and practice altogether; and yet, if there were power to do away with the writ of certiorari, there was, equally, power to abolish the writ of habeas corpus and the other writs named in the legislation and the whole of the long-existing procedure under them; quite too great a power to be acted upon if there were, at the most, even only a doubt as to the power; quite too much power to assume on doubtful language. Though I am strongly in favour of abolishing all writs, and all other unnecessary proceedings, and have long advocated it, that cannot rightly be done, in such a case as this, without clear legislative authority. I can call to memory no case in which that has been done other than by legislation or by Rules confirmed by legislation.

Parliament has not said, unrestrictedly, that the Provincial Court may create a new practice in all criminal matters, nor that it may change the practice altogether; its language is quite restrictive in dealing with this particular subject; the Court may only regulate the practice in "certiorari"; that is, the familiar long-continued practice under the writ of certiorari; it may not, expressly, even regulate the practice on motions to quash convictions, but only in certiorari. Regulate "the practice"—not the subject—of certiorari; that is, the existing practice.

But the applicant has not relied upon this ground, and may not desire to do so, and as, ever since the making of the Rules, the Courts have acted upon them, the better way to deal with this motion is to dismiss it, and give leave, under these Rules, to the applicant, to appeal; an appeal which, if taken, may also answer the purpose of determining whether there is any Court, now existing, to which an appeal can be made; another question of grave importance.

*Rule 1279: In all cases in which it is desired to move to quash a conviction, order, warrant or inquisition, the proceeding shall be by a notice of motion in the first instance instead of by certiorari, or by rule or order *nisi*.

ONT.

S. C.

REX v. TITCHMARSH.

Meredith, C.J.C.P.

I have delayed disposing of this application so as to learn whether the question I have last dealt with was discussed at the time of the making of the Rules; and am now informed that it was, and that the view, then entertained, was, that the Rules are *intra vires;* but, of course, that does not bind any one; the appellant is entitled, if he desires to do so, to have the point judicially determined.

The application is refused; and leave to appeal is given.

The defendant appealed, by leave, from the decision of MEREDITH, C.J.C.P.

December 15. The appeal was heard by MULOCK, C.J.EX., MACLAREN, J.A., CLUTE, RIDDELL, and SUTHERLAND, JJ.

J. B. Mackenzie, for the appellant.

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

Riddell, J.

The judgment of the Court was delivered by RIDDELL, J.:—The defendant was convicted of cruelty to animals, under sec. 542 of the Code. Instead of proceeding in the manner prescribed by the Rules of 1908, the defendant chose to apply for a writ of certiorari. This was refused by the learned Chief Justice of the Common Pleas; and the defendant now appeals.

A reasonable case is made out on the merits for the matter being brought into the Supreme Court, and this the Crown admits. Accordingly, if the practice still exists and the Rules of 1908 are invalid, the writ should go.

The learned Chief Justice must have decided that the practice prescribed by the Rules of 1908 is to be followed. Notwithstanding that he has expressed great difficulty in coming to the conclusion he does come to, his decision is not doubtful.

It seems to me, with much respect, that the doubt arises from confusing "certiorari" and the "writ of certiorari."

The word "certiorari" is simply the present infinitive passive of *certioro* (=*certiorem facio* and from *certus, certior*), used only in juridical Latin, meaning "I inform, apprise, shew;" and it is taken from the original form of the writ.

The theory is that the Sovereign has been appealed to by some one of his subjects who complains of an injustice done him in an inferior Court; whereupon the Sovereign, saying that he wishes to be informed—*certiorari*—of the matter, orders that the

ONT.
S. C.
REX
v.
TITCH-
MARSH.
Riddell, J.

record, etc., be transmitted into a Court where he is sitting. This order is put in the form of a writ, which is the only and the conclusive evidence of such order. The form of the writ (when proceedings were in Latin) can be seen in any old edition of Fitz-Herbert's Natura Brevium—my own edition is that of 1730, and the writs are set out on pp. 548 *sqq.* The Library edition is of 1794, and the writs are there given in translation and not in Latin: pp. 242 *sqq.* The verb "certified" is the translation of "certiorari."

The whole proceeding of removal into a Court where the King may be "certified" is the certiorari; the means by which his order is made known is the writ. So long as by some means the record etc. are got before the King, the means is unimportant, the effect the same. If the King were to (effectively) change his method of procedure and cause the record etc. to come into his Court by some other process than by signifying his pleasure by a writ, surely that could not be called an abolition of certiorari, although the writ might be abolished.

It is most true that innumerable instances may be adduced in which the word "certiorari" is used judicially and in text-books and legal dictionaries as synonymous with "writ of certiorari;" but that is in the same way as we constantly speak of "injunction," meaning now "an order of injunction," but formerly "a writ of injunction"—"prohibition," meaning "an order of prohibition," but till the other day "a writ of prohibition." It could not, I venture to think, be said that injunction, prohibition, etc., were abolished or interfered with when the writ went by the board; nor can it be said that civil certiorari is abolished since our Rule (now Rule 623) abolished the writ.

In the same way I quite fail to understand how the abolition of the writ of certiorari in criminal matters has any greater effect. The remedy exists; the manner of obtaining it is different—that is all.

The King now says, "I desire to be certified of the matters, etc., and I am to be so informed by the record, etc., being produced in obedience to a notice by the complainant," instead of a formal writ under seal.

I think that the judgment is right and that the appeal should be dismissed. *Appeal dismissed.*

UNDERHILL v. C.N.R.

MAN.

C. A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Cameron, and Haggart, JJ.A. March 19, 1915.

1. RAILWAY COMMISSION (§ I—5)—VALIDITY OF ORDERS—PUBLICATION.

Publication in the *Canada Gazette* is not a condition precedent to the operation of an order of the Railway Commission of Canada even as regards general orders affecting the public; sec. 31 of the Railway Act, Can., requires that judicial notice shall be taken of an order published by the Railway Commission or by leave of the Commission, but in other cases the order may be proved by a certified copy under sec. 69 of the Railway Act.

[*R. v. C.N.R. Co.*, 18 Can. Cr. Cas. 170, followed.]

Statement

APPEAL from a judgment of Mickle, Co.,C.J.

H. V. Hudson, for appellant.

C. W. Jackson, for respondent.

Howell, C.J.M., and Richards, J.A.

HOWELL, C.J.M., and RICHARDS, J.A., concurred with CAMERON, J.A.

Cameron, J.A.

CAMERON, J.A.:—This action was tried before His Honour Judge Mickle, at Rapid City, who entered a verdict for the defendant company. I quote from his judgment as follows:—

"This is an action brought to recover damages for injuries done to plaintiff's automobile in crossing defendant's railway on the highway between sections 7 and 8 in township 14 and range 20, on December 3, 1913, from negligence of defendant in removing planks between the rails on the crossing. Defendant claims protection under an order of the Board of Railway Commissioners permitting the removal of planks, etc.

"At the trial the parties agreed on a statement of facts: that the plaintiff had suffered damage in the manner claimed to the extent of $50; that the planks were removed in accordance with the Order of the Board of Railway Commissioners."

Section 31 of the Railway Act provides:—

Any order of the Board shall, when published by the Board, or by leave of the Board, for three weeks in the *Canada Gazette*, and while the same remains in force, have the like effect as if enacted in this Act, and all Courts shall take judicial notice thereof.

"No evidence is produced of publication of the Order."

The question before us, therefore, is as to the construction to be placed upon section 31. Is the effect of that section to render orders of the Board inoperative unless and until pub-

MAN.
C. A.
UNDERHILL
v.
C.N.R.
Cameron, J.A.

lished in the *Gazette*? It has certainly never been taken as intended that all orders of the Board should be published. Great numbers of them deal with matters of a strictly local and private nature between railway companies and individuals or firms or private corporations, or between railway companies and railway companies, or with reference to the internal conduct and management of the railway companies. There could manifestly be no object in the publication of such orders, and it has never been thought necessary to publish them either to give publicity to them or to give them any other effect than that which they have as orders of the Board. On the argument for the plaintiff it was sought to restrict the operation of section 31, as an imperative provision, to such orders as affect the public who are not parties to the application on which such order is made. But no such distinction is made in the section.

By sec. 10, sub-sec. 2, the Board of Railway Commissioners for Canada is constituted a Court of record. Orders of the Board are to be signed by the Chief Commissioner, sealed with the official seal and filed with the Secretary of the Board: (sec. 23, sub-sec. (e)). The jurisdiction and general powers of the Board are set forth in sections 26 and 26A, and other sections of the Act. The jurisdiction of the Board in this particular case is not questioned. The only question is as to the effect of the non-publication of the order above quoted.

I would read the sections above referred to as giving the orders of the Board the force and effect of the orders of a Court of record and if, in certain cases, the Board deem the publication of orders in the *Gazette* expedient, then they are to have statutory effect and judicial notice must be taken of them by the Courts. It would not then be necessary to prove the original orders by production of the originals under section 68, or of copies certified by the secretary under section 69.

This view is in accord with the judgment of the Supreme Court of Saskatchewan in *R.* v. *Canadian Northern Ry. Co.*, 18 Can. Cr. Cas. 170. At p. 172, Chief Justice Wetmore says:—

> Now, does sec. 31 contemplate that every order or decision under sec. 26 or 27 shall be published in the *Gazette* before it takes effect? I cannot bring my mind to the conclusion that that was what Parliament in-

tended; and I am, therefore, of opinion that it was not necessary that the order in question should have been published in the Gazette in order to give it effect.

And at p. 178, Mr. Justice Newlands says:—

Does this section require the order or regulation to be published as provided, before the order or regulation can take effect? It does not say so. Section 30 gives the Board power to make this regulation, and it has, therefore, power to put it into effect unless the Act requires that something else must be done before it becomes effective.

Section 31 does not make any such provision. All that section does is to provide a way by which this regulation shall have the effect of an Act of Parliament, and after its publication requires all Courts to take judicial notice of it. Until that is done the regulation would have to be properly proved before a justice could act upon it.

These views seem to me incontrovertible.

In *Buskey* v. *C.P.R.*, 11 O.L.R. 1, Mr. Justice Teetzel held that an order made by the Board became effective on the day it was made, and for the whole of that day: a view plainly inconsistent with the contention that it becomes effective on, and not until, publication.

Sections 41 and 42, in providing for the service of orders of the Board, contemplate action by the corporations and others affected by such orders immediately upon service thereof without reference to publication, the time for which is not definitely fixed by section 31. There is nothing I can see that prevents the publication, when decided upon, from being postponed indefinitely.

I think the learned County Court Judge was right in his conclusion, and I would dismiss the appeal.

Haggart, J.A.

HAGGART, J.A.:—I would affirm the judgment of the trial Judge. I have perused the reasons of Mr. Justice Cameron and agree with them. Section 31, ch. 37, R.S.C. which provides for publication in the *Canada Gazette* is not even mandatory. It is optional with the Board of Railway Commissioners to publish the order. The words are that the order "shall when published by the Board or by leave of the Board . . . have the like effect as if enacted in this Act and all Courts shall take judicial notice thereof." Sections 26, 28 and 30 are wide enough

MAN.

C. A.

UNDERHILL v. C.N.R.

Haggart, J.A.

to authorize the making of the order in question, and it is a valid order notwithstanding its non-publication in the *Gazette*. Non-compliance with the order would subject the defendants to the penalties of the Act.

I do not think the fact that there was no snow on the ground helps the plaintiff. There may have been no snow on the ground on December 3, and there might be snow drifts on the morning of the following day. It was the season when snow might fall at any time. There may have been snow on the ground before that date. A reasonable meaning must be given to the terms of the order.

The appeal should be dismissed.

Appeal dismissed.

STUART v. TAYLOR.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Hodgins, J.A., and Clute and Riddell, JJ.

1. WILLS (§ 3 F—115)—DEVISE OF LAND—CONSTRUCTION OF HABENDUM—LIFE ESTATE.

A devise of land to the sons of a testator for life and upon their marriage to their surviving wives and children, with a recital in the habendum "to have and to hold to them as aforesaid mentioned" creates a life estate for the sons only, and intestacy as to the remainder.

2. ADVERSE POSSESSION (§ I G—31)—LIFE TENANTS—HEIRS OF REVERSIONER—LIMITATION OF ACTION.

The continued occupation of land by the successors in title, in which their predecessors had a life estate as tenants in common, for a period more than 35 years between the death of the life tenant and the commencement of action for its recovery by the heirs of the reversioner, is within the purview of sec. 7(3) of the Limitation Act, R.S.O. 1914 ch. 75, barring recovery where lands are held adversely for a period of 10 years.

3. ESTOPPEL (§ J 2—125)—ESTOPPEL IN PAIS—LANDS HELD IN COMMON—PARTITION.

A tract of land devised by a testator to his sons to be held as tenants in common for their natural life, which had been fenced off and partitioned by them into their respective severalities, does not create an estoppel against trespassers holding such land adversely against the heirs of the reversioner.

Statement

THREE appeals from the judgment of MIDDLETON, J.: by the plaintiff; by the defendant Emily V. Sharon; and by the defendants Strong, Chevalier, and the Dubys.

F. D. Davis, for the appellants the Dubys and Chevalier.

M. Sheppard, for the appellant Strong.

J. H. Rodd, for the plaintiff, appellant.

A. B. Drake, for the appellant Sharon.

A. R. Bartlet, for the defendants Taylor.

RIDDELL, J.:—. . . The main ground of the appeals is as to the effect of the devise of the land in question. The will is printed in 12 O.L.R. at pp. 606, 607, 608, the clause in controversy being as follows: "I give, devise, and bequeath to my son Narcisse Charron the east half of lot number 5 on Lake St. Clair, township of Rochester, containing 50 acres more or less, and to my son Pierre Charron the west half of lot number 5 aforesaid, containing also 50 acres, and to my son Joseph Charron the west half of lot number 8 also on Lake St. Clair in said township of Rochester, and to my son Olivier the east half of the said lot number 8 in said township, containing also 50 acres. To have and to hold to each of them for and during their natural life respectively, and if they should marry, after their and such of their decease to have and to hold to their surviving wife respectively, and on the demise of their or each of their wives to have and to hold to their children respectively and their heirs forever, and I give, devise, and bequeath to my three sons, Gilbert, Olivier, and Joseph, the south part of lot lettered 'A' also on Lake St. Clair in said township of Rochester, containing 50 arpents, to have and to hold to them as is aforesaid mentioned, provided that they pay out of their share of money or otherwise to my executors hereinafter named the sum of $500, to be disposed of by my said executors in paying my debts and other bequests, and I give, devise, and bequeath to my son Gilbert Charron the north part of the aforesaid lot lettered 'A,' containing also fifty acres, in said township of Rochester, to have and to hold to him, etc., as aforesaid and not otherwise."

The land in question is, in the devise to the three sons, "the south part of lot lettered 'A' . . . containing 50 arpents, to have and to hold to them as is aforesaid mentioned, provided . . ." The learned trial Judge seems to have interpreted the words "as is aforesaid mentioned" as importing into this devise a devise to the wives and children of the three named sons, and held that the limitation could not stand in law. I do not agree as to the effect of the words "as is aforesaid mentioned;" it is

ONT.
S. C.
STUART
v.
TAYLOR.
Riddell, J.

"to hold *to them* as is aforesaid mentioned," not to hold to their surviving wives respectively, or to have and to hold to their children. These limitations are all mentioned in the preceding devise; but in this they are not. What is "aforesaid mentioned" as to having and holding "*to them*" is, "to have and to hold to each of them for and during their natural life respectively;" and the whole clause now under consideration, and every word of it, can be given full effect by holding that these are the limitations meant. After the life estates there is an intestacy, as the will makes no provision beyond these life estates. The interpretation contended for would compel us to leave out "to them" or to import other words, either of which courses is wholly inadmissible.

We were pressed with the judgment of the Chief Justice of the King's Bench in *Re Sharon and Stuart*, 12 O.L.R. 605. That decision was on the last devise, and the limitation was "to have and to hold to him, etc., as aforesaid and not otherwise." . . . But in our devise there is no "etc."—this devise has no limitation carried beyond its express words by an "etc."—it must have less limitations than the third, and the only reasonable interpretation is to abide by the express words. This interpretation is strengthened by the proviso imposing upon the named devisees the burden of paying the sum of $500 "out of their share of money." We in no way attack the credit of the decision of the learned Chief Justice, but the contrary, so far as it affects this case, when we say that the present devise goes no further than its express words carry it. There is consequently no necessity for a new trial on the ground that all parties relied upon that decision.

The declaration in the judgment appealed from, that there is an intestacy after the life estates of the wives, should be varied by declaring an intestacy after the life estates of the sons.

The plaintiff appeals, asking for an order that the lands in question should be divided among the heirs of Gilbert, Olivier, and Joseph, and not the heirs of Pierre, or for a new trial to bring in evidence of a family arrangement by the heirs of Pierre.

Emily V. Sharon makes the same appeal on much the same grounds.

Strong, Chevalier, and the Dubys appeal, and ask that the action be dismissed as against them.

We must now set out the facts so far as they seem to be material. Some of these we have by admission of counsel, and some from the evidence.

Pierre Charron (or Sharon) died shortly after making his said will, leaving seven heirs at law: Nelson (or Narcisse), Olivier(or Oliver), Gilbert, Joseph, Amelia, Peter, and Emery (or Henry). The date of the death must have been about 1860.

The three sons, Gilbert, Olivier, and Joseph, took possession of parcel "A," and a few years after the father's death, say eight or ten, they divided it into three substantially equal portions, fenced the lots and occupied the land, each occupying one portion. Each of the three (or his successor in title) continued to occupy his piece; and the parcels were fenced off as occupied.

Duby and his predecessors in title have been in possession of his strip for about 50 years, and it is not disputed that the occupation was such as would give a title by the statute. Olivier died between 35 and 40 years ago, leaving a widow who is now believed to be dead. She married one Israel Markham, and, with her son, Frederick Henry Charron, and her husband, in 1884 conveyed the south part of parcel "A" to Firman Lappan. Other heirs at law of Olivier conveyed their interests to Lappan in 1886 and 1887. Lappan conveyed to Dieudonné Lagacé in 1889, and Lagacé to the defendant Strong in 1898, the possession in each case following the title ostensibly conveyed by the deed; so that Strong has now any title Olivier and his wife and heirs at law could convey in "the easterly third of the 50 arpents of said lot 'A,'" as the deed put it.

Gilbert Charron died in 1911, his wife having predeceased him some 5 years. The plaintiff Stuart has a deed from the grantee of his representatives of the east 16 arpents of the south part of parcel "A;" and he is in possession of this lot. (The deeds are not quite alike, but that is for the Master to investigate as critically as is found necessary.)

Joseph died on the 4th September, 1912 (his wife having

ONT.
S.C.
STUART
v.
TAYLOR.
Riddell, J.

died in 1905); he left only one child, a daughter, the defendant Emily V. Sharon. In 1866 he had (with his wife) conveyed all his right in lot "A" to G.C.G.; and G.C.G., in the same year, conveyed to Rose Taylor, through whom the defendants Taylor claim.

The position of the defendant Chevalier is rather different. He has a deed, but it is not of this property or any part of it, and it does not assist in any way to determine rights here in question. His predecessor in title and himself have been in possession of the part claimed by him and adjoining Gilbert's lot from before the time of the amicable division by the three sons of Pierre Charron.

As to the main ground of one appeal, the result will depend wholly on the language of the testator.

With these facts, we proceed to the other appeals; we should, of course, look to the formal judgment to see what we have to dispose of; it is not the reasons of the judgment, but the judgment itself, with which we have any immediate concern.

Clause 1 deals with the declaration of title already spoken of; clauses 2, 3, and 4 direct a partition following on the declaration, and are unobjectionable; clause 5 is as to costs, and stands in the same category, with one exception to be mentioned later; clause 6 declares that the defendants Duby have not acquired title to any part of the lands, and the Duby appeal must now be dealt with.

The trial Judge proceeded on the ground that the Statute of Limitations did not begin to run against the heirs of Pierre Charron till the death of the last surviving life-tenant Joseph, in 1912. It is claimed for Duby that he, who or whose predecessor had undoubtedly for many years before the death of the life-tenants had possession of the strip of land, can thereby hold it as against the heirs of Pierre Charron.

It is plain that, if he has any interest in the strip occupied by him, his appeal must succeed. To succeed so far as to obtain a dismissal of the action for partition, he must prove exclusive ownership.

The strip of land in his possession is said to be a part of Gilbert's third. If so, before the death of Olivier the life estate

of Gilbert in this strip had become barred by the statute; and as, during the period, Gilbert had been the owner of three remainders, viz., 1/7th of 1/3rd=1/21st, on the death of each of his two brothers and on his own, these also would be barred.

The learned Judge here referred to section 7(3) of the Limitations Act, R.S.O. 1914, ch. 75; *Sladden* v. *Smith* (1858), 7 U.C.C.P. 74; *Doe dem. Hall* v. *Moulsdale* (1847), 16 M. & W. 689; *Clarke* v. *Clarke* (1868), 2 Ir. Rep. C.L. 395.

We should therefore hold that *Sladden* v. *Smith* is not well decided, and that sec. 7 (3) applies to the present case.

Unless more appears, the death of Olivier saw Duby entitled to the life estate of Gilbert in possession, the $\frac{1}{21}$ of the fee, to which, on Olivier's death, he (Gilbert) became entitled in possession, and remainders amounting to $\frac{5}{21}$ of the fee, in this strip. Of course any division by the three sons of Pierre could not be assumed to last beyond their joint lives, since, on the death of any one, other persons became interested in possession as tenants in common of an undivided third interest in all the land, and no arrangement by these sons, *inter se*, could bind them.

Then Duby became a tenant in common of the fee; he held possession of the whole land without accounting to any one.

Reference to sec. 12 of the Act. The result would be that, on the death of Gilbert in 1911, since the outside limit of time given under secs. 40 and 41 of the Act had elapsed, Duby would have acquired the fee in one-third of the lot, directly under sec. 5 and indirectly under sec. 7 (3). The death of Gilbert would not give a new term for the statute to begin.

Hill v. *Ashbridge* (1892), 20 A.R. 44.

If the strip be considered not a part of Gilbert's third, the same result will follow *à fortiori*. The three sons of Pierre were tenants in common each for life or *pur autre vie* as might turn out. The trespasser acquired whatever estate they had in possession, and, by virtue of sec. 7 (3), also their remainders in fee. Then, as all the other heirs at law of Pierre became entitled on the death of Olivier to a share in fee, the trespasser, as tenant in common remaining in possession of the whole, became en-

ONT.
S. C.
STUART
v.
TAYLOR.
Riddell, J.

titled to their shares, both immediate through sec. 5, and through sec. 7 (3) in remainder.

On this evidence and on this record, Duby should have a judgment dismissing this action as against him; and that is all he asks now. The judgment should be varied accordingly, and Duby have his costs here and below.

This, however, should not be considered final in all respects. Some of the facts we have from statements of counsel, and some are not wholly clear except with the admissions of counsel. So, while all parties interested will probably be willing to leave Duby's strip out of the partition proceedings, any one not a party to this record should, if he alleges the facts as being different from what appears above, be allowed by the Master, at his own peril as to costs, to bring him into the partition proceedings.

Chevalier is in the same position as to title. I think the same order should be made in his case as in Duby's.

These two argue that the partition made by the three sons of Pierre Charron should be declared binding on all parties. The argument that such act created an estoppel as against these trespassers savours of absurdity. The essence of an estoppel *in pais* is an act or word done or said with the intent that it should be acted upon by him claiming the benefit of an estoppel, and it will scarcely be contended that these three brothers divided up their lands so that some one should trespass on them.

I do not think it matters to these defendants whether the representatives of these three were bound by their partition; but, in any event, as has been said, it could not last beyond the life-tenancies.

Strong stands in quite a different position. He has all that Gilbert and his children could give him. He is rightly a party to the partition; and whether there can be anything in the way of an estoppel will be threshed out in the Master's office, when all the facts are known. The case cannot be dismissed as against him, the only declaration made being as to the effect of the will at the time of the death of Pierre. Evidence can be taken by the Master on anything shewing or tending to shew any trans-

action (*dehors* the will), estoppel, descent, conveyance and everything material to determine the present title to the land.

Taylor is the assignee of Joseph Sharon, and is in the same position, and his appeal should be dismissed also. He, too, will have a chance to shew in the Master's office any right, claim, or title he may have.

Emily A. Sharon can have nothing to complain of so far as the judgment is concerned. She claims a share in the estate under the will; the claim that she is a devisee in remainder under the will cannot be given effect to, but she is an heir of Pierre Charron, and will be heard in the Master's office. Her appeal should be dismissed.

For the plaintiff's appeal the reasons are adduced, viz., that all parties relied upon the interpretation of the will in 12 O.L.R., and they now desire to give evidence that all the heirs of Gilbert (*sic*), i.e., Pierre Charron, deceased, consented to a division of the estate. This is quite unnecessary. It has already been pointed out that evidence of everything *dehors* the will can be effectively taken, and should be taken, in the Master's office in the partition proceedings. No evidence as to family settlement, etc., can affect the meaning of the will itself.

While Duby and Chevalier should have their costs here and below paid by the plaintiff, who brought them in, there should otherwise be no costs.

The last clause in the judgment directing the Master to determine what improvements have been made on the property by the plaintiff and defendants, and the value thereof, is, of course, conditional on any such having made improvements under mistake of title, and the inquiry will not be as to the value of the improvements but as to "the amount by which the value of the land is enhanced by the improvements," quite a different thing: the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 37.

In settling judgments, etc., "officers of the Court should endeavour to use the language of the statute, and not employ terminology which may seem to them to be equivalent:" *Re Coulter* (1907), 10 O.W.R. 342, 344.

MULOCK, C.J.Ex., and HODGINS, J.A., concurred.

Mulock, C.J.Ex. Hodgins, J.A.

ONT.
S. C.
STUART
v.
TAYLOR.
Clute, J.

CLUTE, J., was of opinion that the defendants Elizabeth Duby and Louis Duby and Albert Chevalier, had by their possession, as to their respective parcels of land, acquired title thereto, as against the three brothers, Oliver, Joseph and Gilbert, and those claiming under them, and in the partition were entitled to three-sevenths of the same respectively, and the judgment below should be varied accordingly; and with this variation, that all three appeals should be dismissed; the costs of all parties including the costs here and below of the defendants, the Dubys and Chevalier, to be paid out of the estate.

Order as stated by RIDDELL, J.

MAN.
C. A.

NISBET v. TAPPE.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Cameron, and Haggart, JJ.A. May 7, 1915.

1. PARTNERSHIP (§ III—10)—FORMATION INTO COMPANY—RIGHTS OF CREDITORS.

A partnership is not relieved from any liability for the price of goods purchased in the firm name because of its formation into an incorporated company, if it appears that recourse for the price of goods was in point of fact sought from the partners and that sec. 20, of the Joint Stock Companies Act (Man.) respecting the payment of stock had not been complied with.

Statement

APPEAL from a judgment of the trial Judge.

G. A. Elliott, K.C., and *W. L. McLaws*, for appellant.

A. E. Hoskin, K.C., for respondent.

Howell, C.J.M.

HOWELL, C.J.M.:—The learned trial Judge found as a fact that at the time the goods were purchased from the plaintiffs, the defendants Jay N. Tappe and C. H. Forrester were partners carrying on business as Jay N. Tappe & Co., and there was ample evidence to support that finding.

In addition to the evidence referred to in his reasons for judgment, the first recital in the agreement of July 23, under the hand and seal of each of these defendants declares the same fact.

It might be well to consider the date when the joint stock company, known as Jay N. Tappe & Co. Ltd., took over, or was in a position to take over, this business.

Letters of incorporation of the company were issued by patent, dated September 24, 1912, and recorded October 10. The capital stock is fixed at $50,000, in shares of $100 each, and five persons are mentioned as the incorporators, each with one share only, it is declared that nothing has been paid on any of these shares, and neither Tappe nor Forrester is mentioned as incorporator.

Section 20 of the Joint Stock Companies Act declares that no company shall commence business until at least ten per cent. of the capital stock of the company has been subscribed and at least ten per cent. so subscribed has been "actually paid up." At the trial, counsel for the defendant Forrester put in as exhibit 20, a book containing, amongst other things, a copy of the Letters Patent, which I take to be the book required to be kept under section 59 of the Act. This book also contains the minutes of the meetings of directors and shareholders, certain agreements and the by-laws of the company.

The minutes of a meeting of the directors of the company are shewn in the book as held on October 14, in which by-law 21 is enacted and passed, and this by-law set forth in full under the seal of the company has as a last clause the following:—

Done and enacted as a by-law of the Directors of Jay N. Tappe & Co., Limited, on the 5th day of November, 1912. Then follows the signatures of the President and Secretary, and the corporate seal. Yet the minutes of the meeting say this by-law was passed on October 14.

This by-law purports to ratify and accept an agreement made July 23, previously, by which the defendants agreed to transfer the stock and assets of Jay N. Tappe & Co. to a joint stock company thereafter to be formed.

At the meeting of October 14, the following resolution was passed:—

"It was then moved by A. K. Dysart, and seconded by C. R. Dixon that one hundred (100) shares of fully paid up, non-assessable capital stock of the company be issued at par to C. H. Forrester and Jay N. Tappe, respectively, in payment and in accordance with the terms of the above mentioned agreement of sale. Carried.

"The said Forrester and Tappe were then admitted to the meeting."

MAN.

C. A.

NISBET v. TAPPE.

Howell, C.J.M.

No stock had been subscribed and no payments had apparently been made thereon, at all events until the meeting of October 14. The by-law solemnly states that it was enacted on November 5. Section 20 of the Act certainly had not been complied with until October 14, if even then. I think the only safe construction to put upon the whole matter is that on October 14 stock was allotted and a by-law to take over the business was passed to take effect on November 5, and that this was the date when the joint stock company took over the business of the partnership, and until then the business was that of the partnership.

All the goods were sold and shipped before November 5. There is no evidence that any portion of the goods was purchased by or in the name of the company, and from the evidence I have no difficulty in finding as a fact that all the goods were purchased by and sold to the partnership. It is clear that all were shipped in the partnership name and bills of exchange were from time to time drawn upon the partnership and accepted in that name.

The action is brought on the bills of exchange and also for the purchase price of the goods and if there is any reason why the defendant Forrester is not liable upon the bills, I can see no reason for his escaping payment for the goods.

The appeal is dismissed with costs.

Richards, J.A.

RICHARDS, J.A.:—The question before us is whether the defendant Forrester is liable for the price of the goods sold by the plaintiffs in the latter part of July but delivered at different times later on.

The evidence convinces me that neither the defendant Tappe nor the defendant Forrester supposed that the defendant Forrester was becoming liable, as a partner of Jay N. Tappe & Co. I am also satisfied, from the evidence, that the plaintiffs did not think, when they sold the goods, that they were selling them to the defendant Forrester, either alone or with others. I feel convinced that they imagined they were selling them to the intended joint stock company which was to be called Jay N. Tappe & Co. Limited, they, the plaintiffs, probably not being

aware that they could not enter into a transaction with such a company before its existence. Their refusal to forward more than half the goods until they had got the defendant Forrester's guarantee, and the fact that the form of guarantee which they furnished referred to the goods as purchased by Jay N. Tappe & Co. Limited, confirm this idea.

But the goods were purchased by some one and it must be held that they sold the goods to whoever did so purchase. I think they sold them to Jay N. Tappe & Co. The question then is, was the defendant Forrester a member of Jay N. Tappe & Co.?

I do not place much weight upon expressions by Mr. Forrester that he was a partner, because I do not think he understood by that anything more than a part owner. Mr. Dysart's evidence shews that the intention was that Mr. Forrester should not be liable.

On the other hand, the evidence does shew that Mr. Forrester purchased a half interest in the business as a going concern. I arrive at this conclusion with a great deal of regret, because I feel satisfied, as stated above, that the plaintiffs did not think they had his liability beyond that contained in the written guarantee he gave them for the $2,500. It seems apparent to me from the short time that the business lasted, that Mr. Forrester must have been deceived as to its condition and prosperity when he entered into it. Still he did buy the half interest in it and I cannot doubt that if before the limited company was formed it had made profits he would have been entitled to his share in them. I am, therefore, driven, with reluctance, to the belief that he was in fact a member of the firm of Jay N. Tappe & Co. and as such one of the purchasers of the goods and liable on that firm's acceptance for the price.

I would dismiss the appeal with costs.

CAMERON, J.A., concurred with HOWELL, C.J.M.

Cameron, J.A.

HAGGART, J.A. (dissented).

Haggart, J.A. (dissenting)

Appeal dismissed.

ONT.

S. C.

Re BREAKWATER CO.

Ontario Supreme Court, Middleton, J.

1. CORPORATIONS AND COMPANIES (§ VII D—380)—FOREIGN COMPANY—WINDING UP—DISTRIBUTION.

The Winding-up Act, R.S.C. 1906, ch. 144, applies to all companies carrying on business in Canada and includes a foreign corporation which is being liquidated in the country of its origin; and the assets in the hands of the Canadian liquidator are to be distributed pro rata amongst all creditors of the company ranking *pari passu*, without preference to the claims of creditors residing in Canada.

Statement

APPEAL by the American liquidator and foreign creditors of the company from an order of the Master in Ordinary.

A. J. Russell Snow, K.C., for the appellants.

R. C. H. Cassels, for the Ontario liquidator, the respondent.

Middleton, J.

MIDDLETON, J.:—This company is an Ohio company, and is in liquidation in the Ohio Courts. Subsequent to the American liquidation, and at the instance of the American liquidator, ordinary winding-up orders were made in Ontario. Creditors have been advertised for in the ordinary way, and claims have been proved by creditors residing in Canada, as well as by creditors residing in the United States.

The winding-up was made under the provisions of the Dominion statute, which applies to all companies carrying on business in Canada: *Allen* v. *Hanson* (1890), 18 S.C.R. 667. The jurisdiction of the Court to wind up a company under insolvency legislation is not taken away or defeated by the fact that a winding-up order has already been made in a foreign country, even though that country was the country of the company's origin: *Ex p. McCulloch* (1880), 14 Ch. D. 716; *In re Artola Hermanos* (1890), 24 Q.B.D. 640; *Ex p. Robinson* (1883), 22 Ch. D. 816.

When once a winding-up order is made, then, I think, the provisions of the Dominion statute apply, and control the entire situation. The winding-up under our statute is in no sense ancillary to the proceedings in the American Court. It is an independent and self-contained proceeding. The statute provides that, regard being had to secured claims and to certain preferences to wage-earners and the like, the assets shall be distributed among all the creditors of the company *pro ratâ*. There is no

warrant for giving preference to the claims of creditors residing in Canada.

If in the United States liquidation priority should be given to the American creditors, then the amounts that such creditors would receive under the American liquidation would be treated as payments made after the date of the Canadian winding-up, and regard would then be had to such payments in order to secure the equality contemplated by the Dominion Act. There was no evidence before me as to what course will be followed in the American liquidation; I, therefore, directed information to be obtained from the American liquidator; and I am now told that under the American liquidation all creditors, foreign as well as domestic, will rank *pari passu* in the distribution of the assets of the estate, after payment of preferred claims.

The American liquidator seeks to have the funds transmitted to him to make this distribution; but I take it that it is the duty of the Canadian liquidator to distribute the Canadian funds, and that he cannot discharge himself by remitting them to the American liquidator. The result would probably be the same, but the remitting of the funds to the American liquidator might render them liable to preferential claims not recognised in our liquidation, and might render them liable for the expenses of an American liquidation if the liquidator is not in funds.

This is in accord with *Banco de Portugal* v. *Waddell* (1880), 5 App. Cas. 161, where it was determined: "Where traders possess two properties, one situated abroad, and the other situated in this country, and there has been a petition for adjudication here, followed immediately, in point of date, by proceedings in insolvency abroad, and the foreign Court takes possession of the foreign property, as under a *cessio bonorum*, and employs it in paying the foreign creditors a dividend, such creditors cannot afterwards prove under the English adjudication, except on the condition of first accounting for what they have received abroad."

This is to ensure equality among all the creditors, and has no application where the foreign adjudication recognises the rights of all creditors, domestic and foreign, to share *pro ratâ*.

ONT.
S. C.
RE BREAKWATER CO.
Middleton, J.

The judgment in *In re Klabe* (1884), 28 Ch. D. 175, 177, where the right of English creditors to priority in the administration proceedings is denied and the cases are reviewed, is most instructive. There Pearson, J., says: "No doubt in a case in which French assets were distributed so as to give French creditors, as such, priority, in distributing the English assets the Court would be astute to equalize the payments, and take care that no French creditors should come in and receive anything till the English creditors had been paid a proportionate amount. But subject to that, which is for the purpose of doing what is equal and just to all the creditors, I know of no law under which the English creditors are to be preferred to foreigners. On the other hand the rule is they are all to be treated equally, subject to what priorities the law may give them, from whatever part of the world they come."

The appeal will, therefore, be allowed, and the matter remitted to the Master with the directions above indicated.

Costs of all parties may come out of the fund.

Appeal allowed.

ONT.
S. C.

CITY OF BERLIN v. THE COUNTY JUDGE OF WATERLOO.

Ontario Supreme Court, Middleton, J.

1. MUNICIPAL CORPORATIONS (§ II A—31)—POWERS OVER POLICE DEPARTMENT—INVESTIGATION—POLICE BOARD.

Sec. 278, ch. 192, of the Municipal Act, R.S.O. 1914, directing a Judge of the County Court to investigate upon a resolution of the City Council any matter relating to malfeasance or misconduct on the part of an officer or servant of the corporation, does not apply to an inquiry into charges of misconduct in the police force, which by sec. 354, etc., is within the jurisdiction of the Board of Police Commissioners.

Statement

MOTION by the Corporation of the City of Berlin for a mandamus to the Senior Judge of the County Court of the County of Waterloo directing him to proceed with an inquiry, under a resolution of the city council, into certain charges of misconduct and lack of harmony in the police force of the city.

H. J. Sims, for the applicant corporation.

Edward Bayly, K.C., for the County Court Judge.

MIDDLETON, J.:—By the Municipal Act, R.S.O. 1914, ch. 192, sec. 248, where the council of a municipality passes a resolution requesting a Judge of the County Court to investigate any matter relating to a supposed malfeasance or breach of trust or misconduct on the part of a member of the council, or an officer, or a servant of the corporation, "or to inquire into or concerning any matter connected with the good government of the municipality, or the conduct of any part of its public business," it thereupon becomes the duty of the Judge to make the inquiry directed, and the Judge is given for the purpose of that inquiry all the powers which may be conferred upon Commissioners under the Public Inquiries Act.

The police of the City of Berlin are in charge of a Board of Commissioners constituted under secs. 354 *et seq.* of the Municipal Act. The Board in this case consists of the Mayor, the Police Magistrate, and the Junior Judge of the County, who has been designated by the Lieutenant-Governor in Council. The resolution in question requests the Senior Judge of the County to conduct this inquiry.

The learned Judge has declined to enter upon the inquiry; taking the view that what is now sought is not within the scope of sec. 248, and that he cannot be called upon to investigate matters which properly fall within the jurisdiction of the Board of Police Commissioners.

Upon this motion an affidavit is filed by the Police Magistrate stating that all complaints of every kind which have been made to the Board of Police Commissioners have been investigated and dealt with by the Board.

I think the learned Judge is right in the position which he takes. The words which I have quoted from sec. 248 are undoubtedly very wide. Practically everything in one way or another concerns the good government of the municipality, and some limitation must necessarily be found to the wide terms used. Similar wide expressions are found in sec. 250: "Every council may pass such by-laws and make such regulations for the health, safety, morality, and welfare of the inhabitants of the municipality . . . as may be deemed expedient." No one supposes that his general provision confers unlimited juris-

ONT.

S. C.

CITY OF BERLIN v. COUNTY JUDGE OF WATERLOO.

Middleton, J.

diction upon the municipal council; yet it might well be argued that all laws dealing with every possible topic are presumed to be passed in the interest of the health, safety, morality, and welfare of the inhabitants.

A somewhat similar problem has recently been faced in Australia, in the case of *Colonial Sugar Refining Co. Limited* v. *Attorney-General for the Commonwealth of Australia* (1912), 15 Commonwealth L.R. 182, *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co. Limited* (1913), 17 Commonwealth L.R. 644 and [1914] A.C. 237. There, an Act had been passed authorising inquiry of the widest possible nature, and a commission had been issued directing an inquiry into the sugar industry. One of the industries to be investigated attacked the Act, and brought action claiming a declaration of the invalidity of the Act and an injunction to restrain the investigation contemplated. It was admitted that the investigation was concerning a matter over which the legislative body had no jurisdiction under the constitution as it stood; but it was said that the inquiry concerned the good government and welfare of the community, and that what was sought was material upon which to base proceedings looking towards an amendment of the constitution. The Privy Council held that the Act was *ultra vires*, and that the Legislature had no authority to direct an inquiry with reference to a matter outside of some actually existing power possessed by the Legislature, either under the constituting statute or at common law; and that, therefore, there was no power to direct a general inquiry—more particularly an inquiry into matters which had been excepted from the jurisdiction of that particular legislative body.

This principle appears to me to be entirely applicable here. In our scheme of municipal government some matters concerning the welfare of the inhabitants are taken from the jurisdiction of the municipal council and vested in other legislative and administrative bodies. School affairs are entrusted to school boards and boards of education; certain public utilities are placed in charge of boards specially constituted; and the affairs relating to the police force are placed in the hands of Police

Commissioners. I do not think it is competent for the municipal council to direct an inquiry before the County Judge into the matters entrusted to these independent bodies. Within the limits of the jurisdiction conferred upon these bodies they are supreme and in no sense subordinate to the municipal council. This has been demonstrated in a series of cases in which the municipal council has undertaken to review the action of school boards.

The unseemly results, if this is not so, are quite apparent upon most superficial consideration of the situation. The Board of Police Commissioners, consisting of the Mayor, the Police Magistrate, and one of the County Judges, has considered and dealt with the very matters now to be inquired into. The council now suggest that the whole matter be reviewed by the other County Judge. The Police Commissioners have the authority to act, and no doubt have acted, in accordance with their views. The County Judge who is asked to investigate has no power to take any action upon the evidence brought before him. His only function is to report to the municipal council. The municipal council, then, has no power to act, for the matters in question are not within its jurisdiction, but under the charge of the Police Commission. If there is the right to have the inquiry, the inquiry might just as well be directed to take place before the County Judge who is himself a member of the Police Commission. In many counties this must be so, because there is only one Judge in the county; and, speaking generally, the Senior Judge is the member of the Board; and the council, if it has the power, may direct that the conduct of the Senior Judge and his colleagues be investigated by the Junior Judge sitting alone.

For these reasons, I think I am bound to hold that the inquiry authorised by sec. 248 can only be directed concerning matters within the jurisdiction of the municipal council and with a view to obtaining a report for the guidance of the municipal council in dealing with matters over which it has authority.

The scope of the inquiry and its purpose is, I think, well indicated in *Re Godson and City of Toronto* (1888-9), 16 O.R. 275, 16 A.R. 452, *Godson* v. *City of Toronto* (1890), 18 S.C.R. 36. Paramount authority of the Board of Police Commissioners

ONT.

S. C.

CITY OF BERLIN v. COUNTY JUDGE OF WATERLOO.

Middleton, J.

with respect to matters over which it has jurisdiction established in *Kelly* v. *Barton* (1895), 26 O.R. 608, 22 A.R. 522; and *Winterbottom* v. *London Police Commissioners* (1901), 1 O.L.R. 549, 2 O.L.R. 105.

The decision of my learned brother Britton in *Lane* v. *City of Toronto* (1904), 7 O.L.R. 423, is in no way in conflict with this view. There it was alleged that in a municipal election for members of the Council and Board of Education there had been corruption and misconduct. It was held that this was a matter connected with the good government of the municipality, and that an inquiry was justified under the statute. Manifestly so; what was to be investigated was the conduct of an election under the control of the council itself. Its officers were charged with misfeasance. No inquiry was sought into the conduct of the Board of Education; the inquiry was into the conduct of the election.

The motion fails and must be dismissed with costs.

Motion dismissed.

MAN.

C. A.

REX v. PALMER.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. April 19, 1915.

1. INTOXICATING LIQUORS (§ III A—55)—UNLAWFUL SALES—STATUTORY PRESUMPTION FROM FINDING LIQUOR IN QUANTITY.

A statutory presumption of illegal sale of liquor is raised under sec. 204 of the Liquor License Act, Man., against the person on whose premises is found more intoxicating liquor than is reasonably required for the use of a person not licensed to sell; and by virtue of sec. 215 such presumption will support a conviction for illegal sale without license as being an offence under the same statute although the information was only for unlawful possession of liquors in a local option district and did not allege a sale by the accused.

[See *R.* v. *Publicover*, 21 D.L.R. 203, 24 Can. Cr. Cas. 1, and Annotation to same.]

2. INTOXICATING LIQUORS (§ III A—55)—SALE WITHOUT LICENSE—LOCAL OPTION DISTRICT—AMENDING CONVICTION.

Under the Liquor License Act, Man., the onus of proving a license to sell is placed upon the accused (sec. 203) and where such onus is not rebutted, a conviction for unlawfully selling without license is justified under sec. 159 on the finding of more liquor than the accused would reasonably require upon his premises if he fails to rebut the statutory presumption of selling which arises thereupon; and the court may make the necessary amendments to a conviction purporting to be for selling in a local option district so as to make it merely a conviction for selling without license without entering into a

consideration of the validity of the local option by-law, the provision for sale without license being equally applicable whether or no there was a valid local option by-law.

3. SUMMARY CONVICTION (§ V—50)—COSTS—ARBITRARY AND EXCESSIVE AMOUNT—STRIKING OUT.

A summary conviction under a liquor license law cannot be supported in so far as it awards as an arbitrary sum, fifty dollars to the complainant for costs where no witnesses were brought from a distance, but the court on a motion to quash may amend the conviction by striking out the award of such costs.

MOTION to quash a summary conviction by two justices under the Manitoba Liquor License Act. Statement

F. M. Burbidge, for accused.

P. C. Locke, for the Crown.

The opinion of the Court was delivered by

RICHARDS, J.A.:—The defendant was charged before two justices of the peace with having on 22nd January, 1915, at Treherne, in the municipality of South Norfolk in Manitoba, being a municipality in which a local option by-law was then in force under the provisions of the Liquor License Act and amendments thereto, unlawfully had in his possession intoxicating liquor "without having received a lawful permission to receive the same." Richards, J.A.

The case was tried and the justices have returned an amended conviction by which they convict the defendant for that he, on 22nd January, 1915, at the said village of Treherne in the said municipality of South Norfolk in the Province of Manitoba, the said municipality being one in which the local option by-law was then in force, did unlawfully not being then the holder of a druggist's wholesale license or a druggist's retail license, sell intoxicating liquor, W. B. Moore being informant.

The conviction adjudged the defendant, "for his said offence to forfeit and pay the sum of two hundred and fifty dollars to be paid and applied according to law, and also to pay to the said W. B. Moore the sum of fifty dollars for his costs in this behalf."

It further provided that "if the said several sums be not paid forthwith then we adjudge that the said Joseph S. Palmer be imprisoned in" (naming the proper common gaol),

MAN.

C. A.

REX v. PALMER.

Richards, J.A.

"there to be kept for the space of three months unless the said sum and costs and charges of conveying the said Joseph S. Palmer to the said common gaol shall be paid."

The defendant applied to quash the conviction on the ground that the alleged local option by-law, claimed to be in force where the offence was committed, was invalid for non-compliance with certain statutory provisions.

Section 215 of the Liquor License Act (eliminating portions not essential to the present case) reads:—

> "215. No conviction . . . shall be held insufficient or invalid by reason of any variance between the information and the conviction . . . *provided it can be understood from such conviction . . . that the same was made for an offence against some provision of this Act* within the jurisdiction of the . . . justices . . . who made or signed the same, and provided there be evidence to prove such offence and that it can be understood from such conviction . . . that the appropriate penalty or punishment for such offence was thereby adjudged."

It was not suggested that the justices had not jurisdiction, and section 159 of the Act provides a penalty for sale of liquor, without the license therefore by law required, of not less than one hundred dollars nor more than two hundred and fifty dollars and, in default of payment, imprisonment for not less than two months nor more than six months. The conviction before us imposes a penalty of $250 and fixes the imprisonment, in case of default, at three months.

It seems plain that the offence stated in the conviction is really one against section 159 of the Act.

Section 204 is hard to understand. But I take it to mean, amongst other things, that the fact that there is on the accused's premises "more liquor than is reasonably required for" the accused, "shall be deemed *primâ facie* evidence of the unlawful sale of liquor by" the accused.

In this case there was found, on the accused's premises such quantities of liquor as to justify the magistrates in holding that it was more than was reasonably required by the accused. So

that there was evidence, under section 204 to prove the offence of selling.

Section 203 of the Act throws upon the defendant the onus of proving that he was duly licensed, and he has not offered any evidence that he was so licensed.

There is in the local option clauses of the Act, no express prohibition of *selling* liquor without a license, the reason being, no doubt, that such prohibition is sufficiently provided in the general provisions of section 159.

It seems to me that, though the proceedings were instituted as for an offence under the local option clauses of the Act, and though the conviction, as returned, purports to be a conviction under those clauses, yet the references to them can be treated as surplusage and struck out. The offence provided for by section 159 is the same, whether committed in, or out of, a district where local option is in force.

There being, therefore, an offence shewn "against some provision of this Act," and the convicting justices having jurisdiction, and there being, with the aid of sections 203 and 204, evidence to prove the offence of selling liquor without a license, and the penalty, and the punishment in default of payment, being within the limit of the discretion given by section 159, I am of opinion that the provisions of section 215 apply and that the conviction should stand.

The imposition of fifty dollars for costs, however, stands on a different footing. There was plainly no right to arbitrarily fix such a sum. Counsel for the Crown admitted that the witnesses had not to be brought from a distance, and we are unable to say that any fees were paid to them.

I should have preferred to cut this sum down to the amount of fees actually allowable, but we have no papers returned from which we can attempt to make a bill of the costs properly taxable. The only thing, therefore, open to us is to disallow the whole sum.

The conviction should I think, be amended as follows:—

MAN.

C. A.

REX v. PALMER.

Richards, J.A.

1st. By striking out the words "the said municipality being one in which the local option by-law was then in force."

2nd. By striking out the words "druggist's wholesale license or a druggist's retail license," and by substituting therefor the words, "license to sell intoxicating liquor."

3rd. By striking out the words "and also to pay to the said W. B. Moore the sum of fifty dollars for his costs in this behalf and if the said several sums" and by substituting therefor the words "and if the said sum."

4th. By striking out the words "said sums and costs" and by substituting therefor the words "said sum."

5th. By inserting after the words "common gaol shall be" the word "sooner."

As so amended, the conviction should be affirmed.

I express no opinion as to the validity of the local option by-law, as the amended conviction does not depend on it.

As the conviction differs from the charge laid and has had to be amended, I would allow no costs of this application to either party.

Conviction amended.

INDEX OF SUBJECT MATTER, VOL. XXII., PART 2.

(For Table of Cases Reported see end of this Index.)

CASES REPORTED, VOL. XXII., PART 2.

BUSINESS BROKERS v. DINER.

MAN.

C. A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. June 7, 1915.

1. BROKERS (§ II B 1—12)—REAL ESTATE BROKERS—EXCHANGE OF LANDS—SUFFICIENCY OF SERVICES.

A real estate broker negotiating an exchange of lands for his customer is in no better position to claim that he procured a party ready, able and willing to exchange on the authorized terms than he would have been if the sale had been for a fixed price which the purchaser was unable to pay, if the proposed exchange fell through because the other party to it was not able to give what he had agreed to give in exchange for the property of such customer, nor was any exchange effected or finally agreed upon by the document which the defendant signed.

Statement

APPEAL from the judgment of the trial Judge in favour of the plaintiffs.

W. F. Hull, for plaintiffs.

J. G. Harvey, K.C., for defendant.

Howell, C.J.M.

HOWELL, C.J.M., concurred with RICHARDS, J.A.

Richards, J.A.

RICHARDS, J.A.:—The plaintiffs, a corporation under the Companies Act of Manitoba, sue the defendant for $500 claimed to have been earned as the fee, or commission, for making "a sale or other disposition" of a hotel property owned by the defendant.

One Gordon had a farm with certain stock, which farm and stock it was proposed to exchange for the hotel property.

The plaintiffs' president, B. N. Fraser, who acted for them throughout, brought the defendant and Gordon together, and an exchange was agreed of the farm and stock for the hotel. Memoranda of the exchange were taken down by Fraser and given to one of plaintiffs' clerks to be put into the form of an agreement. While the agreement was being prepared Fraser and the defendant agreed that the latter should pay plaintiffs $500, as a commission, a similar sum, it is said, being agreed to be paid by Gordon.

At the time of signing the agreement the defendant had not seen the farm, or the farm stock, and relied on Gordon's representations as to the quantity of land, the amount of the encumbrances against it, the rate of interest borne by such encumbrances, the dates of payment of the principal of such encumbrances, and the nature and quality of the farm stock. As soon as it could conveniently be done after the agreement, the defendant's solicitor looked into the title to the farm, and found that the acreage was

MAN.

C. A.

BUSINESS BROKERS v. DINER.

Richards, J.A.

less than had been represented by Gordon, and that part of the principal of the encumbrances became payable at a much earlier date than had been represented. There was also a question raised that two stallions which had been represented as worth $4,000 were in fact worth much less. The defendant at once repudiated the exchange, and Gordon appears to have acquiesced, on being faced with the facts, as no attempt was made by him to enforce the bargain. There is no doubt that Gordon could not have enforced it, as the difference between the representations and the facts gave ample ground for the defendant's repudiation.

The plaintiffs claim that, having brought the parties together and procured the execution of the agreement, they have done everything on their part to entitle them to be paid their commission. As I understand the learned trial Judge's reasons for judgment, he upheld that contention. He gave judgment in the plaintiffs' favour for the $500 with costs.

It seems to me, on reading the evidence, that neither Mr. Fraser nor either of the contracting parties considered the signing of the agreement a completion of the matter. As far as I can judge, they looked on it merely as a statement of the terms of the exchange, and not to be carried into effect until the parties could investigate and each see that he was getting from the other what that other had agreed to give him. That, I think, appears distinctly from the fact that after executing the document none of them acted as if it were a completed exchange. The parties to the agreement at once went to both the hotel and the farm and checked over the properties. Mr. Fraser himself went with them to the hotel for that purpose. That action by him would be unnecessary if he had, as he now contends, earned the commission when the agreement was signed. His taking it seems to me inconsistent with that contention. I do not think that any exchange was either effected or finally agreed upon. If the plaintiffs' claim is put on the ground that they procured a party ready, able and willing to effect the exchange, I do not think it can be supported. Gordon was not able to give what was agreed to be given by him, and the plaintiffs are in no better position than they would have been if Gordon, instead of agreeing to exchange, had agreed to buy for a fixed price, but was unable to pay that price.

With deference, I would allow the appeal with costs, set aside

the judgment entered in the County Court, and enter judgment there for the defendant with costs, including a counsel fee of $20.

CAMERON, J.A., concurred.

PERDUE and HAGGART, JJ.A., dissented.

Appeal allowed.

MAN.
C. A.
BUSINESS BROKERS v. DINER.

DONOVAN v. THE EXCELSIOR LIFE INS. CO.

N. B.
S. C.

New Brunswick Supreme Court, White, J. May 25, 1915.

1. INSURANCE (§ III A—48)—REQUISITES OF CONTRACT—NON-DELIVERY OF POLICY—EFFECT OF ON PAYMENT OF PREMIUMS.

The approval by the head office of a life insurance company of an application for insurance and the forwarding of a policy to the company's local agent which however was never delivered to the insured will not constitute a contract of insurance with the insured where it was a term both of the application and of the policy that the policy should not be in force until delivered, and until the official receipt for the premium had been surrendered by the company during the continued good health of the insured, although the premium had been collected by the local agent.

[*Calhoun* v. *Union Mutual Life Insurance Co.*, 19 N.B.R. 13; *Roberts* v. *Security Co.*, [1897] 1 Q.B. 111; *Equitable Fire* v. *Ching Wo Hong*, [1907] A.C. 96, referred to.]

ACTION to enforce specific performance of a contract of insurance. Statement

WHITE, J.:—This action was brought to enforce specific performance of a contract of insurance alleged to have been entered into by the defendant with the plaintiff's mother, and to compel the defendant to issue a policy as of March 5, 1912, on the life of the plaintiff's mother, payable in the event of death to the plaintiff. White, J.

By amendment at the trial the suit has resolved itself into an action to recover $1,000 upon a contract of insurance which it is claimed was entered into by the defendant, whereby the company insured the life of the plaintiff's mother in that sum, and agreed to pay such insurance to the plaintiff in the event of the death of the insured within the twenty-year period covered by such contract.

The material facts are: That early in March, 1912, Mr. King, who was then inspector and agent of the company, called upon the plaintiff's mother with the view of getting her to effect insurance on her life. He found that she was willing to take insurance for $1,000, but, as she was over sixty years of age, he, before proceeding further in the matter, reported the circumstances to

N. B.

S. C.

DONOVAN v. THE EXCELSIOR LIFE INS. CO.

White, J.

the company's head office, as he was, by his instructions, required to do in all cases where the age of the prospect exceeded sixty years. Having received in reply authority to take the application, he, on March 11, 1912, again visited the plaintiff's mother at her home on Pond street, Saint John, and while there, in the presence of the plaintiff and her mother, inserted in writing upon the printed form of application furnished by the company the answers which the applicant gave to the questions therein contained, all of which questions, he said, he read to her. The applicant, not being able to read or write, signed this filled-in application by her mark, and Mr. King signed the same as witness.

The application so signed contains *inter alia* the following stipulations:—

It is hereby declared and agreed that the statements and representations made in the foregoing application, together with those made to the Medical Examiner whose report shall be deemed to be incorporated with and form part of this application, shall be the consideration for and basis of the contract for insurance between me and THE EXCELSIOR LIFE INSURANCE COMPANY, and I hereby declare that all such statements and answers are true in so far as they are material to the contract, whether written by my own hand or not, and I agree that no other statements, representations or information, shall be binding upon or in any wise affect the rights of the Company.

That I have read or heard read and understand the said application and assent to all therein contained and I agree to accept the policy when issued on the terms mentioned herein and on such terms as are contained in the printed policy in use by the Company applicable to this application and to pay thereon the premiums of the first year.

That any policy which may be issued under the application shall not be in force until the same be delivered and until the actual payment to and acceptance of the premium by said Company or its authorized agent in accordance with the Company's rules during my life time and continued good health, and said premium shall then be considered to have been paid and the insurance to have begun at the due date named in the policy.

The premium, $83.90, was not paid at the time the application was signed, but was paid on or before March 15. Mr. King says it was paid on March 12; while the plaintiff says that it was paid the second day after Mr. King called. Upon receiving the premium Mr. King gave the applicant a receipt, which reads as follows:—

The Excelsior Life Insurance Company,

Head Office: Excelsior Life Building, 59-61 Victoria St., Toronto.

$83.90 St. John, N.B., March 5, 1912.

Received from Mrs. Julia Donovan, the sum of Eighty three & 90/100 Dollars, being first year's premium in full on policy for $1000 Insurance.

(Sgd.) H. KING, Provincial Inspector.

It appears from the evidence that this receipt is not the official receipt specified in condition 1 of the policy, to which I will later refer.

The application was forwarded to the head office at Toronto, and on March 25, Mr. Ferris, the defendant's manager at Saint John, received by mail from the head office a policy to which was attached a copy of the application which had been signed by the plaintiff's mother and upon which the policy was issued; and I infer from the evidence that it was accompanied by an official receipt for the premium. It was also accompanied by a letter which reads as follows (omitting the headings):—

F. S. Ferris, Esq., Toronto, March 18, 1912.
Provincial Manager, St. John, N.B.

Dear Sir:—We have accepted this application, and are issuing policy, but before delivering the same, you will please ascertain from Dr. Pratt that he has sent in his confidential report, and that it is satisfactory. It is not yet to hand. You will also reconcile Dr. Pratt's statement that the applicant is 65 whereas the applicant herself gives her age as 64. In a case of this kind in future in view of the age it is best that proof of age be submitted with a view of the same being admitted on the policy. Yours truly,

(Sgd.) E. MARSHALL, General Manager.

On March 26 Mr. Ferris again called at the home of the applicant and there shewed the policy to the plaintiff, but he did not then see the applicant, who, the plaintiff informed him, was lying down. He pointed out to the plaintiff that there was a discrepancy between the age of her mother as stated in the application and that shewn in the report of Dr. Pratt, the examining physician. In the application the age is stated to be 64 next birthday, while in the physician's report it is placed at 65 next October. The plaintiff testified that Mr. Ferris told her, that as her mother's real age was 65 next birthday the policy would only be good for $800, and that "to secure the other $200 to pay a few more dollars, and that would make the thousand; so he took away the policy and said it would be nine or ten days before the other would come back, but in the meantime that was all right."

Mr. Ferris denies that he told the plaintiff the policy was only good for $800, but admits he may have mentioned that sum, though he does not recollect doing so; and if he did, it was only by way of illustration. He says the policy was, as a matter of fact, according to his interpretation of its terms, good for $950.

N. B.

S. C.

DONOVAN v. THE EXCELSIOR LIFE INS. CO.

White, J.

The witness was unable to state with certainty whether or not, pursuant to the instructions contained in the letter quoted, he took steps to ascertain whether Dr. Pratt had sent in his confidential report. Mr. Ferris did not deliver any official receipt for the premium to either the plaintiff or her mother, nor did he ever deliver to either the plaintiff or her mother the policy of insurance, unless the facts detailed must be taken as matter of law to have constituted delivery. The plaintiff paid him $4.15 additional premium called for to make the policy one for a full thousand dollars.

On the same day, that is, March 26, Mr. Ferris mailed the policy to the head office, and on April 4 received back a new policy bearing the like date and similar in all respects to the first one, save that the premium specified in the second policy was $88.05. Mr. Ferris says that because he had, at the time he received the second policy, learned of the illness of the plaintiff's mother, he did not deliver that policy. After Mrs. Donovan's death, which occurred on April 7, he called on the plaintiff three times, at intervals of a few days between each visit, in order, if possible, to induce her to accept return of the premium paid, and on one of these occasions he made her a good tender of the amount of such premium, that is to say, of $88.05.

The defendant, by amendment made at the trial, set up the defence that the insured had made material misrepresentations in her application in two particulars, namely: First, in answering "No" to the printed question "16," "Has any proposal to insure your life been declined, withdrawn or postponed? Give full particulars." Secondly, in answering "No" to the question "14," "Have you any other assurance on your life? If so, where and for what amount? Give full particulars." Ans.—"No."

The evidence relied upon to support the first ground of alleged misrepresentation is that the insured, prior to her application to the defendant for insurance, had verbally asked one Pressly, then agent for the Prudential Insurance Co., for insurance for an amount beyond $200. Mr. Pressly's reply was that his company would not accept a proposal for insurance to that amount from an applicant who was a markswoman. The Prudential Co. did, however, insure the plaintiff's mother, by a policy spoken of as an industrial policy, for a small amount, in the vicinity of $50,

the premium being payable weekly. This insurance was paid upon the death of the plaintiff's mother without question. No formal written application, or application other than I have stated, was made to the Prudential for insurance, and no medical examination was ever made in connection with the application to the Prudential.

I do not think these facts sufficient to sustain the defence that there was a material misrepresentation in answering question 16. What took place did not, I think, constitute either a proposal to insure or a declining of the same within the meaning of that question.

As to the second ground of alleged misrepresentation, I do not think that it is material, inasmuch as the amount of the insurance was so trifling. The defendant, I think it is fair to assume, would be aware of the rule of the Prudential Co. not to insure a marksman in any sum beyond $200; and from the application sent in to its head office the defendant could see that the applicant, the plaintiff's mother, was a markswoman.

As, possibly, having some bearing in this connection, I should, in setting forth the facts, have stated that the plaintiff testified that Mr. King, in taking her mother's application, put questions and filled in the answers in the printed form which her mother signed, but that he never asked any question as to whether or not the applicant was insured in any other company, or had applied for such insurance. Mr. King's testimony was that he felt quite sure he did ask these questions, but that, as the occurrence took place nearly three years previously, he could not undertake to swear, from memory, that he had read all of the application to the applicant, although he believed he had, as it was his custom so to do. The insured signed the application, and, therefore, under the authorities (see *Biggar* v. *Rock Life Ass. Co.*, 71 L.J.K.B. 79 (1901), 11 K.B. 516) must be taken to have had knowledge of its contents, unless the fact that she was a markswoman, and that the witness to her mark was the defendant's agent, could be held to destroy the basis of such assumption; and no such contention as that was made before me. If it were important to make a finding upon the point, I would find that Mr. King was mistaken in his belief that he read to the insured the two questions quoted. He admits that Mr. Pressly, who was his son-in-law, had informed

N. B.

S. C.

DONOVAN v. THE EXCELSIOR LIFE INS. CO.

White, J.

him of Mrs. Donovan's request for insurance in the Prudential, and of the reason why she could not, being a markswoman, get such insurance; and says, further, that it was at Mr. Pressly's suggestion, and upon the understanding that Pressly was to receive a commission if the insurance was effected, that he canvassed the plaintiff's mother. I find there was no fraudulent misrepresentation by or on the part of the plaintiff's mother.

But upon the vital issue, whether or not there was any contract of insurance entered into by the defendant with the plaintiff, I must decide in favour of the defendant.

The contention made by the plaintiff is, that so soon as the plaintiff's application was marked "approved," and was signed by the manager and medical director of the defendant company, there resulted a contract to insure, by which the defendant is bound. In support of this contention the plaintiff relies upon *Roberts* v. *Security Company* (1897), 1 Q.B. 111. The decision in that case was gravely questioned by the Judicial Committee of the Privy Council in *Equitable Fire Insurance and Accident Co.* v. *Ching Wo Hong* (1907), A.C. 96. In that case, referring to the contention that the question involved was already decided by *Roberts* v. *Security*, the Committee say: "The learned counsel for the appellant company cited, and relied on, a decision of the Court of Appeal in England in *Roberts* v. *Security Co. Ltd.* It is enough for their Lordships to say that the words in the instrument in that case were different from those which their Lordships have to construe, and they are relieved from saying whether they would otherwise have been prepared to follow it."

But assuming (though I am far from so deciding) that, notwithstanding the judgment of the Supreme Court of this province in *Calhoun* v. *Union Mutual Life Insurance Co.*, 19 N.B.R. 13, I should accept and follow the decision in *Roberts* v. *Security*, I do not think it governs the present case; and this for the like reason assigned by the Privy Council in the case referred to, namely, that there are essential differences in the facts between *Roberts* v. *Security* and the present case. In *Roberts* v. *Security* the policy shewed upon its face no condition which required to be performed in order to give the policy effect as a binding contract. The only such condition stated in the policy in that case was that the premium should be paid, and such payment was acknowledged

in the policy itself to have been made. Lord Fisher, in his judgment, says: "I do not see any evidence of a conditional delivery, or that this document was intended not to be a policy unless certain conditions were fulfilled."

In the present case the application specified the policy applied for to be a non-participating twenty-year endowment. It was such a policy that was mailed to the company's agent at Saint John on March 21. That policy, in the portion thereof which the Judicial Committee, in *Equitable* v. *The Ching Wo Hong*, refer to as the operative part, states that the company,

in consideration of the application for this policy of insurance upon the life of Julia Donovan, hereinafter called the assured, of St. John, in the county of St. John and Province of New Brunswick, and of the annual premium of Eighty Three 90/100 Dollars, to be paid on or before the delivery of this policy, and a like sum thereafter in advance to the Company at its Head Office in the City of Toronto, on the First day of April in every year during its continuance, or until twenty full years' premiums shall have been paid.

Hereby agrees (subject to the terms and conditions endorsed thereon, annexed hereto, or contained in the application attached hereto) to pay at the Head Office of the Company the sum of One Thousand Dollars, to the assured if living on the First day of April in the year one thousand nine hundred and thirty-two or to pay the said sum to Catherine Donovan, the daughter of the assured, or in case she shall pre-decease the assured, to the executors, administrators or assigns of the assured, upon receipt of proofs satisfactory to the Company of the death of the assured during the continuance of the policy.

IN WITNESS WHEREOF, the said Company has executed these presents at Toronto, this First day of April one thousand nine hundred and twelve.

Endorsed upon the policy are a number of conditions, two of which are as follows:—

1. When Policy in Force.—This Policy shall not take effect until the same has been delivered, the first premium thereon paid and the official receipt surrendered by the Company during the lifetime and continued good health of the assured.

10. The Contract.—The Policy, the endorsements thereon, and the papers attached bearing the Company's seal, shall constitute the entire contract between the parties hereto, and all statements made by the assured shall in the absence of fraud, be deemed representations and not warranties, and no such statement shall be used in defence of a claim under the policy unless it is contained in the application, a copy of which is hereto attached. No provision or condition of this contract can be waived or modified except by an endorsement thereon signed by the President, a Vice-President, the General Manager, or Secretary.

Now, assuming for the moment that the plaintiff is right in her contention that the moment the application was approved

N. B.

S. C.

DONOVAN v. THE EXCELSIOR LIFE INS. CO.

White, J.

by the company it became a valid contract, that contract could only be one to insure the plaintiff's mother upon the terms and conditions contained in their form of non-participating twenty-year endowment policy, because that is the form of policy asked for in the application. Condition 1 of that policy expressly provides that the policy shall not take effect until it has been delivered and the official receipt surrendered by the company during the continued good health of the assured. To my mind this indicates very clearly that there was no intention on the part of the company that the preparation and mailing of the policy, and much less that the marking as approved the application sent in, should constitute a contract binding on them without performance of the conditions which the policy expressly stipulates must be performed before the policy shall take effect.

In *Xenos* v. *Wickham* (1867), 2 H. of L. 296, relied on by the plaintiff, Mr. Justice Blackburn, in delivering his opinion upon the question put to the Judges summoned, said:

> If I thought that the parties did not in fact intend it (the policy) to be then finally binding, I do not think there would be any Magic in the law to make it binding contrary to their intention.

These words of Mr. Justice Blackburn are quoted with approval by Burton, J.A., in *Western Assurance Co.* v. *Provincial Insurance Co.*, 5 Ont. Rep. 190.

I do not think there was any such delivery of the policy, or surrender of the official receipt, as is contemplated and required by the policy as a condition precedent to its taking effect. Moreover, when the policy was mailed to the agent at Saint John it was accompanied by the letter of instructions I have already referred to. In face of the contents of that letter I do not see how it could reasonably be held that the defendant, by accepting the plaintiff's application, intended thereby to make, or did in fact make, a contract binding upon the company regardless not only of conditions contained in the policy itself but of the instructions given to the agent in the letter with which the policy was mailed.

For the reasons stated I am forced to the conclusion that there never was any contract of insurance executed and in force between the parties.

It will be observed that the date which the policy, on its face, states to be that on which it was executed, is April 1, 1912. I

have not discussed the effect of this in its bearing upon the question as to when the policy took effect. But in case the Court on appeal decide that I am in error in the conclusion I have reached, and with the view of avoiding, if possible, in that event, the necessity of sending this case down to a new trial, I think it well to make a finding as to the disputed date on which the insured became ill with the sickness of which she died. The plaintiff in her direct examination stated that her mother died on April 7, and was ill three or four weeks before she died. On cross-examination she said it would not be over three weeks that her mother was ill. She could not fix clearly the date on which Mr. Ferris called with the first policy, but said she recollected his visit and that her mother was not then ill. I am satisfied the witness honestly gave her best recollection of the matters upon which she was interrogated; and while her recollection of dates, and as to the duration of her mother's last illness, was not very clear or satisfactory, I accept her statement that when Mr. Ferris called, that is to say on March 26, her mother was in good health. It seems to me that while the witness might easily be mistaken in attempting to recall the duration of her mother's illness without reference to any occurrence outstanding in her memory by which she could fix the period of such illness, she would be most likely to remember whether or not her mother was ill when Mr. Ferris called with the policy, though she could not fix the date of that visit.

Judgment will be for the defendant with costs of suit.

Judgment for defendant.

ROUNDY v. SALINAS.

B. C.
C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, Galliher, and McPhillips, JJ.A. April 30, 1915.

1. JUDICIAL SALE (§ II A—15)—SALE OF MINERAL CLAIMS UNDER EXECUTION —VALIDITY OF BIDS.

The sale by the sheriff under execution of a mineral claim under the Mining Act, R.S.B.C., ch. 157, is not invalid because the purchaser was not the holder of a free miner certificate at the time of making his bid at the sheriff's sale, if he had a certificate at the later date when the sheriff made a bill of sale of the claim to him; the court will uphold sheriff's sales bona fide made notwithstanding mere irregularities.

[*Crawshaw* v. *Harrison*, [1894] 1 Q.B. 79, 63 L.J.Q.B. 91, referred to.]

Statement

APPEAL from Young, Co.J., dated September 11, 1914, heard in Victoria, January 20, 1915, before MACDONALD, C.J.A., and IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

B. C.

C. A.

ROUNDY v. SALINAS.

Appeal dismissed April 30, 1915, MARTIN and MCPHILLIPS, JJ.A., dissenting.

MACDONALD, C.J.A., agrees with IRVING, J.A.

D. S. Tait, for appellant.

Mochan, K.C., for respondent.

Irving, J.A.

IRVING, J.A.:—The defendant certainly has a strong equity in his favour. It was his money which paid the execution creditor, and to that extent was a final discharge of the execution debtor. Notwithstanding this, the execution debtor now sues without offering to repay the money so paid on his account. His contention is that there was no sale on the 25th because the defendant was not eligible to purchase.

The defendant's position, I think, may be maintained on the following ground: Sheriffs in England are required to sell by public auction under an execution for a sum exceeding £20. A failure to observe this statute is an irregularity only: see *Crawshaw* v. *Harrison* [1894], 1 Q.B. 79, 63 L.J.Q.B. 91. We have no such provision in British Columbia, and the sheriff here can sell by public auction or bill of sale. *Hernaman* v. *Bowker* (1856), 11 Ex. 760, 25 L.J.Ex. 69, is an authority for the proposition that the sheriff may sell in any way. A sale by auction or bill of sale is only a mode of exercising the authority which the law gives by the *fi. fa.*—"*You cause to be made.*" Assuming, without deciding, what was done at the auction on March 25 was not a sale, the special property and power to sell remained with the sheriff until the 29th, when he gave the bill of sale to the defendant.

The bill of sale put an end to his power to sell under the *fi. fa.*, and put an end to the plaintiff's general "property" in the claims. The acceptance of the bid at the auction we may assume was void, but the completion of the transaction on the 29th would be a new contract, although based on the theory that the auction bid was good.

What was done in this case was at most irregularity, and the authorities shew that Courts will uphold sales *bonâ fide* made where irregularities have occurred: see, for example, *Jeanes* v. *Wilkins* (1748), 1 Ves. Sr. 195, where a sheriff sold after the return day of the writ had expired; also *Doe dem Stevens* v. *Doniston* (1818), 1 B. & Ald. 230, and *Hernaman* v. *Bowker*, *supra*.

If on March 26 the sheriff had been ruled by the present

B. C.

C. A.

ROUNDY v. SALINAS.

Irving, J.A.

plaintiff to make a return to the writ, he would either return that the property remained unsold for want of buyers, in which case a writ of *venditioni exponas* would issue, to sell for the best price you can, or (more properly) make a special return saying that Salinas had at the auction made a bid, and paid $200, and he (sheriff) would complete by bill of sale as soon as Salinas had obtained his qualifying free miner's license. There can be no doubt that if such a special return were made the Court would have extended the time for completion. As the Court could have adopted such a course there is no reason why we should not uphold the sale as made on the 29th. In considering how the Court would have dealt with such a return, we must have regard to the fact that up to the 29th the execution creditor had a legal right as against the owner to have the goods sold and to be paid out of the proceeds of the sale (per Lindley, M.R., in *Re Clarke* (1898), 1 Ch. 336, 67 L.J.Ch. 234).

I would dismiss the appeal.

Martin, J.A.

MARTIN, J.A.:—On the admitted facts it appears that the sheriff of the County of Atlin took in execution two mineral claims, the "Alderbaran" and "I'll Chance It," the property of the present plaintiff, and on March 25, 1914, sold them by public auction to the defendant for $200 cash and gave the defendant a receipt for the money, and two days later, and in order to effectuate and carry out said sale, the sheriff gave the defendant a formal bill of sale of said claims.

At the time the claims were knocked down to the defendant he was not the holder of a free miner's certificate, but he obtained one two days later, on the 27th, and before the bill of sale was executed. No question, it will be observed, arises here of what might be the position of the parties if the sheriff had decided to treat the sale by auction as void or invalid and had later sold privately to the purchaser, because the transfer that he subsequently gave was admittedly "pursuant to" and in furtherance of his sale by auction and therefore an attempted confirmation of it, and so the transfer relates back to said sale, which was completed upon payment of the price and the giving of the receipt therefor. I say "completed" because sec. 75 only requires transfers of mineral claims to be in writing (not under seal), and here we have a written receipt for the money, and though it is

B. C.
C. A.
ROUNDY
v.
SALINAS.
Martin, J.A.

not before us, yet, as it is admitted that it was given, it must be taken to include the essentials of the sale it relates to, *viz.*, the date, the price, the names of the claims sold, and the signature of the vendor, which is all that would be necessary to satisfy the section, which, it is to be noted, does not say that verbal transfers shall be void, but merely that only written ones shall be "enforceable": *Cf. McMeekin* v. *Furry* (1907), 2 M.M.C. 432, 536, and *Grutchfield* v. *Harbottle* (1900), 1 M.M.C. 396. So here there was at least a written "document of title" that could be recorded under sec. 74, and it is furthermore, and in any event, an acknowledgment that the purchaser had acquired the right to obtain from the vendor a formal transfer to satisfy sec. 75, if the receipt were not deemed sufficient, and that right he could not be deprived of if he had the capacity to acquire the property at all. Therefore the position was that the sale was completed at the auction unless there was some other legal enactment which incapacitated the purchaser from acquiring the property.

These circumstances distinguish the case from *Playfair* v. *Musgrove* (1845), 14 M. & W. 239, because here, in my opinion, this chattel real—*Pope* v. *Cole* (1898), 1 M.M.C. 257; *McMeekin* v. *Furry, supra; Williams Creek, etc., Co.* v. *Symon* (1867), 1 M.M.C. 1—was, by virtue of said receipt, both "bargained and sold," as well as knocked down, as Baron Rolfe puts it in the *Playfair* case, and so the question is, did the purchaser acquire "any right or interest" in the claims having regard to sec. 12 of the Mineral Act, which enacts as follows:—

> Subject to the proviso hereinafter stated, no person or joint stock company shall be recognised as having any right or interest in or to any mining property unless he or it shall have a free miner's certificate unexpired.

The would-be purchaser at the time of this sale not being a "free miner," *i.e.*, "a person . . . named in and lawfully possessed of a valid existing free miner's certificate and no other" (sec. 2), was, in my opinion, a member of a class prohibited from becoming, as he desired to be, a purchaser at said sale, which was consequently a void one, and all proceedings later taken to patch it up were inoperative. The situation is, perhaps, made clearer by the illustration that if immediately after the purchaser paid his money the sheriff had then and there executed and delivered to him a formal bill of sale, he nevertheless took nothing, because

he was incapacitated by sec. 12 from holding "mining property," and no claim of his thereto could be "recognised," and so there was no sale in law, and it could not be made one afterwards by acquiring a capacity which he did not hold at the time, the statutory bar having intervened between the original disability and the attempted confirmation. As it is an impossibility to add something to nothing, therefore, since the original attempted sale was a nullity, it is inappropriate to refer to what was done later as having the effect of supplementing the void proceeding.

A reference during the argument was made to the ordinary case of a purchase of real property by an infant, but that presents no true analogy, because Coke himself has it "that an infant may make a purchase of land which is voidable only, for it is intended for his benefit, and at his full age he may either agree thereunto and perfect it, or, without any cause to be alleged, waive or disagree to the purchase:" Eversley on Domestic Relations, 3rd ed., 754. And the general rule is: "All acts and instruments of a solemn nature which are not to an infant's prejudice are valid and binding until set aside by him on attaining majority:" p. 756. It should in this relation be noted that by sec. 4 of the Mineral Act legal infants over 18 years may acquire the privileges of a free miner, and it is declared that

> A minor, who shall become a free miner, shall, as regards his mining property and liabilities contracted in connection therewith, be treated as of full age.

It follows, therefore, that, as was said in *Giles* v. *Grover* (1872), 9 Bing. 128, 230, the claims "still remained the property of the debtor to whom they originally belonged," who is the plaintiff at bar, and therefore the defendant acquired no "right or interest" in them, and consequently the appeal should be allowed and judgment entered for the plaintiff.

GALLIHER, J.A.:—There is no law which prohibited Salinas from becoming a bidder at the sale. Galliher, J.A.

He did bid and the property was knocked down to him by the sheriff; the money was paid by Salinas to the sheriff, and a receipt given.

This did not vest the title in Salinas. In order to do so it was necessary that the sheriff should execute a bill of sale to Salinas, and until the sheriff did so the title in the property remained in Roundy.

B. C.

C. A.

ROUNDY v. SALINAS,

Galliher, J.A.

After the sale the sheriff was merely the conduit pipe to transfer the rights of Roundy to Salinas.

The plaintiff relies on sec. 12 of the Mineral Act, ch. 157, R.S.B.C., which is: "subject to the proviso hereinafter stated no person or joint stock company shall be recognised as having any right or interest in or to any mining property unless he or it shall have a free miner certificate unexpired," and contend that as Salinas was not the holder of a free miner's certificate on the day of the sale when the property was knocked down to him that the sale was abortive.

At the time the sheriff executed the bill of sale to Salinas he was the holder of a free miner's certificate.

So far as the sheriff is concerned he was not, I think, bound to inquire as to whether Salinas was the holder of a free miner's certificate or not, at all events up to the time he executed the bill of sale, and finding him so at that time he did nothing he was not required to do by virtue of his office in execution of the writ.

In order to succeed the plaintiff must go so far as to say that the defendant was at the time of the sale incapable of contracting with respect to a mineral claim.

The section in question, while it says he shall not be recognized as having any interest, does not destroy his capacity to contract, and when he has, by procuring a free miner's certificate, placed himself in a position to receive the fruits of that contract and the person authorized has conferred upon him those fruits, the plaintiff cannot attack his position.

A person may contract in respect of something he is not at the time in a position to deliver—why not also in respect of something which he is not at the moment in a position to receive by reason of some disability as to receiving which is afterwards removed?

I think the more liberal construction of sec. 12 should be applied, *i.e.*, that any person coming to the Crown claiming an interest in mining property shall not be recognized as having any interest unless he is the holder of a free miner's certificate, or that, in case of disputed rights between parties, a like result follows, and not the more technical construction that the section incapacitates any one not so holding from contracting in respect of a mineral claim so as to render a sale to him under execution

abortive where the title to the property has to be afterwards conveyed by deed—the sale and giving of the conveyance being, I think, a continuous transaction.

If the latter construction is to prevail it narrows the field of bidders at public auction, and is contrary to what is supposed to be the advantages of sales in open market, and it is hardly likely that the Legislature intended that.

Moreover, I think the section is one which is designed for revenue and is penal in its effect.

Should I be in error in this conclusion I agree with my brother IRVING on the other ground taken by him.

McPHILLIPS, J.A.:—This is an appeal from the Judge of the County Court of Atlin (Young, Co.J.). M.Phillips, J.A.

The facts being admitted are as follows:—

"1. That on March 25, 1914, the sheriff of the County of Atlin offered for sale at auction under an execution duly issued all the interest of the plaintiff in the mineral claims 'I'll Chance It,' 'Black Bear' and 'Alderbaran,' recorded in the name of the plaintiff. Said mineral claims were not Crown granted.

"2. That at such sale Pedro Salinas, the defendant, bid the sum of two hundred dollars ($200), and the sheriff knocked the property down at that price and *gave Pedro Salinas a receipt for the money*.

"3. Pursuant to such sale the sheriff executed a bill of sale on March 29, 1914, of the interest of the plaintiff in the above-named mineral claims in favour of the defendant, Pedro Salinas, which was duly filed in the office of the Mining Recorder for the district in which the claims were located.

"4. On the date of the auction by the sheriff Pedro Salinas was not the holder of a free miner's license, but on March 27, 1914, became the holder of one, and was the holder of such when the bill of sale was executed."

The action is one for a declaration that the appellant is the owner of the mineral claims notwithstanding the attempted sale made by the sheriff, the delivery up of the bill of sale for cancellation, and damages for trespass upon the mineral claims.

The short point for determination is—was the sale a valid one in view of the fact that the respondent was not at the time

B. C.

C. A.

ROUNDY v. SALINAS.

McPhillips, J.A.

of the sale to him by the sheriff a free miner holding a certificate under the provisions of the Mineral Act (R.S.B.C. 1911, ch. 157)?

Turning to sec. 12 of the Mineral Act, we find that it reads as follows:—

12. Subject to the proviso hereinafter stated no person or joint stock company shall be recognised as having any interest in or to any mining property unless he be or it shall have a free miner's certificate unexpired.

In my opinion a mineral claim is in its nature an interest in land—a realty interest, a chattel real. Mr. Justice Gregory considered what the nature of the interest in a mineral claim was in *Barinds* v. *Green* (1911), 16 B.C. 438. Section 18 of the Mineral Act reads as follows:—

18. The interest of a free miner in his mineral claim shall, save as to claims held as real estate, be deemed to be a chattel interest equivalent to a lease for one year and thence from year to year subject to the performance and observance of all the terms and conditions of this Act.

Were it not for sec. 12 of the Execution Act (R.S.B.C. 1911, ch. 72), a mineral claim would not be exigible and capable of being sold under an execution against goods and chattels. The section reads as follows:—

12. Any interest which a free miner has in any mineral claim before the issue of a Crown Grant therefor or in any mining property as defined by the "Mineral Act" and any placer claim and mining property as defined in the "Placer Mining Act" may be seized and sold by the Sheriff under and by virtue of an execution issued against goods and chattels.

Now, it is not contended that there was but the one sale by the sheriff, and the bill of sale is referable only to the sale made when the respondent was not possessed of a free miner's certificate and in pursuance of the sale made on March 25, 1914—that is, the bill of sale was executed by the sheriff as grantor to the respondent as grantee in recognition of a right or interest claimed to have been acquired by the sale of March 25, 1914. This, in my opinion, offends against the law and the policy of the law, and I would again refer to the judgment of Mr. Justice Gregory in *Barinds* v. *Green*, *supra*, at p. 439.

In *Playfair* v. *Musgrove* (1845), 14 M. & W. 239-249 (69 R.R. 690), Rolfe, B., said, at pp. 246-247:—

The Sheriff has pleaded that he was justified in entering the plaintiff's dwelling house by the writ of *fieri facias* and that before the return he sold the lease and the plaintiff's interest in the term and continued in possession of the dwelling house for the fuller execution of the writ. Now, the word "sold" seems to me to mean "bargained and sold" for the law knows nothing

of the sale of a chattel real except by instrument under seal; and the mere knocking it down at an auction is nothing more than making a contract to sell it.

If, therefore, the act of the sheriff in the present case was the making of a contract to sell the mineral claims when knocking same down to the respondent at the auction, which contract of sale was evidenced by a receipt in writing, it was, in my opinion, a void sale, and the execution later of the bill of sale can in no way be said to be curative of a void act. The respondent was incapacitated by statute from entering into an agreement for the acquirement of the mineral claims sold by the sheriff, and they could not be knocked down to him at the auction sale, and the agreement was therefore invalid.

The present case raises the question of the protection of the revenue, and it is abundantly clear that the Mineral Act in its provisions—and the policy of the law generally is—that all persons and corporations engaged in mining and holding or acquiring mineral claims or any right or interest therein shall as of necessity be the holders of certificates as free miners. It would follow that if the requirement be that—which in my opinion is the law—all those bidding at the auction sale should at the time be the holders of such certificates, and that it is not to be admitted that the taking out of the certificate at the later time, before the actual execution of the bill of sale by the successful bidder, is sufficient.

In my opinion, therefore, the appeal should be allowed, and there should be a declaration that the appellant is the owner of the mineral claims in question, that the bill of sale be delivered up to be cancelled, and a reference to assess the damages, the appellant to have the costs here and in the Court below.

Appeal dismissed.

REX v. KWONG YICK TAI.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. April 6, 1915.

1. APPEAL (§ I C—25)—REFUSAL OF CERTIORARI IN CRIMINAL CASE—COURT OF APPEAL, B.C.

No appeal lies in British Columbia from the refusal of a certiorari in respect of a summary conviction under the Criminal Code.

2. COURTS (§ II A 6—175)—JURISDICTION—COURT OF APPEAL, B.C.

The jurisdiction of the former full Court of British Columbia is by sec. 6 of the Court of Appeal Act, B.C. conferred on the Court of Appeal as of April 25, 1907, not 1897 as erroneously printed in the B.C. statutes, the correct date appearing in the original roll and being the date of the passing of the Court of Appeal Act.

B. C.

C. A.

REX v. KWONG YICK TAI.

APPEAL by defendant from order of Hunter, C.J.B.C., of December 23, 1914, refusing a writ of certiorari.

Ritchie, K.C., for the appellant.

Joseph Martin, K.C., for respondent (*Martin Griffin*, with him).

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The appeal should be quashed. The accused was convicted under the Criminal Code and applied in the Court below for an order for a writ of *certiorari* which was refused, and from that refusal he is appealing to this Court.

No right of appeal from such an order is given by the Criminal Code or any other Dominion statute. While an appeal may lie in a like case in civil proceedings in virtue of provincial statutes, it cannot be held to do so in a criminal cause or matter.

It was urged by Mr. Ritchie that the late Full Court had prior to May 1897 power to review an order such as the one in question, and that all the jurisdiction which that Court enjoyed on April 25, 1897, was by section 6 of the Court of Appeal Act, conferred on the Court of Appeal, and that hence this court has power to review the said order. This contention assuming it to be relevant, is founded on a clerical error in the revision of the statutes. Reference to the original roll will shew that the date is not April 25, 1897, but the date of the passing of the Court of Appeal Act, namely, April 25, 1907.

This Court is merely an appellate Court and has no original jurisdiction except that set forth in the Act, which jurisdiction is confined to matters incidental to the hearing and determination of appeals. As we have no jurisdiction to entertain this appeal, I refrain from expressing any opinion concerning the merits of the case.

Irving, J.A. McPhillips, J.A.

IRVING and MCPHILLIPS, JJ.A., concurred with the Chief Justice.

Martin, J.A.

MARTIN, J.A.:—In my opinion, this Court has no jurisdiction to entertain this appeal and therefore it should be quashed.

Galliher, J.A.

GALLIHER, J.A.:—I am of the opinion that we have no jurisdiction to entertain this appeal.

Appeal quashed.

PARKER v. THE CAPITAL LIFE.

N. S.

S. C.

Nova Scotia Supreme Court, Townshend, C.J., Graham, E.J., and Russell and Longley, JJ. February 13, 1915.

1. INSURANCE (§ V B 3—190)—ESTOPPEL OF INSURER—NON-PAYMENT OF PREMIUM NOTE—MISREPRESENTATION OF AGENT.

Where the insured was induced to abstain from paying the premium note by reason of the company, through its agent, saying that the life insurance policy was then void by reason of the carrying of the balance of the former premium note into the next quarter's note, the company is estopped from setting up the non-payment of the note when it was due, or availing itself of the condition contained in the note vitiating the policy.

Ex parte Adamson, 8 Ch.D. 807, applied.]

Statement

APPEAL from a judgment of Ritchie, J.

C. J. Burchell, K.C., and *Colin McKenzie*, for appellant.

H. Mellish, K.C., for respondent.

Townshend, C.J.

TOWNSHEND, C.J., concurred with GRAHAM, E.J.

Graham, E.J.

GRAHAM, E.J.:—This is an appeal from the decision of the trial Judge, finding a judgment for the plaintiff on a policy of life insurance for $1,000. The defendant set up his non-payment of a premium note.

After the death of the insured, the solicitor for the plaintiff received the following letter from the defendant company:—

The Capital Life Assurance Co. of Canada,
Ottawa, August 29, 1914.

Finlay MacDonald, Esq.,
Sydney, N.S.

Re William J. Parker.

Dear Sir,—Your favour of 24 instant received. Policy No. 624 called for a premium of $27.65 payable four times yearly in advance, commencing December 20, 1912. At December 30, 1913, there remained a balance of $10.70 unpaid on account of the four instalments of premium due for the first policy year. This balance of $10.70 with interest of 85 cts. for delay up to that time was merged by our agents with the next quarterly instalment due December 20, 1913, and a note for the combined amounts, in all $39.20, was taken by them. This note fell due by its terms March 4, with no payment whatever made thereon, and the policy consequently lapsed automatically. It might have been reinstated upon payment of the amount due, and submission of satisfactory evidence of health, but no application was ever made. So far as official receipts for premiums are concerned, these are handed to the insured upon his settling by cash or note. If a note is given, the policy, by the terms of the note, lapses unless payment is made on or before the due date thereof. Yours truly, M. D. GRANT, *Secretary*.

N. S.

S.C.

PARKER v. THE CAPITAL LIFE.

Graham, E.J.

The action was brought no doubt on the strength of the facts stated in that letter being correct and the company is estopped from saying to the contrary.

It is quite clear from the transactions mentioned in the evidence that this company took notes for its premiums. That meant giving credit for premiums. This is not a case of a first premium. At any rate the insured on February 2, 1914, gave his note to the agent of the company on the company's form for $39.20 payable at 30 days with a condition that if it was not paid at maturity the policy would be void. This is the note:—

Renewal premium note.

Note $39.20. Due Mar. 4/14. T.R. (if any) $0.20. Balance $39.40. Interest $. Thirty days after date I promise to pay to the Capital Life Assurance Company of Canada at its Head Office, Ottawa, Canada, the sum of Thirty Nine 20/100 Dollars, with interest thereon at 6 per cent. per annum till paid, being the renewal premium upon Policy No. 624 of the said company on my life. It is understood and agreed that if this note be not paid at maturity said Policy shall forthwith become null and void, and also if payment of this note be made after its maturity, that such payment shall not revive the Policy, but the Policy may be reinstated on evidence satisfactory to the Company of continued good health.

Name, WILLIAM J. PARKER.

Agency, Sydney, N.S.

(Agents are not authorized to make, alter or discharge contracts or waive forfeitures).

That note comprised a balance of $10.70 due on the previous note with interest, 85 cts., and the whole premium for another quarter.

That note would fall due March 4 (or, rather, March 7, for I suppose there are the usual three days' grace), in 1914. And because this note was not paid at maturity, as the letter points out, it is contended that the policy lapsed. To that the reply is estoppel by reason of a misrepresentation which led the insured not to pay this premium note when it was due, and to change his position prejudicially.

The learned Judge has found as a fact that before the note fell due, namely, between February 27 and March 2, 1914, the defendant's superintendent had a conversation with the insured. As detailed by the brother of the insured, George Richard Parker, that conversation was as follows:—

Q. Will you tell the Court the conversation you heard? A. Mr. Jory said "Mr. Parker, your policy is not in force." My brother said "Why?" He said (Mr. Jory) "You have allowed one part of that premium to be carried forth into a note covering the next premium, which is against the rules of our Company." My brother said, "My policy has not been in force for a long time as you have been accepting my notes in part payment on same." Mr. Jory said, "It is strictly against the rules of our Company to carry forth part of the payment into a new quarter and when I go back to the office someone will be on the carpet for putting this note through." My brother said, "If that is so, what in h—— am I paying for?" A few hasty words were said by my brother before Mr. Jory went out. Q. Who was present at that time? A. My brother, the deceased, and myself, Mr. Jory and my other brother. My other brother was in the stockroom, or in the door of the stockroom, which is adjoining the printing office. Q. Can you tell us what happened as a result of that? (Objected.) A. After Mr. Jory left we talked the matter over, as we talked business matters over, and I asked my brother what conclusion he had come to on the insurance. He said, "Well, in view of what Mr. Jory said, it is useless to pay the note when due as I am deriving no benefit from the insurance." It was left with him. Nothing more was done.

The other brother corroborates this in effect and Mr. Jory, the superintendent, admits that conversation, but says it took place at a later date, namely, March 7. He says that he saw the insured was too great a risk, in fact he was far gone in consumption, and that he first telegraphed the head office as to the matter, and it was after that that the conversation took place. The learned trial Judge has found against his testimony as to the date of the conversation and in favour of that of the two brothers. Payment of the note could have been made at that date and been effective.

Now that representation, that the policy was void because this premium note was carrying forward a balance due on one premium note into another quarter's premium note which was not permitted, was untrue. It was told with circumstance, namely, that someone would be on the carpet at the head office for putting that note through.

No secret rule of the company of that kind if any existed (the company produced none), would vitiate the policy. The Statutes of Canada require any such condition to be indorsed on or referred to in the policy to be effective. The note had been put through. It was on one of their forms and it had been at the head office for 15 or 20 days with the interest all charged up.

N. S.
S. C.
PARKER
v.
THE
CAPITAL
LIFE.
Graham, E.J.

I think all of the elements of estoppel are present. It is clear that the insured believed the representation and acted on it. The representation was calculated to have the effect of leading a reasonable and prudent man not to pay this premium if the policy was already void. I think the superintendent intended that the man should not pay the note and that thus the policy would lapse, and the company get rid of a bad risk. One cannot believe that the insured in his condition of health would, after paying previous premiums, let off an insurance company at that stage if he could avoid doing so, and the payment of a premium would, comparatively to the advantage to be gained, be considered a small matter. He must have relied on the representation. If the man had been in good health one can hardly imagine the official of the company not taking payment of the note. These people with moderate means who become insured in this way are really in the hands of a company when it repudiates a policy on any plausible ground.

The learned counsel for the company contended that this was only a representation as to law. I think there is more involved than a mere opinion of law, *i.e.*, either a "general law" or a "well known rule of law" which the insured must be taken to have known.

It had nothing to do with any principle of law that a balance due on one quarter's premium note could not be carried forward into the next note. He was stating a fact. He did not profess to be giving an opinion as to what the law was. The fact stated was that a balance on one note being carried forward into another, because it was against the rules of the company, rendered the policy void. I think the non-payment of the premium was proximately caused by the representation made. And it is almost trite to say that one cannot take advantage of his own wrong.

The defendant contended that this was something that could only be taken advantage of by an action of deceit and that there was no actual fraud. You may have fraud and estoppel both. Fraud is not essential to an estoppel. As a matter of fact I think this was a fraud and that the misrepresentation was also avail-

able as an estoppel in this action. I quote two passages from Ewart on Estoppel, 131:—

> To create an estoppel *en pais* the party in whose favour it operates must have altered his position through reliance on the words or conduct of the party estopped.

In *Ex parte Adamson*, 8 Ch.D. 807, James, L.J. said:—

> Nobody ought to be estopped from averring the truth or asserting a just demand unless by his acts or words or neglect his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something or to abstain from doing something by reason of what he had said or done or omitted to say or do.

To apply the quotation I say that the insured was induced to abstain from paying the premium note by reason of the company, through the agent, saying that the policy was then void by reason of the carrying of the balance of the former premium note into the next quarter's note. The defendant is estopped from setting up the non-payment of the note when it was due, or availing himself of the condition contained in the note vitiating the policy.

Without such a condition the mere non-payment of a premium note when it fell due would not vitiate the policy. I refer to *Knickerbocker* v. *Pendleton*, 112 U.S. 696.

The amount due can be deducted from the amount payable on the policy.

Meanwhile another quarterly premium fell due but the company had done nothing to renew the false impression it had created, and apparently the truth was only discovered by the solicitor.

I think that want of payment is in the same position as the other one, namely, that the defendant cannot set it up. There is American authority in favour of the plaintiff on both points.

In *Manhattan Life* v. *Smith*, 44 Ohio State, 140.

> The action of the company in the case at bar was in effect a repudiation of its promise to pay the amount stipulated in the policy. Even had Mrs. Smith learned the amount and time of payment after the death of her husband a tender would have been a useless ceremony. On general principles whenever the act of one party to whom another is bound to tender money, services, or goods indicates clearly that the tender is made, would not be accepted, the other party is excused from technical performance of the agreement. The law never requires a vain thing to be done.

N.S.

S. C.

PARKER v. THE CAPITAL LIFE.

Graham, E.J.

In *Gerard* v. *Mutual Life Insurance Co.*, 86 Pa. St., the Court says:—

It was argued on behalf of defendants that payment of the premium due on January 14, 1871, was a condition precedent and also payment of the premium after that date falling due before his death in February, 1872, and that equity will not relieve against losses resulting from non-performance of such condition through neglect alone of the sufferer. Be it so, the non-performance was because of defendants' refusal to take the premium when tendered. They declared them forfeited on January 16, 1871, and from that date persisted in treating it as a nullity. On another policy they had given mortgage they gave notice as was their custom on the falling due of premiums but none in reference to this. They still say it became void and that no life was left in it. The assured lost nothing by omitting the farcical act of a formal tender every quarter, while the company insisted the policy was dead. It was not this neglect but their fault that the premiums were unpaid.

This case was followed in the case of *National Insurance Co.* v. *The Home Benefit of New York*, 181 Pa. St. 443, in which a portion of the headnote is as follows:—

Where an insurance company has declared a policy forfeited and refused to accept a premium, the fact that insured subsequently failed to pay the premiums as they fell due will not affect the right to recover on the policy if the forfeiture was invalid.

May on Insurance, vol. 2, sec. 358, it is said:—

Payment or tender of payment of premiums is not necessary where the insurers have already declared the policy forfeited or done any other act which is tantamount to a declaration on their part that they will not receive it if tendered.

Note A. Where the insurer has declared the policy forfeited and has refused to accept a premium the fact that the insured subsequently failed to pay premiums as they fell due does not affect the right to recover on the policy.

In my opinion the appeal should be dismissed with costs.

Russell, J.

RUSSELL, J.:—A policy of life insurance was issued by the defendant company on the life of William J. Parker, the plaintiff his mother, being the beneficiary. The premiums were payable quarterly, and a note was taken for the premium due September 20, 1913, which was not fully paid otherwise than by its amount being included in a later note. The premium for December 20, was also not paid in cash. Whether a note was taken for it does not clearly appear. On February 2, 1914, a note was taken by the local agent for the balance of the September 20 premium and the premium due December 20, 1913.

This note would come due on March 7, 1914. It was sent to the Head Office at Ottawa, and I think there can be no doubt that if this note had been paid at maturity the policy would have been in force. It is contended that the policy lapsed because of the non-payment of the December 20 premium within thirty days from its date as required by the policy. But I think we may fairly assume from the letter of the secretary in August 29, 1914, that the premiums up to that for December 20, 1913, had all been settled either by cash or by note. Either that or else that the company is estopped from saying that they were not duly paid, and that policy was in good standing when the note of February 2, 1914, was accepted in settlement. That letter is as follows:—

[Letter referred to appears in full in the judgment of Graham, E.J.]

The statement in this letter as to the lapsing of the policy by non-payment of the note is in strict accordance with the express terms of the note signed by the assured in which he agrees to this condition.

Between February 27, 1914, and March 2, 1914, as found by the trial Judge, a conversation took place between the General Superintendent who had come down from Ottawa and the late William J. Parker, the assured, in the course of which the former told the assured that his policy had lapsed and was no longer in force because of a rule of the company which did not permit of any balance due on an unpaid premium being carried forward into a note for a premium fully due at a later date. There was no such provision in the policy and the learned trial Judge has held, as I think, rightly, that the assured was not bound by any such rule made for the government of the company's officials if there was one, of which he says there was no proof. At the time this conversation took place the insured was far gone in consumption and the Judge thinks it fairly to be inferred that this was his condition when the note was given. He draws an inference of fact that the note would have been paid at maturity if the Superintendent had not informed the assured that the policy was void. There was evidence to this effect and the Judge believed it. The only question therefore in the case, on this appeal, which seems to call for

N. S.
S. C.
PARKER
v.
THE
CAPITAL
LIFE.
Russell, J.

argument, is the question whether the non-payment of the note under these circumstances caused the policy to lapse.

I am unable to see why it should not have done so. I do not see how the expression of the superintendent's opinion that the policy had lapsed because of the non-payment in cash of a previous premium prevents the policy from lapsing because of the failure to pay the note for the later premium. If the statement of the superintendent is to be treated as a misrepresentation it cannot operate by way of estoppel. The principle of estoppel is expounded in the judgment appealed from. It only prevents the person making the representation from afterwards asserting against the other party a condition of things different from that so represented. The company does not wish to assert any different condition of things from that represented by the agent. It is contended now as its agent represented then, that the policy was void because of the previous failure to pay the premium.

The ground on which the plaintiff contends that the policy is in force is that the statement of the superintendent induced the assured to refrain from paying his premium. Probably it did. But the question remains, did it excuse him from his obligation to pay and place him in as good a position as if he had paid? I cannot think so. If the company had refused to accept payment of the note the assured would, no doubt, have been in the same position as if the note had been paid. At all events, if he had tendered the amount of the note this would have been the result, and I do not suppose it would have been necessary to tender payment if the company had refused to receive it or clearly indicated that it would not be accepted. But I do not see how the mere expression of opinion by the superintendent could have the effect of discharging the assured from the obligation to pay the note or relieve him from any legal consequences that resulted from the failure to pay it. I do not say, although I am not without an opinion on the subject, what the legal results would have been if the representation of the agent had been fraudulently made for the purpose of inducing the assured to refrain from making his payment. There is no finding of fraud and I doubt if there is evidence that would have

justified such a finding. I regret having to come to the conclusion that the assured had allowed his policy to lapse and that the plaintiff's claim must therefore be dismissed, the appeal being allowed with costs.

Since the foregoing opinion was written I have been favoured with a perusal of the opinion of my learned brother Graham. Referring to the letter of August 29, 1914, to Mr. Finlay McDonald, solicitor of the plaintiff, from the secretary of the defendant company, he says that the present action was no doubt brought on the strength of the facts stated in the letter being correct and the company is estopped from saying to the contrary. There is no assertion in that letter which the company might not safely repeat in the present action. But I cannot think that any estoppel follows merely from the fact of an action having been brought on the strength of that letter. It is conceivable to me that I might inadvertently and erroneously admit that I owed by tailor for a suit of clothes and yet successfully defend an action brought against me for the price after discovering that I was mistaken in making such an admission. It is not, however, necessary to dismiss this estoppel because it is not the one relied on by the plaintiff. The estoppel relied on is that which it is said arises out of the misrepresentation made by the company's superintendent when he told the deceased that his policy was void because of balance due on an earlier premium of September 20, had been carried into the note given for the premium due in December. It may be granted that all the elements necessary to constitute an estoppel exist in respect of the representation that the assured was prejudiced by his reliance upon the truth of the representation. The point at which I part company with my learned brother, relates to the application of the principle of estoppel to these circumstances. He says that the company is thereby estopped from setting up the non-payment of the note due March 7. I must confess that I am not familiar with that manner of operation on the part of an estoppel. To my mind the effect of the estoppel, and its only effect, must be to prevent the company from averring that the policy had not been rendered void by the inclusion of the unpaid arrearage in the note given for the December premium.

N. S.
S. C.
PARKER v. THE CAPITAL LIFE.
Russell, J.

In the citation given from the decision of James, L.J., it appears to me that my learned brother fails to lay the necessary stress on one of the most significant words in the passage he has quoted: "Nobody ought to be estopped from averring the truth or asserting the just demands, etc." I assume the truth in this case to be that the policy had not been avoided by the inclusion of the arrearage in the December note. The defendant, I assume, is estopped from averring that truth. Be it so. He does not wish to aver the truth. He is only too well contented with the lie, if it was a lie, which he told the deceased in regard to the affect of so including the arrears in the new note. The case that is made for the plaintiff is therefore not one of estoppel but of misrepresentation, and I do not think that misrepresentation can have excused the defendant from the obligation to pay the note due March 7. What effect the representation would have had if there had been a finding of fraud does not seem at present to call for decision. The circumstances come so near to a fraud that I should be very well pleased to see the question of fraud submitted to a jury.

Longley, J.

LONGLEY, J.:—In this case we have not only the evidence of the case, but we have the judgment of the learned Judge who tried the case. In all the findings of fact which the learned Judge has made I concur, and also in his views of the law in relation to insurance, except on one point.

The policy in this case is a policy which does not make the payments in advance a condition precedent, but even without that feature in a policy the Supreme Court of Canada has held that every premium must be paid and that a policy would be void if the premiums were not paid, as it would be impossible for a company to carry on an insurance business with no person paying in money. The policy in this case therefore would entirely lapse according to the terms required in the notes for keeping it alive, unless all the premiums had been paid up. In the present case the policy fell due on September 20, 1913, which was not paid at maturity. It may be stated that at this time the policy holder who was John Parker, was in very serious health, and in the last stages of consumption. On February 2,

1914, he gave a renewal note for the coming quarter's premium and a balance on the old quarter due September 20, a part of which was not paid until some time afterwards. And this note stated:—

It is understood and agreed that if this note is not paid at maturity said policy shall forthwith become null and void and also if the payment of this note shall not be made at maturity, but after its maturity, such payment shall not revive the policy but the policy may be reinstated on evidence satisfactory to the company of continued good health.

Now it is impossible to reconcile the duty of the agent in Sydney in taking this note with the obligation which he owed to the company because he should at least have been able to have certified that the policyholder was in good health whereas in February, 1914, the insured was in a desperate condition of health making him a not insurable party at all. However, this note was taken, and it was payable on February 7. Somewhat prior to that date Mr. Jory, the superintendent of the company, came from Ottawa to Sydney, as he states for the express purpose of finding out what was the condition of the policyholder in respect of health. He came down, and had an interview with the policyholder in which, as the Judge finds, he made this explanation to the policyholder.

Mr. Jory said, "Mr. Parker, your policy is not in force;" my brother said: "Why." He said (Mr. Jory), "You have allowed one part of that premium to be carried forth into a note covering the next premium which is against the rules of our company." My brother said: "My policy has not been in force for a long time as you have been accepting my notes in part payment on same." Mr. Jory said: "It is strictly against the rules of our company to carry forth part of the payment into a new quarter and when I go back to the office someone will be on the carpet for putting this note through." My brother said: "If that is so, what in h—— am I paying for."

It is upon this explanation of the superintendent that an attempt has been made to establish that he made fraudulent representations to the policyholder and prevented him from paying the note which was due in March, paying the next quarter's premium and finally dying in July, 1914.

I hold that the superintendent represented nothing more than the facts justified. If he had come down for the purpose of ascertaining whether or not the party was in suitable health to be insured at the time the note of February 2 was given,

N. S.
S. C.
PARKER v. THE CAPITAL LIFE.
Longley, J.

he must have been convinced at the first view of the policyholder that he was not an insurable person and that note should never have been taken at all, and that the agent at Sydney was therefore entirely at fault and blameable for having taken that note. But even if the note were held to be good and that the company had been guilty of delay in making themselves aware of the proper health of the party the representation of Jory to Parker was still a representation of law in regard to the character and text of the note, and therefore he was bound by law to attend to it if it was to be kept alive and to pay for his last quarter's insurance in cash, and I don't think the interview with Jory was sufficient to prevent him taking advantage of all possible rights and interests that he had in it.

The letter of M. C. Grant, dated from Ottawa, August 29, 1914, I do not regard as in any way conclusively binding on the company. It was written after the death of the insured, and he may have written it with a misunderstanding of the facts of the case. In any case, even if this letter be regarded as the true position of Parker in the company at the time, it still remains necessary for Parker to pay up every farthing within the time to keep the matter alive.

My judgment is for defendant.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—The result is that the appeal is dismissed.

Appeal dismissed.

ALTA.
S. C.

REX v. MARCEAU.

Alberta Supreme Court, Scott, Beck, and Walsh, JJ. January 8, 1915.

1. DISORDERLY HOUSES (§ I—5)—OFFENCE OF KEEPING—STATING PLACE OF OFFENCE.

A conviction made by a magistrate for keeping a bawdy house will not be quashed because it is not expressly shewn in the depositions that the street address referred to in the depositions was in fact in the city which was named as the place of the offence in both the information and the formal conviction, although the magistrate's jurisdiction was limited to that city.

[*R.* v. *C.P.R.*, 14 Can. Cr. Cas. 1, 1 A.L.R. 341, applied.]

Statement

APPEAL under Alberta Crown practice Rule 20 from an order of Stuart, J., refusing to discharge from custody and to quash the conviction of accused for keeping a bawdy house.

J. McK. Cameron, for appellant.
James Short, K.C., for the Crown.

SCOTT, J., concurred with WALSH, J.

BECK, J.:—Had this been a case in which the conviction was invalid on grounds which might be met under sec. 1124 of the Code by amendment, where the Court or Judge, upon a perusal of the depositions, is satisfied that an offence of the nature described in the conviction has been committed over which the Justice had jurisdiction, I should, had it come before me in the first instance, in all probability, have refused to amend on the ground that, though the magistrate was satisfied, I was not.

The evidence at best is slight and inferential, and depends on the evidence of disreputable witnesses, who, out of their own mouths, admit the practice of immoral methods in connection with the case. The principal witness is one Ogden. He was employed by the Calgary police, paid for his services, and provided with money for his out-of-pocket expenses. He went to the accused's house, says he had sexual intercourse with her, and paid her $3. He had been, it is stated in the evidence, supplied with "marked money."

Another witness is Detective Turner, who sent Ogden to the accused's house. Turner and another constable say they waited outside the house till Ogden came out. Then they indicate that they made a pretence of arresting Ogden as a frequenter and took him back to the house. There they searched for the marked money and could find none. The magistrate's decision rests wholly on the evidence of these three men—men of no moral sense, adopting, according to their own account, immoral and disreputable methods. And their evidence, such as it is, goes only to one act and a very ambiguous statement of the accused. The three witnesses are, on their own admission, *participes criminis* with the accused, and, for my part, I should not be ready to take their uncorroborated story. I had, in a former case, occasion to comment on the same methods being used by the Calgary police force. I there said, in referring to a result unfavourable to the prosecution, "If that is the result, I shall have no regret. I say this because of what I look upon as irregular, immoral and disreputable methods adopted by members of the city police of Calgary to procure evidence on which to obtain

ALTA.

S. C.

REX v. MARCEAU.

Beck, J.

a conviction. They employed two men, residents of Calgary, one a married man, for their purpose. These two men picked up two street walkers whom they had seen going in and out of the house; arranged to go to the house with them; each of these men paid $1.50 for a room, to which they each took one of the women, to whom they each paid $3 for actual prostitution; and it is quite clear, from these men's evidence, that they expect, not only payment for their services, but a refund of their expenses. Their employers must at least have had a pretty correct surmise of the methods they would employ."

My former criticism has evidently had no influence upon the Calgary police, who continue the hypocritical and pharisaical pretence of being zealous in extirpating public vice by the secret adoption of the same vices.

It is time, in my opinion, that the mayor and council of Calgary, as representing the citizens generally, should publicly say whether they intend to tolerate such methods.

As the conviction is valid on its face and the evidence is sufficient to justify the magistrate in convicting, I regret that I have to concur in the dismissal of the application.

Walsh, J.

WALSH, J.:—The appellant was convicted by the police magistrate for the city of Calgary on a charge of keeping a bawdy house. Stuart, J., dismissed her application to quash the conviction and for her discharge from custody under it, and from his judgment an appeal is taken by her under rule 20 of the Crown practice rules.

The application rests upon three grounds, namely:—

(1) That there was no evidence to shew that the offence was committed in the city of Calgary, the jurisdiction of the convicting magistrate being limited to that municipality;

(2) That there was no evidence as to the date upon which it was committed; and

(3) That there was no or not sufficient evidence to justify the conviction.

The only reference in the depositions to the locality in which the offence was committed is that the house in question was ——— ——— (a street number upon a named avenue was here given). Nowhere in them is the city of Calgary mentioned. In addition to the reasons given by the learned Judge for refusing

to give effect to this objection, I think this point is disposed of by the judgment of this Court *en banc* in *Rex* v. *Canadian Pacific R. Co.*, 14 Can. Cr. Cas. 1, 1 A.L.R. 341. Stuart, J., in delivering the judgment of the Court in that case, says:—

> "The information shews that the offence was alleged to have been committed within the province of Alberta, and we must presume that it was for such an offence that the defendant was tried and convicted. I do not think therefore, the Court ought, particularly when jurisdiction appears on the face of the conviction, to scrutinize the depositions in order to discover an absence of exact evidence to establish local jurisdiction."

This statement exactly covers this case, for here it is shewn by the record that the charge upon which the woman was being tried and to which she pleaded was for an offence alleged to have been committed in the city of Calgary, and it was of that offence there committed that she was convicted, as appears on the face of the conviction.

Upon the second ground, I think it quite clear from the depositions that the date to which the evidence is directed is the day before that upon which the evidence was taken, namely, September 16, 1914, which is the date mentioned in the charge and in the conviction. In addition to the references to the evidence under this head which my brother Stuart gave in his reasons for judgment, I think that the statement of the witness, W. E. Turner, one of the detectives under whose directions the raid was made, in answer to a question as to why this house was raided, "I know we made an effort to catch it, yesterday," plainly refers, or at any rate justified the magistrate in inferring, that it refers to the events in which the two Turners and Ogden took part which resulted in the procuring of direct evidence against the appellant and the subsequent raiding of the house. This meets also, I think, Mr. Cameron's objection that the references in the deposition to "yesterday" might mean a time later in the day than the hour at which this evidence was procured and the raid was made.

As to the third ground, in my opinion the one act of sexual intercourse which the evidence shews to have occurred in this house, coupled with the statement which the witness Ogden

ALTA.

S. C.

REX v. MARCEAU.

Walsh, J.

swears that the appellant made to him that "she had not been doing this over three or four days," afforded sufficient proof, if believed by the magistrate, to stamp her house as a bawdy house.

The reference in this statement is obviously to business of the character of that which the appellant and the witness were then negotiating, and is an admission upon her part that for three or four days before September 16 she had been engaged in carrying on that kind of business. I do not think there is any evidence of the general reputation of the house, but there are other facts, such as the finding in the house of all of the accessories of such a trade, which, coupled with the proof of the one act and the appellant's admission, constitute sufficient evidence of the character of the house to justify the conviction.

The appeal is dismissed with costs

Appeal dismissed.

IMP.

P. C.

TORONTO POWER CO. LIMITED v. KATE PASKWAN.

Judicial Committee of the Privy Council, Lord Atkinson, Lord Parmoor, Sir George Farwell and Sir Arthur Channell, April 15, 1915.

1. MASTER AND SERVANT (§ II A 4—71)—DUTY AS TO SAFETY APPLIANCES—HOISTING MACHINERY—SELECTION OF APPLIANCES—QUESTION OF FACT FOR JURY.

Although a master is not bound to adopt all the latest improvements and appliances, the question as to whether proper safety appliances had been installed by a master to prevent the overwinding of hoisting machinery is one of fact for the jury, notwithstanding the fact that the master entrusted the selection of such appliances to a competent man; and it is sufficient, for the finding of the jury, where the evidence points to several kinds of safety appliances, that the improper devises had been installed.

[*Paskwan* v. *Toronto Power Co.*, 15 D.L.R. 752, affirmed.]

Statement

APPEAL from the judgment of the Ontario Supreme Court, Appellate Division, 15 D.L.R. 752.

The judgment of the Board was delivered by

Sir Arthur Channell.

SIR ARTHUR CHANNELL:—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Ontario confirming the judgment of Mr. Justice Kelly whereby he directed judgment to be entered, after a trial before a jury, in favour of the respondent for the sum of six thousand dollars.

The respondent is the widow of one John Paskwan, who was

IMP.

P. C.

TORONTO POWER CO. LTD. v. KATE PASKWAN.

Sir Arthur Channell.

killed on February 8, 1913, by an accident on the works of the appellant company, in whose service he then was, having entered their employment on that day. The respondent brought the action on behalf of herself, and two children of hers, step-children of the deceased, who were alleg to be dependent upon him, and she alleged that the appellar ere liable both at common law and under the Workmen Compensation Act, which corresponds to the English Employers' Liability Acts. The jury at the trial answered certain questions put to them by the learned Judge and found $3,000 as the damages if the liability was the restricted liability of the Workmen's Compensation Act, and $6,000 if the defendants were liable at common law, and the learned Judge afterwards entered judgment for the $6,000.

The deceased man was working as a rigger and had been preparing some logs for hoisting by a travelling crane, and was waiting to hitch on the logs when he was killed by the falling of a block from the crane. The cause of the block falling was the overwinding of the drum which hoisted the chain on which the block was. It was not contended in the Supreme Court of Ontario or before this Board that there was not a clear case proved of negligence by fellow workmen giving a cause of action under the Workmen's Compensation Act, and the only question on the appeal is as to the liability of the appellants at common law. The suggested grounds for holding them liable are that they ought to have provided some kind of safety device which would have prevented the overwinding, or that in default of such a device they ought to have employed a signalman to give warning to the crane operator when he ought to stop winding. The respondent called several witnesses who spoke to two different kinds of safety apparatus which they had seen in use at other works, and it could hardly be said that at the end of the plaintiff's case, there had not been made a case which must have been left to the jury. Indeed no submission on this point seems to have been made at that stage. The defendants' answer to this case was that the directors of the company did not take any personal part in the superintendence of the mechanical work of the company, but employed a competent man as mechanical

IMP.
P. C.
TORONTO POWER CO. LTD. v. KATE PASKWAN.
Sir Arthur Channell.

superintendent. It appeared from the defendants' evidence that, on an occasion some two years before the accident to Paskwan, the hook had fallen from overwinding in the same way, and that the defendants' superintendent had then visited other works, including those mentioned by the plaintiff's witnesses, to see the safety devices there in use, and that he came to the conclusion that they were not satisfactory, and accordingly no safety appliance was installed; as to the signalman, the defendants' case was that the operator had a clear view and could see as well as any signalman could have done. The learned Judge left three questions to the jury in addition to the question of the amount of damages.

(1) Was the death of deceased, John Paskwan, caused by negligence or was it a mere accident?

To which the jury answered "Negligence."

(2) Was the casualty or accident caused by the negligence of the defendants or of any person or persons in the employ of the defendants?

Answer.—Yes.

(3) If so, state fully and clearly whose negligence it was and what were the act or acts or omission or omissions which caused or brought about the accident?

Answer.—The defendant company were negligent through their authorized employees, namely, through their master mechanic, for failing to install proper safety appliances and to employ a competent signalman. Through their foreman rigger for failing to give proper attention to the descent of the large hook and to leave the craneman to watch the small block. Through the craneman for neglecting to stop the small hook at its proper place.

On these findings the learned Judge entered judgment for the larger of the two sums found by the jury as on a common law liability.

The summing up of the learned Judge is not now complained of nor is it contended that if there was evidence which ought to have been left to the jury, their finding ought to be set aside as perverse or one which the jury could not reasonably find. The contention of the defendants is that they performed their duty

IMP.

P. C.

TORONTO POWER CO. LTD. v. KATE PASKWAN.

Sir Arthur Channell.

by leaving the selection and care of the plant to a competent man, and they rely mainly on a well-known passage in the judgment of Lord Cairns in *Wilson* v. *Merry*, L.R. 1 H. of L. (Scotch), at page 332. Reliance was also placed on *Cribb* v. *Kynoch, Ltd.*, 1907, 2 K.B. 548, and *Young* v. *Hoffmann Manufacturing Co.*, 1907, 2 K.B. 646. It is, of course, true that a master is not bound to give personal superintendence to the conduct of the works, and that there are many things which in general it is for the safety of the workman that the master should not personally undertake. It is necessary, however, in each case to consider the particular duty omitted, and the providing proper plant as distinguished from its subsequent care is especially within the province of the master rather than of his servants.

In *Cribb* v. *Kynoch* and *Young* v. *Hoffmann*, the question arose as to the duty of a master to have inexperienced persons in his employ properly instructed in the way to perform dangerous work, and that is a matter which it is fairly obvious must in almost all cases be done for the master by others. The supplying of that which, in the opinion of a jury, is proper plant, stands on rather a different footing. It is true that the master does not warrant the plant, and if there is a latent defect which could not be detected by reasonable examination, or if in the course of working, plant becomes defective and the defect is not brought to the master's knowledge and could not by reasonable diligence have been discovered by him, the master is not liable, and, further, a master is not bound at once to adopt all the latest improvements and appliances. It is a question of fact in each case, was it in the circumstances a want of reasonable care not to have adopted them, see *per* Willes, J., in *Hanson* v. *Lancashire and Yorkshire Railway Co.*, 20 W.R. 297. Here the nature of the accident must be borne in mind. Accidents from overwinding are by no means uncommon with all kinds of hoisting machinery. They arise from negligence of the operator, but it is a kind of negligence so likely to occur that a jury may well consider that safety appliances should be provided. In mine shafts it is, in this country, compulsory to do so. In the present case the jury may well have thought that even if the

IMP.

P. C.

TORONTO POWER CO. LTD. v. KATE PASKWAN.

Sir Arthur Channell.

particular appliances spoken of by the plaintiff's witnesses, and inspected by the defendants' manager after the former accident, were not entirely satisfactory, still there could have been no real difficulty in installing a safety device, and that ought to have been done. Then, is it an answer that a master whose attention has been called by a previous occurrence to the danger from overwinding, should take the advice either of his manager or any other person whom he presumes to be more skilled than himself, and on such advice do nothing? The jury might perhaps under such circumstances have found that there was no want of reasonable care and only an error of judgment, but this jury have not done so. It is enough to say, as both the Judge who tried the case and the Judges on Appeal in the Supreme Court have said, that there was a case which could not have been withdrawn from the jury, and that the jury have found against the defendants. The learned Judge could not have ruled that as a matter of law the answer of the defendants was necessarily conclusive in their favour. It is unnecessary to go so far as Mr. Justice Middleton did in the Court below and say that the jury have come to the right conclusion. It is enough that they have come to a conclusion which, on the evidence, is not unreasonable. Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

MAN.

C. A.

REX v. LUPARELLO.

Manitoba Court of Appeal, Richards, Perdue, Cameron and Haggart, JJ.A. February 24, 1915.

1. JURY (§ II B—55)—CRIMINAL TRIAL—DISCHARGE OF JURY AND EMPANELLING FRESH JURY—INCLUSION OF SOME OF THE SAME JURORS.

Where, on the trial of a capital charge, the jury were not kept together on an adjournment over night, as directed by Code sec. 945, whereupon the trial Judge discharged the jury and empanelled a fresh jury, before which the trial was commenced *de novo*, there is no duty upon the trial Judge, on his own initiative, to exclude all the twelve jurors sworn on the first day from the second jury; and the circumstance that eight of the first jury before which testimony had been given were called and sworn on the second jury without challenge does not raise a presumption of "substantial wrong or miscarriage" to found an order for a new trial.

[*R.* v. *Theriault*, 2 Can. Cr. Cas. 444; *R.* v. *Sonyer*, 2 Can. Cr. Cas. 501; *R.* v. *Long*, 5 Can. Cr. Cas. 493; *R.* v. *Lawrence*, 25 Times L.R. 374, referred to.]

Statement

CROWN case reserved on a trial for rape.

A. V. Darrach, for the prisoner.

John Allen, Deputy Attorney-General, for the Crown.

RICHARDS, J.A., dissented.

The opinion of the majority of the Court was delivered by

CAMERON, J.A.:—This is a case reserved under the Criminal Code by Mr. Justice Metcalfe, who sets forth the facts therein. The prisoner was indicted on the charge of unlawfully having carnal knowledge of a woman, not his wife, without her consent. The question is whether the learned trial Judge was right in not excluding from the array the twelve jurors who were called and sworn on the afternoon of Tuesday, November 25, 1913, and who heard the evidence of several witnesses, but were discharged the next morning on the ground that they had not been kept together over night. Another jury was then called and sworn and the trial proceeded with. Eight of the jurors who sat on the jury who convicted the prisoner were members of the jury sworn the first day. The prisoner was found guilty.

Under sec. 299 of the Code, everyone who commits rape is liable to suffer death. Section 945, sub-sec. 4, provides that directions that during an adjournment the jury shall be kept together be given in all cases in which the accused may upon conviction be sentenced to death.

Counsel for the prisoner contended that a manifest and substantial wrong was done him by the fact that the evidence of five witnesses for the Crown was given twice to eight members of the jury, who would thus be unduly and unfairly impressed thereby. But the method adopted in England, according to the cases cited, of discharging and re-swearing eleven jurors when the twelfth had become incapacitated to act by illness, meets this criticism: see *Rex* v. *Lawrence*, 25 T.L.R. 374; *Rex* v. *Ward*, 10 Cox 573; *Rex* v. *Edwards*, 3 Camp. 207, where eleven Judges upheld the trial Judge; *Regina* v. *Beere*, 2 Moody & R. 472; *R.* v. *Ashe*, 1 Cox 150; Halsbury, IX., 370.

Counsel for the Crown relied upon sec. 1019 of the Code, which is as follows:—

> "1019. No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according

MAN.

C. A.

REX v. LUPARELLO.

Cameron, J.A.

to law was done at the trial or some misdirection given, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial: Provided that if the Court of Appeal is of opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted."

It is urged that unless something is positively shewn that some substantial wrong or miscarriage has been occasioned there is no ground for this Court to interfere. We were referred to *R.* v. *Harris*, 2 Can. Cr. Cas. 75, where a private prosecutor had a conversation with a juror, and Wurtele, J., held that that could not avoid the verdict. Also to *The King* v. *Mah Hung*, 20 Can. Cr. Cas. 40.

It is further urged that the prisoner had, when the fresh jury was being called, the right to challenge for cause under sec. 935, sub-sec. (*b*).

Prisoner's counsel urged that it was the duty of the Court, of its own initiative, to exclude all the twelve jurors sworn the first day. He referred to *R.* v. *Theriault*, 2 Can. Cr. Cas. 444, at p. 455; *Reg.* v. *Sawyer*, 2 Can. Cr. Cas. 501, and to *Rex* v. *Long*, 5 Can. Cr. Cas. 493, where Wurtele, J., at p. 499, defines the duties and functions of the Judge at a criminal trial with great clearness. A number of cases, including some of those cited above, are referred to in Tremeear [Criminal Code and Evidence, 2nd ed., pp. 806 *et seq.*], in his notes to sec. 1019.

I must say that it does not seem to me that it was shewn that there was anything not according to law done at the actual trial at which the prisoner was convicted. The trial proceedings commenced on Tuesday became abortive and null upon the discharge of the jury on the following morning. With the swearing of the fresh jury the actual trial, leading up to the conviction, commenced, and the calling of some of the jurors sworn on the first jury to act on the second was in no way contrary to law as I see it. But, further, there is nothing before us from which we can draw the conclusion that any substantial wrong or miscarriage was occasioned by the presence of the eight jurors, who had been sworn the first day, on the jury who convicted. We can presume nothing of the kind. On the contrary, our presumption must be, on the wording of the case submitted, that

everything was properly done with due regard to the interests of the accused. To find any substantial wrong or miscarriage occasioned at this trial by the presence of the eight jurors in question on the jury, we are driven to the region of imagination altogether. Moreover, the prisoner had, at the trial, the unimpaired right to challenge for cause, and, in my humble judgment, there was no duty cast on the Judge at the trial to exclude all the twelve jurors in question from the jury called and sworn on the second day.

I would, therefore, answer the question submitted in the affirmative.

Judgment for the Crown.

JOHNSON v. BUTLER.

Alberta Supreme Court, Walsh, J.

1. MECHANICS' LIENS (§ VIII—60)—NOTICE—POSTING OF BY OWNER—WHEN NECESSARY—PRESUMPTION—MECHANICS' LIEN ACT (ALTA.)—APPLICATION OF.

The Mechanics' Lien Act, 1906, Alta, ch. 21, sec. 11, does not make necessary the posting of a notice by the owner who does not learn until after the completion of the building by his tenant that construction work had begun, in order to escape the liability ensuing under the Act as upon the statutory presumption that in default of posting notice it shall be held to have been constructed "at the request of such owner;" sec. 11 applies only where knowledge of the construction is acquired by the owner during the course of construction and it is not sufficient to fix the owner with liability that he had given the tenant permission by the lease to erect a building at his own expense and to remove it at the end of the term.

TRIAL of mechanics' lien action. Statement

W. H. Sellar, for the plaintiff.

F. C. Moyer, for the defendant.

WALSH, J.:—The plaintiff put up a building for the defendant Butler on land of which he was tenant under a lease from the defendant Spencer, the registered owner. When Butler was negotiating for this lease he attempted to induce Spencer to erect this building for him, but this, Spencer declined to do. Spencer, however, gave him verbal permission to have such buildings erected on this land, at his own expense, as he might require for the purposes of the business which he intended to carry on upon it; and the written lease contains a clause Walsh, J.

ALTA.

S. C.

JOHNSON v. BUTLER.

Walsh, J.

giving Butler the right to remove, at the expiration of the term, any buildings placed by him on the demised premises. The building in question was constructed under contract with Butler alone, and upon his credit. Spencer not only was not a party to the contract, but was not aware that it had been made or that any work had been done under it until after its full completion and the building was in the occupation of Butler. No notice disclaiming responsibility for the work, on the part of Spencer, was ever posted on the land. The plaintiff, having recorded his lien against the interest of Spencer, now seeks the usual judgment for its enforcement.

I have considered but one of the many objections raised by Mr. Moyer to the plaintiff's right to recover, as in my view of the law that objection which goes to the root of the matter must be decided adversely to the plaintiff.

The plaintiff's work was admittedly not done at the express request of the defendant Spencer. It is only by virtue of the provisions of sec. 11 of the Act (Ch. 21, 1906), that any argument can be raised in support of the contention that the plaintiff's lien attaches to this defendant's interest in the land. This section provides that,

> Every building . . . constructed upon any lands with the knowledge of the owner . . . shall be held to have been constructed at the request of such owner . . . unless such owner . . . shall, within three days after he shall have obtained knowledge of the construction . . . give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place upon said land or upon the building or other improvement thereon.

It is proved, as I have said, that his first knowledge of this construction was acquired after its completion. It is true that he knew that his tenant Butler intended to erect, at his own expense, a building upon the land, but I do not think that that is the knowledge referred to in this section. It is knowledge of the fact of construction, not knowledge of the intention to construct, which, in my opinion, gives rise to the statutory request created by this section.

It is argued for the plaintiff that the failure of the defendant Spencer to post the notice called for by the section—within three days after he obtained knowledge of the construc-

tion—takes from him the right, which he might otherwise have had, to say that this work was not done at his request.

The two-fold purpose of the section is obvious. It is to give to a contractor, who otherwise might have the mistaken idea that he was doing the work in hand for the owner of the land, notice to the contrary so that he may, with his eyes open to the facts, elect whether or not he will proceed with it on the personal liability of him by whom he is employed, and at the same time to work a statutory estoppel against an owner who stands by while the work is being done to his knowledge, and says nothing. It surely never was the intention to make necessary the posting of such a notice by an owner to whom knowledge of the construction comes only after its completion. I can see nothing in the language of the section to compel me to adopt that view of it, and having in mind the manifest object of the provision, I think that I should not force that meaning out of it. It might happen that the first knowledge that the work claimed for was done might come to an owner through the service upon him of process for the enforcement of the lien. How absurd it would be to say in such a case that unless he, within three days after such service, posted the notice called for by the section, it must be held that the work was done at his request. And yet, if the plaintiff's contention is well founded, that is exactly what would, in such a case, follow the owner's failure to post the notice.

The section applies in terms only to a building constructed with the knowledge of the owner, which means I think, knowledge acquired during the course of construction and therefore none of its provisions apply to such a case as this.

I must hold that as the work was not done at the request of the defendant Spencer, his interest in the land is not liable for the amount of the plaintiff's claim. I regret this the less because the plaintiff dealt only with Butler whom he knew to be but a tenant of the property having the right under his lease to remove the building at the end of his term.

The action is dismissed as against the defendant Spencer with costs and the registration of the plaintiff's lien must be vacated.

Judgment accordingly.

ONT.

S. C.

Re LORNE PARK.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell and Sutherland, JJ.

1. DEEDS (§ II A—15)—CONSTRUCTION OF COVENANT—"COMMONS"—RECREATION GROUNDS.

The ball grounds, the reservoir, and the picnic grounds of a summer resort, used for general recreation, are "commons" within the meaning of a covenant in a deed entitling the lot owners to free access to the "commons" of the park, and are appurtenances running with the land that cannot be encroached upon by subsequent purchasers or assigns of the vendors of the grounds.

Statement

APPEAL from the judgment of MIDDLETON, J., 18 D.L.R. 595, 30 O.L.R. 289.

J. Bicknell, K.C., for the appellant.

M. H. Ludwig, K.C., for A. R. Clarke and others, claimants, respondents.

Clute, J.

CLUTE, J.:—. . . The principal facts are not in dispute, and are fully set out in the judgment of the learned Referee of Titles and in the judgment of Middleton, J., reported in 18 D.L.R. 595, 30 O.L.R. 289.

The question is largely one of facts, a short review of which is necessary before referring to the law bearing upon the case. I take the facts largely from the carefully reasoned judgment of the learned Referee.

In July, 1886, the Toronto and Lorne Park Summer Resort Company was incorporated by letters patent under R.S.O. 1887, ch. 157. Upon its incorporation the conveyance was made to the company of the principal part of the land in question, to which an addition was made in May, 1889, and the company acquired the water lots in March, 1890. The purposes for which the company was organised are stated in the patent to be: "To purchase, own, and improve Lorne Park as a summer resort; (a) to make such improvements and alterations as may be deemed expedient or advantageous; (b) to erect and construct thereon all kinds of structures and buildings; (c) for the purposes of the company to erect and maintain wharves, docks, piers, and breakwaters; (d) to construct and maintain all necessary and desirable roads, bridges, streets, avenues, and sewers, and other conveniences of all kinds whatsoever, for the improvement of the park; (e) to sell, lease, mortgage, or exchange the

whole or portions of the said park or any of the structures or buildings now or hereafter erected thereon; (f) to own; (g) to run a line of steamers between the park and other places; (h) to enter into contracts for providing entertainments for the public on the property of the company; (i) to charge fees for the privileges of the park; (j) to buy adjoining property for park purposes; (k) to borrow on security of park property."

It was intended to be a summer resort for permanent summer residents and transient guests; a private park open only to those whom the company saw fit to admit to its privileges. Access to it was by a gate on the Lake Shore road and by a wharf on the lake shore. The whole area was between 80 and 90 acres, laid out into lots and streets and undesignated places, aggregating about 25 acres. Many lots were sold; the form of deed common to all is made in pursuance of the Act respecting Short Forms of Conveyances; and, besides the usual covenants, contains a covenant that the grantors will pay off an existing incumbrance of $9,000 upon the park property and indemnify the purchaser against the same; and, *inter alia*, the following clause: "It is hereby agreed that the party of the second part, his heirs, executors, administrators, and assigns, and his or their families, subject to the by-laws of the company, shall have free access to the streets, avenues, terraces, and commons of the said park, and shall have free ingress and egress for himself and themselves, his and their family or families, servants and agents, with horses and carriages or other vehicles, to and from the said lands by any of the streets or avenues in the said park, and, subject as aforesaid, shall have free ingress and egress to and from the said park at any wharf or wharves in front thereof. . . ."

By deed dated June 3, 1891, the Toronto and Lorne Park Summer Resort Company conveyed to one Frederick Roper all the property and estates of the company set forth in the schedule annexed, the consideration being $1 and the assumption of a certain mortgage.

This conveyance, as the Referee finds, appears to have been preliminary to organising a new company to take over the park property. . . .

The learned Referee finds that inducements were held out to

ONT.
S. C.
RE LORNE PARK.
Clute, J.

the purchasers that they would have the benefit of public recreation grounds provided by the company, and facilities would be offered for holding picnics to all who chose to patronise the park for that purpose. . . .

I agree with the learned Referee that blocks X and Z were used as a common playground open to all the cottagers, and were two of the places intended by the word "commons," and that the lot-owners have a right to free access thereto, which ought not to be interfered with by the petitioner; but I cannot agree with him that a different consideration should apply to block Y. As he very truly points out, it was equally open and accessible to all as the other two blocks; and, while it was not used as frequently as the other two, it was used at the will and pleasure of the cottagers as a common and place of resort, and the evidence shews that the owners of the cottages could and did resort thereto and make use of the seats and tables there provided; and I agree with my brother Middleton that no distinction ought to be made between the three blocks as to the rights of the cottagers in respect of the same.

I am also clearly of opinion that the petitioner cannot claim as a *bonâ fide* purchaser for value without notice. There is no doubt that sufficient was said at the time of his purchase to put him on inquiry as to the rights of the cottagers; but, whether he was put upon inquiry or not, I am of opinion that the word "commons" in the deeds to the various cottagers had reference to these three blocks, and that the plan annexed to and forming part of his chain of title through Roper was express notice that these blocks were reserved and used for the general benefit of the park owners, including the cottagers.

Reference is made to *Municipal Council of Sydney* v. *Attorney-General of New South Wales*, [1894] A.C. 444, 453; 13 Cyc. 444 (IV.A.); *Bateman* v. *Bluck*, 18 Q.B. 870, and other cases there cited; 13 Cyc. 448 (D.).

Here, no doubt, the dedication was not to the public, but was of a quasi-public nature, limited to the general use of those who became owners of lots and residents within the park and their friends who might visit them, and others to whom the company gave, for the time being, the privilege of user.

The deed which, it was admitted, is common to all the pur-

chasers of lots within the park, contains a covenant in favour of the purchaser, that he, "his heirs, executors, administrators, and assigns, and his or their families, subject to the by-laws of the company, shall have free access to the streets, avenues, terraces, and *commons* of the said park," and free ingress and egress to and from the said park at any wharf or wharves thereof.

I agree with the learned Referee and my brother Middleton that the word "commons," as used in the deeds to the purchasers of lots, was not intended to have any strict or technical meaning, but to signify certain places in the park which were to be open and free to all for the purposes of general enjoyment and amusement, and I have nothing to add in that respect to the view so clearly expressed in the Court below.

The leading case is that of *Renals* v. *Cowlishaw*, 9 Ch. D. 125, affirmed on appeal, 11 Ch.D. 866; and in the House of Lords, in *Spicer* v. *Martin*, 14 App. Cas. 12.

Reference to *Nottingham Patent Brick and Tile Co.* v. *Butler* (1885), 15 Q.B.D. 261, 269; *S.C.* on appeal (1886), 16 Q.B.D. 778.

In my opinion, the principle here enunciated applies to the present case, which should be governed by it. The incorporation of the original company shews clearly that its object and purpose was a building scheme, and that the duties of the company and of the purchasers were correlative, and that there was what has conveniently been termed a "law" common to both for their mutual benefit. The subsequent patent of incorporation, changing the name, reaffirmed the purpose. The mutual duties, express and implied, in the various conveyances to purchasers set forth the mutual obligations to carry out the original purpose. The literature published and the representations made by the chief officers under which purchasers were invited, and their conduct through a period of some 25 years, recognising the mutual relations between the vendors and the purchasers, all shew that the original scheme during this long period was not departed from, and the conveyances through which the petitioner claims his title, and particularly the pink plan referred to and forming a part of the Roper deed, and having special

ONT.
S. C.
RE LORNE PARK.
Clute, J.

reference to the three blocks in question, and the express notice given to the purchaser (the petitioner) at the time of the purchase, put it beyond doubt that he was not a *bonâ fide* purchaser for value without notice of the object and purpose of the building scheme and of the "law" governing the same.

The principle in *Spicer* v. *Martin* was applied in *Mackenzie* v. *Childers*, 43 Ch. D. 265, referred to in the judgment appealed from. In that case, referring to *Renals* v. *Cowlishaw*, Kay, J., (p. 276), quotes thus from the judgment of Vice-Chancellor Hall: "This right exists not only where the several parties execute a mutual deed of covenant, but wherever a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such covenant need not be express, but may be collected from the transaction of sale and purchase;" and proceeds: "To apply that language I should in this case, if there were no express covenant, 'collect from the transaction of sale and purchase' an implied agreement by the vendors with every purchaser that none of the unsold lots should be built upon in a manner inconsistent with the building scheme, or at least that they would not authorise such a departure from the scheme;" and he held that the recital in the deed was not a mere expression of intention which the vendors were at liberty to change, but the effect of the deed was that the vendors thereby entered into a covenant not to authorise the use of the unsold plots in a manner inconsistent with the building scheme as therein expressed; that, even if the deed had not the effect of a covenant by the vendors, yet the trustees were bound by a contract, implied from the whole transaction, restricting their dealing with the land in violation of the building scheme; and that an injunction ought to be granted restraining them from authorising any purchaser to build contrary to the building scheme.

The views here expressed are, I think, applicable in principle to the present case. Having regard to the building scheme here inaugurated and put upon the market, the covenant giving to the purchasers the rights in respect of what are called the com-

mons clearly created an obligation on the part of the vendors that this right should not be encroached upon by them or purchasers from them.

In *Davis* v. *Corporation of Leicester*, [1894] 2 Ch. 208, it was held by North, J., that the publication of particulars and conditions in that case was, to use Lord Macnaghten's language in *Spicer* v. *Martin*, an invitation to the public to come in and buy portions of the estate upon the footing of the general building scheme put forward therein, intended to bind all the purchasers as likely to be for the benefit of all, and to enhance the value of their respective properties, and, consequently, to increase the price they would be willing to pay for their respective lots. The rights of the purchasers *inter se*, when such a scheme exists, to enforce the provisions thereof against one another, and the obligation attaching to the vendors to observe and perform the same, are now thoroughly settled and recognised; and reference is made to the cases above quoted; and it was there held by North, J., and the Court of Appeal, that, if the corporation had been ordinary individuals, they would have been bound by the original building scheme.

The principle was also applied in *Elliston* v. *Reacher*, [1908] 2 Ch. 374, and Parker, J., points out the requirements necessary to bring the principles of *Renals* v. *Cowlishaw* and *Spicer* v. *Martin* into operation, and states (p. 385): "It is, I think, enough to say, using Lord Macnaghten's words in *Spicer* v. *Martin*, that where the four points I have mentioned are established, the community of interest imports in equity the reciprocity of obligation which is in fact contemplated by each at the time of his own purchase."

I would dismiss the appeal with costs.

MULOCK, C.J.Ex., and SUTHERLAND, J., concurred.

RIDDELL, J., agreed in the result.

Appeal dismissed with costs.

IMP.

P. C.

THE CANADIAN PACIFIC R. CO. v. FRECHETTE.

Judicial Committee of the Privy Council, The Lord Chancellor (Viscount Haldane), Lord Dunedin, and Lord Atkinson. June 25, 1915.

1. MASTER AND SERVANT (§ II B 4—161)—ASSUMPTION OF RISK—COUPLING CARS—KNOWLEDGE OF DANGER—VIOLATION OF RULES.

On the principle of *volens*, a brakesman is not entitled to recover from a railway company for personal injuries he sustained while uncoupling cars where, with full knowledge of the risk and in violation of the company's rules, he goes between the cars while in motion for the purpose of uncoupling them.

[23 Que. K.B. 203, reversed.]

2. NEGLIGENCE (§ II A—75)—CONTRIBUTORY NEGLIGENCE—VOLENS.

If a person with full knowledge and appreciation of the risk and danger attending a certain act, voluntarily does that act, it will be assumed that he voluntarily incurred the attendant risk and danger, and the maxim *volenti non fit injuria* directly applies.

[23 Que. K.B. 203, reversed.]

3. MASTER AND SERVANT (§ II A 2—46)—RAILWAY EMPLOYEES—RULES AND REGULATIONS—METHOD OF ADOPTION.

A railway company are not required to have every rule for the guidance of their staff printed or reduced to writing; if their employees are aware of the existence and terms of any rule they are bound by it.

[23 Que. K.B. 203, reversed.]

4. MASTER AND SERVANT (§ II B 3—153)—SAFETY APPLIANCES—AUTOMATIC COUPLERS—STATUTORY COMPLIANCE.

Sec. 264 of the Canadian Railway Act, 1906, imposing on railway companies the duty of equipping their cars with automatic couplers and with modern and efficient appliances, does not create an obligation to their employees to equip their cars with the very latest improved couplers immediately after they are put upon the market; and the equipment with couplers of 10 to 15 years' duration used extensively by other railways and approved by the railway commission is a sufficient compliance with the Act.

[23 Que. K.B. 203, reversed.]

Statement

APPEAL from a judgment of the Court of King's Bench of Quebec.

The judgment of the Board was delivered by

Lord Atkinson.

LORD ATKINSON:—This is an appeal from a judgment of the Court of King's Bench of Quebec (Appeal Side), dated March 9, 1914, confirming the judgment of the Superior Court, sitting in Review, dated November 28, 1913, whereby damages amounting to the sum of $12,000 were, in accordance with the verdict of the jury which tried the case, awarded to the respondent in respect of personal injuries sustained by him through the negligence of the appellants, while he was engaged in working as a brakesman shunting a freight car or waggon on the line at

Princess Louise Basin at Quebec. This line and the electrical apparatus for lighting it belong to and are controlled by the Commissioners of Quebec harbour.

By sec. 264 of the Canadian Railway Act, 1906, it is provided that:—

> Every company shall provide and cause to be used on all trains modern and efficient appparatus and appliances and means . . . to securely couple and connect the cars composing the train and to attach the engine to such train with couplers which couple automatically by impact and which can be uncoupled without the necessity of men going in between the ends of the cars.

In obedience to this enactment the appellants have equipped most of their freight cars at each end with a certain coupling and decoupling machine called the Tower coupler. It is unnecessary to describe in detail the mechanism of these machines further than to say that the portion of each called the knuckle, designed for coupling the cars by impact, is kept close and in position by an iron pin or peg which fits into a sheath or socket in the knuckle, and that when this pin is withdrawn from its sheath the knuckle opens and the cars theretofore coupled together become detached from each other. These pins are each attached to one end of a lever fixed to the car. The other end or handle of the lever projects beyond the side of the car to such an extent that it can be worked so as to raise the pin by a person standing on the permanent way but clear of the car. The fore and aft levers of each car project beyond opposite sides of the car. If that on one end of the car projects beyond its left side, that on the other end projects beyond its right side. It was not disputed that when there is a strain on the coupling mechanism, which may happen in many ways, the pin may be nipped so tightly by the knuckle that it cannot be withdrawn by the action of the lever, and that it is only at a moment when there is what is called a "slack" between the cars that the pin does not stick, and can be readily withdrawn by the action of the lever. But it was clearly proved, and was not, their Lordships think, seriously disputed, that this sticking of the pin does not shew that the coupling machine is a defective machine. Strain will admittedly cause the pin to stick however perfect the machine may be.

IMP.
P. C.
CANADIAN PACIFIC R. CO. v. FRECHETTE.
Lord Atkinson.

The respondent was 27 years of age at the time of the accident, was educated and intelligent. He had been about three months in the employment of the appellant company as a "spare" brakesman, that is one who may be discharged in the slack season if no berth be found for him at some other place on the line.

On October 13, 1912, he had work through the night. The electric lights on the jetty were extinguished about 1.30 a.m., but the men who were at work on the railway were furnished with lamps such as brakesmen use, good of their kind. About five o'clock in the morning of this day an engine, with fourteen or fifteen waggons, bound for three different destinations, attached, was standing on one of the sets of rails on the main line. It became necessary to divide up this train and shunt those of the cars destined for Winnipeg into one siding, those destined for Vancouver into another, and those destined for Montreal into a third. The car furthest from the engine was to be shunted into the Winnipeg siding. The respondent was aware of all this and was helping in the very work under the superintendence of a foreman named Ernest Tremblay. The respondent threw over the switch lever which was situated on the north side of the line of rails upon which the engine and cars were standing, in order to let this foremost car pass into the Winnipeg siding, and, having done so, he recrossed the line to its south side. The engine was then pushing the car for Winnipeg up towards the points thus set, at a speed of about three miles an hour.

Tremblay signalled to the engine driver to stop the train, and then (at what interval of time is not clear) ordered the respondent to uncouple this truck. This the respondent proceeded to do. He tried to do it several times with the aid of the lever, but found that the pin was fixed and the machine would not work. He then, while the train was in motion, went in between the Winnipeg waggon and the succeeding waggon to endeavour to work the lever on the opposite side of the succeeding car. This he clearly deposes to. He failed to uncouple the cars. As he walked along between the cars his foot caught in the points, he was knocked down by the succeeding car and car-

IMP.

P. C.

CANADIAN PACIFIC R. CO. v. FRECHETTE.

Lord Atkinson.

ried about 25 feet over the switches, when all the cars came to a standstill. He crawled out from under the cars. Tremblay then came to his aid and found him badly injured.

The only negligence on the part of the appellants relied on by the respondent, in his declaration, were, first, their negligence in permitting this shunting to be done in the absence of light, and second, their negligence in providing a defective coupling machine. But the pleadings developed; much new matter was introduced, and new issues raised upon it.

The appellants in their answer, in addition to traversing the material averments in the declaration, pleaded:—

(1) That the accident was solely due to the respondent's own negligence, and that they were not guilty of any fault or negligence whatever;

(2) That the coupler attached to this car was a patent coupler of approved design, and was in good order;

(3) That there was no necessity for the respondent to have gone in between the cars for the purpose of uncoupling them;

(4) That even if it were necessary for him so to do, he should have given notice of this intention, and was bound to wait till the cars had stopped before attempting to enter between them while moving, and that this was a grossly negligent act on his part, forbidden by the orders of the company;

(5) That if he had any difficulty in working the coupler he should have signalled to the engine-driver, as he had a right to do, to stop the cars, and should have given the signal to start again only after he had got clear of the cars;

(6) That the appellants were not responsible for the want of light; and

(7) That its absence was not the cause of the accident.

The respondent replied to this answer by traversing its material averments, and pleading:—

(1) That it was necessary for him to go in between the cars to get the pin out and make the knuckle work, and that in so doing he had acted in the circumstances as all the other employees of the company act, and according to the practice followed not only on the appellants' line of railway, but on all other railways; and

(2) That in doing what he did he conformed to the rules of the company, and the directions of his superior employees, namely, the yard-master, John Vachon, and the foreman, Ernest Tremblay.

On these pleadings the case went to trial. The learned Judge who tried the case left seven questions to the jury. The five following, with the answers to them, are alone of importance on this appeal. They run thus:—

3. Is the said accident due solely to the fault and negligence of the plaintiff, and if so, in what did such fault and negligence consist?—No.

IMP.

P. C.

CANADIAN PACIFIC R. CO. v. FRECHETTE.

Lord Atkinson.

4. Is the said accident due solely to the fault and negligence of the defendant, its servants and employees, and if so, in what did such fault and negligence consist?—No.

5. Is the said accident due to the common fault and negligence of the plaintiff and of the defendant, its servants or employees, and if so, in what did the respective fault and negligence of each consist?—Yes. The plaintiff was imprudent in going between the cars to uncouple them. The defendant was very much to blame for not instructing the brakesmen, as no rules were shewn to the jury that had a direct bearing on a shunter's work in a yard, making up trains. Fréchette, after working all day, was called out to take Tweedell's place, who was hurt running to catch the engine in the dark. Tweedell fell and injured himself. Further, the defendant should not allow the shunters to make running shunts during a dark night when there was no light, only a signal lamp of about one candle power, which was principally used for signalling. Further, the coupling apparatus was proven to be out of order, and Fréchette, acting on orders from Tremblay to uncouple the car, tried to lift the pin on the other car. If there was a double lever attachment, it would not be necessary to do so. We find the defendant very negligent for not stopping the work when the lights went out.

6. Has the plaintiff suffered damage by reason of this accident, and if so, for what amount?—$15,000.

7. If you replied affirmatively to question No. 5 what amount do you deduct from the damages suffered by the plaintiff?—$3,000.

The appellants rely strongly on the answer to this fifth question as proving that the jury were misdirected and misled by the learned Judge in his charge, inasmuch as they appear to have based this verdict to a large extent upon what they supposed to be improper methods of managing the business of the railway adopted by the appellants. Even if this were so it was irrelevant, as these methods did not materially, or at all, contribute to the plaintiff's injury, and upon this ground, with others, the appellants contend that they are entitled at the least to have the verdict set aside and a new trial granted.

But their main attack was directed against the answer of the jury to the third question. They contend that the evidence clearly establishes that the respondent's own negligence was the sole effective cause of the injury he received; that having regard to that evidence, no reasonable man could find as the jury have, in fact, found in answer to this question; and that as it is a crucial question the verdict should be set aside and judgment be entered for them.

There is no doubt that the law of Quebec differs from the

law of England on the question of contributory negligence properly so called. If one takes, for example, such a plea of contributory negligence as might be framed in conformity with the judgment by Wightman, J., in *Tuff* v. *Warman*, 5 C.B. (M.S.) 573, 585, to this effect:—

> That the plaintiff himself so far contributed to the misfortune by his own negligence that, but for such negligence on his part the misfortune would not have happened, and the defendants could not by the exercise of ordinary care and caution upon their part have avoided the consequences of the plaintiff's negligence.

Now that plea, if proved, would be a perfectly good defence in England: *Radley* v. *London and North-Western Railway Company*, 1 A.C. 754. It would be no defence in Quebec. The jury in Quebec, notwithstanding the proof of it, would be entitled to inflict a kind of penalty upon the plaintiff on account of his own negligence, proportioned, presumably, in their opinion, to his culpability, deduct that sum from what they would have awarded to him had he been blameless, and give him a verdict for the balance: *Nichols Chemical Company of Canada* v. *Lefebvre*, 42 S.C. Canada, 402. That is, in fact, what the jury have done in the present case.

But though this difference between the laws of the two countries on this subject does exist, it is equally certain that in Quebec, as in England, a plaintiff suing for damages in respect of an injury sustained by him cannot recover if his own negligence be the sole effective cause of that injury. See judgment of Taschereau, J., as he then was, in *George Matthews Company* v. *Bouchard*, 28 S.C.C. 580, 584. At p. 584 he said:—

> There is no evidence whatever that the negligence of the company, assuming negligence to be proved, caused the accident in question, and an affirmance of the condemnation against it would unquestionably be at variance with our own jurisprudence.

The other members of the Court took a different view as to the existence of evidence of the defendant's negligence, but did not dispute this principle.

The ground of this distinction between the two cases is this, the latter is not, in the true sense of the term, a case of contributory negligence at all. That term can only be properly applied to a case where both the parties, plaintiff and defendant,

IMP.

P. C.

CANADIAN PACIFIC R. CO. v. FRECHETTE.

Lord Atkinson.

are each guilty of negligence so connected with the injury as to be a cause materially contributing to it. If the negligence of either party falls short of this it is an irrelevant matter, an *incuria*, no doubt, but, to use Lord Cairns' words, not an *incuria dans locum injuria*. See Lord Bowen's judgment in *Thomas* v. *Quartermain*, 18 Q.B.D., 685, 698, and Lord Cairns' judgment in *The Directors of the Metropolitan Railway Company* v. *Jackson*, 3 A.C. 193, 197-8.

Some of the observations of Lord Cairns reported at the two latter pages of the last-mentioned case are so applicable to the present case that it is excusable to quote them at length. He said (p. 197):—

> There was not at your Lordships' bar any serious controversy as to the principles applicable to a case of this description. The Judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether from those facts, when submitted to them, negligence ought to be inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of a jury if, in a case where there are facts from which negligence may reasonably be inferred, the Judge were to withdraw the case from the jury upon the ground that in his opinion negligence ought not to be inferred; and it would, on the other hand, place in the hands of jurors a power which might be exercised in the most arbitrary manner if they were at liberty to hold that negligence might be inferred from any state of facts whatever. To take the instance of actions against railway companies: a company might be unpopular, unpunctual, and irregular in its service; badly equipped as to its staff, unaccommodating to the public; notorious, perhaps, for accidents occurring on the line, and when an action was brought for the consequences of an accident, jurors, if left to themselves, might, upon evidence of general carelessness, find a verdict against the company in a case where the company was really blameless.

And at p. 198 he proceeds:—

> In the present case I am bound to say that I do not find any evidence from which, in my opinion, negligence could reasonably be inferred. The negligence must in some way connect itself or be connected by evidence with the accident. It must be, if I might invent an expression, founded on a phrase in the Civil Law, *incuria dans locum injuriæ*. In the present case there was, no doubt, negligence in the company's servants in allowing more passengers than the proper number to get in at Gower Street Station, and it may also have been negligence if they saw these supernumerary passengers, or if they ought to have seen them, at Portland Road, not to have removed them; but there is nothing, in my opinion, in this negligence which connects itself with the accident which took place.

IMP.

P.C.

CANADIAN PACIFIC R. CO. v. FRECHETTE.

Lord Atkinson.

Now, that was a very strong case. The carriage of the company in which Jackson, the plaintiff, was travelling, got overcrowded at Gower Street; three people were standing in it. At Portland Road some people, from a crowded platform, opened the door of this carriage, and others tried to force their way into it. The plaintiff stood up to prevent them, the train suddenly moved on; the plaintiff to save himself from falling, put his hand upon the lintel of the door, when a porter hastily slammed the door as the train was entering a tunnel, thereby catching the plaintiff's thumb in the door and crushing it. Yet, for the reasons stated by Lord Cairns, it was decided that the Judge at the trial should have directed a verdict for the defendant company.

In reference to the right of a defendant albeit guilty of negligence not amounting to *incuria dans locum injuria*, to have a verdict directed for him where the plaintiff's negligence is the sole effective cause of the injury in respect of which he sues, the same great Judge laid down the guiding principle of the English law applicable to it in a well-known passage of his judgment in the case of *The Dublin, Wicklow, and Wexford Railway* v. *Slattery*, 3 A.C. 1155. At p. 1166 of the report he says:—

> If a railway train which ought to whistle when passing through a station were to pass through without whistling, and a man were in broad daylight, and without anything either in the structure of the line or otherwise to obstruct his view to cross in front of the advancing train and to be killed, I should think the Judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company, which caused his death. This would be an example of what was spoken of in this House in the case of *Jackson* v. *The Metropolitan Railway Company* as an *incuria*, but not an *incuria dans locum injuria*. The jury could not be allowed to connect the carelessness in not whistling with the accident to the man, who rushed with his eyes open on his own destruction.

The principle thus laid down has been many times applied. It was applied in the case of *Davey* v. *The London and South-Western Railway Company*, L.R. 12 Q.B.D. 70, and quite recently in the cases of *McLeod* v. *The Edinburgh and District Tramway* (1913), S.C. 626, and *The Grand Trunk Railway* v. *McAlpine* (1913), A.C. 838. In each of these cases the act upon which the risk of injury attended, and from which the injury

IMP.
P.C.
CANADIAN PACIFIC R. CO. v. FRECHETTE.
Lord Atkinson.

sustained resulted, was done by the person who suffered the injury.

The question, therefore, which arose and was most discussed in the case of *Smith* v. *Baker and Son* (1891), A.C. 325, namely, whether a man voluntarily incurred a risk attending his employment, where the act or negligence by which he was injured was the act or negligence of some person other than himself, did not arise in these cases.

In cases such as *Smith* v. *Baker and Son*, it must be shewn (1) that plaintiff clearly knew and appreciated the nature and character of the risk he ran, and (2) that he voluntarily incurred it. Until both are established, the maxim *Volenti non fit injuria* cannot apply. If, however, a person, with full knowledge and appreciation of the risk and danger attending a certain act, voluntarily does that act it must be assumed that he voluntarily incurred the attendant risk and danger, and the maxim *Volenti non fit injuria* directly applies. Lord Halsbury, at page 338 of the report in *Smith* v. *Baker and Son*, points out this difference with great clearness. He said:—

> As I have intimated before, I do not deny that a particular consent may be inferred from a general course of conduct. Every sailor who mounts the rigging of a ship knows and appreciates the risk he is encountering. The act is his own and he cannot be said not to consent to the thing he himself is doing. And examples might be indefinitely multiplied where the essential cause of the risk is the act of the complaining plaintiff himself, and where, therefore, the application of the maxim *Volenti non fit injuria* is completely justified.

The first question to be decided, then, resolves itself into this. Does the evidence shew that the respondent's own negligence was the sole effective cause of the injury he sustained; that is, does it shew that he, knowing the risk and danger of going in between cars in motion in order to uncouple them by means of this Tower coupler, voluntarily encountered that risk and danger, thereby sustaining the injuries he complains of? If he did so, then it must be held that there was no evidence before the jury upon which they could reasonably find as they have found in answer to question No. 3.

The presence or absence of evidence sufficient, in any given case, to support the finding of a jury as reasonable men, is a

IMP.

P. C.

CANADIAN PACIFIC R. CO. v. FRECHETTE.

Lord Atkinson.

matter upon which different minds may well come to opposite conclusions. The division of judicial opinion in the present case is proof of this. And every appellate tribunal, conscious of the great advantage enjoyed by a jury in having seen and heard the witnesses, and in having had the whole trial conducted under their observation, must feel reluctant to disturb the decision of such a tribunal. This applies in a special degree to this Board, which has to deal with the administration of justice in distant and dissimilar parts of the Empire, and has always desired to strengthen the well-deserved confidence of the local public in their native tribunals; but if, despite this ever-present desire, the Board, after careful examination of the evidence, comes to the conclusion that the verdict of the jury cannot be sustained, no course is open to it but to set that verdict aside. Any other course would amount to a judicial wrong, the punishment of a litigant for something for which he has not been proved to be answerable.

Now, since the respondent again and again admitted that he knew that in going in between freight cars while in motion to uncouple them he endangered both his life and limbs, it could not be contended that he did not know and appreciate the risk he ran. He was acquainted with the place; knew where the switches were; knew they were open, since he himself had opened them. If the darkness increased the risk, he must have been aware of that fact also. Accordingly, Mr. Leslie Scott, who appeared for the respondent, was driven to contend that, though his client knew well the nature and character of the risk he would run if he should act as he has done, he did not encounter that risk voluntarily, but, on the contrary, encountered it under the compulsion of a legal contractual obligation. Basing himself upon the supposed likeness of the case of *Sword* v. *Cameron*, 1 Sess. Cas. 2 Series, 125, discussed at length by Lord Cranworth in the *Bartonshill Colliery* v. *Reid*, 3 Macqueen, 266, at 289 and 290, he argued, borrowing Lord Cranworth's language, that a negligent and defective system of carrying on the operation of shunting was allowed to grow up upon the appellant railway, according to which brakesmen were only required to operate uncoupling levers from outside the waggons so long as the

IMP.
P. C.
CANADIAN PACIFIC R. CO. v. FRECHETTE.
Lord Atkinson.

coupling machines worked satisfactorily, but were not only permitted but were bound by the terms of their hiring to get in between cars when in motion for the purpose of uncoupling them whenever the pin happened to stick or the coupler did not work satisfactorily—that is that the brakesmen, including the respondent, were employed to discharge their duties as such according to this defective and negligent practice which was so permitted to prevail.

This, he admitted, was the way most favourable to him in which the contention could be put. It will be considered presently how far the principle of *Sword* v. *Cameron* is applicable to the present case. Before proceeding further, however, it would be convenient to deal with the respondent's point as to the alleged defectiveness of the Tower coupler. The respondent himself admitted that in the best of couplers the pin may be held so tight sometimes that it will stick if there be not "slack" between the cars. He explained how this "slack" might be produced. Tremblay, his witness, proved that the Tower was the "*avant dernier*" patent, the Sharon the *dernier* patent, and that some of the former work as satisfactory as the latter.

In addition, three or four witnesses were examined on behalf of the appellants on this point but not on the existence of this practice. They proved that this Tower coupler was a patent automatic coupler, the very best of its kind; that its ordinary life was about 10 to 15 years; that about 75 per cent. of the Canadian Pacific freight cars were equipped with it; that it was used on many other of the great Canadian railways; that the Railway Commission, whose rules, regulations, and requirements all Canadian railway companies are bound to obey and comply with, approved of it; that the Sharon patented coupler was 50 lbs. heavier than the Tower, had the same inside mechanism, but had the additional advantage of an attachment operating underneath; that the cars of the company were increased in size so that they were able to carry a load of from 50 to 60 tons, instead of 20 to 30 as theretofore; that the company equipped these larger cars with the heavier coupler because of its greater strength and its additional attachment; and that no cars are built in Canada with the levers attached to couplers running from side to side of the car.

This evidence was practically uncontradicted. Mr. Leslie Scott admitted, as, indeed, according to a well-established principle of law he was bound to admit, that the company were under no obligation whatever to their employees to equip their cars with the very latest improved coupler immediately after it was put upon the market. Their Lordships are clearly of opinion that the evidence does not establish that the Tower coupler is a defective machine, or that the company failed in any way in their duty to their brakesmen to provide them with machines reasonably fit and proper for the work those brakesmen had to do. The learned Judge who presided at the trial was apparently of the same opinion.

It remains to deal with the evidence bearing on the main question in the case. Of the five witnesses examined on behalf of the respondent on this part of the case, two, Bégin and Therrien, were former employees of the company, and three, Tremblay, Desjardins, and Vachon were existing members of the company's staff. The respondent himself gave evidence, and there was this peculiarity in the proceedings that Vachon was first examined on behalf of the respondent, and afterwards examined on behalf of the appellant company.

A great deal of the evidence given went to shew that the respondent, after working all day, was called upon to work at night as well—to take the place of a man named Tweedell, who had met with an injury. This evidence was given with the object, apparently, of shewing that the company overworked the respondent, and, therefore, should pay him damages, although neither he nor any witnesses examined on his behalf proved he was fatigued or unable to do his work, or that he complained of being overworked, or that this alleged overworking had in any way contributed to the accident which caused his injury. It was, therefore, quite an irrelevant matter, and should not have been taken into consideration by the jury, as it evidently was.

Tremblay, the foreman, under whom both the respondent and Desjardins were working on the morning of the accident, was the first witness examined. He proved, amongst other things, that neither the Tower nor Sharon models will work

IMP.
P. C.
CANADIAN PACIFIC R. CO. v. FRECHETTE.
Lord Atkinson.

satisfactorily if there be not "slack" between the cars, that sometimes a car cannot be uncoupled by using the coupler attached to it, that the brakesmen then endeavour to detach the cars by working the coupler on the car succeeding the first, but that the lever of this latter being placed on the side of the succeeding car opposite to that, beyond which the lever first tried projects, the brakesman should go round the car sought to be detached, in order to get hold of the untried lever, that to do this the train ought to be stopped, but that sometimes the men go in between the two cars in motion to the extent of putting one foot between the rails upon which the cars are running, while keeping the other foot on the permanent way outside these rails; that there was a rule against doing even this, whether written or not he did not remember; that when he himself began to work as brakesman he was told not to do it; that he never saw the respondent going in between two cars in motion to endeavour to uncouple them; that had he done so he would have said, "*Va pas là; c'est dangereux.*"

The witness was then asked, Why, if it was dangerous to go in between two cars in motion in order to uncouple them, he had, as he admitted, done this himself? He replied, "*Je risquais*" (p. 28). In cross-examination the witness was again asked, If the lever does not work, is it not necessary to wait till the train stops? and he replied, "*Oui, on serait supposé attendre.*" Mr. Leslie Scott suggested that Tremblay accompanied this reply with a shrug of his shoulders, more expressive than even Lord Burleigh's nod, as described in "The Critic," since, according to him, it indicated that the rule against going in between cars in motion was more honoured in the breach than in the observance; that the systematic disregard of it was winked at (as he put it) by the officers of the appellant company; and that the negligent practice thus grew up which the respondent was by his contract of service entitled, indeed bound, to follow. There was no evidence that Tremblay accompanied his answer with a shrug of his shoulders, or any grimace or gesticulation whatever, and to the unimaginative his words would appear to mean no more than this, that the rule which should be observed was well known to the brakesmen, but that they sometimes some-

IMP.
P.C.
CANADIAN PACIFIC R. CO. v. FRECHETTE.
Lord Atkinson.

what surreptitiously transgressed it at their own risk. The witness then proceeded to give a detailed account of what happened on the night of October 12 and the morning of October 13.

On most points there is little, if any, disagreement between his account and that of the respondent. He said, however, that at or about 4.45 on that morning, about three-quarters of an hour before dawn, the engine was pushing up a number of cars at the rate of about 3 miles an hour, as fast as a man could conveniently walk, towards the switches in order to shunt the foremost car into the Winnipeg siding; that the respondent was then standing westward of the points at the point marked B on P (1). That he signalled to the engine driver to stop the train, and that after he had so signalled he ordered the respondent to uncouple the foremost car; that in obedience to the order to stop, the foremost car ought to have been allowed to pass into the siding and then the remainder of the train pulled back in an opposite direction; that after giving the respondent the order to uncouple he himself turned away upon some other business, and did not see the respondent go in between the cars; but, attracted by his cries for help, went to the respondent's assistance, and found him half way out from under the cars at point A on P (1). The cars, he said, were then standing still, the first still uncoupled. The witness further stated that he found the boot of the respondent between the rails of the switch at a place marked with a cross on P (1), that the distance of this latter point from the point marked A is 25 feet—just the length of one of these freight cars, which are 25 feet long by 8 feet broad. These distances are most significant. They shew that the engine-driver must, in obedience to the signal he had received from Tremblay, have so effectually slackened the speed of this long train of waggons that the first carriage came to a standstill some little over 25 feet from the points of the switches. This is the strongest corroboration of the respondent's evidence (p. 103) to the effect that when he tried to work the lever the train was only proceeding at the rate of one-quarter of a mile an hour.

An effort was made on behalf of the respondent to shew that in this answer he under-estimated the speed of the train, but the

IMP.
P. C.
CANADIAN PACIFIC R. CO. v. FRECHETTE.
Lord Atkinson.

measured distances above given shew that this was not so. They have a most important bearing upon the statement afterwards made by him setting forth the reasons which induced him to go in between the cars. Tremblay admitted that while the cars were standing still after the accident he tried, with the assistance of others, to uncouple the first car, but failed to do so. This, however, affords no proof that the coupler was defective since he did not ascertain, and did not state, whether there was or was not any "slack" between the cars at the time. He described at length the mode by which "slack" is produced, stated that in the course of a day a pin may stick two or three times, and that the lamp that the respondent had was an ordinary signal lamp sufficient for the purpose of signalling and reading the numbers on the cars, and sometimes of shewing where one was. Desjardins proved that occasionally the coupler will not work, and that when this happens one is obliged to stop the train to uncouple. He was then asked, did he always stop the train when this happened, and he replied, "*Celui qui veut faire le découplage en marche est obligé de prendre cela sur lui parce qu'on est obligé d'arrêter le train pour découpler quand la patente ne fonctionne pas,*" and then proceeded to add that he himself had gone in between cars *en marche* to uncouple them, that the yard foreman always reproached him for so doing, yet he had often done it, but when working with other brakesmen the yard foreman always reproached him and told him they ought to let the train stop before decoupling when the lever would not work.

Then Bégin, a man no longer in the employ of the company, was examined. He stated that when the lever attached to the Tower coupler would not work they endeavoured to pull out the pin by hand, and that in order to do this it was necessary to go in between the ends of the two cars, but Therrien, the other witness, examined after Bégin, who, like the latter, was no longer in the company's employment, stated that he knew it was dangerous to go between cars in motion, that he knew it was forbidden, that this very man, the foreman Bégin, had told him a couple of times not to do it, but that sometimes he did it notwithstanding. Bégin was not recalled to contradict this statement. Vachon was also examined; he proved that the com-

pany have no control over the electric lighting of the Basin; that it frequently went out altogether; that when it did they worked through the night at the Basin all the same; that the men never complained of this; that there are 40 stations between Quebec and Montreal where there is no electric light, yet they worked through the night; that with the aid of the lamps supplied a brakesman would be quite able to do his work, and to see where he was if he went in between the cars. He could see the rails and the frog of the switch.

The respondent was then examined. He proved the opening of the points by himself, and the crossing and recrossing of the line, and then stated, amongst other matters not in dispute, that he was standing at the point marked B P 1 when Tremblay ordered him to uncouple the first car; that he ought to have done so before he came to the switch; that he tried to do it (he first said three or four times, and afterwards said two or three times), but without success, and then went in between the cars, "*comme tout le monde faisait*," to lift the lever on the second car; that it was so dark he put his foot in between the rails of the switch at the point marked with a cross on P 1; that he could not withdraw his foot; that he was knocked down by the second car and badly injured. He then explained how the Tower coupler worked. He admitted he was furnished by the company with a book of their rules when he entered their service, part of which he read. He stated the company never instructed him how to uncouple cars when the lever would not work; that he had been taught by the persons under whom Vachon placed him (not one of whom he named) to go in between the cars to uncouple them; that when he went in on any occasion between the cars to work the lever of the other car he followed the examples of his elders; that he had learned from the other employees of the company that they had done the same. He admitted he knew the train was to stop as it approached the switch. He said that nobody had ever told him, or had ever forbidden him to go in between cars in motion; that he knew in doing so he was exposing his life and limbs to danger. He then gave three reasons for acting as he had done. First, that when an attempt to uncouple does not succeed, it takes 8 or 10 minutes more to un-

IMP.
P. C.
CANADIAN PACIFIC R. CO. v. FRECHETTE.
Lord Atkinson

couple if one does not go between the cars "*et on a des bêtises de l'homme en charge;*" (2) that he acted as all the others did, and to save time for the company; and (3) to save himself from the *bêtises* he would have had. He admitted, however, that he never had *des bêtises* for this, and that he never had seen a foreman *dire des bêtises* to a brakesman because he did not enter in between cars in motion, but if he took 10 minutes more to uncouple that would be known by his foreman.

One can readily understand that if a brakesman took ten additional minutes to uncouple a car he might be considered deficient in dexterity; but one only has to look at P 1 to be convinced that this additional period of ten minutes was in this case a grotesque exaggeration. The train was on the point of stopping, as the respondent well knew. A quarter of a mile an hour is in such matters when speed is diminishing, little removed from standing still. In fact, the train did stand still after running about 25 feet. The siding was clear; whether one car or six cars passed over the points into the Winnipeg section was a matter of perfect indifference. In any event, all the cars but the one to be detached for Winnipeg should be pulled back again in an opposite direction. To get round the Winnipeg car so as to reach the lever on the car succeeding it, the respondent would only have had to go along one side of the former 25 feet in length across the end of it, 8 feet in breadth, and along the other side of it 25 feet, 58 feet in length, between 19 and 20 yards, or thereabouts, in all. To say that this involved a delay of ten minutes, so detrimental to the interest of the respondent's employers that he shrank from subjecting them to it, is preposterous. The fear of having *bêtises* attributed to him, whatever that strange phrase may mean, is too fanciful. Indeed, if these difficulties in uncoupling cars arise as frequently as is said, it would be strange that he should be blamed in any way for not uncoupling when the coupler would not work satisfactorily. The evidence of all of his witnesses bearing on this point shews conclusively that the rule prohibiting men from going in between cars in motion was perfectly well known.

The necessity of observing it was impressed upon brakesmen, and they were fully aware of the dangers attending the

transgression of it. He must be bound by evidence given on his behalf. Now the argument advanced by Mr. Leslie Scott places him in this difficulty. If the respondent contracted to serve according to the defective system alleged to have been pursued, with or without light, he has no more right to recover for injuries arising from dangers inherent in that system than would a sailor, to take Lord Halsbury's illustration, be entitled to recover damages because he fell from the rigging when, in obedience to orders, he went aloft, or a jockey who was retained to ride a steeplechase be entitled to recover damages because in the race he was thrown and injured, while if the defective system merely applied to acts done in the daylight or with clear and adequate artificial light, the respondent, knowing the dangers, as he admittedly did, was all the more rash and reckless in going in between the trucks at night. The case of *Sword* v. *Cameron* was a very peculiar one. The plaintiff was employed to work on or near a certain crane erected in a quarry. The position in which he had to remain to do this work was such that he was within reach, when a blasting shot was fired, of stones sent flying through the air.

There were only two ways of preventing this—one was by using bushes or such-like things to intercept these stones, or by giving to the plaintiff such timely warning as would enable him to get beyond the reach of the flying stones. The operation of blasting was regularly and habitually carried on to the knowledge of the employer with culpable negligence in this respect, that the warning given before the shot was fired was too short to enable the plaintiff to escape beyond the reach of the flying stones. It was sought to bring the case within the principle of the negligence of a fellow servant, namely, of the man who fired the shot, but it was shewn that this servant was not guilty of any negligence, since he merely acted in strict conformity with the only method of working adopted in the quarry; and that the person guilty of negligence was therefore the employer, who knowingly permitted that system to be followed. That case, in their Lordships' view, bears no resemblance whatever to the present. There is no proof whatever in this case that this practice of going in between moving cars was ever tolerated or

IMP.

P. C.

CANADIAN PACIFIC R. CO. v. FRECHETTE.

Lord Atkinson.

approved of by the company, or the infraction of the rule against it systematically winked at by the company or its officers, and still less proof that the respondent was hired to act under any circumstances in violation of the rule.

It was proved that the brakesmen, though directed to observe the rule, violated it occasionally at their own risk. A company such as this are not required to have every rule for the guidance of their staff printed or reduced to writing. If their employees are aware of the existence and terms of the rule, they are bound by it whether it be written or not. Negligence is a breach of duty, and their Lordships are quite unable to discover what is the particular duty owed by the appellant company to the respondent which the company has violated. They supplied their brakesmen with machines reasonably effective for the purposes required. They caused their staff to be informed that certain rules should be observed. The fact that their employees violated these cannot enlarge the duties the company owed their staff, or impose new duties towards that staff upon them. The respondent has suffered very serious injuries, and is entitled to one's deepest sympathy; but on the whole case their Lordships are clearly of opinion that he is the unfortunate victim of his own rashness and recklessness, and that consequently he has no legal claim against the appellant company since they have done him no legal wrong. With moral claims, if any, this Board has no concern. They further think that the answer to question No. 3 is not such as a jury could, on the evidence, have reasonably found; that this appeal should therefore be allowed; the judgment appealed from overruled; the verdict found by the jury set aside; and a verdict entered for the appellants; and they will humbly advise his Majesty accordingly.

The respondent must pay the costs here and below.

Appeal allowed.

M. BRENNEN & SONS v. THOMPSON.

ONT.
S. C.

Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Riddell, Latchford and Kelly, JJ. March 9, 1915.

1. JUDGMENT (§ II E 1—150)—RES JUDICATA—CONCLUSIVENESS AS TO PARTIES—PRINCIPAL AND AGENT.

Where an agent has been sued and judgment taken against him, it operates as *res judicata* barring the prosecution of an action on the same grounds against the principal, even if the judgment is by default.

[*Partington* v. *Hawthorne*, 52 J.P. 807, applied.]

2. ELECTION OF REMEDIES (§ II—10)—ACTION AGAINST PRINCIPAL OR AGENT—CHOICE—EFFECT.

For the purpose of determining their liability an agent acting for an undisclosed principal may be sued jointly with his principal; but if a judgment has been recovered against either in an action against them jointly or in an action against either separately, it will bar the prosecution of an action against either of them on the same grounds.

3. APPEAL (§ I B—15)—FINALITY OF DECISION—INTERLOCUTORY ORDER—MOTION FOR DISMISSAL.

An order overruling a motion for the striking out of a statement of claim and the dismissal of an action leased thereon against a principal after judgment had been recovered against the agent is "final in its nature," and not "merely interlocutory" within the meaning of sec. 40(2) of the County Courts Act, R.S.O. ch. 59, from which an appeal properly lies.

Statement

APPEAL by the defendants from an order of the Junior Judge of the County of Wentworth.

The following statement of the facts is taken from the judgment of RIDDELL, J.:—

The plaintiffs, a company carrying on business in Hamilton as lumber dealers, on the 23rd October, 1914, issued a writ against Thompson, Levy, and Mrs. Crear (as executrix) for $319.12 for goods sold and delivered, and for interest. The endorsement reads:—

"The following are the particulars:—

"1912, Aug. 17. To 73900 No. 2 white pine lath at $3.80	$280.82
"To interest thereon from Nov. 20, 1912, when same became due, to Oct. 20, 1914, at 7 per cent. per annum, the defendant having agreed to pay interest at the said rate on all due accounts	38.30
"And the plaintiffs claim	$319.12

ONT.

S. C.

M. BRENNEN & SONS v. THOMPSON.

Statement

and interest on $280.82 from the date hereof until judgment, at the rate aforesaid."

The defendants Levy and Mrs. Crerar entered an appearance, but Thompson did not; and on the 3rd December, 1914, judgment was entered against him on default of appearance for $320.77 and $21.30 costs.

The affidavits filed by the defendants Levy and Mrs. Crerar, under Rule 56, were in the same form—that they had a good defence to the action on the merits; that they did not purchase or order the goods; that they did not agree to pay for them, and the goods were not delivered to them.

The plaintiffs delivered a statement of claim, which in substance sets out that Levy and Mrs. Crerar's testator had been in partnership to build a number of houses, and had employed Thompson to do the lathing; that Thompson had bought from the plaintiffs the goods the price of which is sued for; that the plaintiffs had signed judgment against Thompson by default; but that if it should appear that Levy and Mrs. Crerar are liable as principals, the plaintiffs ask that the judgment should be set aside as against Thompson.

The defendants Levy and Mrs. Crerar served notice of a motion to strike out the statement of claim, on the ground that it disclosed no cause of action, and to dismiss the action against them accordingly. On this motion the Junior Judge of the County Court of the County of Wentworth, *in invitum* these defendants, made the following order:—

"1. It is ordered that the default judgment signed and entered against the defendant P. E. Thompson be and the same is hereby set aside and vacated without costs.

"2. It is further ordered that the plaintiffs be at liberty to amend their statement of claim and writ of summons herein as they may be advised, within one week from the date of this order."

W. E. B. Coyne, for the appellants.

H. S. White, for the plaintiffs, respondents.

Riddell, J.

The judgment of the Court was delivered by RIDDELL, J.:—It is quite clear from the pleadings and statements before us that the

real claim of the plaintiffs is this: "We sold lath to Thompson; we do not know whether the other defendants are undisclosed principals; if they are, we claim judgment against them; and, to enable us to obtain that judgment, we ask to have the default judgment set aside; but, if they are not, we want judgment (already had) against Thompson."

There are two common cases in transactions of this kind; and much confusion, reaching into the cases and occasioning no little inaccuracy of statement, has arisen from the want of careful distinction between the principles upon which is based, in the two cases, the refusal of the Court to grant more than one judgment.

The first case is this: A., representing himself, expressly or by implication, as the agent of B., buys from C. goods in the name of and ostensibly for B.; the goods are "bargained and sold" to B., and credit is given to B. Payment being demanded, B. may acknowledge or ratify the agency of A.; if so, *cadit quæstio*, no action lies against A.; C. must fight it out with B.

Or B. may deny the agency of A., then C. may (1) sue B. on the contract, in which case he will succeed only if he prove A.'s agency, or (2) sue A., not on the contract—for the goods were not sold to him—but on the implied contract that he had authority to act for B. The action may indeed be laid in tort for fraud. In this case he will succeed only if he fails to prove A.'s agency. The causes of action are wholly different. The one is on the contract for "goods bargained and sold, goods sold and delivered," and would, in the old practice, be sued for on the "common counts." The other is on a different contract (or on a tort), and would have been the subject of a special count. As they are different, the judgment on one does not merge the other: if and when the one *transit in rem judicatam*, the other is wholly unaffected. It is not on the principle of merger that the Court would not allow a judgment against both, but on the principle that the Court could not allow a plaintiff to have two judgments based on two contradictory and inconsistent sets of facts. Accordingly, if the plaintiff sued the ostensible agent, he could succeed only if the agent had no authority, and therefore there was no contract with the alleged principal; then,

ONT.
S. C.
M. BRENNEN & SONS v. THOMPSON.
Riddell, J.

if judgment were obtained against the agent, the Court could not allow a judgment against the principal. The cause of action, if any, against the principal, however, is not merged, *non transivit in rem judicatam;* there is no reason why an action should not be brought upon it; but, before any judgment can be had on it, the former judgment must be got out of the way. *Allegans contraria non est audiendus.*

Such was the case in *Partington* v. *Hawthorne*, 52 J.P. 807. Miss Hawthorne was the lessee of the Princess's Theatre. One Kelly, representing himself as acting for the Princess's Theatre, ordered some goods for the theatre from the plaintiff. "The goods were sold and delivered to, and were debited against, the Princess's Theatre." They were sold on the credit of the theatre, and Miss Hawthorne did not deny receipt of them. For some reason which does not appear, Kelly was sued; on default, judgment was signed against him. This, of course, was necessarily on the hypothesis that he had not the authority to act for the lessee. The lessee was then sued, as she might well be. Any cause of action against her had not been merged. The Master gave her unconditional leave to defend. Sir James Hannen varied that order by giving her leave to defend on payment of the amount into Court. The defendant appealed, and then the plaintiff had the Kelly judgment set aside. The Divisional Court, Pollock, B., and Manisty, J., upheld Sir James Hannen's order: Pollock, B., on the ground that the action against Kelly was obviously a mistaken proceeding, and should from the first have been against Miss Hawthorne (that is, Kelly was not, and Miss Hawthorne was, the Princess's Theatre). Manisty, J., says that she did not deny the receipt of the goods which were sold and delivered to and were debited to the Princess's Theatre, although ordered by Kelly.

This case is wholly intelligible and undoubted law, on the principles I have laid down. The judgment against Kelly rested on the claim that he had no right to buy for the Princess's Theatre unless he (1) was the Princess's Theatre himself, or (2) was authorised to buy for the person who was the Princess's Theatre. The action against Miss Hawthorne rested upon the facts that (1) she was the Princess's Theatre, and (2) Kelly was

authorised to buy for the theatre. These two sets of facts were wholly inconsistent, and the Court could not permit the plaintiff to have judgment on both hypotheses. But there was no merger of the claim against Miss Hawthorne, and once the judgment against Kelly was out of the way, the action against her could proceed.

That this obstacle to an action against Miss Hawthorne did not need to be removed before action brought, is certain. It will be sufficient to refer to *Re Harper and Township of East Flamborough* (1914), 32 O.L.R. 490, and cases there cited.

Instead of suing either the alleged principal and ostensible agent separately, (3) both may be sued in one action. But the causes of action are still distinct: against the principal, for "goods sold and delivered;" against the agent, on a special count in contract or tort. If at the trial the agency is established, the plaintiff will have judgment against the principal—if not, against the agent. He has no choice; no question of election arises; he must take the judgment the facts justify.

The other case, which has an outward resemblance but is different in principle, is this. A. goes to C. and buys goods ostensibly for himself. Credit is given to him. C. then discovers (as he believes) that B. is the real purchaser, and A. only an agent for his undisclosed principal, B. C. (1) may sue A., and will succeed if he proves the sale only; or (2) may sue B., when he will succeed if he prove A.'s agency. In either case the action is the same, for "goods bargained and sold, and sold and delivered;" there is only one cause of action, the one contract: a contract to which C. is one party and either B. or A. (at C.'s option) the other. If he take judgment against either, the contract *transit in rem judicatam* and is merged, gone. He cannot thereafter say that the contract is in existence. Nor can he, having taken a judgment against one, revive against the other the dead contract; it stays dead. There is indeed no objection to suing the agent and principal in separate actions; it is not the writ which merges the contract, but the judgment; and, so long as the plaintiff stops short of a judgment, he can proceed safely with the other action.

ONT.
S. C.
M. BRENNEN & SONS v. THOMPSON.
Riddell, J.

The plaintiff may accordingly sue both in one action; but here, differing from the case first put, the cause of action is one and only one, and it is for that reason that he can have only one judgment. If, at the trial, he prove that B. is in reality the principal, he may take judgment against B., but he has the choice or an "election," nevertheless, to take it against A., the agent and actual purchaser. If he elect to take the judgment against A., *transit in rem judicatam*, and he cannot get judgment against B. In like manner, he cannot take judgment against B. and then get judgment against A. One or other, but not both, is the party to the one and only contract upon which he has sued.

The law has so recently been discussed by the Court in *Campbell Flour Mills Co. Limited* v. *Bowes*, 32 O.L.R. 270, that it is unnecessary to say more on this point.

The present case is the case of an alleged undisclosed principal, and it is quite clear that, where the agent has been sued and judgment taken against the alleged agent, this operates as a bar to the prosecution of the action against the principal, even if the judgment be by default: *Morel Brothers & Co. Limited* v. *Earl of Westmorland*, [1903] 1 K.B. 64, [1904] A.C. 11; see especially p. 14; *French* v. *Howie*, [1905] 2 K.B. 580, [1906] 2 K.B. 674; *Cross and Co.* v. *Matthews and Wallace*, 91 L.T.R. 500, 117 L.T. Jour. 220.

The cause of action having passed into a judgment, *transit in rem judicatam*, and this judgment cannot be set aside without the consent of the principal. "There cannot be more than one judgment on one entire contract." See especially *McLeod* v. *Power*, [1898] 2 Ch. 295; *Hammond* v. *Schofield*, [1891] 1 Q.B. 453; *In re Hodgson* (1885), 31 Ch. D. 177.

The only other question to consider is, whether the order appealed from is "final in its nature," not "merely interlocutory," under R.S.O. 1914, ch. 59, sec. 40 (2).

The application was, in substance, for a determination of the action against Levy and Mrs. Crerar, upon the ground that it could not be legally prosecuted against them further; that is, that the facts alleged in the statement of claim did not consti-

tute a cause of action. The decision of the Court below is, that these facts do give a cause of action—that the defendants have not a perfect defence on the plaintiff's own shewing. This is final in its nature, though it may be in form interlocutory.

In *Smith* v. *Traders Bank*, 11 O.L.R. 24, the County Court Judge had struck out certain paragraphs of a statement of defence as disclosing no reasonable answer. On appeal, a Divisional Court decided that this was an order final in form within the meaning of the statute.

In the present case, the County Court Judge has decided that the facts alleged in the statement of claim do give a cause of action. There can be no sound distinction between the cases. I am of opinion that the County Court Judge should have acceded to the defendants' motion, and dismissed the action as against them with costs.

The appeal should be allowed with costs, and the action dismissed with costs; the judgment against Thompson to stand.

No case is made for amendment, nor is there any pretence that the facts are not as stated.

Appeal allowed.

Re HARRIS.

Ontario Supreme Court, Middleton, J.

1. EXECUTORS AND ADMINISTRATORS (§ IV C—100)—DISTRIBUTION IN SPECIE—SHARES OF STOCK.

Where in the administration of the estate of an intestate a sale of shares of stock cannot be profitably made because of the uncertainty of their market value, a distribution *in specie* will not be allowed over the objections of certain next of kin, if in effect it would place the control of the corporation in favour of some over the others.

Statement

MOTION by the administrator for the advice and direction of the Court.

The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

D. Inglis Grant, for the administrator.

J. A. Macintosh, for the widow and adult son.

G. C. Campbell, for the adult daughter.

F. W. Harcourt, K.C., for the infants.

ONT.
S. C.
RE HARRIS.
Middleton, J.

MIDDLETON, J.:—Andrew D. Harris died intestate on December 12, 1913, leaving him surviving his widow and four children, two of whom are now infants. At the time of his death, Mr. Harris was substantially the owner of a valuable factory business, as he held 2,994 shares out of 3,000 of the capital stock of the Ontario Sewer Pipe Company. This stock is of very considerable value, but at the present time, owing to the financial conditions now prevailing, the stock cannot readily be marketed; and, although the business of the company is large and profitable, it is plain that any attempt to wind up the company would be productive of great loss. There is a wide difference of opinion between those concerned as to the best course to pursue and as to the duty of the administrator.

The widow and the adult son desire the administrator to give them the shares that would be coming to them upon a distribution, that is, one-half of the 2,994 shares. The adult daughter, on the other hand, desires that there should be no partition of the stock, but that it should be held by the administrator until a realisation can take place at a fair price. The infant children, represented by the Official Guardian, submit their rights to the Court, and of course they cannot make any election.

The adult daughter has since her infancy resided with her grandfather and her uncle, one Thomas Kennedy, who is the manager of the Dominion Sewer Pipe Company.

The matter first came before me upon a motion to determine how far the daughter was entitled to go in the examination of officers of the company for the purpose of indicating that the affairs of the company are not being properly managed and that moneys of the company were being improperly spent. It appeared to me that the inquiry was being pressed too far, but I did not think it wise to dispose finally of the motion, and I therefore directed that the motion stand over and that the main motion be argued, reserving liberty to allow the other motion to be prosecuted, and further materials in answer to be filed, if I came to the conclusion that the matters discussed had any bearing upon the rights of the parties under the circumstances.

There is, unfortunately, some hard feeling and a tendency to recrimination. It is said that the daughter is refusing to ac-

cept her share, seeking rather to serve the interests of the uncle, who stands *in loco parentis* to her, as manager of the opposition company. On the other hand, it is said that what has taken place in the past would indicate that the affairs of the company would probably be operated entirely in the interest of the widow and adult son if they received their portion; for this, with the outstanding shares which are held or controlled by the widow and son, would give to them the majority interest and controlling vote in the management of the affairs of the company.

I have come to the conclusion that this recrimination throws absolutely no light upon the situation, and that the motion must be dealt with upon the basis of the right or lack of right of those entitled to share in the estate to demand that their shares be given to them in specie. There are no creditors, and no rights need be considered save the rights of the widow and the children.

The question involved is not so devoid of authority as counsel apparently thought. There is no question that as soon as debts have been paid the administrator holds the estate in trust to convert and divide among those entitled under the statute to distribution, in precisely the same way that an executor holds an estate in trust under a will when he is directed to convert and distribute among several residuary devisees. As put in the case cited by Mr. Grant—*Cooper* v. *Cooper* (1874), L.R. 7 H.L. 53—"the Statute of Distributions is nothing but a will made by the Legislature for an intestate. His next of kin stand with regard to his personal estate in the same condition as does the residuary legatee under a will. The same law therefore applies to both. Either is entitled to elect to take the estate is specie." But it must be borne in mind, as pointed out in *Sudeley* v. *Attorney-General*, [1897] A.C. 11, that until distributed the assets which are the subject of the trust are not the property of the beneficiary.

This, however, makes it necessary to consider the exact nature of this right of election. The case is simple where there is only one *cestui que trust*, or where the *cestuis que trust* are all of one mind and no complication arises from disability. There, as soon as all other interests have been provided for, the right to demand the delivery of the estate in specie is incontrovertible.

ONT.
S. C.
RE HARRIS.
Middleton, J.

But I think it is also well established that where the parties beneficially concerned are not of one mind, then the parties who so desire are entitled to insist upon the normal course of administration being pursued to the end. There can be no divergence from the donor's will or from the statutory testament which would injuriously affect the right of any one *cestui que trust*. That *cestui que trust* may compel a strict and literal adherence to the prescribed line of duty.

I think this correctly sums up the law to be derived from a large number of authorities. The general principle is clearly stated by Lord Cranworth in *Harcourt* v. *Seymour* (1851), 2 Sim. N.S. 12, at p. 45: "I take the law from this case to be perfectly clear. Where by a settlement land has been agreed to be converted into money, or money to be converted into land, a character is imposed upon it until somebody entitled to take it in either form chooses to elect that instead of its being converted into money or instead of it being converted into land it shall remain in the form in which it is actually found."

The necessity of united action among beneficiaries, where the rights of all are affected, is pointed out in *Holloway* v. *Radcliffe* (1856), 23 Beav. 163, and *Chalmers* v. *Bradley* (1819), 1 J. & W. 51; but, where the trust is to convert money into land, it has been held that any one entitled to the money may elect to take it, as this does not interfere with the other beneficiary: *Seeley* v. *Jago* (1817), 1 P. Wms. 389.

The earlier authorities are collected in Lewin on Trusts, 11th ed., pp. 864, 1205, *et seq.*

In *In re Douglas and Powell's Contract*, [1902] 2 Ch. 296, it was held that there could not be an election to take in specie where a lunatic was concerned until a committee was appointed to represent him and had authority to assent on his behalf.

The most recent case, and that which resembles most closely the problem now presented is, *In re Marshall*, [1914] 1 Ch. 192. There the testator bequeathed, *inter alia*, a number of shares in a limited company to trustees, upon trust to convert, with power to retain without conversion so long as the trustees should deem proper. The residuary estate of which the shares in question formed part was to be divided among certain residuary legatees.

ONT.
S. C.
RE HARRIS.
Middleton, J.

In the events which had happened, a son and two grandsons had become absolutely entitled to certain shares of this residuary estate, and claimed to have transferred to them their proportion of the shares of the company. It was held that "in the absence of special circumstances the right of the absolute owners to have a transfer of their shares ought to prevail over the discretion of the trustees." Cozens-Hardy, M.R., thus states the law (pp. 199, 200): "Speaking generally, the right of a person, who is entitled indefeasibly in possession to an aliquot share of property, to have that share transferred to him is one which is plainly established by law. There is also another case which is equally plain and established by law, that where real estate is devised in trust for sale and to divide the proceeds between A., B., C., and D.—some of the shares being settled and some of them not—A. has no right to say 'Transfer to me my undivided fourth of the real estate because I would rather have it as real estate than personal estate.' The Court has long ago said that that is not right, because it is a matter of notoriety, of which the Court will take judicial notice, that an undivided share of real estate never fetches quite its proper proportion of the proceeds of sale of the entire estate; therefore, to allow an undivided share to be elected to be taken as real estate by one of the beneficiaries would be detrimental to the other beneficiaries. But that doctrine, it seems to me, has no application, apart from special circumstances, to personal property. It may apply to a case of a mortgage debt which you cannot conveniently split up into shares; but when you are dealing with the case of a limited company with ordinary and preference shares, you want to know a great deal more than that before you can say that the trustees are entitled to deprive an absolute owner of his right to claim a transfer. When the case was first before us we suggested that we should like to know what were the facts about the company; what was its capital, and the number of its shareholders, and what were the special circumstances of the case; and it stood over in order that we might have better information. That information has now been furnished very conveniently and satisfactorily, and it appears that this is not in any sense a private company in which the testator held a control by

ONT.
S. C.
RE HARRIS.
Middleton, J.

holding the majority of the shares, or anything of that kind. It is a case in which there are some 360 shareholders. The amount of the capital now represented by the testator's residuary estate is substantially one-sixth of the capital. The present appellants hold one-fifth of that amount, in regard to which they say to the trustees, 'Please transfer to us our one-fifth of the block of shares which you are now holding; in our opinion there is no reason whatever why you should be entitled so to hold them.'" Phillimore, L.J., points out that in certain cases the desirability of keeping a large block of stock together, so as to ensure solidity of voting power, might be a sound reason for refusing the applicant's request.

In this case, applying the principle which, I think, runs through all these cases, I think it is the duty of the trustee to refuse to transfer any portion of the stock to the beneficiaries, unless all agree. It is plain that if the widow and the son succeed in obtaining their one-half of the stock of the company now held by the administrator, this, together with the stock held or controlled by them, will give them the controlling vote in the company; and the fear of the daughter that she will be converted into a minority stockholder, instead of having a joint interest in the controlling stock, is well-founded. I do not mean to say that she has established in any way that the majority interest will be used in any sense unfairly; but her position will be changed without her consent. She will be given something other than that which she now has; and, as I understand the law, where the objection is one of substance, and not put forward manifestly unreasonably and vexatiously, it is the duty of the trustee to protect the dissentients, and the Court cannot relieve the trustee from the duty which has been imposed upon him by the statute—which here constitutes his trust instrument. The statute directs a sale and conversion; and, in the absence of consent, this must govern.

The question here raised and determined is not far removed from that which has arisen, but has not yet been determined, in *Rose* v. *Rose* (1914), 7 O.W.N. 416, 32 O.L.R. 481.

The administrator was well justified in asking the opinion of the Court; and costs of all parties may, therefore, be paid out of the estate. *Order accordingly.*

HAMILTON v. MARGOLIUS.
MORRISON v. MARGOLIUS.

MAN.
K. B.

Manitoba King's Bench, Galt, J.

1. VENDOR AND PURCHASER (§ I E—27)—CONTRACT—CONSIDERATION—FAILURE OF—MISREPRESENTATION—FRAUD.

Where an agreement of sale has been completed by conveyance, it is no longer open to the purchaser, in the absence of fraud, to complain of misrepresentation by the vendor, except in cases in which the consideration for the conveyance has totally failed.

[*Cole* v. *Pope*, 29 Can. S.C.R. 291, referred to.]

ACTION for specific performance. Statement

J. F. Davidson, for plaintiff.

A. Dubuc, and *J. Mondor*, for defendant.

GALT, J.:—This action was tried before me on April 28 last. Galt, J.

The plaintiff Hamilton sues for specific performance, or in the alternative, damages, arising out of an agreement made between him and the defendant on September 26, 1913. The defendant contends that the plaintiff is entitled to no relief whatever and counterclaims that the agreement be rescinded and that certain property, consisting of nine lots in British Columbia should be re-conveyed by the plaintiff to the defendant, etc.

The evidence shews that the plaintiff was the owner of 5 lots in block 9, in the town of Morden. A man named Winkler had for some time owned and occupied a house situate on one of these 5 lots and there was a sixth lot additional owned by him. The defendant states that he knew the property slightly and that it was all enclosed by a fence.

Negotiations took place between Hamilton and the defendant with a view to exchanging certain lands and the agreement of September 26, 1913, provided that Hamilton agreed to exchange and sell to Margolius

property in Morden, Manitoba, known as the Winkler house, subject to a mortgage and taxes and encumbrances not to exceed $2,300. Property comprising four lots in block 9 in said town of Morden.

Margolius agreed to exchange and sell to Hamilton

Lots 1 to 26 inclusive, block 112, plan D.L. 1782, Salmon River Valley, Cariboo District, B.C., clear of all encumbrances and taxes paid. . . .

MAN.

K. B.

HAMILTON v. MARGOLIUS.

Galt, J.

The deal to be closed by October 16, 1913, otherwise to be null and void. Each of us to search the titles at our own expense. Interest, rates, insurance, taxes, etc., to be adjusted between us up to date. And it is hereby declared that the parties hereto relied upon their own judgment in making this exchange and both of the parties agree to pay commission in the event of this deal being consummated.

The defendant Margolius, as I have stated, was, to some extent, acquainted with the property and spoke of it as "The Winkler home." He was not aware whether it consisted of one or more lots, as he had made no search regarding it. But he knew that there was a substantial house built upon the property and that there were outbuildings consisting of a stable, windmill and a summer house. The plaintiff knew that the property occupied by Winkler consisted of 6 lots and he himself had purchased 5 of them. He did not know the boundaries or description of any of the lots.

It appears by the evidence, ex. 2, that the house stands upon a corner lot, facing on a street; the stable is built on the lot behind it; that the house is built almost up to the boundary line between the two lots. So that unless the owner of the house also owns the lot with the stable on it, he would find himself in a very inconvenient position to utilize the rear of his premises. So little did the plaintiff know of the ownership that even at the trial he was unable to state which of the 6 lots were his.

After the execution of the agreement the defendant conveyed 9 of the lots in British Columbia to the plaintiff, and, being anxious to utilize the property at Morden, he made an arrangement with the plaintiff to receive the deed of the Morden property and to deliver a deed of the remaining 17 lots in British Columbia within one month. The 4 lots at Morden were accordingly conveyed to the defendant.

Both parties admit that the clause in the agreement as to the results of not closing the transaction by October 16 was waived. The defendant made use of his newly-acquired property by pledging the deed of it, by way of collateral security, with a creditor. He also negotiated for the sale of the property for certains lots in Stratheona.

On or about November 15, the defendant went to Morden

to inspect his property and search the title, etc., and then discovered that what he had supposed to be the Winkler house property consisted of 6 lots, as above mentioned, and that he was only to get 4 of them. He also found that the stable was not upon any of his lots.

Having ascertained the above state of affairs, the defendant returned to Winnipeg and verbally repudiated the sale. He also made arrangements with his creditor, and got back the deed he had pledged, so as to be in a position to make *restitutio in integrum*. Nothing material appears to have taken place until the note fell due, on or about December 8, and the same not having been paid, the plaintiff commenced this action.

The defendant pleads that he was induced to purchase the Morden property by the fraudulent misrepresentation of the plaintiff. I can see no evidence whatever to justify the imputation of fraud under the circumstances adduced in evidence. No doubt the plaintiff knew that the property originally occupied by Winkler consisted of 6 lots and that he, the plaintiff, had purchased 5 of said lots, including the one on which the dwelling house stands. It may well be that the defendant supposed he was getting the entire property originally occupied by Winkler, but he did not expressly stipulate for this in the agreement of September 26, 1913. On the contrary, he agrees to the stipulation "that the parties hereto relied upon their own judgment in making this exchange." The maxim *caveat emptor* may well be applied to such a transaction. The defendant had ample opportunity to make inquiry, either personally or through an agent in Morden, as to the exact condition of the property he thought he was purchasing. Instead of doing this the defendant writes to the plaintiff, on October 22, as follows:—

Dear Sir,—In consideration of your handing me deed of land from Mrs. Hamilton to myself covering lots 3, 21, 22 and 23 in block 9, Morden, plan 28, I hereby agree to hand you deed of 17 lots in re-subdivision of district R.L. 1782, Cariboo district, plan 1211, within one month, and, as further security, I hereby authorize you to hold the title to the Dominion St. house until the said lots are duly conveyed. And I give John Hamilton my note for $600 in favour of C. Hamilton.

The description of the 4 lots in Morden in the original agreement was too vague for the purposes of an agreement, and if the case had rested upon this document alone I cannot see how

MAN.

K. B.

HAMILTON v. MARGOLIUS.

Galt, J.

specific performance could have been enforced against the defendant, but when at the defendant's own request the plaintiff conveyed 4 lots in block 9 (including the lot on which the dwelling house stood) by a proper legal description, the above difficulty was removed. After receiving said deed the defendant did not even then inspect his property or make any inquiries regarding it, but, on the contrary, he pledged the deed of it to the manager of the Northern Life Insurance Co. as collateral security to an outstanding loan and furthermore the defendant entered into negotiations for a sale of the property. It was not until November 15 that he took the trouble to make any inquiries respecting the identity or extent of the lots which he had purchased. Under these circumstances I think it is entirely too late for the defendant to complain.

The law is well settled that, where an agreement of sale has been completed by conveyance, it is no longer open to the purchaser, in the absence of fraud, to complain of misrepresentation by the vendor, except in cases in which the consideration for the conveyance has totally failed. See *Cole* v. *Pope*, 29 Can. S.C.R. 291; *Seddon* v. *N.E. Salt Co. Ltd.*, [1905] 1 Ch. 326, 74 L.J. Ch. 199.

In the present case it cannot be said that the consideration has totally failed for the defendant has received the larger portion of the land which he thought he was getting, including the dwelling house. The defendant's counsel conceded that if specific performance were granted the defendant would prefer to convey the lots in British Columbia rather than pay, in the alternative, damages in respect of them.

The plaintiff is therefore entitled to the relief which he seeks. The defendant's counterclaim will be dismissed. The plaintiff is entitled to his costs of both action and counterclaim.

During the trial, counsel for the plaintiff offered to end this dispute by conveying to the defendant the remaining lot which he has in block 9. The defendant did not accept this offer. If the plaintiff be willing to renew the above offer upon condition that there be no further litigation, by appeal or otherwise, over this dispute, a clause to that effect may be inserted in the judgment.

MORRISON v. MARGOLIUS.

GALT, J.:—This action arises out of the same transaction dealt with in the previous case of *Hamilton* v. *Margolius*. The plaintiff sues both Margolius and John Hamilton.

The defendant Margolius, being anxious to secure a deed of certain property in Morden wrote a letter on October 22, 1913, at the foot of which he inserts the following words:—

I hereby authorize you to hold the title to the Dominion Street house until the said lots are duly conveyed, and I give John Hamilton my note for $600, in favour of C. Hamilton (John Hamilton's wife).

The evidence shews that negotiations were pending between Hamilton and Margolius at about the date of this note for the sale or exchange of certain other property, and if the deal had gone through, the proceeds of the note would have been applied as a cash payment on the proposed deal. No money payment was required for the purposes of the Morden deal. Yet, having regard to defendant's letter of October 22, it looks, at first sight, as though the note for $600 might also be treated as further security in connection with the Morden property, and might be forfeited by Hamilton in the event of the Morden deal not being completed within the month.

The difficulty or ambiguity, however, has been cleared up by John Hamilton himself in his examination for discovery in the action brought by him against Margolius, which, by consent, was tried together with this action. He gives the following evidence on page 15, Q. 158-160:—

Q. Why did he give you the note? A. He gave me the note as a deposit on the Dominion Street house. Q. Did he carry out the bargain on the Dominion Street house? A. No. Q. The note was given as security for the carrying out of the bargain on the Dominion St. house? A. Yes.

This extract was not specially put in at the trial, but I refer to it now as explanatory of other portions of the depositions which were put in.

The plaintiff's interest in the note arose as follows: On November 22, 1913, John Hamilton took the note to the plaintiff and succeeded in obtaining from the plaintiff the sum of $585. The transaction was a sale or discount of the note before it was due. Hamilton's wife had already endorsed it "without recourse." Hamilton was a client of the plaintiff's solicitors,

MAN.

K. B.

MORRISON v. MARGOLIUS.

Galt, J.

Messrs. Wilton, McMurray, Delorme & Davidson, and it appears that there were outstanding accounts between himself and his solicitors. The plaintiff Morrison is a barrister, having his office next door to the office of the plaintiff's solicitors, and he is manager of the National Loan & Investment Corporation, of which one of the said solicitors is the president. A few days after the note had been discounted the plaintiff was repaid the sum of $585, which he had advanced, by some member of the firm of solicitors referred to, and the note was thereupon handed to Messrs. Wilton, McMurray & Co. The plaintiff was examined for discovery, but I find his evidence very unsatisfactory. It seemed quite impossible for the examining counsel to extract the information which the plaintiff undoubtedly possessed without the greatest difficulty, and even then fragmentarily.

If the transaction had consisted of a simple purchase or discount of the note in question by the plaintiff, as his evidence at first appeared to indicate, nothing would have been simpler than to state the facts of the case. But, as it is, he is suing upon the note which, so far as he is concerned, has undoubtedly been paid off, and he either does not know, or pretends he does not know, on whose behalf he is suing. I take the following extracts from his depositions by way of illustration, Q. 244-247:—

Q. Did you try and collect that note from Hamilton? A. No. Q. Did you ask him? A. No. Q. What are you suing him for? A. Because he is liable on the note. Q. Do you want him to pay? A. Certainly, if he gives this money I will take it.

251. Q. Would you go after Hamilton or insist on your legal rights against Margolius? A. If Margolius can establish that he is not liable, then Hamilton will be the responsible party. 260. Q. You sue Hamilton and make costs against him and he may have paid you right away? A. I will never have to stand the costs."

It looks to me as though Hamilton, seeing that litigation was about to arise, determined to obtain all the advantage he could from the note in question, and for that purpose transferred it to Morrison.

If Messrs. Wilton, McMurray & Co. paid Morrison off out of their own funds, irrespective of Hamilton's connection with the transaction, they surely would have taken the note them-

selves and sued upon it. If, on the other hand, they utilized funds belonging to Hamilton, but still retained the note nominally for Morrison, why do they make Hamilton a defendant? As it is, I am left to conjecture for whose benefit this action has been brought. Hamilton has allowed judgment to go against him by default.

In my judgment, the plaintiff having been paid off, and having failed to shew a right to sue on behalf of any other person, the action must be dismissed with costs.

The defendant Margolius counterclaims to have the agreement in respect to the Morden lots rescinded, and to have the note delivered up to be cancelled, etc.

I do not think the defendant is entitled to any of the relief sought by this counterclaim. The note was to be retained by Hamilton, as shewn by his depositions, as further security in connection with the Dominion Street house, which was an entirely separate transaction, not in question here.

The counterclaim is therefore dismissed with costs.

Action dismissed.

COOPER v. TAYLOR.

Manitoba King's Bench, Curran, J. January 11, 1915.

1. EXECUTORS AND ADMINISTRATORS (§ I—13)—REMOVAL OF—GROUNDS FOR—INDEBTEDNESS TO ESTATE.

It is not a ground for removing an executor that he is himself indebted to the estate upon a mortgage made to the testator if there are no arrears owing by him upon it.

2. EXECUTORS AND ADMINISTRATORS (§ IV—75)—FALSE CLAIMS—PENALTY—COSTS.

A plaintiff making an unfounded charge against an executor of having made a secret commission will be visited with costs to the fullest extent possible.

3. EXECUTORS AND ADMINISTRATORS (§ I—13)—REMOVAL OF—GROUNDS FOR—PERMITTING SURVIVING PARTNER TO CONTINUE BUSINESS.

It is not a ground for removing an executor from office that he had permitted the salaried and only partner in the deceased's law practice to take entire charge of the closing out of the accounts of the law practice for the estate, where the salaried partner, by reason of his name being used in the partnership name, was personally liable to the clients and interested in seeing that trust funds were promptly accounted for, and no impropriety was shewn in the partner's administration nor any loss attributable thereto.

Statement

ACTION to remove an executor and for an injunction and receiver.

MAN.

K. B.

COOPER v. TAYLOR.

Curran, J.

A. B. Hudson, for plaintiff.

A. Meighen, for defendants.

CURRAN, J.:—This is an action brought by the plaintiff, Alfred Cooper, a brother of the testator, William J. Cooper, and one of the beneficiaries named in his will, against the defendants, who are the executors of the testator's will, to have said executors removed from office and a trust company or some person or persons appointed in their place and stead; for an account of the defendants' trusteeship in respect of the estate; an injunction restraining the defendants from further dealing with the estate, and for the appointment of a receiver.

The testator died on or about October 11, 1913, having made his last will and testament by which the defendants were appointed his executors. The will is a holograph will and was admitted to probate in the Surrogate Court of the Central Judicial District on December 23, 1913. Some delay in actually issuing the probate was caused in arranging the succession duties, but I cannot find that any fault is attributable to the defendants on this account. Probate was actually issued on March 16, 1914.

The plaintiff put in evidence certain portions of the examinations for discovery of both defendants; the will; trust deed and some other documents and letters, and the defendant Taylor was examined *viva voce* at the trial. I have marked in lead pencil in the margin those portions of such examinations put in by the plaintiff, and in ink those portions admitted as explanatory at the request of the defendants. No other evidence was adduced by the plaintiff, and without putting in any evidence, the defendants, at the conclusion of the plaintiff's case, asked for a nonsuit. I then felt disposed to dismiss the plaintiff's action; but in view of the numerous legal authorities cited by the plaintiff and which I then had no opportunity of examining, and considering, and in deference to the argument of the plaintiff's counsel, I thought it best to take time and consider my judgment.

I will first deal with the grounds urged against the defendant Newman, for these differ in some respects from those urged against the defendant Taylor. Newman was a trustee under a separation agreement by deed made between the testator and

his wife. The testator in and by this deed covenanted, amongst other things, to pay his wife the monthly sum of $65.50 during their joint lives, and to secure these payments he further covenanted to grant and convey to the trustee Newman property or securities to be approved by Newman as being in his judgment suitable security for this purpose, to the value, in the opinion of the trustee Newman, of not less than $5,000 over and above all charges and encumbrances; such properties and securities to be held by the trustee during the joint lives of husband and wife, subject to the provisions contained in the agreement. This agreement contained a further provision requiring the trustee from time to time at the written request of the testator to sell and convey such portions of the said property or securities as and when, and upon such terms as the testator should direct upon condition that he should first have conveyed to the trustee other property or securities in lieu thereof in the judgment of the trustee suitable for the purpose of such security and of at least equal value over and above all encumbrances. The proceeds of such sales were to be received by the trustee and paid over to the testator.

The agreement also contained a further provision obligating the trustee upon request from the testator to sell any of such properties or securities without first receiving other properties or securities in substitution, on condition that a price therefor should be obtained which in the judgment of the trustee was the best price that could then be secured, in which event the purchase price or proceeds was to remain in the hands of the trustee as security in lieu of the property disposed of and be invested by the trustee in his own name as such trustee. With respect to such moneys the testator had the right at any and all times to convey to the trustee property or securities to the extent of all or part of such money as should then be held by the trustee and if the trustee was satisfied as to its sufficiency he was required to pay over to the testator such money as shall be replaced by proper securities.

A power of sale of the trust property was vested in the trustee upon certain contingencies. The personal liability of the testator for payment of the monthly sums to his wife and for

MAN.
K. B.
COOPER
v.
TAYLOR.
Curran, J.

performance of all other covenants and obligations contained in the agreement on his part was absolute and in addition to all other remedies contained in the agreement. The trustee was expressly empowered to enforce all remedies available under the personal covenants of the testator contained in such agreement.

I have referred to the provisions of this document fully for reasons that will hereafter appear.

The plaintiff contends that there is a conflict between interest and duty in the case of the defendant Newman, because of this trusteeship, in respect of the following matter. When the testator Cooper died the defendant, Newman, as trustee under the separation agreement, held only a mortgage for $1,000, given by the testator on a half interest in certain farm lands, a lot on Elizabeth Street in the City of Portage la Prairie, which was encumbered, and a cheque on savings bank account in the Merchants Bank of Canada at Portage la Prairie. He should have held securities in land or land mortgages to the full value of $5,000; but he allowed the testator Cooper in his lifetime to practically deal with such properties as had been conveyed to him by way of security under this trust deed as if it had not been pledged or bound in any way by the terms of such trust. In fact, I think Newman looked, more to the testator's personal covenant to pay the monthly allowances and his financial ability to do so rather than to these securities, which seem to have been regarded by the trustee, and indeed by the testator himself, as of nominal rather than real value to protect the rights of the *cestui que trust*.

Exhibit 11 shews what properties were in the first instance transferred to the trustee under the separation agreement. Of these lot 279, plan 12 B., is the Elizabeth Street property, valued by Newman at $1,000. The other properties named in exhibit 11 appear to have been all disposed of by the testator in his lifetime and not replaced, as required by the trust deed. Newman does not appear to have insisted on such replacement being made and no substitution or replacement was made by the testator Cooper with the results that the trust security at the time of the testator's death consisted only of the securities before mentioned, to the value of $2,000 only instead of $5,000 as required

by the trust deed. The cheque on savings account referred to was worthless, as this account had been closed out by the testator long before his death.

It may be that the trustee was negligent in his duty to the *cestui que trust* in permitting these things to be done in violation of the provisions of the trust deed, and thereby had rendered himself personally liable to the *cestui que trust* for any loss she might sustain in consequence of such neglect. But I do not think the liability ended there. The testator, so long as he lived, was liable, not only to pay the monthly allowances, but to maintain the securities in the hands of the trustee to the full value of $5,000. It appears he did not do this, and at the time of his death was in serious default in this respect. Was his estate then not liable to make good this loss to his wife. All she had to depend on after her husband's death was the property held by the trustee or which should have been held by him for her benefit. It seems to me that the estate was and is liable to the same extent that the testator himself would have been liable had he lived, and the trustee demanded fulfilment of his covenants. I think the defendant Taylor took a perfectly correct legal view of the liability of the estate to the wife in connection with this matter, and that the executors were right in allowing her claim. It made no difference that Newman failed to compel the testator to live up to his obligations; the widow was entitled to the full protection the trust agreement gave her and the estate, in my opinion, was and is unquestionably liable.

Counsel for the plaintiff argued that it was Newman's duty personally to make good to the widow the loss which resulted through his neglect of duty. He goes so far as to say that Newman was guilty of a breach of trust and contends that he, with the concurrence of his co-executor, is saddling the estate with a burthen which he himself ought alone to bear and hence there arises a conflict between personal interest and his duty as an executor in this connection. I cannot give effect to this argument because, in my opinion, the testator's estate is primarily responsible to the widow. The default which occasioned the loss to her was the default of the testator. It is true the trustee might have prevented it, but that fact does not relieve the estate.

MAN.
K. B.
COOPER
v.
TAYLOR.
Curran, J.

The legal duty to support his wife during their joint lives at all events always devolved upon the testator. He could not rid himself of this responsibility while he lived, and by mutual consent the fulfilment of this duty was, upon the parties becoming separated, commuted at certain monthly payments which the testator obligated himself to make to the trustee for his wife.

It seems to me the beneficiaries have no status to insist that Newman's default relieves the estate. The widow might have complained of this default, but I do not think that those interested in the estate have any legal right to do so. They are merely the recipients of the testator's bounty. He must be just before he is generous. The debt to his wife must first be discharged, and I see here in the eminently fair and just arrangement made by the executors with the widow, nothing to which the beneficiaries can legally or morally object.

The next objection urged against the defendant Newman was that he had made a claim for some $500 upon the estate when, as a matter of fact there was no foundation for such claim. I do not think there is anything in this objection. I am quite satisfied that the claim when made by Newman was *bonâ fide* believed by him to be an honest claim. It was not presented in a formal way, vouched by statutory declaration or affidavit. All the defendant Newman did was to tell his co-executor Taylor that he was under the impression that he had not received his share of certain moneys (a payment of $1,000 made to the testator by one Curtis on account of a purchase of land in which Newman and the testator were jointly and equally interested) and to request Taylor to look after the matter for him. I find his explanation of the matter at page 16 of his examination for discovery perfectly satisfactory.

Newman is a man of 66 years of age. He manages and looks after his own business. This transaction was not one connected with his business, but was a private matter which was wholly looked after by the testator as appears from Newman's examination.

It does seem to me not incredible that Newman forgot that this money had been paid to him and honestly thought it had not. Under this belief was there anything wrong in what he did? I

do not think so. I am satisfied that there was no fraudulent or dishonest intent, but merely an honest mistake made.

The next objection urged was that both defendants had failed in their duty with regard to the Cooper & Meighen law business. See clause 7 of the statement of claim for charges in this respect. Exhibit 7 shews the nature of the partnership between the testator and Meighen. Meighen was a salaried partner only; but was held out to the public as a partner in fact. As between the partners Cooper alone was liable for the firm's debts and obligations and was entitled to the profits of the business. To creditors and clients of the firm in the absence of knowledge upon this point, I think there can be little doubt but that Meighen was equally liable with Cooper for the firm's debts.

At the time of the testator's death there was a sum of $3,400 standing to the credit of the firm of Cooper & Meighen in the Bank of Montreal at Portage la Prairie. There were then debts owing by the firm and trust moneys to be accounted for to clients, also moneys for costs and legal services owing to the firm, accounts for which were to be rendered and the moneys collected. Part, if not all, of the bank balance was trust moneys. It is not denied that the executors left the winding up of this law business solely in Meighen's hands.

It is to be borne in mind that Meighen was in active practice and had an established business at the time the partnership with Cooper was formed. The Meighen business was simply continued as a going concern under the partnership name with, of course, the added advantages of Cooper's professional ability, connection and influences. It was not Cooper's business originally, and I think this fact ought not to be overlooked in considering the action of the executors in leaving it to Meighen to close out the partnership business. In this connection the defendant Taylor said in his evidence at the trial:—

I left the closing out of the firm business to Meighen because I thought his office could look after it better than I could. I knew of no one else who could do so. Naturally I could not take those accounts away from that office without interfering with that business. Meighen was in practice before the Cooper partnership. The business of Meighen was simply continued in the name of Cooper & Meighen. I didn't see any necessity to interfere with the winding up of the Cooper & Meighen business. I am satisfied J. H. Cooper knew of the arrangement for Meighen to close out

MAN.
K. B.
COOPER v. TAYLOR.
Curran, J.

the Cooper & Meighen business. I never had any doubt about Meighen's financial ability to account for all moneys he might receive.

From this testimony I have not the least doubt but that the executors exercised a wise discretion in committing the winding up of the Cooper & Meighen business to the surviving partner Meighen. Had they the power to do so? I think there can be no doubt that they had. By so doing they did not absolve themselves from liability. If their plan of dealing with this portion of the estate proved injudicious, improper or inexpedient, and loss resulted from it, I suppose the executors could be held accountable. However, no loss of any kind so far has been shewn, nor has anything of an improper character been disclosed which reflects upon the wisdom of the executors in making this arrangement or on their choice of the person selected to wind up the business.

A good deal was sought to be made of the fact that Meighen withdrew from the bank by cheque $982.17 of the funds of the partnership in the Bank of Montreal, and that Taylor was cognizant of and allowed this to be done. Now, Mr. Taylor's statement of the arrangements made with Meighen is to be found on page 4 of his examination for discovery put in by the plaintiff:—

> The arrangement that we made with Mr. Meighen at the time was that he was to go on and close out the Cooper & Meighen business. He was to collect any accounts that were owing to Cooper & Meighen, and he was to pay out any trust moneys or direct debts of the firm of Cooper & Meighen, just continuing the account at the Bank of Montreal in the name of Cooper & Meighen.

And he has this to say of the cheque to Meighen:—

> Q. What was that $982.17 for?
>
> A. As I understand it it was for moneys which Cooper & Meighen had collected for Mr. Meighen and which had been placed to his credit in their books, and for the balance of the allowance of $2,000, or the moneys that would be due to Mr. Meighen at the date of Mr. Cooper's death.

As a matter of fact, all of the moneys at the late firm's credit in the Bank of Montreal were chequed out by Meighen in payment to clients of moneys belonging to such clients and of debts owing by the firm, and an overdraft of some $1,500 was thereby created. This overdraft was arranged for by Meighen with the bank, and he was personally responsible to the bank for it, and not the estate. Since then and up to the time of

trial this overdraft has been wholly paid off with the exception of some $40. In addition to this Mr. Meighen seems to have advanced of his own funds some $895 to liquidate liabilities of the late firm, which amount is still owing to him.

I take it that it was a matter of first importance to Meighen as the surviving partner that clients' funds and trust moneys should be paid out without delay to the parties entitled. I think clients and others whose moneys were in the firm's possession at Cooper's death had a right to look to Meighen and hold him accountable for their money. His professional credit and standing were involved, and the least appearance of bad faith or failure to account would have created distrust and injured him professionally. He had rights which the executors could not ignore. He had to be considered and the clients had to be considered in this matter, rather than the beneficiaries under the will, who could have no possible interest in the partnership business until all debts and liabilities were satisfied.

It may be, from the provisions in the partnership agreement, that all the assets of the firm belonged to Cooper, and so to the estate upon his death, and that Meighen had no right of control or possession as against the executors. This is contended for by the plaintiff, and just as strongly contended against by Meighen. It is not necessary for me to say who is legally right upon this point, for, assuming that the executors alone had this right, I am satisfied that the arrangement they made with Meighen was in the best interests of the estate, and was made in good faith by the executors and in the exercise of a discretion which I think they possessed. I think further it was practically the only arrangement they could profitably have made under the circumstances. When Meighen has completed his work he will then be required to submit proper accounts of his stewardship to the executors. It will then be time, I think, to find fault if he has failed in his duty. It seems to me it is premature now to object to this arrangement. Mr. Meighen is a responsible man financially and the executors are not without recourse, and themselves are responsible as executors to the beneficiaries for what they do or omit to do.

The plaintiff also asks for an account by the defendants of

MAN.
K. B.
COOPER
v.
TAYLOR.
Curran, J.

their trusteeship in respect of the estate. This is not an administration suit. The claim for an account is really an incident to the main relief sought, which was primarily the removal of the executors from office. Since this claim has been abandoned, the question of a receiver becomes the main issue. If a case for a receiver had been made out an account by the defendants would naturally follow. As such a case has not, in my opinion, been made out, I do not think, at all events upon such evidence as is before me, that I ought to make any order for an account. Indeed, as the usual administration order is not asked for, and a case for such order established, I doubt if I have any power to make an order against the executors requiring them to furnish accounts. The action was begun on June 6, 1914. The plaintiff admits that the defendants have furnished him with an account of receipts and disbursements down to May 11 of that year; but alleges that the defendants have refused to permit him to make an inspection of documents and vouchers in their possession. This the defendants deny and the plaintiff has advanced no proof of his allegation.

The plaintiff alleges that the defendants have made no effort to collect the debts due the estate. The defendants deny this allegation and say that they have done all that was reasonably possible to get in the moneys owing to the estate. The plaintiff has produced no proof of his assertions in this connection.

As to the charge contained in clause 8 of the statement of claim the fact appears to be that the executors retained the Elizabeth Street property for the estate upon the advice and request of some at least of the beneficiaries, and have paid the testator's widow the sum of $1,000 in lieu of that property, this being the amount at which the property was valued by the defendant Newman. The property formed part of the trust security in Newman's hands, and upon the death of the testator it belonged not to the estate, but to the testator's widow.

The charge that the defendants attempted to make a secret profit on this transaction is absolutely without foundation. The plaintiff has not adduced a tittle of proof to support it, and the charge seems to have been made recklessly and wantonly.

I have already dealt with the first part of clause 9 of the

statement of claim, relating to the claim preferred by the defendant Newman. As to the remainder of this paragraph no evidence has been produced to shew that there is the slightest foundation for the fears of loss therein expressed.

Clause 10 of the statement of claim is clearly disproved by Taylor's evidence. This charge appears to have been made without foundation and recklessly.

As to clause 11, Taylor admits that he is a legatee and also that he and one Cummings are indebted to the estate upon mortgage given the testator in his lifetime. There is only some $1,900 still unpaid on this mortgage, and no arrears are owing. What the plaintiff's object was in making this allegation I do not know. The testator certainly knew that Taylor was indebted to him upon this mortgage when he appointed him such executor and apparently did not think this fact any reason for disqualification for such office.

As to clause 12 of the statement of claim the fact appears to be that the estate is indebted to Taylor in respect of some 20 shares of stock in the National Finance Company of Vancouver, which Taylor bought for the testator along with some 68 shares purchased for himself. The last payment on this stock was owing by the testator at the time of his death and is still owing by the estate. The company is in liquidation and it would be a waste of money, in the opinion of the defendant Taylor, to pay anything further on this stock.

The defence to clause 13 of the statement of claim is a satisfactory answer, in the absence of proof to the contrary, which has not been adduced.

The plaintiff has produced no proof to support paragraphs 14 and 15 of his statement of claim. The defendants have denied what is alleged against them therein and in the absence of proof, these allegations must fail.

The defendants deny clauses 16 and 17 of the statement of claim and the plaintiff has failed to prove these allegations also.

Clause 18 of the statement of claim is denied by the defendants and no proof of the allegation therein has been produced by the plaintiff. The same may be said of clauses 19, 20, 21 and 22 of the statement of claim.

MAN.

K. B.

COOPER v. TAYLOR.

Curran, J.

I think I have now dealt with every matter arising upon the plaintiff's allegations. I cannot refrain from expressing my disapproval of the plaintiff's conduct in making so many and varied charges of misconduct, neglect and breach of duty against these executors and coming to Court without any proof whatever to sustain them. Beyond the three or four matters which were argued and apparently only relied upon by the plaintiff's counsel as entitling the plaintiff to succeed, and concerning which there was some evidence, no attempt has been made by the plaintiff to prove the multitude of charges made by him against the defendants. Some of these approach very closely to charges of fraud and dishonesty; for example, the charge of making a secret commission. Such charges ought not lightly to be made, and when made and not substantiated, a litigant so making them ought to be visited with costs to the fullest extent possible.

The plaintiff has, in my opinion, entirely failed to prove any case calling for the intervention of the Court and his action will therefore be dismissed with costs.

Action dismissed.

ONT.

S. C.

BIRCH v. STEPHENSON. McDOUGALL v. STEPHENSON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. January 18, 1915.

1. BUILDINGS (§ I B—11)—STATUTORY REGULATIONS—FIRE ESCAPES—DEATH BY FIRE—PROXIMATE CAUSE.

A mere non-compliance with the Factory Shop and Office Building Act, 3 & 4 Geo. V. ch. 60 (R.S.O. ch. 229), in not providing fire-escapes and the non-separation of combustible or inflammable material does not entitle the personal representatives of dependents to recover for the death of a person who lost his life in a building when it was burnt, where the evidence fails to establish that the non-compliance with the statutory provisions was the immediate cause resulting in the person's death.

Statement

APPEAL from the judgments of FALCONBRIDGE, C.J.K.B., in two actions.

I. F. Hellmuth, K.C., and *J. G. Kerr*, for appellants.

O. L. Lewis, K.C., and *Christopher C. Robinson*, for defendant, respondent.

Meredith, C.J.O.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—These are appeals by the respective plaintiffs from the

judgments dated March 27, 1914, which were directed to be entered by the Chief Justice of the King's Bench, after the trial of the actions before him, sitting without a jury, at Chatham, on February 28, 1914.

The actions are brought under the Fatal Accidents Act, to recover damages for the deaths of Alexander McDougall and Robert J. Birch, which were caused, as the appellants allege, owing to the failure of the respondent to comply with the provisions of the Factory Shop and Office Building Act, 3 & 4 Geo. V. ch. 60, as to fire-escapes (sec. 59) and as to the keeping of combustible or inflammable material (sec. 56).

That the respondent was guilty of a contravention of sec. 59 is undoubted, and the fact that there were other means of escape is immaterial, except upon the question whether the deaths of the two men were caused by the absence of the fire-escapes which, by the section, the respondent was required to have provided.

There is more difficulty as to the barrel, party filled with printer's ink, which was undoubtedly both combustible and inflammable; but I am inclined to think that there was also a contravention of sec. 56, in not keeping the ink, when not in actual use, in a building separate from other parts of the factory, or in a fireproof compartment in the factory.

Although this part of the appellants' cases was proved, I have reluctantly come to the conclusion that the actions fail and were rightly dismissed, because there was no evidence which warranted the conclusion that the deceased came to their deaths because of the failure of the respondent to provide the prescribed fire-escapes, or of the presence of the printer's ink in the respondent's factory. I say reluctantly because, if in such a case as this there can be no recovery, the purpose of the Legislature in enacting the section in question will be frustrated in many, and perhaps in most, cases where death occurs, owing to the great difficulty that will exist in establishing the causal connection between the death and the absence of the fire-escapes or the presence of the combustible or inflammable material.

Upon the evidence it is impossible to say that the deaths of the deceased were occasioned by the absence of the fire-escapes or the presence in the factory of the printer's ink, or both. It is

ONT.
S. C.
BIRCH
v.
STEPHENSON.
Meredith, C.J.O.

consistent with the evidence, and perhaps the most probable theory, that they were suffocated by the smoke of the burning building, especially as the avenues of escape, by the windows which opened from the composing room, in which they were working when the fire began on the "lean to," and by the stairways, were not made use of as a way of escape, and as the loud calls which were made to them before the fire had made much progress, and before it had reached the composing room, met with no response. The place in which the bodies were found on the day following the fire also supports this theory; and, besides this, there is an entire absence of anything to indicate that the deceased had sought escape by any window at which a fire-escape ought to have been found.

It is clear, I think, that proof of a contravention of the Act and that a person lost his life in the burning building, is not enough to entitle his personal representatives or his dependents to recover; but there must be, in addition to this, reasonable evidence to warrant the conclusion that the death resulted from the contravention, and the appellants fail because of the absence of that evidence.

The Admiralty cases cited by Mr. Hellmuth have no application. The doctrine laid down in them, that an infringement of the regulations for preventing collisions contained in or made under the Merchant Shipping Acts, 1854 to 1873, must be one having some possible connection with the collision, or, in other words, the presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision, and that the burden of shewing this lies on the party guilty of the infringement, proof that the infringement did not in fact contribute to the collision being excluded, depends upon the provisions of sec. 17 of the Merchant Shipping Act, 1873, which are as follows: "If, in any case of collision, it is proved to the Court before which the case is tried, that any of the regulations for preventing collision contained in, or made under, the Merchant Shipping Acts, 1854 to 1873, have been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulations necessary."

In the case of *The Fanny M. Carvill* (1875), 13 App. Cas. 455 (note), it was held by the Privy Council that the presumption which this section creates may be met by proof that the infringement could not by any possibility have contributed to the collision. This view as to the true construction of the section was treated as settled law by the Privy Council in the case of *The Arklow*, 9 App. Cas. 136, and was approved and adopted by the House of Lords in the case of *The Duke of Buccleuch*, [1891] A.C. 310, and was applied by the Court of Appeal in the case of *The Corinthian*, [1909] P. 260. In this last case it was argued that the rule had been modified or explained by the House of Lords in the case of *The Bellanoch*, [1907] A.C. 269; and that, according to the decision in that case, the statutory presumption may be rebutted by shewing that the infringement of the regulation did not in fact affect the collision; but that contention was rejected by the Court.

There being in the Factory Shop and Office Building Act no provision similar to that of sec. 17 of the Merchant Shipping Act, 1873, these cases, as I have said, have no application; but, though they cannot help the appellants, they may suggest to the Legislature the advisability of amending the Provincial Act by providing that there shall be such a presumption as sec. 17 raises, where there has been a non-observance of those provisions of the Act which are designed to safeguard human life.

It is unnecessary to discuss the cases bearing upon the general question as to what is sufficient evidence of the causal connection between a wrongful act or omission and the injury which is alleged to have resulted from it, but I may refer to *Smith* v. *Midland R.W. Co.* (1888), 57 L.T.R. 813, as a case which illustrates the difficulty which a plaintiff has to meet where a condition which is proved to exist might have been due to several causes and there is nothing to indicate by which of them it was caused.

I would dismiss the appeals with costs, if costs are asked.

Appeals dismissed.

ONT.

S. C.

HEALY v. ROSS.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren and Magee, JJ.A. February 16, 1915.

1. DRAINS AND SEWERS (§ II—10)—DITCHES AND WATERCOURSES—PROCEDURE—INFANT'S LAND—NOTICE OF INFANT'S FATHER—GUARDIAN—INVALIDITY OF PROCEEDINGS.

The guardian intended by the interpretation clause (sec. 3) of the Ditches and Watercourses Act, R.S.O. 1897, ch. 285, is such as has by law the management and control of the infant's land, and not merely the guardian of his person; and notice of proceedings under the Act, given to the father of an infant whose land was affected by the proceedings—the father not having been appointed guardian of the infant's estate—is insufficient to satisfy sec. 8 of the Act, which requires notice to be given to every "owner;" and the infant so improperly made a party to the proceedings is not bound by the award therein rendered, and all proceedings had thereunder are invalid: 32 O.L.R. 184, reversed.

Statement

APPEAL by the plaintiffs from the judgment of MIDDLETON, J., 32 O.L.R. 184.

S. S. Sharpe, for appellant.

J. T. Malcahy, for defendants, respondents.

Garrow, J.A.

The judgment of the Court was delivered by GARROW, J.A.:—

Upon the argument before us, we declined to enter upon the question of the merits of the award, which counsel for the plaintiffs desired to discuss. See *In re McLellan and Township of Chinguacousy* (1900), 27 A.R. 355.

The plaintiffs also object to the proceedings upon the ground that, when they were instituted, the plaintiff William Johnston the younger, one of the "owners," was an infant and was not duly served with notice of the proceedings as required by the statute.

The statute in force when the proceedings began was R.S.O. 1897, ch. 285 (the Ditches and Watercourses Act).

Section 8 of this statute is as follows: "The owner of any parcel of land who requires the construction of a ditch thereon shall, before filing with the clerk of the municipality the requisition provided for by section 13 of this Act, serve upon the owners or occupants of the other lands to be affected a notice in writing (Form C) signed by him and naming therein a day and hour and also a place convenient to the site of the ditch at which all the owners are to meet and estimate the cost of the ditch, and agree, if possible, upon the apportionment of the work, and supply of material for construction, among the several owners according to their respective interests therein, and settle the proportions in which the ditch shall be maintained, and the notices shall be served not less than twelve clear days before the time named therein for meeting."

By sec. 3, the word "owner" is interpreted to mean and include (1) an owner, (2) the executor of an owner, (3) the guardian of an infant owner, (4) any person entitled to sell and convey the land, (5) an agent under a general power of attorney or a power of attorney authorising the appointee to manage and lease the lands, and (6) a municipal corporation in respect of highways under its jurisdiction.

At that time William Johnston the younger was about 17 years of age. He resided with his father, William Johnston the elder, who was also an "owner" within the drainage scheme. It was apparently at first assumed that the father owned both lots. He was duly served with notice, and at the meeting informed the engineer that his son owned one of the lots. The engineer then verbally informed the son that proceedings were being taken, but no fresh notices were served upon any one.

Not much help is, I think, to be derived from the two contradictory English cases to which the learned Judge refers in his judgment. The language there under consideration was quite different. There was no such context as we have here in the case of agents and other representatives of owners whose lands are involved in the scheme, and the consent to be given, by whomsoever given, had, for the protection of the infant, always a much-favoured person, to be approved by the Court. There is no similar protection in our statute.

An infant, it is clear, may have more guardians than one. To put the simplest case, he may have a guardian of his person, and another and a different person as the guardian of his estate. The father may, it is true, if he desires it, be both. See the Infants Act, R.S.O. 1914, ch. 153, sec. 26. But, if he is intended to have the management and control of the infant's property, he is not exempt from giving proper security under sec. 27.

By force of the interpretation clause of R.S.O. 1897, ch. 285, the guardian of the infant may not only be brought in as a party to the proceedings under the statute, but he may also originate them, for he has all the powers of an owner, apparently, including that of entering into an agreement respecting the drainage scheme under sec. 9, which, when executed and filed, has all the effect of an award.

ONT.
S.C.
HEALY
v.
ROSS.
GARROW, J.A.

If there were two guardians, that is, one of the person and the other of the estate, there would, I suppose, be little doubt that the proper guardian to act under the statute would be the one entitled by law to manage the estate, and not the one entitled to control the person only. The Legislature might, of course, have conferred the power upon the guardian of the person only; but, considering the extensive powers of the guardian and finding the equivocal word in its present company, with other agencies all more or less associated directly with the management and control of the land of the owner represented, I cannot help thinking that the guardian intended by the statute was such a guardian as has by law the management and control of the infant's land, and not merely the guardian of his person.

The result is that, in my opinion, the plaintiff William Johnston the younger was not properly made a party to the proceedings, and was not and is not bound by the award.

That being so, it seems to follow, as the plaintiffs contend, that the whole drainage scheme falls to the ground. The objection is fundamental, like the objection to the absence of a proper initiating "owner" which proved fatal in *McKillop* v. *Township of Logan* (1899), 29 S.C.R. 702, even after the work had all been done.

The appeal should therefore, in my opinion, be allowed. But, under the circumstances, there should be no costs to either side here or below.

Appeal allowed.

IMP.
P.C.

THE EASTERN TRUST CO. v. MacKENZIE, MANN AND CO. LIMITED.

Judicial Committee of the Privy Council, The Lord Chancellor (Viscount Haldane), Lord Atkinson, Lord Parmoor, Sir George Farwell and Sir Arthur Channell. April 27, 1915.

1. RAILWAYS (§ I—3)—SALE OF RAILWAY—INTERPRETATION OF CONTRACT—BALANCE OF PURCHASE PRICE—SUBSIDIES.

A stipulation in a contract for the sale of a railway that the balance of the purchase price is to be paid from time to time to the extent of fifty per cent. in government subsidies points to the payment of the balance out of subsidies paid in respect of the residue over and above fifty per cent., not to the payment of the entirety of fifty per cent. of the subsidies, as a condition precedent to a demand for payment of so much as has been paid and for an accounting thereof.

[Judgment of Canada Supreme Court reversed; *Irvine* v. *Hervey*, 13 D.L.R. 868, 47 N.S.R. 310, affirmed.]

IMP.

P. C.

EASTERN TRUST CO. v. MACKENZIE, MANN & CO. LTD.

2. RAILWAYS (§ I—7)—RAILWAY SUBSIDY—DUTY OF GOVERNMENT—DISTRIBUTION OF FUNDS—PENDING LITIGATION.

A Provincial Government empowered by statute with the distribution of funds under a railway subsidy contract is not justified in making payments thereon pending an action for the determination of the respective rights relative thereto and of which the Government had full notice.

[Judgment of Canada Supreme Court reversed; *Irvine* v. *Herrey*, 13 D.L.R. 868, 47 N.S.R. 310, affirmed.]

3. RAILWAYS (§ I—7)—RAILWAY SUBSIDY—DISTRIBUTION BY CROWN—PRACTICE.

The proper course to be pursued by the Crown in a case where it is charged with the distribution of certain funds under a railway subsidy contract that is being litigated and a receiver appointed is either to apply to the court for a construction of the contract, and to pay accordingly, or to pay the whole amount over to the receiver to be paid out under orders of court.

[Judgment of Canada Supreme Court reversed; *Irvine* v. *Herrey*, 13 D.L.R. 868, 47 N.S.R. 310, affirmed.]

4. COURTS (§ I C 1—46)—JURISDICTION OVER EXECUTIVE GOVERNMENT—DISTRIBUTION OF PUBLIC FUNDS—CUSTODIA LEGIS.

The powers conferred by a statute on the executive government respecting the payments or disposition of certain funds are subject to the review of and construction by the judiciary and does not extend to the disposition of money the right to which is *sub judice inter partes* and held *in medio* by the order of the court.

[Judgment of Canada Supreme Court reversed; *Irvine* v. *Herrey*, 13 D.L.R. 868, 47 N.S.R. 310, affirmed.]

5. PARTIES (§ II A 2—71)—ACTION AGAINST CROWN—PARTIES DEFENDANT—ATTORNEY-GENERAL—PRACTICE.

The non-existence of any right to bring the Crown into court does not give the Crown immunity from all law, or authorize the interference by the Crown with private rights at its own mere will, and the practice in England in cases where no petition of right will lie is to sue the Crown by the Attorney-General under a declaratory order obtained.

[Judgment of Canada Supreme Court reversed; *Irvine* v. *Herrey*, 13 D.L.R. 868, 47 N.S.R. 310, affirmed.]

6. CONTEMPT (§ I C—14)—DISOBEDIENCE OF INJUNCTION—FORBIDDING RECEIPT OF MONEY—PAYMENTS BY CROWN—EFFECT.

A person forbidden by a restraining order from receiving any money out of a railway subsidy fund pending an action for the determination of rights thereunder is bound by the order so long as it remains undischarged, and his acceptance of money in breach of such order constitutes a contempt, although the payments were made by the Crown.

[Judgment of Canada Supreme Court reversed; *Irvine* v. *Herrey*, 13 D.L.R. 868, 47 N.S.R. 310, affirmed.]

Statement

APPEAL from the judgment of the Supreme Court of Canada.

The judgment of the Board was delivered by

Sir George Farwell.

SIR GEORGE FARWELL:—This is an appeal from a judgment of the Supreme Court of Canada (Duff, J., dissenting), which reversed the unanimous judgment of the Supreme Court of Nova Scotia, dated July 5, 1913, varying the report dated January 15,

IMP.

P. C.

EASTERN TRUST CO. v. MACKENZIE MANN & CO. LTD.

Sir George Farwell.

1912, of the referee appointed by the Court in this action. The action is a partnership action between James Irvine, since deceased, as plaintiff, and Robert G. Hervey and others as defendants, and a decree was made therein by Graham, J., on March 13, 1905, whereby the partnership was dissolved and certain accounts and inquiries were directed to be taken by a referee appointed by the Court. The respondents, Mackenzie and Mann, were made parties to the action under the following circumstances. In June, 1903, the Hervey Trust and Guarantee Company, as agent for the partners Irvine and R. G. Hervey, controlled all the capital, stock, and bonds of the Nova Scotia Southern Railway Company, which had been formed by the partners, who were unable to complete its construction and arrangements had been made whereby the railway was to be completed by the Halifax and South-Western Railway Company, and government subsidies were to be paid to that company in respect of the Nova Scotia line, which would form part of the said Halifax and South-Western Railway when completed; and on June 13, 1903, an agreement was entered into between the trust company, as agents for the two partners of the one part, and the respondents Mackenzie and Mann (therein and hereinafter called the contractors) of the other part, whereby the partners agreed to sell and the contractors agreed to buy all the stock and bonds of the said Nova Scotia Railway Company for $275,000, of which $75,000 was to be paid in fully paid capital stock of the said Halifax Company at par on an event which has happened, and the balance, $200,000, as follows: $5,000 on execution and the balance, $195,000, from time to time to the extent of 50 per cent. of the amounts paid by government on account of loans or subsidies in respect of the said Nova Scotia line as and when such amounts are paid until the whole $195,000 is paid.

Provided that if the 50 per cent. be not sufficient to pay the $195,000 in full, the balance shall be paid when the said loans and subsidies have been all received by the said company.

There is a further proviso which will be more conveniently dealt with later.

The sum payable by the contractors would form part of the assets of the partnership of which the Court had undertaken the

IMP.
P. C.
EASTERN TRUST CO.
v.
MACKENZIE, MANN & CO. LTD.
Sir George Farwell.

administration, and would be primarily applicable in discharging the debts of the firm, including their indebtedness to the Nova Scotia Company, and inasmuch as the contractors owned all the stock and shares of that company, the discharge of the company's debts would enure for their benefit by increasing the value of the company's assets, and consequently of its stocks, shares, and securities. The substantial question in the case is the amount payable under the contract by the contractors.

On January 29, 1904, a receiver was appointed of such assets, and an injunction was granted restraining the defendants Hervey and the Hervey Trust Company from receiving from the contractors or the provincial treasurer of the province all or any part of the $195,000.

When this appeal was opened before their Lordships it was treated as common ground that (as appears from the report of the referee at page 126 of the record) by September 27, 1907, the total subsidy then paid by government was $397,080.90:—

> One-half of this, $198,540.45, a sum sufficient to pay more than the amount called for under the contract of June 13, 1902.

This subsidy was paid on mileage. The inquiry with regard to this matter is given in the order of November 24, 1908 (page 66 of the record):—

> What balance remains due and owing in respect of the consideration moneys payable under the said contract dated June 13, 1902, to the parties entitled under the said agreement, or the persons, if any, who succeeded to their rights thereunder.

The case has throughout proceeded on the footing of ascertaining the exact amount due, but towards the end of his reply before their Lordships, counsel for the respondents took the point that nothing was due, because, according to his argument, the $195,000 fell short by about $30,000, and that the inquiry should be answered accordingly. It may be questioned whether such an argument is now open to the respondents, but whether it is so or not, their Lordships are of opinion that it is untenable; the $5,000 was undoubtedly payable and paid on the execution of the contract, and the balance from time to time to the extent of 50 per cent. of the amounts was payable and paid by government on account of loans or subsidies. There is nothing to lend colour to the suggestion that the contractors are not

IMP.

P. C.

EASTERN TRUST CO. v. MACKENZIE, MANN & CO. LTD.

Sir George Farwell.

bound to pay until the whole accounts have been settled up, and shew no balance, even of a dollar, owing. The proviso points to the payment of the balance out of subsidies paid in respect of the residue over and above the 50 per cent., not to the payment of the entirety of the 50 per cent. of the subsidies, as a condition precedent to a demand for payment of so much as has been paid, and an account of the amount of such payments.

Another objection was also taken by the respondent's counsel, which may possibly have been taken in the Supreme Court of Canada, although the only reference to anything of the sort occurs in Duff, J.'s dissenting judgment, where he says:—

> If it had been shewn that the plaintiff in the action or the receiver was aware that such payments were being made to Hervey, then it is conceivable that a case of estoppel might have been made out. But there is no suggestion of anything of the kind.

The argument offered to their Lordships is that Hervey, in contempt of Court, got payment of some of the subsidy money to himself, and that a motion to commit him was made, which failed by reason of his disappearance from the colony. It appears to their Lordships that it is sufficient to state the point to shew its want of substance.

The real point, however, argued and dealt with in the Courts below is as follows. The contract of June 13, 1902, contained the following proviso referred to above:—

> It is part of this contract that the Government of Nova Scotia have the right to be satisfied that all claims for moneys due and owing by the said Nova Scotia Southern Railway Company, Ltd., and its contractors in the Province of Nova Scotia for labour and supplies furnished in connection with the construction of the said Nova Scotia Southern Railway Company's road, heretofore constructed, have been paid or satisfied, and the amounts of such claims may be paid out of the consideration moneys hereinbefore mentioned, and all sums paid in liquidation of such claims shall be considered payments on account of the said sum of $195,000.

The object of this proviso is to enable the Government of Nova Scotia, in whose jurisdiction labour had been done by working men, and materials supplied and used, on that portion of the railway that had been made in the province, to compel payment therefor by the Nova Scotia Railway and its contractors: the persons to be paid are the labourers for their labour and the tradesmen for their goods: the persons who were bound to pay, and whose default was to be cured by government intervention,

IMP.

P. C.

EASTERN TRUST CO. v. MACKENZIE, MANN & CO. LTD.

Sir George Farwell.

were the railway company and the contractors. There is no such provision with regard to any other work or material.

The contract is framed in accordance with the subsidy contract between the Nova Scotia Government and the Halifax and S.W. R. Co., in whom the undertaking of the Nova Scotia Company was vested (Act I., 3 of 1903, Acts of Nova Scotia), confirmed by C. I. of the Acts of Nova Scotia, 1902, set out at page 237 of the record, which makes special provision for payment of all labour in the construction of the work or materials therefor, and in case of default in paying the men or in paying for materials on or before the 20th day of the month for all works performed or materials delivered before the first of that month, the Governor in Council has power to retain all money due to the company and to apply it in paying the men their wages, or in paying for materials, and charge it as if paid to the company on account of the subsidy. The government undertook no personal liability for such payment, but took power to ascertain the sums due and the persons to whom they were due.

In June, 1903, the government, under the statutory powers given under C. 26, 1903, Nova Scotia, appointed a Commissioner to inquire into and report to the Governor in Council what claims for wages of the workmen employed in and for materials supplied for the construction or unfinished construction of the Nova Scotia Southern Railway are due and unpaid by any person, firm, or corporation, and the particulars and amounts of such claims respectively, and also all other claims against the company, construction company, or contractors engaged in the building of the said railway, the nature and particulars of the said claims, and the respective amounts thereof.

The Commissioner duly made his report, and the Government acted thereon, and made large payments to persons reported as entitled to payments out of the subsidy. The greater part of these payments reached the persons entitled thereto, and no objection is now raised in respect thereof. But before all the payments on account of the subsidy had been made, viz., on July 13, 1903, this action was commenced, and a receiver was appointed by the Court of the assets of the plaintiff's business, and an injunction was granted until the final determination of the action restraining the defendants, R. G. Hervey, and the Hervey Trust from receiving from the Canadian bank, or the contractors, or the Provincial Treasurer of Nova Scotia or other-

IMP.

P. C.

EASTERN TRUST CO. v. MACKENZIE, MANN & CO. LTD.

Sir George Farwell.

wise, and the said bank and the contractors were restrained from paying to the said defendants or to any persons other than the receiver (*inter alia*), all or any part of the said $195,000. The Provincial Treasurer was dismissed from the action on the ground that the Court had no jurisdiction over him, and the government, with full notice of the order, proceeded to distribute the subsidy without any regard to it. With regard to payments actually made by the government under the statutory powers above referred to, the action of the executive may be justifiable; but even so, the question whether any particular sums mentioned in the contract were or were not properly described as for labour and supplies is a question of construction, and, therefore, of law for the Courts. Their Lordships are unable to agree with the view of the Supreme Court as to the powers of the Government and to the presumption that ought to be drawn as to the nature of the payments made.

It was further held, on the admission of the parties, that no injunction could be granted against the Crown, and further that no other party to the action was bound by the injunction or the appointment of a receiver.

This decision raises a question of great importance. Duff, J., in his dissenting judgment, puts the first point very clearly:—

> The parties were declaring that certain payments made by the Government were to be deducted from the consideration moneys. These were such payments as the Government should be satisfied were due and owing in respect of claims for "labour and supplies. The deduction could only be made if two conditions were satisfied: (1) that the claim was for labour and supplies; and (2) that the Government was satisfied that it was due and owing."

In the present case the government have not only made payments which by no latitude of construction can come within the words "labour and supplies," but have also paid a large sum to R. G. Hervey, who was directly restrained by the Court from receiving it. If it was the case of a private individual, he would be clearly liable to make good the wrongful payment and to purge his contempt. In the case of the Crown there is no ground for Idington, J.'s proposition that the government may fairly say that they were given such power by the Legislature over the subject matter and that the Courts have no ground for

interfering, at all, directly or indirectly, with the exercise of such a discretion. There is nothing on which to found the existence of the alleged discretion or to support a decision which pronounces the Executive Government free to dispose of money the right to which is *sub judice inter partes* and held *in medio* by the order of the Court.

The second point taken by Idington, J., is equally untenable and even more important. The non-existence of any right to bring the Crown into Court, such as exists in England by petition of right, and in many of the colonies by the appointment of an officer to sue and be sued on behalf of the Crown, does not give the Crown immunity from all law, or authorize the interference by the Crown with private rights at its own mere will. There is a well-established practice in England in certain cases where no petition of right will lie, under which the Crown can be sued by the Attorney-General, and a declaratory order obtained, as has been recently explained by the Court of Appeal in England in *Attorney-General* v. *Dyson* (1911), 1 K.B. 410, and in *Attorney-General* v. *Burghest* (1912), 1 Ch. 173. It is the duty of the Crown and of every branch of the executive to abide by and obey the law. If there is any difficulty in ascertaining it the Courts are open to the Crown to sue, and it is the duty of the executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it. The proper course in the present case would have been either to apply to the Court to determine the question of construction of the contract, and to pay accordingly, or to pay the whole amount over to the receiver and to obtain from the Court an order on the receiver to pay the sums properly payable for labour and supplies, as to the construction of which their Lordships agree with the Supreme Court of Nova Scotia.

The duty of the Crown in such a case is well stated by Lord Abinger in *Deare* v. *Attorney-General*, 1 Y. & C. Exch. at p. 208. After pointing out that the Crown always appears (in England) by the Attorney-General in a Court of justice—especially in a Court of Equity—where the interest of the Crown is concerned, even perhaps in a bill for discovery, he goes on to say:—

It has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding

IMP.

P. C.

EASTERN TRUST CO. v. MACKENZIE, MANN & CO. LTD.

Sir George Farwell.

for the purpose of bringing matters before a Court of justice where any real point of difficulty that requires judicial decision has occurred.

Further, their Lordships are unable to agree with the Supreme Court of Canada in their opinion of the injunction. Apart from the Crown, the Court had clear jurisdiction over all the parties to the action to restrain them from doing any of the acts complained of; its order and injunction operates *in personam*, and compels the party forbidden to do any act, whether the receipt of money or the like, to refrain from doing it, whoever the other party may be, and whatever his rights may ultimately prove to be. The existence of such a jurisdiction has been part of the equitable jurisdiction of our Courts for centuries, and is necessary in a case like the present for the safe preservation of the subject matter of the action until the rights of the parties can be finally determined. It is a misconception to speak of the order and injunction of the Court in such a case as this as only permissive; it was, of course, interlocutory, not final, but it is binding on all parties to the order so long as it remains undischarged, and although it could not bind the government not to pay or make the government responsible for that obedience to the law which the Court was entitled to expect, the man who received in breach of the order was guilty of a contempt in no way cured by the payment by the government. Their Lordships are unable to agree with the decision of the Supreme Court which gives the executive power to override the judgment of the Court.

Their Lordships, with all respect, differ entirely from the statement in Idington, J.'s judgment, that an injunction under which the hand giving may be innocent, and the hand receiving guilty, would be an anomaly not in accord with the policy of the law which developed the power of injunction. Such an injunction is, on the contrary, in accordance with ordinary practice and well-settled principles, and their Lordships are of opinion that the order to attach Hervey for contempt was rightly and properly made. An injunction, although subsequently discharged because the plaintiff's case failed, must be obeyed while it lasts; it is clear that if a claimant to an inalienable government pension succeeded in persuading the Court in this country that he had a *primâ facie* claim to it, and obtained an interim injunction, the true owner of the pension could be committed for

contempt if he received his money in defiance of the order, although the Crown was no party to the litigation, and paid in disregard or ignorance of the order.

Their Lordships agree with the decision of the Supreme Court of Nova Scotia, and will humbly advise His Majesty to allow this appeal, discharge the order of the Supreme Court of Canada, and restore that of the Supreme Court of Nova Scotia, of July 5, 1913.

But in remitting the report as directed by the last-mentioned order there should be a direction to the referee that in taking the accounts all amounts paid by the government of Nova Scotia to the creditors of the Nova Scotia Southern Railway Company ought to be set off against the amount payable by the respondents.

The respondents must pay all the costs in the Courts below and of this appeal.

Appeal allowed.

MORENS v. BOARD OF INVESTIGATION.

B. C.
C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. May 14, 1915.

1. WATERS (§ II I—156)—EXTENT OF USE — IRRIGATION — PRESCRIPTIVE RIGHTS—PRE-EMPTION.

The prescriptive right which under the Water Act Amendment Act, 1913, B.C., ch. 82, sec. 13, may accrue from the actual enjoyment without interruption for the full period of 20 years for "some other purpose" than that for which a water record existed but for which water might have been recorded, cannot be set up so as to support a claim for use of the water on other premises than that in respect of which it was recorded by the pre-emptor of lands; the "other purpose" in that statute has reference to the various purposes for which a water record might be granted, *ex gr.*, for irrigation or for mining, in respect of the same lands.

2. WATERS (§ II F—105)—IRRIGATION OF LANDS—PRIOR APPROPRIATION.

A pre-emptor having as such acquired a water record for a specific purpose, namely, the irrigation of certain lands, cannot apply that record to after-acquired lands without a new application and record, and any other person acquiring a record in the interim would have priority of rights as against user on the after-acquired lands. (*Per* Galliher, J.A.)

Statement

APPEAL from Board of Investigation under Water Act of May 11, 1914.

J. L. G. Abbott, for appellant.

Moore, for respondent.

B. C.

C. A.

MORENS v. BOARD OF INVESTIGATION.

Irving, J.A.

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

IRVING, J.A.:—I would dismiss this appeal. I think the Board's decision is correct.

On the argument we decided that Curnow could not be heard as he had not been added as an appellant by the Attorney-General. We also held that the serving of notice of appeal by direction of the Board does not make the person served a party to the appeal.

The majority of the Court held that the action of the appellant in voluntarily making a party respondent does not amount to a waiver of the objection that no person can be heard unless by consent of the Attorney-General.

Martin, J.A.

MARTIN, J.A.:—This is an appeal by the executors of Pierre Morens from an order of the Board of Investigation under the Water Act, 1914, dated May 11, 1914, whereby the water record of said Pierre Morens on Twaal, or 84 Mile Creek, dated November 16, 1870, was determined to apply to and directed to be used only in connection with Lot 22, Group 1, Yale District, comprising 160 acres, instead of applying also to Lot 379 in said District, upon which latter lot the appellants had also been using the water under said water record continuously since 1873, and they claimed to be allowed to use it to irrigate upwards of 300 acres. By the said order of the Board it was determined that a license would be issued to Morens to the use of the water upon certain terms limited to Lot 22 only.

Some question was raised as to the right of appeal but to my mind it is clear that it will lie as coming within the first of three classes set out in sec. 50 (1) which with sec. 49 is as follows:—

> 49. An appeal shall lie from every order or decision of the Engineer, the Comptroller, or the Board, unless otherwise provided in this Act.
>
> 50. (1). All appeals from orders of the Board respecting the direction to issue licenses to replace records, or the amendment or cancellation of licenses, or any order affecting the validity of a license, shall be to the Court of Appeal, and the statutes and rules governing appeals from the final judgment of a Judge of the Supreme Court to the Court of Appeal shall apply to and govern any such appeal.

because this is a matter "respecting the direction to issue licenses to replace records."

At the time Morens got his water record, the only land he had pre-empted in that neighbourhood was the 160 acres which afterwards supposedly became Lot 22, and this pre-emption he had recorded on October 12, 1870, more than a month before he got said water record; under sec. 30 of the "Land Ordinance, 1870," assented to on June 1 of that year. Later, on November 19, 1873, he took up a second pre-emption under section 25 of the said Ordinance of 160 acres being "immediately contiguous to or abutting on his said existing claim," which increased it to 320 acres and this second pre-emption subsequently became Lot 379, under a Crown Grant, dated March 3, 1913, but the acreage was increased to 183 acres by said Crown Grant.

It was pointed out to us that in the Crown Grant (dated March 3, 1913), of Lot 22 (therein stated to be 163 acres) which was supposed to have issued in furtherance and confirmation of the first pre-emption, the boundaries thereof were stated to "commence at a post marked 'A' on the bank of the Thompson river," yet in the Crown Grant no part of said Lot is shewn to be on said river, a part of said Lot 379 and other land intervening. There is undoubtedly a discrepancy between the original and present boundaries but this uncertainty does not assist the appellant.

The point of the case really turns upon the meaning of the words "some other purpose" in section 13 of the Water Act Amendment Act, 1913, ch. 82, and the submission is that this water has been "actually enjoyed without interruption for the full period of twenty years for some other purpose than that for which it was recorded, but for which water might have been recorded" in that it has been used for Lot 379 since 1873 in addition to its original "purpose" for Lot 22 in 1870. By the Act of 1870, water had to be recorded in connection with a pre-emption, viz., "water . . . adjacent to or passing through such land, for agricultural or other purposes," and the purpose for which it was recorded in respect of Lot 22 was "to be used on his ranch at the 84 Mile Post for the purpose of irrigation," *i.e.*, agricultural.

Mr. Abbott presented a thoughtful and ingenious argument in support of the view that as water could have been recorded for

B. C.
C. A.
MORENS v. BOARD OF INVESTIGATION.
Martin, J.A.

Lot 379 in 1873, the intervening three-year period, back to 1870, is bridged over and attached to the record for Lot 22 by the later twenty-year enjoyment. After some hesitation, however, I have reached the conclusion that this submission should not be given effect to, for the chief reason that "purpose" here means "the object thereof" (to quote section 30) in relation to the specific land to which the water record has been held to be appurtenant under section 43 of the Land Act of 1884, which in present essentials is the same as section 3 of 1870: *Eastern Townships Bank* v. *Vaughan* (1907-9), 2 M.M.C. 446, 41 S.C. 286, at pp. 289, 312, 316-8. The primary definition of "purpose" is given in the New English Dictionary (Oxford) thus:—

> That which one sets before oneself as a thing to be done or attained; the object one has in view.

And see the definition of "purpose" in section 2, Water Act, 1914.

Here the record might have been used on that land for "other purposes," *e.g.*, power, than that irrigation purpose for which it was granted, in which case it would come within section 13, but it could not be used for any purpose at all on other lands so no room is left for the application of the expression "some other purpose than that for which it was recorded." The different purposes provided for by section 39 are all confined to the land to which the record is appurtenant. In other words, there may be "other purposes" in connection with the enjoyment of a water record relating only to Whiteacre but none at all if the same record is attempted to be extended to Blackacre.

I quite agree with Mr. Abbott that the user for "some other purpose" under section 13 need not begin at the same time as the original purpose under section 30 and that it might begin at any time whenever and after "water might have been recorded" for such later purpose; but that does not get over the difficulty of applying the original record to other lands, which I think is insuperable.

For these reasons I am of the opinion that the intervening water record of Edward Suchel, dated April 6, 1871, now held by the respondent Curnow, should prevail over the appellant's claim to use the water on Lot 379, and therefore the decision of the Board should be confirmed.

B. C.

C. A.

MORENS v. BOARD OF INVESTIGATION.

Gallihier, J.A.

GALLIHER, J.A.:—I would dismiss this appeal.

Morens water record (A.B. 72) was granted November 16, 1870, and on its face is applicable to his ranch at 84 Mile Post. The only land he had then pre-empted at that point was what has since been Crown Granted as Lot 22. Subsequently in 1873 he applied for another piece of land which has since been Crown Granted as Lot 379 and has continuously since that date used water in irrigating both 22 and 379. As I read the different Acts bearing on the subject, a pre-emptor having as such acquired a water record for a specific purpose, namely, the irrigation of certain lands, cannot apply that record to after-acquired lands without a new application and record, and that any other person acquiring a record in the interim would have priority of rights as against user on the after-acquired lands.

Mr. Abbott for the appellant contends that if that be so the appellant still has the right by prescription and relies on section 13 of ch. 82 of the B.C. Statutes, 1913, urging that as the record was for water for irrigation purposes on Lot 22 and was used for another purpose as well, viz., for irrigation on Lot 379, he comes within the meaning of the words in the section "for some other purpose."

I think this is an erroneous interpretation of these words. They have, in my opinion, reference not to the user on lands other than those designated, but to the nature of the purposes to which the water is to be applied, *e.g.*, irrigation, mining, etc.

Appeal dismissed.

PEARLMAN v. GREAT WEST LIFE.

MAN.

K. B.

Manitoba King's Bench, Prendergast, J.A. July 15, 1915.

1. INSURANCE (§ I D—20)—AGENTS—BREACH OF AGENCY CONTRACT—OVERRIDING COMMISSIONS.

An agency contract between an insurance company and its district agent stipulating the forbearance of the company to take on sub-agents employed by him nor override his commissions paid them does not, upon the breach thereof by the company, entitle the agent to recover the commissions he would have earned on the applications secured by such sub-agents, where it appears that the agent subsequently agreed to accept from the company a smaller percentage in satisfaction of what he might have been originally entitled to.

ACTION by an insurance agent for breach of an agreement. Statement

MAN.

K. B.

PEARLMAN v. GREAT WEST LIFE.

Prendergast, J.

S. Hart Green, for plaintiff.

C. P. Fullerton, K.C., and *A. B. Bell*, for defendants.

PRENDERGAST, J.:—The plaintiff, who is an insurance agent and had agents of his own to assist him in soliciting applications, brings this action for breach of an agreement alleged to have been entered into March 16, 1907, whereby the defendants, at the same time that they appointed him their district agent, undertook not to take away any of his own agents or pay them a higher commission than they were receiving from him—the breach being alleged to have been committed with respect to three sub-agents, J. T. Thompson, Robert E. Campbell, and John F. Roberts.

The measure of damages that he claims is the difference between the commission that he would have earned under his agreement with the company had he himself turned in the applications secured by those agents, and the commission that he would have paid them on the same under his agreement with them.

There are other matters in the statement of claim, but they have been abandoned.

The statement of defence contains a denial of all the plaintiff's allegations, and sets up that on June 1, 1911, the parties entered into a new agency contract under seal, one of the terms of which was that all then existing agreements were terminated together with all rights acquired by the plaintiff thereunder.

The plaintiff's evidence is to the effect that prior to March 16, 1907, he was working as agent for Samuel Johnson, his brother-in-law, who was the district agent for the defendants and had with them an agreement as to sub-agents similar to the one on which he now bases his present claim; and that desiring to give up his position and at the same time to favour him, as a relative, Johnson, accompanied by the plaintiff, interviewed Mr. Brock, the company's managing director, and expressed his desire, as he was resigning, that the plaintiff should be placed in the same position that he was in as to sub-agents. The plaintiff says that this was agreed to, in which he is substantially corroborated by Samuel Johnson.

The plaintiff says that in pursuance of the above interview,

he then entered with the defendants into an agreement on a printed form (exhibit 8), which was the one in general use to provide for ordinary commissions, and also a typewritten one (exhibit 9), providing for special bonuses for which the printed form was not well suited, and that it was then again verbally agreed that the defendants should not take away his agents or give them a higher commission than they were getting from him.

The plaintiff's contention, as above set out, is fully borne out by Mr. Brock under examination for discovery (page 8, lines 12-16 and 26-31; page 9, lines 1-16 and 22-31); also by his letter to the plaintiff of February 23, 1909, enclosing that of Robert E. Campbell to himself of February 20, 1909.

It is to be observed at the same time that neither Mr. Brock nor Mr. Johnson state that it was expressly agreed that the company should pay the plaintiff the difference between the commissions (or an over-riding commission as it was called), in case the company did take away the plaintiff's agents, or paid them higher commissions. In fact, this is not at all set up in the statement of claim as a matter of express contract; but only, at paragraph 14, as a consequence legally flowing from the breach of the contract alleged.

As to the plaintiff's evidence, although it is doubtful in places whether he speaks of this matter as a matter of express contract or only as a consequence of a breach of what was agreed upon, he states at least once unequivocally that the matter of his being entitled to overriding commissions in the event of a breach, was expressly stipulated and agreed to.

The evidence does not shew that the defendants took away any of the plaintiff's agents in the sense of taking the initiative in inducing them to leave his employ; but it shews that they entered into agreements with the three agents named on August 10, 1907, September 17, 1909, and October 9, 1911, respectively, and paid them thereunder higher commissions than they were receiving from the plaintiff.

I will say at once that with respect to the ground raised in paragraph 2 of the defence, clause 20 of the subsequent agency contract of June 1, 1911, did not have, in my opinion, the effect

MAN.
K. B.
PEARLMAN v. GREAT WEST LIFE.
Prendergast, J.

of terminating the rights which the plaintiff may then have acquired under the initial agreement.

On the foregoing facts and on the pleadings, I am of opinion that the plaintiff would be entitled to recover. As to whether he would be entitled to a measure of damages equal to the overriding commissions of approximately 15 per cent. as he claims (which as just stated is not alleged to have been part of the express contract), I am not prepared to say definitely, nor do I deem this necessary. But he would in any event be entitled to damages of some kind for the breach.

There are, however, other facts in the case although not pleaded.

The evidence shews that when the company entered with Thompson into an agreement allowing him higher commissions than he was getting from the plaintiff, and later, when they entered into a similar agreement with Roberts, the plaintiff and Mr. Brock had on each occasion a heated interview—the plaintiff claiming that he was entitled to 15 per cent. overriding commission on the business brought in, or to be brought in, by those agents and Mr. Brock denying that their agreement had that effect, although admitting it was understood that the company would not take away his agents nor pay them higher commissions than they were getting from him. On each occasion, the interview terminated by Mr. Brock saying that he would allow the plaintiff 5 per cent. of the commissions earned by the agent during the ensuing year, which was accepted by the plaintiff. With respect to Campbell, the third agent, I understand there was the same conversation terminating in the same way. Mr. Brock, under examination for discovery, said that he did not consider that the company owed the plaintiff anything, but that desiring to keep him with the company he was willing to allow him the 5 per cent. as a gratuity. The plaintiff, also examined for discovery, said (pages 15, 16, 17 and 18): "He (Mr. Brock) said, I will give you this 5 per cent. for a year. I said, Give me that, and he did. . . . He said, We will pay you 5 per cent. for a year and as I said I accepted it. . . . I said, I suppose I will have to take that Mr. Brock, or words to that effect. . . . I took this 5 per cent. then, all that I could get,

with a mental reservation." At page 18 of the examination, there is this question, 135: "You claimed he made a bargain, he denied it, and he agreed to give you 5 per cent. which you accepted with a mental reservation?" And the answer is: "Yes."

This 5 per cent. on the commissions earned by the respective agents during the ensuing year in each case, was in fact paid to the plaintiff as the commissions were earned.

It is also admitted that at the time of those interviews which resulted in the plaintiff being offered and accepting the 5 per cent., only a negligible amount of overriding commissions had then accrued to the plaintiff, assuming that his contentions of law and fact be correct.

I should add that in the course of the year from August, 1907, to August, 1908, during which the plaintiff was being paid 5 per cent. on Thompson's commissions, he never claimed anything more (exhibit 12), and that from the expiration of that year until June, 1912, when he severed altogether his connection with the company, he never claimed any overriding commissions at all with respect to Thompson. The same may be said with respect to Roberts (exhibit 14), and the other agent.

It seems to me that the offer and acceptance of the 5 per cent. as stated, whether viewed in the light of accord and satisfaction or as a new contract whereby the prior one was determined, constitutes a valid ground of defence.

There had been, as admitted, practically nothing earned or done at the time under the first contract, for I do not take the plaintiff's training of his agents to be part performance of his agreement with the company. The contract was then wholly executory. Then, even if some commissions were earned at the time, the contract was severable in its nature, having for its subject-matter a percentage of commissions on distinct and several insurance applications, and no time was provided for its duration. In the light of the matter being one of accord and satisfaction I would say that if the express contract was as stated by Mr. Brock and as is inferentially to be gathered from Mr. Johnson's testimony, I still consider it very doubtful, taking the breach as proven, whether the 15 per cent. overriding

MAN.
K. B.
PEARLMAN v. GREAT WEST LIFE.
Prendergast, J.

commissions that the plaintiff claims, is a proper measure of damages. There would then appear to have been a *bonâ fide* dispute between the parties, where the rights of each might properly be the subject of such adjustment and settlement. And in the other aspect, the contract would seem to be one which could be terminated at any time. But there was, moreover, the new contract and its attendant consideration.

This matter, however, was not at all pleaded in defence. The question is whether I should recognize this ground which counsel for the company has applied to be allowed to raise by amendment at the close of his case.

The facts on which this defence is based were well known to the plaintiff. He was a party thereto and he has admitted them all on examination for discovery. That the plaintiff did receive 5 per cent. of those agents' commissions for a year is surely a material fact even under the original pleadings, and I do not think I am straining the rule by allowing the terms and conditions under which it was paid to be made a matter of defence by amendment.

In disposing of costs, I will also take into consideration the fact that the plaintiff has also applied for an amendment, without which he probably could have recovered in any event only nominal damages.

The action will then be dismissed, but without costs to either party. *Action dismissed.*

ONT.
S. C.

TREASURER OF ONTARIO v. CANADA LIFE ASSURANCE CO.

Ontario Supreme Court, Middleton, J. March 16, 1915.

1. CONSTITUTIONAL LAW (§ II A 3—207)—CORPORATION TAX—TAXATION OF INSURANCE PREMIUMS—POWERS OF PROVINCIAL LEGISLATURE — DIRECT TAXATION.

The Corporations Tax Act, R.S.O. 1914, ch. 27, as amended by 4 Geo. V, ch. 11, in so far as it imposes a tax upon the gross premiums received by any insurance company in respect of business transacted in Ontario, including every premium which by the terms of the contract is payable in Ontario, or which is in fact paid in Ontario, or is payable in respect to a risk undertaken in Ontario, or in respect of a person or property resident or situate in Ontario at the time of payment (clauses (*a*) and (*c*) of sec. 4 (3), as enacted by 4 Geo. V, ch. 11, sec. 2), is within the powers of the Ontario Legislature, and comes within the words of sub-sec. 2 of sec. 92 of the British North America Act, 1867, "Direct Taxation within the Province."

[*Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, explained and applied.]

ONT.
S. C.
TREASURER OF ONTARIO v. CANADA LIFE ASSURANCE CO.
Middleton, J.

ACTION to recover the amount of taxes assessed under the authority of the Corporations Tax Act, R.S.O. 1914, ch. 27.

W. S. Brewster, K.C., for plaintiff.

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

A. W. Anglin, K.C., for defendant company.

MIDDLETON, J.:—Action to recover the sum of $25,059.25, the amount of taxes assessed against the defendant under the authority of the Corporations Tax Act, R.S.O. 1914, ch. 27. The defence is, that the statute imposing this tax is in whole or in part *ultra vires* the Provincial Legislature, because the tax imposed is not within sub-sec. 2 of sec. 92 of the British North America Act, "Direct Taxation within the Province."

This taxation originated in an Act 62 Viet. (2) ch. 8, passed in 1899, and from time to time amended until it assumed its present form in the Revised Statutes of 1914. The Revised Statute has been further amended by the Act 4 Geo. V. ch. 11, which increases the rate of taxation imposed upon insurance companies from one per cent. to one and three-quarters per cent., calculated on the gross premiums received by the company in respect of business transacted in Ontario.

The tax so imposed has been paid by the different insurance companies until last year, when the increased rate became operative.

This action is a test case, for the purpose of determining the validity of the legislation in question.

That the Province may tax the insurance companies is not denied. The complaint is, that the tax is not a direct tax, and that, by virtue of an interpretation clause, the taxation is made to extend to subject-matter which is not "within the Province."

The case really turns upon the correct understanding of the decision of the Privy Council in *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575. There the Province of Quebec imposed a tax upon banks and insurance companies. The tax upon the banks varied with the paid-up capital, and an additional tax was imposed for each office or place of business. The tax upon insurance companies was of a named sum, without reference to the amount of its capital.

Their Lordships accepted as the definition of direct and in-

ONT.
S.C.
TREASURER OF ONTARIO v. CANADA LIFE ASSURANCE CO.
Middleton, J.

direct taxation that found in the writings of John Stuart Mill: "Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs. The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price:" Pol. Ec., bk. V., ch. iii., sec. i.

While accepting this definition, their Lordships make it abundantly plain that they do not intend to import into the construction of this legislative enactment all the refinements adopted by political economists or by Mill himself in his discussion of this question: "It must not be forgotten that the question is a legal one, viz., what the words mean, as used in this statute; whereas the economists are always seeking to trace the effects of taxation throughout the community, and are apt to use the words 'direct' and 'indirect,' according as they find that the burden of a tax abides more or less with the person who first pays it" (p. 581).

Reference is then made to the opinion of Mr. Fawcett, "that a tax may be made direct or indirect by the position of the taxpayers or by private bargains about its payment." Concerning this it is said: "Doubtless such remarks have their value in economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax that it affects persons other than the first payers; and the excellence of the economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The Legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies."

The definition from Mill is adopted, not "with the intention that it should be considered a binding legal definition, but because it seems . . . to embody with sufficient accuracy for this purpose an understanding of the most obvious indicia of direct and indirect taxation, which is a common understanding, and is likely to have been present to the minds of those who passed the Federation Act" (p. 583).

Precisely similar statements are made in other cases which have been carried to the Court of last resort; and in the latest of these, *Cotton* v. *The King*, [1914] A.C. 176, it is said (p. 193): "Their Lordships are of opinion that these decisions have established that the meaning to be attributed to the phrase 'direct taxation' in sec. 92 of the British North America Act, 1867, is substantially the definition quoted . . . from the treatise of John Stuart Mill, and that this question is no longer open to discussion."

Mr. Anglin drew attention to the fact that the phrase "indirect taxation" is not found in the Act, and argued that there might be taxation which could not be regarded as either direct or indirect, and that the Province had no jurisdiction, unless it could be ascertained that the tax imposed was in truth a direct tax. This argument appears to have been put forward by counsel in the *Lambe* case; and I think it must be taken to have been repudiated by their Lordships, and that it may now safely be said that all taxation is, for the purpose of this Act, to be regarded as either direct or indirect. It is either demanded from the very person who is intended or desired should pay it, or it is demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.

Bearing in mind that it has been held that a company possesses a distinct individuality from its shareholders, it might be argued from a theoretical stand-point that every tax imposed upon a joint stock company is indirect, because the taxation is in truth borne by the shareholders. But in the construction of this statute no such narrow interpretation can be given effect to, and the decision in *Bank of Toronto* v. *Lambe* is conclusive authority; for there the tax imposed upon incorporated companies was upheld.

ONT.

S. C.

TREASURER OF ONTARIO v. CANADA LIFE ASSURANCE CO.

Middleton, J.

What Mr. Anglin argued with reference to the tax now in question was that the intention, as ascertained from the Act itself, applied to the existing state of affairs, is that the tax, though imposed upon the insurance company, is in truth indirect because the Legislature must have contemplated that it would not in the result be borne by the insurance companies, but would be cast upon the policy-holders. The imposition of a tax of one and three-quarters per cent. upon the premiums collected must in the long run mean that larger premiums must be paid to precisely that extent, or the companies cannot continue to transact business. The insurance companies are in truth, he says, dealers in insurance as a commodity, and this tax on the cost of the commodity, though levied on the vendor, must inevitably be paid by the purchaser.

At first sight this argument appears to be cogent and forcible; but, after the best consideration I can give to the matter, it appears to me to be unsound. The great bulk of insurance effected within the Province is effected upon the participating plan. The premiums levied are, to use technical language, "loaded;" that is, they are greater than necessary to meet the actual expected loss. This excess or "loading" constitutes the so-called "profit" in the operation of the company, and it is divided between the shareholders and the participating policy-holders. Under the general law, the shareholders can only receive ten per cent. of the profit. Ninety per cent. must be divided among the participating policy-holders. See the Dominion Insurance Act, 1910, 9 & 10 Edw. VII. ch. 32, sec. 110.

The effect of the payment of any taxation out of the gross income of the company will be to reduce the amount of profits available for distribution among the shareholders and the participating policy-holders. The tax does not become indirect because the amount which would reach the shareholders is reduced, nor does it become indirect because the amount which would reach the participating policy-holders would also be reduced. In other words, this case comes precisely within the words already quoted. An economist might argue that this tax had been made indirect by the position of the policy-holders and by the bargain or contract between the in-

surance company and the policy-holders; but no such distinction can be imported into the interpretation of this statute. The policy-holders having contracts with the company stand in precisely the same position, as far as this matter is concerned, as do its shareholders. They alike share in its profits under their several contracts, but this does not affect the true nature of that tax.

To illustrate by analogy. A tax upon land or a tax upon its rental value is undoubtedly a direct tax. It does not become an indirect tax because the land has been leased, and under the lease the tenant has undertaken to pay all taxes. A tax upon the business of an employer is a direct tax, and does not become an indirect tax because he has made an agreement to permit his employees to share in the net profits.

It is true that this taxation may indirectly cause insurance companies to raise the premium upon insurance, either in the case of participating or in the case of non-participating policies, or perhaps both. It is by no means clear that this will be so, for the profits divided greatly exceed the amount of taxation; but, even if so, in the great majority of instances taxation which no one doubts is direct does enhance the price of commodities, and so the burden is, in some more or less circuitous way, passed on to the ultimate consumer. A business tax or a tax upon business turn-over or a tax upon business premises is undoubtedly regarded by the merchant or manufacturer as a part of the overhead charges which must be considered in fixing the price of the goods manufactured or sold. In this way it is in one sense passed on to the consumer; but the dominant intention of the Legislature is to impose a direct tax on the merchant, leaving him to recoup himself if he can devise the means, and as best he can. Therefore, the tax is direct.

All this, however, is beside the question, if I am correct in the view which I entertain that the taxation is direct, even though, by the contract of the policy-holders, ninety per cent. of it must be borne by them.

An argument was presented by Mr. Brewster which is not without weight: that the great bulk of this taxation, certainly

ONT.

S. C.

TREASURER OF ONTARIO v. CANADA LIFE ASSURANCE CO.

Middleton, J.

the entire taxation for the year 1914, must in truth be borne by the company, for the premiums are payable on pre-existing contracts which are not susceptible of change. While this is undoubtedly so, I prefer to rest my judg[illegible]nt upon the broader ground indicated, as the taxation is not o[illegible]emporary nature, and the incidents peculiar to a transition [illegible]riod are not a fair index of the real nature of the tax imposed.

Much has been said concerning the clause in question, looking only at the words "direct taxation" torn apart from their context and without regard to their historical setting.

The framers of the Act sought to mould a stable Dominion out of separate Provinces and to end the jealousy and friction which had resulted from the antagonisms and conflicting interests incident to their separate existence. "Trade and Commerce" was assigned to the Dominion, and with it had to go the power of imposing customs and excise duties. Manifestly no Province could be permitted to interfere with the general fiscal policy of the Dominion by any such indirect tax; but the Provinces had to be given some source of income; and so direct taxation, and this alone, was permitted.

These considerations seem to indicate that it was not so much the intention to limit the Provincial powers to taxation which would be direct in the strictest sense in which that term is used by political writers, as to prevent the imposition of indirect taxes which would tend to interfere with the general policy of the Confederation. The ultimate incidence of the tax was not so much the concern of the draftsman as the securing of freedom for the Dominion from any interference by the Provinces in matters assigned to it. The term "direct taxation" ought therefore to be liberally and not narrowly construed, and all taxation which can fairly be regarded as direct should be permitted so long as it is confined "within the Province."

The tax which is imposed under the Corporations Tax Act is said (in clause (*a*) of sec. 4 (3), as enacted by 4 Geo. V. ch. 11, sec. 2) to be upon the gross premiums received by the company in respect of the business transacted in Ontario; but, by clause (*e*), this is made to cover every premium which by the terms of the contract is payable in Ontario, or which is in fact paid in On-

tario, or is payable in respect to a risk undertaken in Ontario, or in respect of a person or property resident or situate in Ontario at the time of payment. Notwithstanding the wide scope of this interpretation, I think the tax still remains a direct tax within the Province. The application of any artificial scale to determine the amount to be paid where the company taxed is in the Province or has assets which can be reached within the Province, does not appear to me to change the nature of the tax or to take it outside the powers of the Legislature.

The problem which the Legislature was called upon to face, when devising a fair basis for the taxation of insurance companies, was not easy. The amount of capital employed within the Province could not be ascertained. The amount of capital bears no relation to the amount of business done; a fixed assessment or tax would bear heavily upon the smaller companies. The amount of premiums received for business within the Province seemed to be a fair criterion. The Courts, however, are not concerned with the reasonableness of the tax. I can find nothing *ultra vires* in the mode of assessment provided.

In dealing thus with this case I have perhaps done scant justice to the very careful and elaborate arguments presented by counsel; but nothing can be gained, so far as I can see, by more elaborate discussion at this stage.

Judgment will be for the plaintiff for the recovery of the amount claimed. *Judgment for plaintiff.*

Re M., AN INFANT.

Ontario Supreme Court, Middleton, J. April 9, 1915.

1. DIVORCE AND SEPARATION (§ VII—75)—CUSTODY AND SUPPORT OF CHILD—AGREEMENT AS TO—ACCESS TO CHILD.

A separation agreement providing the custody and control of a child with the wife and its maintenance and education by the husband with a privilege to the husband of access to the child entitles the husband to access to the child only while in the mother's custody and control, and unless it is otherwise stipulated he cannot object to the mother's presence in the room during his visits to see the child.

[*Eversheds* v. *Eversheds* (1882), 46 L.T.R. 690; *Rice* v. *Frayser* (1885), 24 Fed. Rep. 460, referred to.

Statement

MOTION by the father of an infant for an order for its custody, or, in the alternative, for an order construing a separation agreement so far as it related to the custody of the child.

ONT.

S. C.

RE M., AN INFANT.

Middleton, J.

E. G. Long, for applicant.

G. H. Kilmer, K.C., for applicant's wife, the mother of the child.

MIDDLETON, J.:—Unfortunately the relations between the husband and wife are most unhappy, and there is no prospect or possibility of reconciliation. The child, a little girl, was born on the 11th July, 1912. Upon the separation, "charge and control" of the child were given to the wife, the husband paying for its support, maintenance, and education: this agreement not being an admission on his part that the wife shall always have the control and charge of the child, and not to prejudice him in any way should he desire to have its custody. The agreement then stipulates that the husband "shall have access to the said child at any reasonable time, upon sending notice to (the wife) that he desires such access."

Correspondence has taken place between the solicitors with reference to the time and mode of access, and it has been arranged that the father shall have access to the child at the apartments of the wife's mother once a week. The husband's grievance is, that during his visit the mother, as well as the child's nurse, remains in the room with the child. The husband desires that the child may be taken elsewhere for the purpose of allowing him to be with it free from any adverse influence or control—or, in the alternative, that such arrangements may be made that during his visit to the wife's apartments she may not be present with the child.

Upon the material there is nothing to justify my making any order giving the father custody of the child. It is manifestly in the interest of the child that it should remain in the mother's custody; and I do not think that I can use the threat of an order to deprive the mother of the custody for the purpose of compelling a course of conduct on her part which might appear to be reasonable. The parties have made their agreement; and all I can do is to construe the agreement as I find it.

At the same time I may say that I am not satisfied that there is any reason why the wife should refuse to afford to the husband the satisfaction of being alone with his child during the

short visit that he pays to it at her apartments. There is no reason to suppose that the father would be in any degree unkind to the child, and the mother and nurse could both be within easy reach so as to look after the child if any occasion should arise.

This case affords an illustration of the fact that there are many things which cannot be worked out through the Courts, and must be left to the good sense of the parties concerned. As said in lines generally attributed to that wise man of the world Samuel Johnson—

> "How small of all that human hearts endure
> "That part which laws or Kings can cause or cure."

All that the agreement gives to the father is a "right of access" to the child. I find that these words are employed not only in statutes but in the forms given for orders dealing with the custody of children and in precedents for separation agreements. I should, therefore, have expected to find somewhere an exposition of what this right of access really involves.

The only case which I have found is *Evershed* v. *Evershed* (1882), 46 L.T.R. 690, where Kay, J., had before him for interpretation an agreement which referred to counsel the settlement of a formal deed, which was to contain "all usual terms as to access to children, etc." Specific performance of this agreement was sought, and the question was, whether the mother, who was there entitled to access, should during the periods of access have the custody of the children. Mr. Justice Kay thought she had not that right: "Access is a thing which can only be dealt with after the question of custody is determined; it means access to children who are in the custody of some other person. Custody is a much larger and more important thing than access."

In an American case, *Rice* v. *Frayser* (1885), 24 Fed. Repr. 460, there is a discussion of the meaning of the word "access" when used in relation, not to children, but to property in the possession of a trustee. Access, it is said, means liberty to approach and inspect the property. Possession means much more than access. Access implies possession in another. This accords well with what was said by Mr. Justice Kay.

ONT.

S. C.

RE M., AN INFANT.

Middleton, J.

I think the meaning of the clause which I have quoted from this separation agreement is, that the father is entitled to access to the child only while it is still in the mother's custody and control; and I cannot say, in the absence of any stipulation in the deed, that the mother is guilty of any breach of its provisions by remaining in the room when the father is seeing the child. It is clear, I think, that the father has no right to have the child taken to his house or in any way to have it taken out of the mother's custody and control. He must be content with access to it while still in her custody and control.

Notwithstanding the view that I entertain of the legal rights of the parties, I repeat what I have said, that I think the mother would be acting more in the real interest of her child if she would forgo her right to be present in the room—for she must appreciate what a source of embarrassment her mere presence must be to her husband.

The husband must pay the wife's costs of these proceedings.

Order dismissed.

ALTA.

S. C.

GIER v. VAN AALST.

Alberta Supreme Court, Harvey, C.J., Stuart and Simmons, JJ.

1. BROKERS (§II A—5)—CHARGE OF SALE OF SEVERAL LOTS—COMMISSION ON TOTAL SALES—DISMISSAL—CAUSE—NEGLECT—CANCELLATION OF AUTHORITY.

Where a broker is given charge of the sale separately of a number of lots and is to receive a percentage on the net profits on the total sales, he would not be subject to dismissal, after having started on his work until it was completed, except for cause; but if the broker neglects the work of selling where it was a part of the arrangement that he should give his personal attention to the business, the property owner may cancel his authority.

[*Gier* v. *Van Aalst*, 16 D.L.R. 870, affirmed.]

Statement

APPEAL by defendant from Scott, J.

Appeal dismissed.

A. H. Clarke, K.C., for plaintiff, respondent.

H. P. O. Savary, for the defendant, appellant.

Harvey, C.J.

HARVEY, C.J., concurred with STUART, J.

Stuart, J.

STUART, J.:—The plaintiff in his statement of claim alleges that about May 1, 1909, the defendant agreed in writing to sell

to him 24 acres out of a certain piece of land containing 40 acres, but that the particular 24 acres were not specified. The purchase-price was $2,580 which the plaintiff paid. He alleges further that there was an arrangement between them by which the whole 40 acres was to be sub-divided and that this was done and the plan of sub-division registered; that it was agreed that the lots should be sold, that the defendant was entrusted with the sale and that the title to the whole remained in the defendant's name; that the defendant did sell a large number of lots while some remained unsold; that the defendant has received large sums of money from the sales of the lots and refused to account. And the plaintiff claims (1) an account; (2) a partition of the unsold lots; (3) an injunction.

To this claim the defendant, who is the plaintiff's son-in-law, pleads denying that he agreed in writing to sell the 24 acres as alleged and saying that if he did, the writing did not express the real agreement. He says that if the $2,580 was paid as alleged it was to enable the defendant to purchase the whole 40 acres from one John Emery for the joint benefit of the plaintiff and defendant as partners and that they had at all times been partners with respect to the said land. He further alleges that prior to April 1909, there was a verbal agreement between the parties that the defendant should invest moneys which might be thereafter provided by the plaintiff in the purchase of land in or near Calgary upon the terms that all the land so purchased should belong to the plaintiff and the defendant jointly as partners, and that the defendant should do all the work in connection with the purchase, management and resale of the lands so purchased and should sell and dispose of it in such manner and at such prices as he should see fit and that the profits should be divided in equal shares; that pursuant to this verbal arrangement, the defendant did purchase for their joint benefit the land referred to in the statement of claim and also certain land in block 2 and block 29, plan 2129-O Calgary, as well as another piece of land which is not in question. He then alleges that this last mentioned piece as well as the land in block 29 has all been sold and the proceeds divided, that a portion of block 2 had been sold and the profits divided, that 6 lots in

ALTA.
S. C.
GIER
v.
VAN AALST.
Stuart, J.

the block had been divided without sale between the parties, each taking 3 lots and that other 10 lots are still unsold and are the joint property of the plaintiff and defendant, but that the title remains in the name of the plaintiff; that the unsold portion of the 40 acres is also partnership property; that the plaintiff has refused to recognize that the defendant has any interest in the unsold portion of block 2, and that he has at all times been willing to render a full account of his dealings with their properties.

The defendant by counterclaim also asks for (1) a declaration that the plaintiff and he are partners with respect to the unsold portions of the 40 acres and of block 2; (2) a dissolu- of the partnership; (3) a partition of the property; (4) an accounting; (5) such other relief, etc.

In his reply the plaintiff denies the existence of any general agreement as alleged and says that each transaction was separate and distinct; and the written documents represent the true agreement; that the land in block 2 was bought entirely for the plaintiff; that the defendant was merely employed to sell the lots in this block; that the plaintiff still has thirteen of the lots unsold in which the defendant has no interest, and that the defendant obtained the three lots out of block 2 by a purchase thereof from the plaintiff. There is also a general denial and a plea of the Statute of Frauds as well as of the statute of Alberta, ch. 27 of 1906.

The action was tried by Mr. Justice Scott, who decided in favour of the plaintiff holding that there had never been any partnership agreement between the parties but merely an agreement that the defendant should sell the plaintiff's property upon commission upon certain terms and he directed an accounting upon this basis.

From this judgment the defendant appeals. I observe that no formal judgment was entered but I suppose this may be overlooked. It will be observed that the defendant is the registered owner of the unsold portion of the forty acres and so the plaintiff sues only in regard to that; while the plaintiff is the registered owner of the unsold portions of block 2, so therefore the defendant sues by counterclaim in regard to that. The defend-

ant made no attempt at the trial to substantiate his allegation of an agreement for a general partnership. It was specifically admitted by counsel for the defendant upon the argument of the appeal that each transaction stood by itself although the dealings in respect to one transaction might throw light upon the real nature of another. It appears that the first transaction related to block 2.

I think it advisable to state precisely what the two parties testified in their evidence in order to see how far apart they are in their relation of the facts. As this land is involved in the counterclaim, I give the defendant's story first. He said that in the fall of 1908, while he was in partnership with one Duckworth in the real estate business under the name of the International Colonization Co., he had suggested to the plaintiff the advisability of buying some South African scrip, that the plaintiff had given him a note for $1,500 which was at first intended to be discounted for this purpose, that afterwards they changed their minds, that on his suggestion the plaintiff bought this block 2, making the first payment with the proceeds of the note, that he made arrangements with Gier as to the sale, that he (defendant) was to sell it and they were to divide the net profits evenly; that he (defendant) was to fix the prices and should also determine when the lots should be sold and the conditions, that Gier was not to have any say whatever "whether or when he was to sell the lots or how," that he spent a good deal of time trying to increase the value of the lots by getting a fire-hall located on two of them and some stores on others.

With respect to the 10 lots remaining unsold in the block, the following statements from the defendant's evidence are very material in my view of the case. He said,

> since September, 1908, I could have sold them (i.e., the 10 lots) I do not know how many times. I have refused to sell those lots on different occasions. People knew in fact that I refused to sell those lots. I have had lots of people bothering me to buy these lots at different times . . . I thought they would be worth more.

He stated also on cross-examination that the International Colonization Co. had got a commission from the vendor on the sale to Gier of block 2, that there never was any agreement in writing shewing that he had any interest in it. And again he

ALTA.
S.C.
GIER
v.
VAN AALST.
Stuart, J.

said he could have sold all the lots, but that he used his judgment in selling what he thought good to sell and what he thought was good to hold.

The plaintiff's account of the transaction is as follows:—He says that he had not seen the block before he bought it, that the defendant suggested to him the buying of it instead of the scrip previously spoken of, that he had left a note for $1,500 with the defendant to make the first payment with, that the block was purchased from one Mitchell, through the defendant and on the defendant's advice, that he was guided by the defendant's assurance that a good profit could be made, that the arrangement was that the defendant was to resell the lots at such time as he thought advisable and at such prices and terms as he thought advisable. The plaintiff assented to the following statement of the position as put to him on his examination for discovery: "Mr. Van Aalst negotiated the purchase, you providing the money; he was given full management of the sale of the lots both with regard to the time of selling and the price and terms of sale, and you were to get back your money out of the sale and one-half of the net profits was to be yours and he was to get the other half of the net profits."

Now, it is difficult for me to see wherein there is anything conflicting in the testimony of the defendant and the plaintiff. The real question is what interpretation is the Court to put upon such an agreement.

It seems to me that the attempt to turn such an arrangement into a partnership is futile. Surely we know enough of the methods of real estate men (I am not reflecting on them at all in the present instance) to discern what the defendant was about. He admitted he had no money of his own of any account and that he could not buy block 2 himself. But he had it listed for sale as agent for Mitchell. He was anxious to make money and if he could make a sale he would at least get a commission from Mitchell. To whom, he wondered, could he sell? He bethought him of his own father-in-law who had money and could raise it and so he went to him. He saw, as every real estate agent sees, that he might not only get a commission on the sale, but as speculation was rife, also get the purchaser to leave it still

in his hands for sale and so get another one. If the purchaser happened to be his father-in-law, no doubt he would be able to make excellent arrangements. The father-in-law would be glad to help his daughter in such a way, so he got his father-in-law to buy it. But in selling on behalf of Mitchell to his father-in-law, he got a commission from Mitchell and was Mitchell's agent, or at least, his firm was. I therefore place no value on the contention that the defendant's trouble or work "in negotiating the purchase" was in some way part of partnership work. There was no trouble in negotiating the purchase when Gier had put up the money for the price asked and Mitchell was willing to give him a commission for selling on his behalf. In my opinion nothing happened here in any essential different from what happens often when a real estate agent having made a sale secures a re-listing from a purchaser. Gier had bought the property outright in his own name with his own money. While this was being arranged and, if you like, as an inducement to lead Gier into making the purchase on which he was getting a commission from Mitchell, Van Aalst said:—

> you can leave it to me to resell it. I shall look after it all, leave it to me to fix the prices. I am in the business, I know best what to do and how and when to sell. You will be relieved from all trouble and get half the profits and I, for my trouble, will take the other half as my reward.

He agreed to this naturally enough because the man was his son-in-law, but for my part, I cannot view it in any other light than employment by Gier of Van Aalst as his agent to sell, an employment indeed in which the agent was given unusual discretion and authority as well as unusual remuneration for an evident reason, but nothing more than that. One might just as well say that when a person is induced by an agent to purchase property in respect of which the agent is getting a commission from the vendor and while the deal is being arranged it is also arranged that the purchaser will leave the property with the agent for re-sale and the agent is to get 5 per cent. or 10 per cent. of the selling price as his reward, there is then a partnership created. What difference can it make that the reward is to be measured as 50 per cent. of the profit instead of 10 per cent. of the selling price? I cannot see that it makes any difference at all?

ALTA.
S. C.
GIER
v.
VAN AALST.
Stuart, J.

With regard to the division of the 6 lots, I think there was a perfectly reasonable explanation of this. The defendant said that he approached Gier on the subject suggesting that these 6 lots should be held and not sold at present and that they were good lots to build on and he suggested that Gier should take 3 and he himself 3, paying to Gier what the latter 3 had cost. He agreed to this and they "drew lots" for the lots. Now, I cannot see any reason why the parties should not make a special bargain of that kind for a special reason without in any way giving an interpretation of their original agreement. The proposition was that the 6 lots would be withdrawn from the sale. If that was done, of course, the defendant's one-half of the profits would be lost to him. As a substituted arrangement therefore, the defendant took 3 of the lots at the cost price and the other 3 were not, perhaps, then, subject to sale by him, but it does not seem to me that the very fine distinction or differences as to the position of the parties in regard to the 3 lots which Gier was allotted can affect the real meaning of the written agreement. I am of opinion therefore that there was no partnership with regard to block 2.

It follows that in counterclaiming in regard to it, the defendant is bringing an action in regard to a verbal agreement which is within the meaning of ch. 27 of the statutes of 1906. It is possible however that there may be such a thing as part performance taking a case out of that statute as well as out of the Statute of Frauds of which it is an extension, but we do not need to concern ourselves with that question because the plaintiff, as we were given to understand, on the argument, is quite willing that the defendant should have all that in my opinion he would be able to get even if there were no statute. Indeed he has already got it in so far as the lots sold are concerned. The defendant has already in his hands the one-half of the profits reckoned on the basis of the cost per lot. The plaintiff is willing that he should retain this. The only difficulty arises when we consider the defendant's position in regard to the unsold lots. They are not partnership property. But leaving the statute out of view, there can be no doubt that the meaning of the agreement and the intention of the parties was that all

the lots should be sold and that it was the one-half of the net profits on the whole thing that the defendant was to get. Now, it might be that the profits on the first sale would be very small and, if the markets were rising, the defendant might expect to reap his chief reward from the later sales. He might have to take, for instance, a great deal more trouble in proportion to the advantage gained on the earlier sales than on the later ones. He would be entitled to have the whole thing treated as a single transaction and to say "wait till the end, till all is sold, and then we shall see what my share is." For this reason it is clear that the defendant having started on his work could not, unless for some special reason be dismissed from it by the plaintiff until it was completed. But I think the trial Judge was right in his view that in the circumstances the plaintiff was entitled to treat the arrangement as at an end. It will be remembered that the defendant admits that he could have sold the lots many a time if he had wanted to. The plaintiff having left the matter in his hands could not have complained very much, although I suppose he still had some power to object. But aside from that it appeared that the defendant did not continue to give his personal attention to the business. Some time in 1911 he went off to Victoria and with the exception of three months in 1912 did not return to Calgary until July, 1913. He said that his brother was looking after the business for him. The last sale of lots in block 2 was in November, 1910. The brother was by no means as much interested in the matter as the defendant, because he only got 10% of what the defendant was to give him. In my opinion the plaintiff had a right to expect closer personal attention to the matter by his agent than that. He no doubt had confidence in his son-in-law, but he was not bound to depend on the services of that son-in-law's brother, who was under a subordinate hiring at a much less remuneration. In my opinion either the defendant must be treated as having abandoned his work or the plaintiff had a right, even if he had not intentionally abandoned it, to determine the employment when it was being thus neglected.

I, therefore, think the dismissal of the defendant's counterclaim as far as it seeks a declaration that the defendant has now

ALTA.

S. C.

GIER v. VAN AALST.

Stuart, J.

any interest in the remaining 10 lots of block 2 was quite proper.

Then with regard to the 40 acres, there was here a somewhat different situation. The defendant himself bought this land from one John Emery for $4,300. He said that before doing so he had discussed the matter with the plaintiff and it is evident from his evidence that it was only because of his success of getting his father-in-law to take an interest that he was able to buy it at all. Gier paid him $2,580, that is three-fifths of the purchase-price and although the agreement spoke of 24 acres as being sold to Gier, it is admitted that this must be treated merely as a purchase of a three-fifths undivided interest, because the particular interest was never specified. The land was all subdivided by an agreement and Gier paid three-fifths of the cost. It was agreed that the defendant should sell the property off in lots and that he should get one-half the net profits on the sale of Gier's three-fifth interest. I am unable to see how there can be any different result in regard to this transaction from that arrived at in regard to block 2.

The defendant was a real estate agent, he was in partnership with, first, Duckworth as the International Colonization Co. and then with his brother as the Canada West Colonization Co. It was his business to sell real estate on commission. Like all real estate agents he was glad to do some buying and selling on his own account and get the profits himself. But to handle this particular 40 acres he needed assistance. Again he turned to his father-in-law and got him to take a three-fifth interest, and being in the real estate business he, of course, arranged that they should not partition the property, but that he should sell it out in lots leaving the final distribution of interest until it was all sold, but that for selling the three-fifths interest he should get one-half the profits thereon. He afterwards endorsed on one of the accounts for the information of auditors the following memorandum:—

Re 40 acres N.W. 1-4 sec. 10, township 24, range 1, west of the 4th sold to William Gier twenty four acres for $2,580.00 surveyed in lots, forty acres equal to 372 lots. William Gier's share three-fifths of 372 lots equals 223 lots.

Wm. Gier's share to be sold by A. Van Aalst, commission half of the net profits.

ALTA.

S. C.

GIER v. VAN AALST

Stuart, J.

I think the proper conclusion in regard to this transaction was made by the learned trial Judge. If the reward had been stated as ten per cent. of the selling price no one would have suggested a partnership. I cannot see why the nature of the transaction should be changed because Gier was willing, I think, for an obvious reason, to make his reward 50% of the net profit. The defendant tried to make out that the above memorandum did not properly represent the bargain, but it most certainly does in essence unless it be with regard to the word "commission." I can see no great magic in that word one way or the other, but it is certainly of some weight that the defendant thus expresses himself when deliberately writing down what the bargain was. This being so, the remarks already made with regard to the balance of the unsold lots in block 2 are applicable in regard to the unsold portion of the plaintiff's three-fifths undivided share in the forty acres.

The question raised at the trial in regard to the admissibility of his wife's evidence against the defendant does not appear to be material. The learned trial Judge did indeed refer in his judgment to what she said, but there is ample evidence to support his conclusion without reference to her statement. Indeed the conclusions I draw are inferences from quite undisputed facts rather than decisions upon conflicting testimony. In the result, I think the appeal should be dismissed with costs.

There was no formal judgment ever drawn up and it will still be necessary to settle the exact form of the judgment. This, I think, should be referred to the learned trial Judge, in as much as we are not modifying what he said in any way. I observe that he reserved the question of the costs of the trial. That question should, I think, be still left to him to be disposed of.

SIMMONS, J., concurred with STUART, J.

Simmons, J.

MAN.

C. A.

MALLORY v. WINNIPEG JOINT TERMINALS.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. June 7, 1915.

1. RAILWAYS (§ II D 2—35)—OPERATION OF—NEGLIGENCE—UNCOVERED SWITCH RODS.

In the absence of any regulation by statutory authority requiring a railway company to cover the switch rods of a hand switch on the railway, it is not open to a jury to find that the failure to do so constitutes negligence.

[*Zuecht* v. *C. P. R. W. Co.*, 23 O.L.R. 602, referred to.]

Statement

APPEAL from a judgment of Prendergast, J.

McMurray and *Davidson* for plaintiff, respondent.

O. H. Clarke, K.C. for defendant, appellant.

Howell, C.J.M.

HOWELL, C.J.M.:—If the verdict in this case is permitted to stand this Court thereby declares that where the ordinary switch rods universally used in Canada and the United States are not covered a jury may infer negligence against a railway company.

There was no evidence given in this case shewing the position or condition of the switch rods, the alleged cause of the accident, and no evidence that they were out of order or out of the ordinary, so I shall assume that these were the ordinary rods in ordinary use. I shall assume that their position, construction and condition is common knowledge to all. There are two rods (ordinarily flat bars of iron) crossing the track holding in place the two movable split rails, one fastened to the beginning of each split rail, connected under the adjoining rail to the switch lever, the other about four feet further in, merely connecting and steadying the two rails. The rods are fastened to the bottom flange of the rails, and so adjusted and placed that they are between ties and that the top of the rods are about on a level with the top of the ties. Necessarily there must be a small unfilled space between the rods and the ballast, and the ballast at these points cannot come quite up to the top of the ties. These switches are to be found at almost all places on a line of railway; in large yards there are hundreds of them. At each switch a rail starts diagonally to cross the line, and a man walking away from the switch on either line must cross a rail running diagonally across the track.

The two rails are each moved at the split end about six inches, and, therefore, to cover these rods at best an open space of about six inches must be left on each side, which might be a dangerous trap.

The plaintiff by his evidence crossed the switch rods, and when he fell he must have been at a point where one of these rails was beginning to obstruct the level walking on the track.

If not covering switch rods may be held to be negligence, the non-protecting of the crossing rail might equally be evidence of negligence.

Howell, C.J.M.

The law requires the railway company to protect the frogs so near the switches, but the Railway Commission have made no order or rule as to the covering of switch rods, and their construction, condition and operation must be well known to each member of the Board. The switch rods in question, I assume, are of the form and in the condition ordinarily used on all railways on this continent, and I cannot think that upon these facts the jury could find that the exposed condition of the rods was negligence by the defendants.

The terrible injury suffered by the plaintiff tends to warp one's judgment, and I regret to hold that he cannot recover.

The appeal is allowed. The judgment in favour of the plaintiff is set aside and entered for the defendants.

Richards, J.A. (dissenting)

RICHARDS, J.A., dissented.

Perdue, J.A.

PERDUE, J.A.:—This action is brought by the plaintiff, a switchman, to recover damages for injuries sustained by him while performing his duties. The action is brought both at common law and under the statute. It is alleged that the defendants maintain and operate a railway in the city of Winnipeg, being the railway terminals, premises and facilities used jointly in that city by the Canadian Northern Railway Company and the Grand Trunk Pacific Railway Company. Probably the "Terminals Board" referred to in 6 & 7 Edw. VII., ch. 52, is what is meant. No objection, however, has been taken to the form in which the responsible parties have been sued, whoever these parties may be, and a defence has been entered for them under the above name.

The plaintiff, while engaged in switching operations in the yards of the Winnipeg Joint Terminals on July 7, 1913, at about five o'clock in the morning, sustained the injuries in respect of which the action is brought. There was clear daylight at the time. A flying switch had been made, the plaintiff had cut off two cars, and these had moved to the line where they were to remain. The plaintiff then set the switch so that other cars might be

MAN.

C. A.

MALLORY v. WINNIPEG JOINT TERMINALS.

Perdue, J.A.

pushed to another track. The cars which were to be switched formed the rear end of the train, and this end had been stopped within three or four feet of the switch at which the plaintiff was standing. After he had set the switch he noticed that the knuckle of the coupler on the end of the car nearest to him was not open. He then stepped across the track and took hold of the lever, there being a lever on that side only, and tried to open the coupler. In so doing he was performing part of his duties. The lever did not work; and then he took the knuckle in one hand and shook it while he held the lever with the other hand. He states that while doing this he held the knuckle with his left hand and the lever with his right, his back being turned to the car. While the plaintiff was so engaged, Lait, the foreman of the switching crew, saw that the switch had been set and gave the engineer the signal to push the cars past the switch. The car at which the plaintiff was working was then pushed forward upon him. His account of what then happened is as follows:—

A. When it knocked me in amongst the switch rods, I had difficulty with my feet. I couldn't get any footing there at all, but I was enabled to keep on my feet by hanging on to the lever, and on to the knuckle, and as soon as I caught my feet sufficiently, I sprang away from the car, and as I sprang I tripped, or stumbled, and I suppose I went 5 or 6 paces alright, and I fell when I was off my balance. Q. What do you say put you off your balance? A. Why, I stumbled, or tripped, over something, and I couldn't get my balance again. Q. What do you say you stumbled, or tripped over? A. Well, I don't know whether it was the switch rods, or loose stone, or what it was. Q. And then what did you do? A. I fell on my face, and turned over on my back, and I hadn't time to make a turn or get out, before the car was upon me.

Now, it is clear from the evidence of the plaintiff and of other witnesses that the end of the car was within three or four feet of the switch rods while the plaintiff was working at it and before it moved. The first step he took would therefore bring him to the switch rods. Even if he stumbled on these in the first instance, he hung to the lever and the knuckle, and, as he says, when he caught his feet sufficiently he sprang away from the car. It seems clear to me that all this—the tripping on the switch rods, the keeping on his feet by hanging to the lever and the knuckle, regaining his feet, springing away from the car and as he sprang stumbling or tripping again—could not have taken place within the three or four feet between the car and the switch rods, while the car was moving forward. It appears from his own account that

after getting free of the switch rods he stumbled again over something, went five or six paces all right, and then fell. In cross-examination he stated that his heels struck the air-hose as he sprang away from the car. The air-hose was hanging six or seven inches from the ground. He then again states, "I wouldn't say what I tripped on."

Switchman Hart, who was employed on the Winnipeg Joint Terminals, saw the accident from a distance of about twenty-five feet. He says the plaintiff when he first tried to open the coupler stood facing the car and holding the lever with his left hand; that he turned round and caught the lever with his right hand, while he shook the knuckle with his left hand; that after the car started to move he tried twice to lift the lever. In his opinion, the plaintiff stumbled over the rail. The plan shews that a rail belonging to another track runs at this point diagonally between the rails of the line the plaintiff was on. This same witness states that the plaintiff walked backwards two or three steps before he turned around with his back to the car, and that he then ran with the car three or four steps.

The following questions were put to the jury and answers given as appears:—

1. Q. Was Lait, the foreman, negligent in causing the train to back, as he did? A. No. (a) Q. And, was that the cause of the accident? A. Yes. 2. Q. Did the plaintiff trip or stumble on the switch rods? A. Yes. 3. Q. Was Mallory guilty of negligence? A. No. (2) Q. And in what was he negligent? A. Nothing. 4. Q. If Mallory was guilty of negligence, could the defendants (notwithstanding the same) have still avoided the accident, by the use of reasonable care? A. Yes. (a) Q. And if so, how? A. By properly covering the switch rods. 5. Q. If you find (in answer to a question above) that Mallory tripped on the switch rods, then, (a) Was the tripping the cause, or one of the causes of the accident? A. Yes. (b) Q. Could he have saved himself, but for the so being tripped by the switch rods? A. Yes. (c) Q. Was the tripping due to the exposed condition of the switch rods? A. Yes. (d) Q. Did the exposed condition of the switch rods constitute the negligence on the part of the defendants? A. Yes. 6. Q. As to the amount of damages, if you award such: they can exceed three (3) years' back wages, only, if you answer "yes" to 2. to (b), to (c) and to (d), of above question 5? A. Amount of damages $10,000.

The natural interpretation to put upon these answers is, that although the backing of the train was the cause of the accident, the foreman was not negligent in causing it to back; that the plaintiff tripped on the switch rods; that the tripping was the cause of the accident; that the plaintiff was not negligent; that

MAN.

C. A.

MALLORY v. WINNIPEG JOINT TERMINALS.

Perdue, J.A.

the exposed condition of the switch rods constituted the negligence which caused the plaintiff to trip and so occasioned the accident.

I have grave doubts whether the evidence was sufficient to enable the jury to find that the cause of the plaintiff's fall was the switch rods. According to his own statement he was able to keep on his feet after getting clear of the switch rods, to take several steps, and then spring away from the car. It was as he sprang away from the car that he stumbled on something—he admits he does not know what—and fell in front of the car. It would appear to me as if the final stumble and fall were not caused by the switch rods.

Independently, however, of the findings as to the cause of the accident, was it open to the jury to find that leaving the switch rods uncovered was negligence on the part of the defendants? The evidence shews that, except where an interlocking plant is in operation, the universal practice on Canadian railways is not to cover the switch rods. But where an interlocking system is used a covering is adopted to protect the mechanism, which is more delicate than that of the ordinary switch. The suggestions made as to how the hand switch in common use could be covered are not convincing. One witness says he saw the switch rods in one instance covered with gravel. The general use of such a protection would, it is safe to say, cause many more accidents than the omission to use any covering at all. It is not shewn that a covering of wood or metal would be feasible or would afford protection to anyone walking across or between the tracks. One might stumble over the box containing the switch rods as easily as over the exposed rods. But it seems to me that the question is one to be dealt with by Parliament or by the Railway Board. The prevention of accidents to men operating or passing by switches was considered by the framers of the Railway Act when provision was made for packing the fixed rails at switches (sec. 288). The Railway Board has also power to make regulations respecting the appliances, devices, structures and works to be used on a railway for the protection of the employees of the company (secs. 30 and 269). It was admitted that no regulation had been made either by the Board or by statute providing for the covering of switches.

In *Grand Trunk Ry. Co.* v. *McKay*, 34 S.C.R. 81, Mr. Justice Davies, speaking for the majority of the Court, gave (at p. 97)

the following view of the law upon a similar question arising under the Railway Act:—

"In my opinion Parliament has by the 187th section of the Railway Act vested in the Railway Committee of the Privy Council the exclusive power and duty of determining the character and extent of the protection which should be given to the public at places where the railway track crosses a highway at rail level. . . . I cannot think that these powers, so full, so complete and so capable of being made effective, can, if exercised, be subject to review either as to their adequacy or otherwise by a jury, nor do I think that the failure to invoke the exercise of the powers is of itself sufficient to take the matter away from the jurisdiction to which Parliament has committed it and vest it in a jury."

I would also refer to *Zurelt* v. *C.P.R.W. Co.*, 23 O.L.R. 602, in which doubt was expressed as to whether the sufficiency of a headlight was a proper question for a jury (pp. 606 and 610).

The question as to whether all switch rods should be covered for the protection of railway employees is one of very great importance. The form of the protection to be adopted, if protection is to be made obligatory, would necessitate the assistance and advice of experts and the most careful consideration by the Legislature or body possessing the power to compel the adoption of the device. Should it be left to a jury to say that defendants were negligent because they adopted the course followed by every railway company in Canada, and left the switch rods uncovered? It appears to me that the matter is essentially one to be dealt with by Parliament or the Railway Board, so that the device to be adopted will be put in general use by all railways, and it will not be left to the conjecture of a jury to pronounce upon the necessity for, or the sufficiency of, the protection in each case.

In regard to the general duties of masters to take precautions for the safety of their servants, I would quote the following passage from Bevan on Negligence, 3rd ed., p. 614:—

The obligations of the master with regard to the use of machinery and appliances are so forcibly set out in an American case (*Titus* v. *Bradford Ry. Co.*, 136 Pa. St. 618) that they may very profitably be inserted here. The master, it is said, performs his duty when he furnishes machinery "of ordinary character and reasonable safety, and the former is the test of the latter: for in regard to the style of implement or nature of the mode of performance of any work 'reasonably safe' means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is un-

MAN.
C. A.
MALLORY
v.
WINNIPEG
JOINT
TERMINALS.
Perdue, J.A.

attainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way, for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community."

The conclusion at which I have arrived is that the jury were not justified in finding that the defendants were negligent in not covering the switch rods. This being the only negligence found by the jury, the plaintiff cannot recover at common law. Their finding that Lait, the foreman, was not negligent in causing the train to back up at the time the injury was caused, prevents the plaintiff from recovering under the Employers' Liability Act.

It is only natural to feel the deepest sympathy for the plaintiff, who has suffered most severe and painful injuries and has been maimed and largely disabled for life. I would express my regret that he did not take advantage of the Workmen's Compensation Act, under which he might have recovered a certain, even if inadequate, compensation, rather than stake everything on the chance of recovering a larger sum in an action of negligence against his employers.

I think the appeal should be allowed, the judgment for the plaintiff set aside, and a judgment entered for the defendants.

Haggart, J.A.

HAGGART, J. A:—I agree with the conclusion arrived at by Mr. Justice CAMERON.

To my mind there is not sufficient evidence to warrant the jury in drawing the inference that the exposed condition of the switch rods constituted negligence on the part of the defendants and that it was the duty of the defendants to cover these switch rods. The weight of evidence is that in this country switches are constructed and maintained by railways generally as was the switch in question. There was no breach of any statutory obligation, because the Railway Act is silent as to the manner in which switch rods should be constructed and the Railway Commissio n

never made any order or rule. To cover these rods with gravel as suggested would, in my opinion, render the track more dangerous, and to cover them with iron plate or sheeting might impose an unreasonable burden on the railways. The covering of switch rods in this country is confined to the block systems, where the delicate mechanism requires protection. The defendants adopted the usual and ordinary method employed by other railways.

I do not think there is sufficient evidence that the tripping was caused by these rods. The plaintiff's application for employment as a yardman with the defendants contains one of the rules of the company with the requirements of which the plaintiff agreed over his signature to comply, in which "going between cars while the same are in motion and similar imprudent actions are strictly prohibited."

The above finding of the jury is necessary to support the verdict for the plaintiff, and if the jury should not have made it then the case can only be disposed of by allowing the appeal.

The verdict for the plaintiff should be set aside and a verdict entered for the defendants.

Appeal allowed.

J. I. CASE THRESHING MACHINE CO. v. DESMOND.

ALTA.
S. C.

Alberta Supreme Court, Scott, Stuart, Beck, and Simmons, JJ.

1. BILLS AND NOTES (§ I A—2)—PROMISSORY NOTE—WHAT CONSTITUTES—"THRESHING MEMORANDUM."

A promise to pay subjoined to a "threshing memorandum" acknowledging the quantity and price of threshing certain grain, may constitute the document a promissory note and therefore transferable by endorsement although the payee is not indicated therein by name, if the document shows with reasonable certainty that the payee is the contractor for the threshing who had acquired a lien under the Threshers Lien Act, Alta.

Statement.

APPEAL from a District Court.

I. B. Howatt for the plaintiffs, respondents.

J. S. Scrimgeour for the defendant, appellant.

Scott, J.

SCOTT, J., concurred with BECK, J.

Beck, J.

BECK, J.:—The sole question for decision in this appeal—one from His Honour Judge Crawford—is whether the instrument, of which the following is a copy, is a promissory note:—

ALTA.

S. C.

J. I. CASE THRESHING MACHINE CO. v. DESMOND.

Beck, J.

THRESHING MEMORANDUM.

Grain.	No. of bushels threshed.	Price per bushel.	
Wheat	3922	10	$392.20
Oats	2727	7	190.89
Barley	554	8	44.32
Flax			
			$627.41
			120.29
			$507.12

I hereby acknowledge having received a copy of the above account which I accept as correct, and agree to pay in ——— days from date, and if not paid on that date I agree to pay interest at the rate of 10 per cent. per annum on the same from that date.

I also acknowledge having received notice of retention of above mentioned grain under the Thresher's Lien until payment of this account in full.

(Sgd.) JAMES DESMOND.

(Endorsed) "Julius Hass" and stamped on the back, "Oct. 26, 1912," (apparently the date on which the Instrument was acquired by the Bank, as endorsee; and to whom the amount of it was ultimately paid by the maker.)

The Bills of Exchange Act (R.S.C., ch. 119) says:—

176. A promissory note is an unconditional promise in writing made by one person to another, signed by the maker engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a *specified person*, or to bearer.

Section 17, defining a bill of exchange, also uses the words "a specified person or to bearer."

Sub-section 4 of sec. 21 says: "The payee must be named or otherwise *indicated therein with reasonable certainty*."

By virtue of sec. 186, the provisions of sec. 21 apply to a promissory note as well as to a bill of exchange. The result is that in either case, if the bill or note is not payable to bearer the payee must either be named or "otherwise indicated with reasonable certainty."

In *Green* v. *Davies* (1825), 4 B. & C. 235, a paper in this form—"December 1814. Received of W. D. Boaz £100 which I promise to pay on demand with lawful interest," was held to be a note; Bayley, J., saying: "As to the first point"—(that it was not a note because no payee was named)—"of that there can be no doubt; no particular form of words is necessary to constitute a note; and *Chadwick* v. *Allen* (2 Stra. 706) is in point to shew that it is not necessary to name the payee more explicitly than this note

does; the substance of the note there was, '£15 5 balance due to Sir Andrew Chadwick, I am still indebted and do promise to pay.' Whom he was to pay was not in terms stated, but as no other payee was named, who but Sir A. Chadwick could be the object of his promise? So here, as the money was received from Boaz, he alone could be the person to whom the money was to be paid back."

A promise to pay "to the trustees acting under the will of the late W.," was held to be a promissory note: *Megginson* v. *Harper* (1834), 2 C. & M. 322.

A paper in this form: "I.O.U. £85 to be paid May 5," not addressed to anyone, was held to be a promissory note: *Waithman* v. *Elsee* (1843), 1 C. & K. 35.

Daniel on Negotiable Instruments, 5th ed., s. 102, after citing the above decisions, says:—

> But as there is no certainty about the payee *on the face of the paper*, and *nothing from which he can be ascertained* (i.e., on the face of the paper) such a paper could not consistently with accepted principles be held *negotiable*

And adds:—

> Pothier puts a case quite similar. "If," he says, "the drawer should omit the name of the payee, but should draw the bill in that form:—'Pay a thousand livres at sight, value received of A.B.,' it appears to me reasonable to presume that the drawer intended that the bill should be payable to the person from whom the value had been received as no other person is named to whom it ought to be paid." He adds, however, that he has learned from an experienced merchant that bankers would make a difficulty as to paying such a bill.

It was formerly held in England (*contra* in Scotland) that a bill or note payable to a specified person without more was not negotiable. The Bills of Exchange Act (R.S.C. 1906, ch. 119) changed the law in this respect by sec. 22, which enacts:—

> A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable.

In view of the foregoing, I am of opinion that the paper in question is a promissory note, for the reason—to answer the only important objection—that the payee is indicated with reasonable certainty as being the person who threshed the maker's grain, this being unquestionably plain from the words of the paper, especially the portion which "*retains*" a lien under the Threshers Lien Act—the thresher being the only person who could "retain" a lien under that Act.

ALTA.

S. C.

J. I. CASE THRESHING MACHINE CO. v. DESMOND.

Stuart, J.

I think, also, that the note was negotiable in view of the statutory provision which I have quoted. In the result I am of opinion that the appeal should be allowed with costs and the judgment in favour of the plaintiffs be set aside and judgment be entered dismissing the plaintiffs' action with costs.

STUART, J., for reasons given in writing, although unable to conclude that the document is a promissory note, agrees that the appeal should be allowed, but without costs, the judgment below set aside, and the action dismissed but without costs.

SIMMONS, J., concurred with BECK, J.

Appeal allowed.

ONT.

S. C.

Re MASONIC TEMPLE CO. AND CITY OF TORONTO.

Ontario Supreme Court, Middleton, J. March 23, 1915.

1. BUILDINGS (§ I A—7)—MUNICIPAL REGULATION—BUILDING PERMITS — STATUTORY BUILDING LINE—FRONT STEPS.

The steps as a means of access to the front of a building extending out across the prescribed building line but the building itself being within the prescribed line, is not within the prohibition of a municipal by-law, authorized by sec. 406, sub-sec. 10, of the Municipal Act, R.S.O. 1914, ch. 192, prohibiting the placing of a building on a residential street nearer to the street line than a certain prescribed distance, as to disentitle one to a building permit.

[*Paddington Corporation* v. *Attorney-General*, [1906] A.C. 1, specially referred to.]

Statement.

MOTION by the company for a mandatory order requiring the city corporation to issue a permit for the erection of a building by the company upon land abutting on a city street.

G. F. Shepley, K.C., and *T. Reid*, for the applicants.

Irving S. Fairty, for the city corporation, the respondents.

Middleton, J.

MIDDLETON, J.:—The only ground alleged for the refusal to issue the permit is that the building is said to be closer to the street line than is permitted by a by-law of the city passed under sec. 406, sub-sec. 10, of the Municipal Act, R.S.O. 1914, ch. 192, authorising the municipality to pass a by-law "prescribing the distance from the line of the street in front at which no building on a residential street may be erected or placed."

The building in question, save as to the front steps, is well inside the prescribed line. In front of it, and as a means of ac-

cess to the front door, it is proposed to construct steps which extend some distance from the front wall of the building and across the defined line. These steps, at their highest point, are four feet six inches above the ground level.

I have come to the conclusion that the construction of these steps is not the erection or placing of a building, within the by-law and the statute. In each case it is a question of fact whether what is done is within the prohibition of the statute.

Much light is thrown upon the situation by the decision in *Boyce* v. *Paddington Borough Council*, [1903] 1 Ch. 109, [1903] 2 Ch. 556, and, *sub nom. Paddington Corporation* v. *Attorney-General*, [1906] A.C. 1. There, under the Metropolitan Open Spaces Acts, a disused burial ground was directed to be kept in an open condition, free from buildings. Boyce erected buildings on abutting land, with windows overlooking the space. The local authority erected a hoarding so as to obstruct the access of light to his windows and prevent him from getting a prescriptive right over the open space. Boyce thereupon, in his zeal to assert the rights of the public, sought an injunction to restrain the erection of this hoarding as being a building within the prohibition. Buckley, J., before whom the matter first came, declared that this hoarding was not a building within the meaning of the Act, although a hoarding had been held to be a building within certain other statutes, and within certain covenants and restrictions. The Court of Appeal took the opposite view; but, on appeal being taken to the Lords, the principle suggested by Buckley, J., was adopted—Lord Halsbury stating (pp. 3 and 4): "The subject-matter to be dealt with has to be looked at in order to see what the word 'building' means in relation to that particular subject-matter. It is impossible to give any definite meaning to it in the loose language which is used in some cases; anything which is in the nature of a building might be within one covenant, and the same erection might not be a building with reference to another covenant . . . But now, my Lords, I have to look at the word 'building' here with reference to this subject-matter and what the Act of Parliament was doing. It is very obvious, I think, that what was intended to be done was to keep this disused burial ground from

ONT.

S. C.

RE MASONIC TEMPLE CO. AND CITY OF TORONTO.

Middleton, J.

being used as a building ground, to keep it as a place of exercise, ventilation and recreation."

This is quite in accordance with the case of *Child* v. *Douglas* (1854), 1 Kay 560, where Sir W. Page Wood held that the erection of a wall two feet high with an iron rail on the top of it and the projection of a doorway, though built of brick, one foot beyond a prescribed limit, did not constitute a breach of a covenant not to build within a prescribed distance from the street; the question being whether the erection complained of in any degree substantially interfered with that which it was the object of the covenant in question to secure.

(The authority of this case was somewhat interfered with by what took place on appeal. See the same case (1854), 5 De G.M & G. 739).

Hull v. *London County Council*, [1901] 1 K.B. 580, recognises the same principle. There it is said by Bruce, J. (p. 588): "It is quite clear that the object of the section is to preserve the width of the street and the general line of building frontage in order to obtain architectural uniformity;" and upon that principle a projection which would form no departure from the general line of the building erected, was not regarded as objectionable. This case was subsequently doubted; but in the latest case in which it is referred to, *A. and F. Pears Limited* v. *London County Council* (1911), 105 L.T.R. 525, Lord Alverstone, C.J., says: "If *Hull* v. *London County Council* is to be altered it must be altered by Act of Parliament and not altered by us."

As might be expected, the American cases are by no means uniform; but they are summarised thus in Cyc., vol. 13, p. 716: "A restriction as to a building line will be held to intend only that the wall of the building should be on the line and will not prohibit the erection of a stoop, porch, or platform along it unless they project an unreasonable distance as compared with like structures or unless they unreasonably obstruct light and air, or unless they are in violation of the intent of the prohibition."

Manners v. *Johnson* (1875), 1 Ch. D. 673, is of importance

as shewing that the English Courts regard bay windows and similar projections as constituting a substantial interference with the uniform and architectural symmetry which the statute endeavours to secure; and I am at present inclined to think that any solid superstructure over the steps would fall within this case.

In the Supreme Court of the United States—*United States* v. *Mueller* (1885), 113, U.S. 153—it is held that steps and approaches leading up to a building may, for some purposes, be regarded as being no part of the building itself, but as merely constituting a means of ascent or way into the building.

If steps were situated some little distance from the main wall of the building, and there was a walk from these steps to the building, then it would be perfectly clear that the steps did not form part of the building, within the meaning of this by-law; and I think I am quite safe in holding that the steps here contemplated, which are entirely outside of the main wall of the building, do not in any way interfere with the object which the statute aims at securing, and are not within its purview.

The question whether the architect could justify his refusal to grant the permit by reference to the by-law in question was not argued before me.

The mandatory order sought must, therefore, be granted; and costs must follow the event.

Order accordingly.

COVENEY v. GLENDENNING.

ONT.
S. C.

Ontario Supreme Court, Middleton, J. April 19, 1915.

1. CORPORATIONS AND COMPANIES (§ IV G 5—130)—STATUTORY LIABILITY OF DIRECTORS—WAGES—ASSIGNMENT OF.

The personal liability imposed upon directors by sec. 98 of the Companies Act, R.S.O. 1914, ch. 178, for wages due to workmen of the company does not apply to an assignment of wage claims to a storekeeper in pursuance of an agreement with the company for periodical adjustment of such claims for supplies furnished them.

Statement

ACTION by an assignee of wages claims against the directors of an incorporated company to recover the amount of the claims, under sec. 98 of the Companies Act, R.S.O. 1914, ch. 178.

ONT.

S. C.

COVENEY v. GLENDENNING.

Middleton, J.

T. H. Peine, for the plaintiff.

D. Inglis Grant, for the defendants Glendenning and Mackie, and for Clarkson, added as a defendant at the trial.

Judgment for default was signed against the other defendants.

MIDDLETON, J.:—The action was brought by a storekeeper carrying on business at St. Anthony Mine, who claims to recover against the defendants, as directors of the Northern Gold Reef Limited, the sum of $2,088.49 alleged to be due for debts for wages to labourers, servants and apprentices, for services performed for the company—the plaintiff being the assignee of the debts or claims.

The facts of the case are simple and undisputed: the whole question is, whether the plaintiff's claim, in whole or in part, can be brought within the statutory provision imposing liability upon the directors.

The mine was originally the property of the Sturgeon Lake Development Company, and the plaintiff's original transactions were with that company. The new company was incorporated and organised in January, 1913, and the course of business continued with the new company in precisely the same way that it had been carried on with the old company.

By an arrangement made on the 1st April, 1912, between the plaintiff and the Sturgeon Lake Development Company, the plaintiff agreed to move his store, then some distance from the mines, to the mines, and he was given the exclusive right to operate a store and pool-room there, in a building owned by the company, for a nominal rent. The company also agreed to supply him with electric light at a nominal charge. It was agreed—although the agreement was not reduced to writing—that the store should be run for the accommodation of the men working at the mines, and that the goods sold to the men should be charged up against their wages, and the amount so charged up should be paid to the plaintiff—payment being in this way secured to the plaintiff for all the goods sold. In order to carry this into effect, the purchasers were required to initial the vouchers, and the vouchers were then sent to the company;

when the pay-cheques were drawn, a separate cheque was made out for the amount of each workman's store-bill, payable to the workman; the men then endorsed these cheques, and they were retained by the company. An adjustment was made monthly between the plaintiff and the company; he was given credit for the amount of these cheques so held and for any goods he had sold to the company; he was charged with the amount due for rent and for electric light and for anything else which he owed the company; and was then given a cheque for his net balance.

The bulk of the plaintiff's claim is based on cheques for balances due him, ascertained in this way. The remainder of his claim is based on wages-cheques given to the servants of the company and cashed by the plaintiff; and as to these the claim is admitted.

The plaintiff has sued the company, judgment has been recovered, and execution has been returned *nulla bona*. The suit against the company, outside the admitted claim, was not upon the cheques which the plaintiff holds; the claim (no doubt to aid his present contention) was made up of the balances due for wages, represented by the original cheques in favour of the men, which had never been in fact handed over to the plaintiff.

One object of dealing with the cheques in the way indicated was to avoid bank commission on the cheques, which had to be sent to Toronto to be cashed. Manifestly this was not the only object, for on each occasion there had to be an adjustment to ascertain the true amount due to the plaintiff.

Two cases have been determined upon this statute, in one of which the plaintiff succeeded, and in the other the plaintiff failed; and the question is, which governs the case in hand?

In *Lee* v. *Friedman* (1909), 20 O.L.R. 49, the facts were very similar to the facts here, but I think they are different in the essential point. There the plaintiff did not discharge the liability of the men for the goods bought until the money had been actually paid over by the company; and, the company not having paid either the plaintiff or the wage-earners, the plaintiff, as assignee of the wage-earners, was held entitled to recover the amount of his claim.

In *Olson* v. *Machin* (1912), 8 D.L.R. 188, 4 O.W.N. 287,

ONT.

S. C.

COVENEY v. GLENDENNING.

Middleton, J.

the agreement with the men was, that the amount of their board should be deducted from their wages, this board being paid to the plaintiff. It was held that the plaintiff failed in his action against the directors, for the amount due was never due as wages, and never due to the workmen, but was due to the plaintiff under his contract with the company; and, therefore, the plaintiff could not claim under any equitable assignment of wages; and further, that, even if the money could have been at any time regarded as wages, the claim changed its character when the plaintiff accepted a note from the company for the balance due to him. His claim then became and was a claim upon this note, and not a claim for wages.

Neither of these cases is identical with that in hand; but I think the money became payable to the plaintiff by virtue of his direct contract with the company when the adjustment took place and he accepted the cheque. There was then a novation, and under this new contract the plaintiff became a creditor of the company in respect of the cheques given to him, and the demands ceased to be demands for wages within the meaning of the statute.

This reduces the plaintiff's claim to the amount of the men's cheques held by him, which is $376.21 plus some small sum for interest, which the parties can, no doubt, adjust.

The question of costs is not easy, because the plaintiff has failed on most of his claim, and the amount recovered is well within the County Court jurisdiction. I think the fairest solution is to allow him $75 costs as against the defendants Glendenning and Mackie, and to declare his right to rank against the estate in the assignee's hands for these sums. There will be no costs as far as Mr. Clarkson is concerned.

Judgment accordingly.

CHAMPION v. WORLD BUILDING.

CAN.
S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff and Anglin, JJ.

1. COURTS (§ IV D—270)—CANADA SUPREME COURT—JURISDICTION—PROVINCIAL APPEALS.

In order that there should be jurisdiction in the Supreme Court of Canada under sec. 37, sub-sec. (*b*), of the Supreme Court Act, in an appeal from the provincial Court of Appeal where the case did not originate in a superior court, it is not sufficient that in respect to some part of the action, some claim made in it or some relief which may be accorded, there is concurrent jurisdiction in both the superior and inferior courts; the jurisdiction to enable such appeal must be concurrent over the action as a whole.

2. APPEAL (§ II A—35)—CANADA SUPREME COURT—APPEALS TO—ACTION ON MECHANIC'S LIEN.

Under the Mechanics' Lien Act (B.C.) an action to enforce a mechanic's lien may be maintained only in a County Court; consequently there can be no appeal to the Supreme Court of Canada from the decision of the Court of Appeal, B.C., on appeal from such County Court.

[*Champion* v. *World Building Co.*, 18 D.L.R. 555, appeal therefrom quashed.]

Statement

APPEAL from a decision of the Court of Appeal for British Columbia (18 D.L.R. 555), dismissing an appeal and cross-appeal from the judgment of Grant, Co. J., in the County Court.

MacNeill, Bird, Macdonald & Darling, for appellants.

Bourne & Macdonald, for respondent, the World Building Co.

Bodwell, Lawson & Lane, for other respondents.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK:—This is an application to dismiss for want of jurisdiction. The action was brought in the County Court to enforce a mechanics' lien under the Act R.S.B.C. (1911), ch. 154. To that claim was joined a demand for a personal condemnation in a sum exceeding the ordinary jurisdiction of the Court. It is admitted that in such an action the jurisdiction of the County Court is exclusive. The Act also provides, sec. 34, that in so far as the parties before the Court are debtor and creditor the Court may give judgment for "the sum actually found to be due notwithstanding such sum may exceed the ordinary jurisdiction of the County Court."

The question is not free from difficulty, but on the whole I am of the opinion that the claim to enforce the mechanic's lien in such an action as this is the foundation of the jurisdiction of the County Court, and it is by reason and as a consequence of the existence of that lien that the County Court has jurisdiction to

CAN.

S. C.

CHAMPION v. WORLD BUILDING.

Sir Charles Fitzpatrick, C.J.

deal with the personal obligation of the defendant. The jurisdiction of the Supreme Court on the other hand is dependent merely upon the amount of the indebtedness or liability and in that respect is exclusive. So that in so far as the action seeks the enforcement of the mechanic's lien the jurisdiction of the County Court *is* exclusive, and in so far as it is a personal claim the jurisdiction of the Supreme Court *would be* exclusive were it not for the statute which confers upon the County Court a special jurisdiction in this particular case.

I read the statute as conferring jurisdiction upon the County Court to give judgment upon the personal claim merely in so far as it is incidental to the enforcement of the mechanics' lien. In that view I come to the conclusion with much hesitation because of the dissent of Duff, J., that the jurisdiction is not concurrent and that the application must be granted with costs.

Davies, J. Idington, J. Anglin, J.

DAVIES, IDINGTON, and ANGLIN, JJ., for reasons stated in writing were also of the opinion that the motion to quash should be granted with costs.

Duff, J. (dissenting)

DUFF, J., dissented.

Application granted.

N. B.

S. C.

FLOYD v. HANSON.

New Brunswick Supreme Court, White, J. May 25, 1915.

1. VENDOR AND PURCHASER (§ I E—27)—RESCISSION OF CONTRACT—MISREPRESENTATION—MATERIALITY.

A misrepresentation on the part of the vendor's agent, although innocently made, that the property for sale included a three foot strip of land available as an alleyway, whereas in fact this strip belonged to the adjoining owner, is a ground for rescission of the agreement to purchase when it was a material consideration inducing the purchaser to enter into the contract that she would obtain such alleyway.

Statement

ACTION for specific performance of a contract for the sale of land.

Henry Morton Floyd, for plaintiff.

P. Knight Hanson, for defendant.

White, J.

WHITE, J.:—This action is brought to obtain the specific performance of contract for the sale of a lot of land situate on the north-east corner formed by the intersection of Queen and Carmarthen Streets in the City of Saint John.

The contract sought to be enforced bears date May 16, 1914, is under seal, and is therein expressed to be made by the plaintiff as vendor and by the defendant as purchaser. It sets forth

that the vendor agrees to sell and the purchaser agrees to buy—all that certain freehold property situate on the north-east corner of Queen and Carmarthen Streets and having a frontage on Queen Street of approximately seventy-three (73) feet, extending at right angles along Carmarthen Street for a distance of about sixty (60) feet, together with all buildings and improvements thereon, for the price or sum of seven thousand three hundred seventy-five dollars to be paid in the manner following, that is to say: Three hundred and fifty dollars (350) before the delivery of this agreement. Two thousand five hundred twenty-five dollars in cash on delivery of the deed of said property as hereinafter provided; four thousand five hundred dollars by taking the said property subject to the following mortgages which are now liens thereon: Mortgage for thirty-five hundred dollars ($3,500), due five years from September twenty-eighth, 1912, interest at seven per cent.; mortgage for one thousand dollars ($1,000), due four years, dated March fifteenth, 1913, interest at seven per cent., payment of which the purchaser shall assume when the deed is delivered.

The contract further contains *inter alia* the following provisions:—

(b) The deed shall be prepared by the vendor and at his expense in form satisfactory to the purchaser or her solicitor and shall be duly executed by the vendor and acknowledged so as to convey to the purchaser the fee simple of said premises free of all incumbrances except as herein stated, said deed shall be delivered by the vendor to the purchaser upon receipt of said payments at the office of Allison & Thomas at ..... o'clock on ....., 191..

(e) Within twenty days from the date hereof the purchaser or her solicitor shall furnish in writing any objections she may have to the title of said property and the vendor shall then have a further period of ten days to remove same and if the vendor is unable or unwilling to remove any valid objection to the title within said time the purchaser may at her option accept the title and specifically enforce this contract or not in which last mentioned case the vendor shall repay to the purchaser all moneys paid hereunder and all parties shall be relieved from all liability hereunder.

(f) For the purposes of this agreement a title by possession shall not be deemed a satisfactory title unless the purchaser so elects.

The defendant by her pleadings sets up a number of defences, and upon the trial of the cause by amendment added as an additional defence that the defendant was induced to enter into the contract by a material misrepresentation of the vendor that the lot in question has a frontage on Queen Street of seventy-three feet, whereas the plaintiff owns and is entitled to

N. B.

S. C.

FLOYD v. HANSON.

White, J.

convey at most only a lot with a frontage of seventy feet on said Queen Street.

From the evidence it appears that the plaintiff in the spring of 1914 listed the property in question for sale with Allison & Thomas, a firm of real estate brokers in Saint John. A card setting forth particulars as to the location, size and character of the property to be sold was prepared, and upon this was endorsed the following agreement, which was signed by the plaintiff:—

In consideration of the listing for sale of my property described hereon, I hereby grant unto Allison & Thomas the exclusive right to offer, sell and contract for the usual conveyances of said property on the terms and conditions stated hereon, or that may hereafter be assented to by me. I further agree to contribute my efforts to induce such sale and if a sale of it or any portion thereof is contracted or subsequently made through information obtained in any way through said agencies I agree to pay Allison & Thomas a commission of 5%. I, however, reserve the right to withdraw said property by giving 10 days' notice in writing to Allison & Thomas.

(Sgd.) H. M. FLOYD.

On the reverse side of the card among other particulars as to the lot the size thereof is given in these words: "Size lot 73 Queen St. 60." Subsequently a second card was signed by the plaintiff in which the price at which Allison & Thomas were authorized to sell was reduced from $7,150 net to $7,100. No other change was by this second card, made in the description and particulars contained in the card first mentioned.

The defendant during her negotiations with Allison & Thomas for the purchase of the land in question, and prior to signing the agreement for purchase was given by them for her information a document partly printed and partly in writing (that is to say a printed form with blanks filled in by handwriting) setting forth particulars of the property. In this last mentioned document the size of the lot is specified in these words: "Size of lot 73 Queen X 60." It appears that upon the land in question there is a building having a frontage extending along the north side of Queen Street eastwardly sixty-nine feet six inches from the corner at the intersection of Queen by Carmarthen Street. Between the eastern end of this building and the building on the next adjoining lot to the east is an open strip of ground about three feet three inches wide, running back the whole width of

the plaintiff's building. The defendant testifies that when she signed the agreement to purchase she understood and believed that this strip formed part of the land she was purchasing, and that had she known it did not form part of the land she would not have signed the agreement. She says that the representation made to her by Allison & Thomas on the part of the plaintiff, and her consequent belief that this strip of land was an alleyway forming part of the lot, was one of the inducements which led her to purchase; and that she considered this strip of land to be important because its possession would enable her to light two small tenements which she contemplated constructing in the eastern end of the building; moreover, it would enable the owner of the lot to erect staging there to enable repairs to be made when necessary on that end of the building. It would also afford access to the rear of the vacant part of that portion of the land lying north of the building and fronting on Carmarthen Street.

It is not claimed by the plaintiff that his land extends along Queen Street beyond seventy feet. The registered deed from C. Ernest Wilson to the plaintiff, dated May 23, 1912, under which the plaintiff acquired title to the land in question, describes the land thereby conveyed as—

> Beginning at the south-east corner of Queen and Carmarthen Streets, thence eastwardly along the northern line of Queen Street seventy feet more or less to the western line of property owned by the estate of U. S. Normansell, deceased.

The deeds which the plaintiff tendered to the defendant as being in fulfilment of his contract follow this description.

Although the evidence of the plaintiff was in some degree at variance with that of Mr. Allison (of Allison & Thomas), as to the conversation which passed between them, prior to his signing the contract, there is no such conflict in the testimony of these two witnesses as would lead me to find otherwise than that the defendant was mislead by the information she received from Allison & Thomas as to the length of frontage which the lot had on Queen Street. The listing card signed by the plaintiff and filed with Allison & Thomas, as stated; and the document mentioned as handed by that firm to the defendant, giving her particulars as to the property, both state that the

N. B.

S. C.

FLOYD v. HANSON.

White, J.

Queen Street frontage of the lot is seventy-three feet. While I do not find there was any fraud on the part of the plaintiff or his agents, I cannot but find upon the evidence that there was a mis-description, materially affecting the value of the subject matter of the contract, by which the defendant was mislead and induced to enter into the agreement to purchase. Indeed, I think the statement in the contract itself that the lot to be conveyed has a frontage on Queen Street of approximately seventy-three feet is one that is liable to mislead. "Approximately" is defined in the "Century" Dictionary as "nearly approaching accuracy or correctness; nearly precise, perfect, or complete." The description of a frontage of seventy feet as one of seventy-three feet can hardly be deemed approximately correct within that definition.

For these reasons I do not think that specific performance of the contract should be decreed. For the same reasons, I think that the counterclaim put in by the defendant to recover the three hundred and fifty dollars paid on account of the purchase money should be allowed; it being admitted by the pleadings that that sum was paid by the defendant to Allison & Thomas, at, or prior, to, the execution of the contract, as a first instalment on the purchase price.

Having reached these conclusions, it is unnecessary for me to discuss the other defences set up by the defendant, save in so far as is requisite to explain why I make no order allowing the defendant her costs of suit. The defendant in addition to other defences, some of which she failed to establish, pleaded that "the plaintiff's title to the said property agreed to be sold is a title by possession only." In order to meet this defence the plaintiff was forced to procure and put in evidence certified copies of a number of registered deeds and of other instruments. By means of these certified copies and other testimony adduced he established a chain of documentary title back to 1842. The first link in this chain is a quit claim deed dated April 22, 1842, and registered August 4, 1851, from Robert McKelvey to Charles Whitney, conveying, or at least purporting to convey, the land in question. It was proved by the plaintiff that lots No. 968 and No. 969, of which the land in question forms part, were granted

by the Crown in 1784. But there are no links in the chain of documentary title connecting the grantees of the Crown with Robert McKelvey, the grantor in the deed of 1842.

Upon this evidence which I have referred to the defendant founds her contention that the title shewn by the plaintiff is one of possession only, within the clause of the contract which provides, that a title by possession should not be deemed to be a satisfactory title.

I do not agree with that contention. I do not think that a documentary title which is traced back to a recorded deed made over seventy years ago can be deemed to be merely a "title by possession" within the meaning of those words as used in the contract. At common law prior to the English statute, 3 & 4 Wm. IV., ch. 27, as pointed out in Sugden on Vendors, a purchaser had the right to require title commencing at least sixty years previously to the time of his purchase. After the passage of that statute, it was contended in *Cooper* v. *Emery*, 1 Ph. 388, that, inasmuch as this new Statute of Limitations shortened the period requisite to acquire title by possession, the sixty-year period required to establish the vendor's title should be correspondingly shortened. But the Court held that the statute did not introduce any new rule in that respect; that the rule rested upon other grounds as well as upon the Statute of Limitations. Subsequently, by statute 37 and 38 Vict., ch. 78 (the Vendor and Purchaser Act (Eng.)), this sixty-year period was reduced to forty years. That the rule requiring title to be traced back forty years, does not apply where, by the contract of sale, the vendor is not bound to shew any title beyond that of adverse possession, appears, I think, from *Games* v. *Bonner*, 54 L.J. Ch. 517. I quote from the headnote of that case, which I think correctly epitomizes the judgment of the Court of Appeal:—

> A vendor at the date of the contract relied on a title under a deed, which was subsequently shewn to be no title at all. After the date of the contract a twelve years' possessory title under the Statute of Limitations accrued—the Court holding such title sufficiently made out or admitted by the purchaser forced it upon the purchaser.

It is against being required to accept such a title by mere adverse possession that I think the clause in the agreement, providing that a title by possession shall not be deemed satisfactory,

N. B.

S. C.

FLOYD v. HANSON.

White, J.

is directed. But even if I am wrong in my interpretation of the contract upon this point, it would not affect the fact that, in my judgment, the defendant, if she intended to rely upon the misrepresentation set up by her as a defence at the trial, should have given the plaintiff notice of that fact as soon as she became aware of the misrepresentation. Had she done so, it is not only possible, but, assuming the plaintiff to be well advised, I think it very probable that he would not have brought this case to trial. She could not plead this defence in her statement of defence because she says that she did not discover that she had been mislead until after the suit was brought. But when she did make that discovery she should not have waited till the trial before informing the plaintiff that she refused to complete the purchase on that ground. The only reason she gave the plaintiff, prior to the trial, for so refusing, was that the plaintiff's title was only possessory.

It is only upon the defence raised by the defendant for the first time at the trial, that she has succeeded; and I therefore think there should be no costs of suit to either party.

Having stated that the plaintiff traced a documentary title back to 1842 I ought, perhaps, to add this further observation. It appears that the title to an undivided portion of the property in question became vested in Sally F. Whitney. The plaintiff sought to shew that this title passed to one of his predecessors in title by the last will of Sally F. Whitney. To prove such last will Mr. McInerney, the Registrar of Probates, was called, and produced the will of Sally F. Whitney, with the record of probate of the same and copies of the will and probate were put in evidence and are exhibits in the case. Objection was made that the will having been proved in common form only, could not in this action, which involves the title to land, be established by the proof given. But Mr. Raymond admitted that if the plaintiff had gone a step further, and put on record in the office of the Registrar of Deeds a certified copy as provided by the Evidence Act, sec. 65, then certified copy of that registry would be admissible here. So much being conceded, it follows, of course, that if time were given to the plaintiff to register a certified copy of the will under that section, he could have proved what he sought to establish by a certified copy of such registry.

Under the authorities I think I would, if necessary, have power to direct a reference as to the plaintiff's title, thus affording the plaintiff opportunity to make good the defect, if such it be, in his evidence of title from Sally F. Whitney.

Under these circumstances I accepted the proof of the will made, as sufficient for the purposes of this suit, where the question is whether or not the plaintiff could shew a sufficient title to entitle him to the decree asked for.

I therefore adjudge and order that specific performance by the defendant of the contract for sale ought not to be, and will not be, granted to the plaintiff; and I further adjudge and order that the plaintiff do forthwith upon the settlement and entry of the claim herein repay to the defendant or to her solicitor the sum of three hundred and fifty dollars paid by the defendant as a first instalment on the purchase price of said lot. There will be no costs to either party.

Judgment accordingly.

THE KING v. TAYLOR.

Exchequer Court of Canada, Audette, J.

1. EMINENT DOMAIN (§ III C—150)—EXPROPRIATION — COMPENSATION — RIGHT OF DEVISEE.

No right to compensation in expropriation proceedings exists in respect of the privilege conferred on other members of the testator's family under a devise of a farm to a son expressed in the following terms: "for his own use subject to the right of the rest of my family to use the same for the summer as heretofore as I know he will allow them to do;" the privilege referred to is to be construed as existing only so long as the devisee remained in occupation and was the owner and could not be claimed to the detriment of the fee.

[*Dougherty* v. *Carson*, 7 Gr. 31, followed.]

Statement

INFORMATION exhibited by the Attorney-General of Canada for the expropriation of certain lands for the purposes of a rifle range.

A. H. Armstrong, for the plaintiff.

A. E. Fripp, K.C., for defendant, G. D. Taylor.

J. E. O'Mara, for the other defendants.

Audette, J.

AUDETTE, J.:—There is nothing in the evidence to shew that when the defendant, George D. Taylor, gave the option in question he was unduly influenced, or that he was unable to act

CAN.
EX. C.
THE KING
v.
TAYLOR.
Audette, J.

satisfactorily for himself—and that furthermore in getting $8,000, the amount of the option, he is not paid the full value of his property.

The option is the best intimation of what he thought his property was worth at the time, and the Court cannot overlook that aspect of the case under the circumstances. Much more so, indeed, when even part of the claimant's evidence bears that out.

The defendant was perfectly satisfied with the $8,000 until about one year after when he heard a higher rate per acre had been paid others, but he is overlooking the fact that such higher rate was paid for much better land than his.

Mr. Rudcliffe testified it would cost $2,500 to renew the buildings on the property. That is not the test. It is what were those buildings worth at the date of the expropriation, taking the wear and tear and depreciation into consideration.

The evidence on behalf of the Crown establishes clearly that Richardson acted in a perfectly irreproachable manner in his relations with Taylor when obtaining the option in question. His dealings appear to have been straight and above board—no fault to find with him. His valuation is also quite rational.

In the amount of the option Taylor received a very liberal compensation. The prospective capabilities and potentiality of the breach to be turned into building lots for summer residences are too remote to affect the actual market value—such prospective value is not within a reasonable near future.

The defendants, outside of George D. Taylor, claim, under the codicil to a will, from the common *auteur* to them all.

Dealing with the claim of the other defendants as arising under the codicil, I find, following the decision in the case of *Dougherty* v. *Carson*, 7 Gr. 31, their claim cannot be charged to the detriment of the fee. The defendant George Taylor does not here try and get rid of his property to free himself from the obligation towards his brothers and sisters. He is forced to sell and that power to alienate is not denied him under the will. The obligation to receive his brothers and sisters existed so long as George remained in occupation and was the owner, but no longer.

Indeed this comparatively light burden of allowing his brothers and sisters to come during the summer upon the farm would press much more heavily upon George if a certain sum is to be set aside as a monied value of the right of occupation, and it is highly improbable that the testator intended to impose upon George the greater burden which is one that would probably consume a material part of the value of the lands.

There will be judgment as follows:—

1. The lands mentioned and described in the information are declared vested in the Crown from the date of the expropriation.

2. The compensation for such land is fixed at the amount of the option given by George D. Taylor, namely the sum of $8,000 which the said Taylor is entitled to be paid upon giving to the Crown a good and satisfactory title.

3. The said George D. Taylor is the only defendant entitled to any portion of the said compensation money—none of the other defendants having any right to the said money, their claim being hereby dismissed without costs to either of the parties.

The Crown will have costs on the issue of compensation as against defendant George D. Taylor, and the said costs are hereby fixed at the sum of $150.

Judgment accordingly.

KENDLER v. BERNSTOCK.

ONT.
S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee, and Hodgins, JJ.A. March 15, 1915.

1. MECHANIC'S LIEN (§ VIII—69) — ENFORCEMENT OF — PERSONAL JUDGMENT.

If under the Mechanics and Wage Earners Lien Act, R.S.O. 1914, ch. 140, a contractor fails to enforce his lien against the owner because of his failure to commence the action within the statutory period, the contractor may be awarded in the same hearing a personal judgment against the owner to the extent of the amount of the lien claimed.

Statement

APPEAL by the defendant from the judgment of an Official Referee.

H. H. Shaver, for appellant.

A. Cohen, for plaintiff.

GARROW, J.A.

GARROW, J.A.:—Appeal by the defendant from the judgment of an Official Referee in a proceeding brought by

ONT.
S. C.
KENDLER
v.
BERNSTOCK.
Garrow, J.A.

the plaintiff to enforce an alleged lien under the provisions of the Mechanics and Wage Earners Lien Act, R.S.O. 1914, ch. 140.

Upon the hearing, the plaintiff failed to establish a subsisting lien, to which extent his claim was disallowed; but, notwithstanding such failure, he was given judgment against the defendant personally for the sum found to be due by the defendant to the plaintiff for the work and material in respect of which the lien was claimed. And the sole question on this appeal is as to the jurisdiction of the learned Referee to award such judgment.

That such jurisdiction exists seems to be clear.

Section 48 of the Act provides that all judgments in favour of lien-holders shall adjudge that the party personally liable shall pay the deficiency, if any, upon a sale.

Section 49 provides that where a claimant fails to establish a valid lien he may nevertheless recover a personal judgment for such sum as may appear to be due to him and which he might have recovered in an action against the party.

There is absolutely nothing in the case that I can see to take it out of the very explicit language of sec. 49; and the appeal should, accordingly, in my opinion, be dismissed with costs.

Hodgins, J.A.

HODGINS, J.A.:—The only objection on which judgment was reserved was that, the action having been begun after the lien had expired, there was nothing on which to found jurisdiction to pronounce a personal judgment. The mechanic's lien was registered on the 17th July, 1914, and in it the date of the last supply of material was given as the 18th June, 1914. Action to enforce the lien, under sec. 24 of the Mechanics and Wage Earners Lien Act, R.S.O. 1914, ch. 140, should therefore have been begun before the 16th September, 1914. It was not commenced, however, until the 8th October, 1914.

Section 49 provides that where a claimant fails to establish a valid lien he may nevertheless recover a personal judgment against any party to the action for such sum as may appear due to him and which he might recover in an action against such party.

The Official Referee before whom the action was tried held that there was no valid lien—an issue expressly raised in the

pleadings—and gave judgment for the amount found by him to be due by the appellant to the respondent.

The Act gives a lien upon the lands of an owner, limited except in certain cases to the amount justly due by the owner to the contractor, which was the relationship of the parties to this action. The lien in this case was registered apparently within the time limited by sec. 22. Under sec. 31, actions to realise all liens must be brought in the Supreme Court of Ontario, and the procedure and mode of trial is therein prescribed. Power is vested in certain officers to exercise the jurisdiction of the Supreme Court in trying and disposing of these actions: *Smeeton* v. *Collier* (1847), 1 Ex. 457, 462.

There are generally but two issues to be determined: the first, whether a valid lien or more than one exists; and the second, the amount due in respect thereof.

The Supreme Court being seised of an action commenced in it, according to the practice prescribed by the Act, to realise the lien or liens, it becomes a judicial question whether or not a lien or more than one exists, or whether, by reason either of non-compliance with any of the statutory provisions (see secs. 17, 18, 19, 22, 24, 25) or otherwise, the lien or liens has or have ceased to exist. Evidence upon these points must be given at the trial, and the judgment becomes a judgment of the Court (sec. 37, sub-sec. 3), and it is appealable under sec. 40. It is not always a simple matter to decide whether a lien has been registered in time or whether a mechanic's lien proceeding has been begun within the proper time-limit: *Re Moorehouse and Leak* (1887), 13 O.R. 290.

If any one affected by the registration of a lien desires to take advantage of the cesser thereof by reason of the provisions of sec. 23, 24, or 25, he may apply *ex parte* under sec. 27, sub-sec. 5, to vacate the registration of the certificate of *lis pendens;* and, if he is successful, the lien itself may be discharged. In such a case there is no trial, and no judgment can be pronounced. But, where the question is left to be tried, the provisions of sec. 49 apply, and a judgment for the amount properly due may be had, although no lien is established.

The appeal fails, and must be dismissed with costs.

ONT.
S. C.
KENDLER
v.
BERNSTOCK.

MEREDITH, C.J.O., and MACLAREN and MAGEE, JJ.A., concurred.

Appeal dismissed with costs.

ONT.
S. C.

SOPER v. CITY OF WINDSOR.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Sutherland and Riddell, JJ.

1. TAXES (§ III F—145)—SALE FOR—PERSON ASSESSED MAY BUY—TAX DEED—NEW COMMENCEMENT OF TITLE—ASSESSMENT ACT (ONT.).

The person assessed may himself buy in the property at a tax sale under the Assessment Act, R.S.O. 1914 ch. 195, to perfect his prior defective title, and his tax deed will create a new commencement of title free from prior adverse possession.

[*Stewart* v. *Taggart*, 22 U.C.C.P. 284, and *Tomlinson* v. *Hill*, 5 Gr. (Ont.) 231, applied.]

Statement

ACTION for damages and an injunction.

J. H. Rodd and *F. D. Davis*, for the appellants.

D. L. McCarthy, K.C., for the plaintiffs, respondents.

Clute, J.

CLUTE, J.:—The plaintiffs claim the land in question by possession for a period exceeding twelve years prior to the 23rd April, 1914, and state that during the whole of said period the lands have been enclosed with other lands belonging to the plaintiffs, by a fence erected by the plaintiffs; that on the 23rd April, 1914, the defendants broke down the plaintiffs' fence and otherwise committed trespass; and the plaintiffs claim damages and an injunction.

The defence states that on the 25th May, 1910, the defendants purchased from one Pulling the lands in question; that Pulling purchased the said lands on the 15th January, 1902, and remained in continuous possession down to the time of the defendants' purchase; and further claims that any acts of ownership over the lands by the plaintiffs were by the leave and license of the said Pulling and the defendants, and denies that the plaintiffs have acquired any title or interest by their alleged occupation of the lands.

It appears from the evidence that Pulling bought the lands at a tax sale on the 21st December, 1900, and received a statutory deed, dated the 15th January, 1902. Pulling had previously owned the land, but, owing to some defect in the registered title

by reason of a mortgage not being discharged, which had in fact been paid off, and the difficulty of obtaining such discharge, he allowed the lands to run in arrear for the taxes, with a view of clearing the title. It is claimed that the effect of this act upon his part, in buying in his own lands, was, that the tax deed was not effective to give a new start to his title as against possession. The plaintiffs claim that they have been in possession a sufficient length of time since the tax deed to give them title.

It has long been held in our own Courts that there is no objection to the prior owner of the land buying it at a tax sale: *Stewart* v. *Taggart*, 22 U.C.C.P. 284. This view of the law has been followed in numberless cases and ought not now to be disturbed. Pulling, I think, had a right to purchase as he did.

The land itself is charged with the taxes, for which there is a special lien on such land, which has preference over all other claims except of the Crown: the Assessment Act, R.S.O. 1897, ch. 224, sec. 149 (now R.S.O. 1914, ch. 195, sec. 94). As was said by the Chancellor in *Tomlinson* v. *Hill*, 5 Gr. 231: "It follows that a conveyance . . . in pursuance of a sale for arrears of taxes operates as an extinguishment of every claim upon the land and confers a perfect title." In my opinion, any possession by the plaintiffs prior to the tax title deed cannot run in their favour; the deed creates a new commencement of title, freed from any such possession.

It remains, therefore, to consider whether the plaintiffs shew sufficient possession subsequent to the title deed.

As to this the son of the plaintiffs, after stating that the property had been fenced, gave evidence as follows:—

"Q. Has the fencing ever been removed on the side where the house is? A. Not until about two years ago, when the city bought the property adjoining ours on the west for factory purposes. When they moved the buildings out, they tore the fence down.

"Q. Has that fence been replaced? A. No.

"Q. Are the posts there? A. They took the posts."

And he states that since that time he pastured the property and kept the weeds out, that is, two years ago. The trial took place on the 29th May, 1914.

ONT.
S. C.
SOPER
v.
CITY OF
WINDSOR.
Clute, J.

On cross-examination he says:—

"Q. Can you tell me about what time in the year the fence was removed? A. I cannot, I was not here.

"Q. When you came back the fence was gone? A. Yes.

"Q. When had you been home before that? A. About—I think it was three summers ago this summer, I went to Indianapolis.

"Q. How long have you been home? A. I came back a year ago this last spring.

"Q. You came back in 1912? A. Yes."

When he went there, the fence was up; he went in October, 1910.

"Q. So you went in October, 1910? A. Yes.

"Q. And the fence was gone when you came back? A. Yes.

"Q. That is about all you know of the removal of the fence? A. Yes."

This witness fixes the time when the fence was removed in this way: he says: "I went in October; I was away more than a year; I came back a year from the following February;" that is, he returned in February, 1912, and the fence was gone when he came back.

Pulling states in his evidence that after the tax deed of 1902 the property remained idle for a number of years until he made an agreement for sale to one Azaline Brown; this was about six or eight years ago. She made two small payments on the property, and then relinquished her claim. She held it for two or three years. He states that he never heard of any intimation of Soper claiming the property; that he had no knowledge that he made such claim; but, on the contrary, Soper tried to purchase it from Pulling on several occasions within the last ten years.

George Cheyne, tax collector since 1886 for the city of Windsor, states that the property has been assessed to Pulling. He traced it back to 1904, and the taxes were paid by Pulling up to the time he sold and by the Corporation of the City of Windsor since.

Azaline Brown states that she lived near this property for 30 years; that she purchased it from Mr. Pulling about 1906 for $300; that it was arranged that Pulling would send a man and

mark the stakes with "B," which she found there. She paid $15 at least, she says. She put up a sign upon the property, "No Trespassing," after she purchased it. She put up this sign four times altogether. As to fencing, she says that there were a number of posts and wire here and there. In some cases it was cut at the top, and in other cases both wires, and in other cases the bottom wire: "So I would not call it a fence, that is why I put up the sign."

"Q. How many strands of wire? A. Two."

She further states that she pastured on the lot a couple of cows for two seasons, tethered with a chain and stake. This was a little while after she made the deal, in 1910 or 1911.

If the witness is correct in her date of sale and her length of possession under the purchase, then the time of pasturing the cows would be after she had given it up. She says that she pastured them from November, 1910, until it was time to put them in, and in the spring of 1911 she again put them out to pasture. She did not keep them on the one lot all the time, but that was their home. She remembers a man by the name of Bell being engaged in ploughing on the property; and, having heard that he was ploughing the property that she had bought from Pulling, she went to see him and told him not to interfere with her possession; that she did not want it ploughed. He stated that he had orders to plough it. She said, "Well, you have orders not to plough it," and he stopped ploughing. The agreement which she had was burned. She says that she was never dispossessed by Mr. Pulling; that she moved out of the town and dropped payments. She could not state the exact date, about 1906.

Charles Brown, a son of the last witness, stated that the pasturing was in 1910 and 1911.

Joe Bell, the witness referred to by Mrs. Brown, states that he rented lands belonging to the Sopers on the east and west sides of the street; that:—

"When I got the east side ploughed I come to the west side and started to plough, and it was getting late in the evening, and I run two or three furrows, and in going home in the evening, on the corner of Giles and Goyeau, I met Mrs. Brown, and

ONT.
S. C.
SOPER
v.
CITY OF
WINDSOR.
Clute, J.

she said to me, she says, 'Do you know you were trespassing over there?' I said, 'No, how am I trespassing?' She says, 'On that piece of property there.' I says, 'I don't know anything about that.' She says, 'I know,' and she says, 'I forbid you ploughing.' I said, 'I rented that from Mrs. Soper, and if there is any grievance you will have to settle with Mrs. Soper.' So it went on until the next day, and I went back and saw some signs up along the fence.

"Q. What was on the signs? A. 'No Trespassing.' I goes over to Mrs. Soper, and I tells her about the grievance, and she says to me, 'Well, you go on and plough,' but she says, 'There is a little piece in there that is on the west side of Mersea street,' that she said there was some man down town claimed he owned, and she told me who the man were, but I can't remember, and she says, 'A little further up Mr. McLean claims he owns a couple of lots in there,' and she says, 'He has never bothered anything at all about it,' and she says, 'You had better not plough this,' and she says 'until I see the man.' I says, 'When you go down town, you see the man and see what he wants for that strip.' I wanted to plough clean through; and she went down in a day or two, and when she come back she said he wanted $8.50 for it, and I said, 'No, I won't bother,' so I left a strip from Giles avenue coming this way, . . . a space I suppose 150 or 160 feet. . . .

"Q. Did you plough on both sides of that strip? A. Yes, and left that without being ploughed.

"Q. What piece did Mrs. Brown refer to? A. Mrs. Brown told me, if my memory serves me right, she said, 'I own from the bush through to Giles avenue.' That included the whole strip, because I were going clean through, and when I came back to plough, there was two or three signs up on the fence.

"Q. Did Mrs. Soper say anything about the signs and ask who put them there? A. She said—I don't know—she said, 'May be Mrs. Brown put them there or some one,' she said."

Mrs. Soper was recalled, and said that she knew about Mrs. Brown pasturing her cows: "I knew that she had her cows there, and we were not making any use of the land, and I told her boys they could use it." Asked about going down to see

ONT.

S. C.

SOPER v. CITY OF WINDSOR.

Clute, J.

some man, she said: "I cannot remember that; if Mr. Bell remembers that, he remembers better than me." The further evidence as to possession given by Mrs. Soper is of the most general character.

I think that the evidence wholly fails to shew possession by the plaintiffs for ten years subsequent to the tax deed.

In the view I take, it is unnecessary to consider whether the possession could run against the defendants, who held the land in question in trust under a statute for public use.

The appeal should be allowed, and the plaintiffs' action be dismissed with costs.

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

Mulock, C.J.Ex. Sutherland, J.

RIDDELL, J., agreed in the result.

Riddell, J.

Judgment accordingly.

BURM v. THE KING.

CAN.

Ex. C.

Exchequer Court of Canada, Audette, J.

1. STATUTES (§ II B—119)—CUSTOMS ACT—INFRACTION OF—SMUGGLING—SEIZURE OF GOODS DUTIABLE AND NON-DUTIABLE—RELEASE.

Where jewellery not dutiable is mixed with dutiable jewellery which is being smuggled into Canada and all are seized for infraction of the Customs Act, the seizure is justified as to both dutiable and non-dutiable goods, but as to any of the latter shewn to the satisfaction of the Exchequer Court (Can.) to be the separate property of the wife of the party against whom the seizure was made, the seizure may be released under the power conferred on the court to decide "according to the right of the matter" (Customs Act, sec. 180).

[*R. v. Sixbarrels*, 8 N.B.E. 387; *Dominion Bag Co. v. The Queen*, 4 Can. Exch. 311, referred to.]

REFERENCE by the Minister of Customs, under sec. 179 of the Customs Act (R.S.C. 1906, ch. 48) of a claim for the release of certain goods seized for an alleged infraction of the Customs Act.

Statement

Judgment accordingly.

L. C. Meunier, for the claimant, contended that there was no intention on the part of the claimant to evade the law. He was under the impression that personal belongings such as rings were not dutiable. To shew how far his mind was from the offence of smuggling we must regard the fact that the claimant consulted an officer on board the ship he came by to ascer-

Argument

CAN.

EX. C.

BURM v. THE KING.

Argument

tain his views on the matter. Claimant took his advice. This is clear evidence of an innocent mind. If Burm had wanted to dispose of the jewels he could have done so when he was in Canada before. The Court is required to decide "according to the right of the matter," and the demands of justice would not be regarded if the Court ordered the forfeiture of articles that were not dutiable simply because they were mixed with articles upon which certain duties were payable. As to the jewels belonging to the claimant's wife they clearly must be released. She merely entrusted them for safe-keeping to her husband, and was in no way guilty of the offence of smuggling.

He cited Mignault's Droit Civ. Can., p. 110; Audette's Prac. Exchequer Court, 2nd ed. p. 347; 12 Cyclopedia of Law and Procedure, *verbo* "Customs Duties" p. 1186; 24 American and English Encyclopedia of Law, *verbo* "Revenue Laws," p. 888; R.S.C. 1906, ch. 48, sec. 23.

H. J. Trihey, for the respondent, contended that the evidence shewed a clear intent on the part of the claimant to defraud the revenue by evading the payment of duty. It was established that he attempted to sell the articles in question or some of them, in Montreal, after he had clandestinely introduced them into Canada. The evidence also rebuts the contention put forward by the claimant that the articles had been worn for some time by him; the expert evidence offered on behalf of the Crown is against that being found by the Court. Then there was no proof that claimant was an immigrant when he brought the goods in question into Canada, nor that they were really personal effects. In these circumstances the seizure must be maintained.

Audette, J.

AUDETTE, J.:—This matter comes before this Court on a reference by the Minister of Customs, under section 179 of the Customs Act (R.S.C. 1906, ch. 48), the claimant having declined to accept the Minister's decision maintaining a seizure made, at the port of Montreal, of twenty-six articles of jewellery "for having been offered for sale without report or entry at customs or payment of the duties lawfully payable thereon."

The claimant, who is an ebonist by trade, first came to Canada in June, 1908, and settled in Winnipeg with his family.

During December, 1911, he left Canada for Antwerp, where he wanted to have his wife undergo a surgical operation. While in Belgium he tried to start a furniture factory, but found he had not enough money. He then came back to Canada and arrived in Montreal some time around September, 12, 1912. Being in need of money he offered for sale, at three different places, jewels he brought with him from Belgium. Judging his social standing both from his own walk in life and his associations, as set forth in the evidence, one is somewhat astonished at the quantity of jewellery he possesses. However, that may be explained both from the fact that his father-in-law was, besides being a saloon-keeper, a diamond cutter; and further that in Belgium, where banks are in the hands of private individuals and do not command the same security as in Canada, it is customary to invest one's money in jewels, and sell them whenever one wants to realize. This will be again hereafter referred to.

Bringing this quantity of jewellery across with him, the claimant seemed anxious to avoid the law and smuggle the goods, if possible; and he therefore sought legal advice from, among others, one of the nautical officers on board of the steamer in which he was coming across, and, as may well be expected, the result did prove fatal to him. There are many cases in fiction as well as in real life where the danger of consulting a "sea lawyer" is exemplified—so it was with the claimant, who following that officer's advice with the obvious object to avoid the law, says he distributed his jewels among several members of his family. His conscience further allowed him to swear to the ownership of such goods according to this distribution, as appears by his affidavit of October 12, 1912, and exhibit 6 attached thereto, both forming part of the customs file.

His evidence is also unsatisfactory, unreliable and conflicting. A few instances may be here related. In his affidavit he states he possessed this jewellery on his first arrival in Canada. Then in his evidence before this Court he states he bought some jewellery in Belgium on his return there (p. 20). His wife states some of the jewels were bought in Belgium and in France before their return to Canada, and further that the last time they

CAN.

EX. C.

BURM v. THE KING.

Audette, J.

went to Belgium her husband has (une occasion) the chance of a bargain and bought diamonds (pierres) which he had made up in these horse-shoe pins.

It is unnecessary to review the evidence any longer, it will suffice to give the result. it is, however, well to state at this stage that the claimant is not a British subject, and that he did not get naturalized before he left Winnipeg in December, 1911, where he had been since June, 1908. He was still a Belgian when he came to Canada in 1912. Therefore, in view of that fact and of the further fact that quite a quantity of jewellery was bought by him in Belgium on his return thereto, which latter fact brings him within the principle of the case of *The Queen* v. *Six Barrels of Hams*, hereafter referred to, it is obvious that item 705 of schedule A of 6-7 Edw. VII. cannot apply. Since any of the goods owned by the claimant himself were smuggled by him through the customs, all of them should be declared forfeited.

In the result it appears quite clear that the six diamond pins were bought in Belgium on his last journey and were brought therefrom by him with the settled idea of selling them, and that they were smuggled through the customs. The same may also be said with respect to a very large proportion of the jewellery seized with, however, some exception. The six horse-shoe shaped diamond pins were not bought for his own use—a certain variety would have been resorted to if it had been the case. These, then, were offered for sale to the public. However, it appears to this tribunal that some of the jewellery did belong to his wife, but from the loose and conflicting manner in which the evidence is presented, it is impossible to ascertain with any degree of certainty which of the said jewels belong to her and which do not. There is, however, enough evidence to find that the brooch or pendant, a marquise-ring with baroque pearls, and the ear-rings which go with this set, did belong to his wife, coming to her from her father as a wedding present, and the Court so finds for the purposes of this case.

Great stress has been laid in adducing the evidence to shew that some of the jewels were not new and had been worn. That is not of great importance,—they might very well be new

and be worn temporarily, with still the ultimate object on behalf of the owner of selling them. And it must be borne in mind that they were really merchandise investments, as above explained, and this being so, made them subject to duty.

Being satisfied on the question of fact, can the case of *The Queen* v. *Six Barrels of Hams*, 8 N.B.R. 387, be overlooked? Indeed this case as above mentioned goes as far as deciding that where a seizure of goods is made, and that among such goods there are some which are not subject to duty, the seizure is good for the whole. However, that case may be distinguished from the present one in that here all the jewellery did not belong to the one and the same individual, permitting thereby this Court to actually "decide according to the right of the matter" as provided by section 180 of the Customs Act. These words "decide according to the right of the matter" were commented upon in the case of *The Dominion Bag Co.* v. *The Queen*, 4 Ex. C.R. 311, where it was questioned as to whether or not they were really intended in any way or case to free the Court from following the strict letter of the law and to give it a discretion to depart therefrom if the enforcement, in a particular case, of the letter of the law, would, in the opinion of the Court, work an injustice.

Under the evidence as adduced before the Minister of Customs, no other decision than the one arrived at could have been given, and his finding was most justifiable under the circumstances. However, under the further evidence adduced at the trial read with the evidence before the Minister, and for the reasons above mentioned, this Court has come to the conclusion to somewhat vary that decision.

There will be judgment maintaining the seizure of the goods herein, with the exception of the above mentioned pieces of jewellery belonging to the claimant's wife, viz.:—the brooch or pendant, a marquise-ring with baroque pearls and the earrings which go with the set, of which said last articles of jewellery release, or *mainlevée*, is hereby ordered with directions to deliver the same to the claimant's wife upon her giving a receipt for them.

The Crown will have the costs of the action after taxation thereof.

CAN.

EX. C.

ONTARIO GRAVEL FREIGHTING CO. v. THE "A. L. SMITH" AND "CHINOOK."

Exchequer Court of Canada, Toronto Admiralty District, Hodgins, J.A.

1. COLLISION (§ I A—1)—SHIPPING—TUG AND TOW BOATS—RULES OF ROAD—CONSTRUCTION.

The rules of the road are not applied as strictly in the case of a tug and tow as where a single vessel is concerned.

[*The "Lord Bangor,"* 8 Asp. M.C. 217; *C.P.R.* v. *Bermuda*, 13 Can. Exch. 389, referred to.]

2. ADMIRALTY (§ II—5)—COLLISION ACTION—RESTRAINING—RULE AS TO.

The rule as to restraining a collision action in the domestic forum because of an action relating to the same matter in a foreign Court is one of convenience and fair dealing, but can only be invoked by the defendant where the plaintiff is in some way responsible for or a party to the foreign proceedings; so, if the defendant has given a bond to pay the damages awarded, if any, and has thereupon obtained the release of the ship arrested in Canada, it is not open to the defendant to object to the jurisdiction on the ground of a pending action taken by one of the defendant ships in a United States Court to limit her liability, although the collision occurred in American waters and the defendant ships are both of American register.

[*St. Clair* v. *Whitney*, 38 Can. S.C.R. 303, distinguished.]

Statement

ACTION *in rem* for damages for collision.

Judgment accordingly.

J. H. Rodd, for plaintiff.

A. St. George Ellis, for defendant.

Hodgins, J.A.

HODGINS, J.A.:—The plaintiff's loaded scow "Hustler," while being towed down stream by the tug "Moiles," was struck and sunk by the tug "Smith," heading up stream, towing the scow "Chinook" light. The collision occurred in the St. Clair River just below Russell Island, at a point a little beyond Gd. Pointe Dock in American waters at about 1 a.m. on a bright moonlight night, November 28, 1913.

Both tugs were hugging the American shore, and the "Moiles" had the right of way descending the stream. Ray, the mate of the "Smith," says that he saw the "Moiles" hugging the American shore and admits that the rule of the road is that the vessel coming down should keep or direct its course to starboard in the St. Clair River; that if he had wanted her to take another course he should have given some other signal, and that he did not do so; that the "Moiles" was in her usual course, and at the time of the collision she was as near to the American shore as she could safely go. This last admission accords with the statement of Hunter, the mate of the "Moiles."

Ray accounts for the collision by stating that when he sighted the "Moiles" he saw her starboard-light and thought she was on the range course for large vessels, that his ship was inside that course and so he intended to pass starboard to starboard instead of, as usual, port to port. He says the "Moiles" changed her course during a time when, owing to smoke, he had lost sight of her, and that when it cleared he saw her red light on a course at an angle of forty-five degrees to that of the "Smith," and right across her course. He says that the smoke was caused by his own fireman putting in fire, and that a following wind blowing at 35 miles (or 25 to 30 miles, according to Hunter) had carried the smoke forward, right down on his bow and obstructed his view. The weather reports put the velocity of the wind at 16 to 18 or 20 miles. As to signals, he says he did not give any and did not hear the first signal given by the "Moiles" notifying him that she was directing her course to starboard. This signal was given, according to Hunter, mate of the "Moiles," and others, about half a mile away, and Ray admits seeing her on that course when sighted. Ray says the danger signal was given only five seconds before the collision, but admits this is a guess and it may have been fifteen seconds, in which time both vessels would go two hundred and eighty feet. Hunter deposes that it was given five hundred or six hundred feet away, and three or four minutes before the collision, when he noticed the "Smith" sheer, and that after the earlier single blast he had given way a little towards the American shore, but not much, as he had not much room. The sheer of the "Smith" was denied.

It is clear that the "Smith" was heading so as to pass inside the "Moiles." Ray says he gave no passing signal, because the "Moiles" was so far to starboard; but I cannot accept this statement, as he admits that he knew the "Moiles," which he often met, was close to the American shore, and would have to edge in further towards the American shore, after passing Light Ten, because there is a bay just below that light and that she had always done so, and he had no reason to expect she would not do it that night. He says he gave no danger signal, although the rules require three blasts when the view is obstructed: Canadian Rules, art. 15 (a); American Rules, No. XIII. Allen, master of the "Smith," on cross-examination admits that an upgoing vessel should keep out of the way, and that that should have been

CAN. EX. C.

ONTARIO GRAVEL FREIGHTING CO. v. "A. J. SMITH" AND "CHINOOK."

Hodgins, J.A.

done in this case, and if blinded by smoke he would have given a signal.

The "Moiles," when she realized that a collision was imminent, turned in towards shore and cleared the "Smith." The "Chinook" came up on the starboard of the "Smith," which struck the "Hustler" on the port bow. The "Smith" put her helm to port and went to starboard, and was also hit by the "Chinook" before she struck the "Hustler."

The collision ought to have been avoided if the "Moiles" had had longer warning of the sheer of the "Smith," so Heddrick, captain of the "Moiles," deposes, provided the "Smith" had been in control; but both he and his mate think that the "Smith's" steering was affected by the "Chinook," which had machinery for using crane and anchor in its forward end, and that being light, this affected her own steering, which Hunter says was not good.

The mate of the "Moiles" admits that she did not slow down or stop until his crossing signal was understood and answered; and this is relied on as a breach of the regulations contributing to the collision.

There are two answers to this. There was nothing to indicate that the "Smith" was not observing and would not observe the rule of the road, and the "Moiles" was justified in keeping on: *The Ceto*, 14 A.C. 670, at p. 686; *China Navigation Co.* v. *Asiatic Petroleum Co.*, 101 L.T. 547, 11 Asp. M.C. 310. The other answer made is that the danger from the loaded scow going down stream made this impossible, and that if the "Moiles" had stopped the "Smith" would have struck her, or the "Hustler" fouled her screw with the tow-line, as the down current was one and a half miles and the speed of the "Moiles" 4½ miles. To stop would mean collision or disabling or beaching the tug, as there was no visible channel bank and the "Moiles" was in as far as was safe at night. I accept this explanation as reasonable; the rules not being applied as strictly in the case of a tug and tow as where a single vessel is concerned: *The Lord Bangor*, 8 Asp. M.C. 217; *Canadian Pacific R. Co.* v. *Bermuda*, 13 Ex. C.R. 389.

I also think that the difficulties in the situation proved distinguish this case from that of the *Owen Wallis*, L.R. 4 A. & E. 175. There was plenty of water to allow the "Smith" to have gone to the eastward and avoided all trouble. Under the Canadian

Rules, art. 18, it is provided that when two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other. Rule V. of the American rules is substantially the same. Hunter says when he sighted the "Smith" he saw all her lights and hence his course was properly altered to starboard, although only slightly, owing to the danger he apprehended in getting too close in. He gave the signal required by art. 28 (a) (American Rules 1); and the fact that it was not heard does not put the vessel giving it in the wrong. If not heard, it was the duty of the "Moiles" or "Smith" to have sounded five short blasts (art. 28, American Rules 2). Ray, on the other hand, says he saw the green lights of the "Moiles," and, under art. 19 (American Rule X.), it was his duty to have kept out of her way, and the "Moiles" was right in keeping her course (arts. 21, 25 a and b, American Rules V. or X.). The "Moiles" gave the five short blasts when no answer was given to the first signal, and so conformed to the rules.

On the evidence I find that the fault lay with the "Smith," and that she alone was to blame for the collision.

The defendants argue that as the "Smith" had taken proceedings in the District Court of the United States for the Eastern District of Michigan in Admiralty to limit her liability, that this Court has no jurisdiction to proceed with this action. It is also put in the statement of defence on the ground that the defendant ships are both American ships and that the collision occurred in American waters, hence the proper forum is the United States Court.

It appears by the exemplification put in that those proceedings were begun in the United States Court on December 4, 1912, and that up to October 10, 1913, no judgment had been rendered. The proceedings were advertised in the Detroit newspapers, but no notice was given to the plaintiffs, and their president denies any notice, and says he saw only a "squib" in the papers. This is not to be wondered at, as the order directing publication authorizes service on the owners of the barge "Hunter" through the post office at Detroit, Michigan. The proceedings appear to be directed to limiting liability, and admit of proof being made by all claimants against the ship.

CAN.

EX. C.

ONTARIO GRAVEL FREIGHTING CO. v. "A. L. SMITH" AND "CHINOOK."

Hodgins, J.A.

The "Smith" and "Chinook" were arrested on May 12, 1913, at the dock at Walkerville, in the Province of Ontario, this action having been begun on April 14, 1913, and a bond was given under which they were released on July 11, 1913. The question of jurisdiction, therefore, dealt with in *St. Clair* v. *Whitney*, 10 Ex. C.R. 1, 38 Can. S.C.R. 303, does not arise here. I do not think the objection is open to the defendants. They have chosen to give a bond and to obtain an order releasing the *res* upon submitting to the jurisdiction of the Court, and securing to the plaintiffs payment of whatever amount is adjudged against them in this action.

The bond given is as follows:—

> Know all men by these presents that the United States Fidelity and Guaranty Company hereby submits itself to the jurisdiction of the said Court and consents that if E. Jacques & Sons, owners of the vessels, "A. L. Smith" and "Chinook," seized by the sheriff of the county of Essex in this action, and for whom bail is to be given, shall not pay what may be adjudged against them or said vessels or either of said vessels in the above-named action with costs, execution may issue against us, the said United States Fidelity and Guaranty Company, its goods and chattels, for a sum not exceeding twelve thousand dollars ($12,000).

The ships are therefore free, and the plaintiffs cannot follow them into the American Court and claim against them. They are limited to their bond, with which they are well content.

I have found no case, and none was cited to me, where the person or ship damaged was restrained from proceeding in the domestic forum because the foreign vessel had instituted proceedings in a foreign Court to which the person or ship damaged was not a party.

The rule invoked rests upon convenience and fair dealing, and the plaintiff must be in some way responsible for or a party to the foreign proceedings before it is applied. No claim is made to limit liability under the Merchants Shipping Act.

I give judgment for the plaintiffs, with costs, and with a reference to the Deputy-Registrar of this Court at Windsor to assess the damages.

AUDET v. SARAGUAY ELECTRIC AND WATER CO.

QUE.
C. R.

Quebec Court of Review, Archibald, Martineau and Beaudin, JJ.

1. DAMAGES (§ III K—229)—INJURY TO BUSINESS—BREACH OF CONTRACT—INSTALLING DENTIST'S SIGN—FAILURE TO PROVE SPECIAL DAMAGES—EFFECT.

For every breach of contract which necessarily causes damage, the party breaking his contract can be condemned in nominal damages to be fixed by the Court; this warrants a judgment in favour of a dentist for failure of an electric company to install and light an electric sign advertising his business, although special damage could not be proved.

APPEAL in review from the Superior Court, dismissing the action. Statement

The appeal was allowed.

Loranger & Prud'homme, for the plaintiff.

Foster, Martin, Mann, Mackinnon, Hackett & Mulvena, for the defendant.

The judgment in review was delivered by

ARCHIBALD, J.:—Plaintiff declares that, by a private writing of August 7, 1911, the defendant undertook to furnish the premises occupied by him at 1303 St. Catherine St. E., Montreal, with a system of electric wires necessary for the use of an electric sign with certain dimensions and certain letters, containing 39 Tungsten lamps of four candle-power each, and should furnish and install the said sign, and also should furnish electricity for the lighting of the said sign for a period of 60 months at the rate of $6 per month; that defendant had not complied with that contract and more than six months had elapsed since the signing of the contract; that defendant did install the sign and electrical apparatus, but never connected the current with it, and the sign has never been in a position to light; that, consequently, plaintiff cannot derive any benefit from the said sign, which was his reason for ordering the same; that he has notified defendant to fulfil its obligation of lighting said sign, but defendant refuses, and that, in consequence, plaintiff has suffered, and will suffer considerable damage which he estimates at the sum of $1,500, which damage consists in the loss of his clientele and in the failure to attract other clients; that plaintiff has duly protested defendant, and plaintiff concludes for judgment in the sum of $1,500. Archibald, J.

Defendant denies all the allegations, except the protest, and alleges that the contract which the plaintiff sets up was not passed

QUE.

C. R.

AUDET v. SARAGUAY ELECTRIC AND WATER CO.

Archibald, J.

by the company defendant and was never approved by said company, and that it was only a proposal and had no effect until approved by the company; that the sign which the plaintiff says was erected was not so erected by the defendant, but by some person unknown to the defendant and not under the order of defendant, and that plaintiff was notified by the defendant that the contract in question had not been approved and would not be carried out.

Plaintiff joined issue.

The judgment found that it had been proved that about August 17, 1911, the plaintiff was solicited to enter into a contract (ex. No. 1), and it was signed by plaintiff as well as by defendant; that the contract was brought to defendant and was approved by it and was initialled by the defendant's manager, one Champagne; that it had also been proved that defendant had ordered the sign made by the Holman Electric Sign Co., of Toronto, in accordance with the description contained in the contract, and defendant's order to that company is produced; that subsequently defendant cancelled its contract for that sign as well as for all others, with the Holman Co., and then refused to carry out the contract with plaintiff; that, notwithstanding such cancellation, the Holman Co. had erected the sign in question under their contract with the defendant, and the Court found that the defendant was unaware that the sign had been erected at all and plaintiff was unaware that it was not the defendant who had erected it.

The Court also found that defendant had entered into a contract with the plaintiff which it did not carry out; that although no time had been fixed within which the contract should be carried out, it should have been carried out within a reasonable time, and that such reasonable time had elapsed before action brought; thereupon, the Court held that the kind of damages which the plaintiff was claiming was not the damages to which he was entitled, considering that the proper measure of damage would have been the additional cost to plaintiff to have the contract, which defendant failed to carry out, performed by some other person; that damages caused by loss of future clientele are too remote, speculative and indefinite. The Court then held that plaintiff would be entitled, seeing the breach of contract, to such damages as are an immediate and direct consequence of the

inexecution of the defendant's obligation, but that he had not asked for such damages, and, therefore, the Court could not grant them, and the action was dismissed.

I am of opinion that the judgment of the Court below misinterpreted the plaintiff's action. It is true that plaintiff based his damages upon the loss of his clientele who might be induced to go to his office by the existence of the sign in question. But that was rather a description of the cause of plaintiff's damage than a specification of the details of it. There was undoubtedly a breach of contract on the defendant's part, and for that breach of contract plaintiff did not profess to be able to specify any details of damage.

For every breach of contract which necessarily causes damage, the party breaking his contract can be condemned in nominal damages, to be fixed by the Court, and, in opposition to what the Judge of the Superior Court has found, I am of opinion that plaintiff's action in this case sought that kind of damage.

Plaintiff has not proved any considerable amount of damage. Certainly, if his place were illuminated in the evening by his sign, it would be of a nature to indicate to passers-by that he was there exercising his profession. One cannot tell who might be attracted by the sign and who might not. Some one was likely to be so attracted. Defendant claims that it has established that plaintiff's time was fully occupied, and that he could not have attended to any further business, even if he got it; but I do not think it lies in defendant's mouth to make an argument of that kind.

I am of opinion that the judgment should be set aside and nominal damages awarded, which I would fix at the sum of $150. I would therefore reverse the judgment and maintain plaintiff's action for said sum of $150, and costs of an action of that class, both in the Superior Court and the Court of Review.

METALS LTD. v. TRUSTS & GUARANTEE CO.

ALTA.
S. C.

Alberta Supreme Court, Beck, J.

1. MECHANICS' LIENS (§ VI—51)—EFFECT OF PAYING CONTRACTOR OR SUB-CONTRACTOR.

If it appears that moneys were paid by the owner to the contractor or sub-contractor for the very purpose of being applied in paying wage-earners having a privileged and preferential lien under the Mechanics' Lien Act, Alta., over other lienholders, and the moneys were in fact so applied, the owner is entitled to credit for such payments against the contract price.

ALTA.

S. C.

METALS LTD. v. TRUSTS & GUARANTEE CO.

Statement

2. MECHANICS' LIENS (§ VI—47) — MATERIALMAN — EXTENT OF LIEN — REMEDY OF RESUMING POSSESSION—CEASES WHEN.

The lien created by sec. 5 of the Mechanics' Lien Act, Alta., for the unpaid price of material "until it is put or worked into the building" is a continuation of the seller's lien for the unpaid purchase price notwithstanding delivery until the material is worked into the building; and the remedy of resuming possession must be taken before the materials are worked into the building.

MECHANICS' lien action.

Order accordingly.

Savary, for plaintiffs.

Moffat, for defendant Dick.

Beck, J.

BECK, J.:—This is a mechanic's lien action which I tried some time ago referring certain matters to a referee. I have now to deal with the referee's report. [The learned Judge here referred to the report in detail.]

No point is raised except with regard to the last four items: Items 5, 6, 7 and 8 [total $3,558.71] in respect of which it is said the referee has not reported sufficiently.

And it is claimed by the defendant Dick the owner that this $3,558.71 should be deducted from the $3,563.30 balance claimed as in owner's hands, leaving only $4.59 for which he is liable.

Inasmuch as under the Mechanics' Lien Act the owner is liable for 6 weeks' wages of labourers on the work, no matter by whom employed, even if such wages increase his liability beyond the contract price and such wages rank in priority to the claims of all other lien claimants, and inasmuch as all liens accrue against the owner's interest from the time material is furnished or work is done, I think the owner is entitled to discharge such liens for wages though the result may be to reduce the fund which would otherwise be available for other lien claimants. The giving of notice by a lien claimant puts no obligation on the owner to stop the work. The liens of wage-earners for six weeks' wages are placed in a privileged position; the provisions with regard to posting up receipted payrolls are at least as effective as a written notice to the owner to place upon him an obligation to pay them; and the Act gives such liens priority over all others.

I think further that if it appears that moneys though not

paid directly to the wage-earners were paid by the owner to the contractor or sub-contractor for the very purpose of being applied in paying wage-earners (and thus discharging their liens) and the moneys were in fact so applied, the owner is entitled to credit for such payments against the contract price.

I therefore refer the matter back to the referee to ascertain with regard to items 5, 6, 7 and 8, whether and to what extent these items were paid for the purpose of paying wage-earners in respect of wages not exceeding six weeks' wages and to what extent such payments were actually made.

My opinion is that the amount certified by the referee should be deducted from the sum of $3,558.71 and that the balance is the only sum upon which the lien of the Canadian Equipment Co. attaches. I make no order now to this effect because other questions will have to be determined when the referee's report is completed and it will be best to deal with all undisposed of matters at the same time. Another point remains for decision.

The plaintiffs, the Western Planing Mills, Ltd., filed a lien but gave no notice of it. The referee finds that at the time Dick, the owner, took over the completion of the work there were on the premises not yet worked into the building material supplied by these claimants to the value of $209 and they claim a lien to this amount by virtue of sec. 5 of the Act which says:—

> When any material is brought upon any land to be used in connection with such land for any of the purposes enumerated in the last preceding section hereof, the same shall be subject to a lien for the unpaid price thereof in favour of any person supplying the same until it is put or worked into the building, erection or work as part of the same.

I think these claimants have no lien. The lien created by this section is a seller's lien for unpaid purchase price. Such a lien exists independently of this section, until delivery. The section continues the lien notwithstanding delivery until the material is worked into the building. This special lien ceases on that being done. In order to preserve the lien, clearly, I think the remedy of resuming possession must be adopted and this necessarily must be done before the materials are worked into the building.

Order accordingly.

CAN.

EX. C.

THE KING v. TWEEDIE.

Exchequer Court of Canada, Audette, J.

1. ADVERSE POSSESSION (§ I A—1)—PRESCRIPTION—DISTINCTION BETWEEN.

The distinction in English law between prescription and adverse possession is that prescription relates to an incorporeal hereditament, while adverse possession is in respect of a thing corporeal.

2. PUBLIC LANDS (§ I A—1)—CROWN LANDS—GRANT—CONSTRUCTION OF.

Crown grants are to be construed most favourably for the King where a fair doubt exists as to the real meaning of the instrument.

3. EASEMENTS (§ II B—10)—CREATION OF—BY PRESCRIPTION—AGAINST CROWN.

Before 1903 (C.S.N.B. 1903, ch. 156) there existed no laws in New Brunswick whereby a subject could prescribe an easement as against the Crown.

4. ADVERSE POSSESSION (§ II—64)—AGAINST CROWN—BED OF NAVIGABLE RIVER—EXTENT OF RIGHTS.

No title by adverse possession against the Crown accrues to the *solum* or bed of a navigable river by stretching a boom and booming logs in the waters of the river; the right to use a navigable river in that way is distinct from a right to the bed of the river, and is subject to the public right of navigation.

[*Atty.-Gen. of B.C.* v. *Atty.-Gen. of Canada*, [1914] A.C. 153, 168, 15 D.L.R. 308, referred to.]

Statement

INFORMATION filed by the Attorney-General of Canada for the assessment of compensation due to the owner of certain land taken for the Intercolonial Railway under the Expropriation Act.

J. B. M. Baxter, K.C., for the plaintiff.

M. G. Teed, K.C., for the defendant.

A. A. Davidson, for the plaintiff.

M. & J. Teed, for the defendant.

Audette, J.

AUDETTE, J.:—There are in this case two pieces or parcels of land expropriated which form the subject of contention, and which must be dealt with separately and which will hereafter be respectively called the upland lot and the water-lot . . . The Crown by its original information tendered the sum of $2,150 for the upland so taken and for all damages resulting from the said expropriation.

The defendant claimed that he was the owner and in possession of certain other lands which adjoined to the eastward of the said lands, and which lands were taken and expropriated for the purposes aforesaid, and taken and used for the right-of-way, and was and is the owner and in possession of other lands on either side of the said right-of-way, which were and are injuriously affected by such expropriation . . .

The defendant therefore claimed for all such lands and damages the sum of $25,000 . . .

At the opening of the trial the Crown admitted the title of the defendant to the upland lot, but denied his title to the water-lot.

The upland lot left the hands of the Crown under a grant of May 4, 1798, and is filed herein as ex. "A."

The defendant claims the ownership of this water-lot by virtue of this grant . . .

It must be found that under the plain language of the grant itself the defendant cannot derive any title to the water-lot. Indeed, under this grant lot 37 is given to Thomas Loban, the predecessor in title of the said defendant, but is bounded "by the northerly bank or shore of the Miramichi River." . . .

This Crown grant, ex. "A," clearly conveyed the upland, and the upland alone, the bed of the river remaining in the Crown, in the right of the province, the Crown holding it for the benefit of its subjects, for the purpose of navigation and fishery.

Now remains the question—how, if ever, did the water-lot come out of the hands of the Crown? It must be found it never left the hands of the Crown.

The defendant contends that if it did not come to him by virtue of the grant, that he owns it by possession and prescription as against the Crown. . . .

Let us now approach the question of possession and prescription, under the laws of the Province of New Brunswick. (R.S.C. ch. 140, sec. 33.) . . .

It is somewhat difficult to take actual possession of the *solum*, the bed of the river. It would not be sufficient to use the surface of the water, but it would of necessity involve the actual seizing or possession of the soil of the bed of the river.

The right of stretching a boom and booming logs in the waters of a river is quite distinct from a right to the bed of the river. Standing by itself the former would be a profit *à prendre in alieno solo*, an incorporeal hereditament subject to prescription.

The Miramichi River is a tidal and navigable river opposite the upland in question and where the ownership of the water-lot is claimed. . . .

It would, therefore, appear that the Crown, as trustee for the

CAN.
EX. C.
THE KING
v.
TWEEDIE.
Audette, J.

public, is the guardian of such right held by the public to use navigable and tidal rivers as a public highway. Reference to the Exchequer Court Act, sec. 33, R.S.N.B. 1903, ch. 139, sec. 1. . . .

The defendant having failed to prove, as a question of fact, actual continuous possession for sixty years, it becomes unnecessary to decide whether or not a subject can acquire ownership in a foreshore on tidal and navigable water by such possession, assuming that the word "land" in the statute would be wide enough to embody the meaning of foreshore. On the question of possession the defendant fails. . . .

Coming now to the question of prescription as distinguished from that of possession, it may be said that assuming the defendant could prescribe, as against the Crown, an easement over these waters, giving him the right to so stretch that boom and use it for collecting logs, he would in such a case, fall under ch. 156 of the Consolidated Statutes of N.B., which for the first time enacted such law only in 1903. . . . Therefore, from 1903, there did not elapse such delay as would under that statute acquire the right to so prescribe.

Having found on the question of fact, as disclosed by the evidence, that the defendant cannot succeed in his contentions of ownership or easement with respect to the water-lot, it becomes unnecessary to decide whether or not a subject can acquire by possession or prescription the foreshore on tidal and navigable waters—a moot question upon which decisions are found both ways.

The Crown at the trial, under the provisions of sec. 30 of the Expropriation Act (R.S. 1906, ch. 143), filed an undertaking whereby it granted to the defendant a right-of-way across the line of the Intercolonial Railway at the Russell Wharf, and further undertook to efficiently maintain the same. Under the evidence, the privileges and material advantages derived from such undertaking, coupled with the offer of $2,150 made by the information, constitutes, in the opinion of the Court, a just and liberal compensation for the upland expropriated herein and for all damages resulting therefrom. Reference to *Lyons* v. *The Fishmongers*, L.R. 1 App. Cas. 662.

With respect to the water-lot, the defendant has failed to establish any title to the same either under his grant for the upland or by adverse possession or prescription.

CAN.

EX. C.

THE KING v. TWEEDIE.

. . . There will be judgment in favour of the defendant for the sum of $2,150, together with a declaration that he is entitled to the crossing mentioned in the said undertaking. The whole with costs.

Judgment accordingly.

ATT'Y-GEN'L FOR ALBERTA v. ATT'Y-GEN'L OF CANADA.

IMP.

P. C.

Judicial Committee of the Privy Council, Viscount Haldane, L.C., Lord Moulton, Lord Sumner, Sir Charles Fitzpatrick, and Sir Joshua Williams.

1. CONSTITUTIONAL LAW (§ II A—200)—PROVINCIAL REGULATION—DOMINION RAILWAY COMPANIES—EXTENDING RIGHTS OF OCCUPANCY—ULTRA VIRES.

Sec. 7 of ch. 15, Alberta statutes, 1912, amending the Alberta Railway Act, 1907, by the addition of a sub-section purporting to make sec. 82 of the latter Act apply to Dominion railways so as to make the latter subject to a right of occupancy along with a provincial railway on terms to be approved by the Lieutenant-Governor in Council, is *ultra vires* of the Legislature of Alberta; it would be none the less *ultra vires* if the amendment had not been limited as it was by a clause thereof to cases where the taking of the Dominion railway company's land did not "unreasonably interfere with the construction and operation" of its own railway.

[*C.P.R.* v. *Notre Dame de Bonsecours*, [1899] A.C. 367, and *Madden* v. *Nelson & F.S.R. Co.*, [1899] A.C. 626, applied.]

2. RAILWAYS (§ II B—16)—CROSSING—RIGHTS TO—DOMINION AND PROVINCIAL RAILWAYS.

A provincial railway as distinguished from a Dominion or federal railway which latter is subject to the Railway Act, Can., has a *locus standi* to make application to the Railway Commission (Can.), for permission to cross a Dominion railway.

Statement

APPEAL referred by H.R.H. the Governor in Council for the hearing and consideration of the Supreme Court of Canada pursuant to sec. 60 of the Supreme Court Act.

Sir Robert Finlay, K.C., *S. B. Woods*, K.C. (A.-G. for Alberta), and *Geoffrey Lawrence*, for the appellant.

E. L. Newcombe, K.C. (for A.-G. for Canada), and *Raymond Asquith*, for respondent.

E. Lafleur, K.C., for the C.P.R. Co., intervenants.

The judgment of the Board was delivered by

Lord Moulton

LORD MOULTON:—Prior to the passing of the above Act, sec. 82 of the Alberta Railway Act of 1907 stood in the following form:—

The company may take possession of, use or occupy any lands belonging to any other railway company, use and enjoy the whole or any por-

IMP.
P. C.
ATT'Y GEN. FOR ALBERTA v. ATT'Y GEN. OF CANADA.
Lord Moulton.

tion of the right of way, tracks, terminals, stations, or station grounds of any other railway company, and have and exercise full right and powers to run and operate its trains over and upon any portion or portions of the railway of any other railway company, subject always to the approval of the Lieutenant-Governor in Council first obtained, or to any order or direction which the Lieutenant-Governor in Council may make in regard to the exercise, enjoyment, or restriction of such powers or privileges.

(2) Such approval may be given upon application and notice, and after hearing the Lieutenant-Governor in Council may make such order, give such directions, and impose such conditions or duties upon either party as to the said Lieutenant-Governor in Council may appear just or desirable having due regard for the public, and all proper interests, and all provisions of the law, at any time applicable to the taking of land and their valuation, and the compensation therefore and appeals from awards thereon shall apply to such lands, and in cases under this section where it becomes necessary for the company to obtain the approval of the Board of Railway Commissioners for Canada, it shall do so in addition to otherwise complying with this section.

By sec. 7 of the Amending Act of 1912, the following subsection was added to the sec. 82 above referred to:—

(3) The provisions of this section shall extend and apply to the lands of every railway company or persons having authority to construct or operate a railway otherwise than under the legislative authority of the province of Alberta in so far as the taking of such land does not unreasonably interfere with the construction and operation of the railway or railways constructed and operated or being constructed and operated by virtue of or under such other legislative authority.

The questions referred to the Supreme Court of Canada were as follows:—

(1) Is sec. 7 of ch. 15 of the Acts of the Legislature of Alberta of 1912 intituled an Act to amend the Railway Act *intra vires* of the provincial legislature in its application to railway companies authorized by the Parliament of Canada to construct or operate railways?

(2) If the said section be *ultra vires* of the provincial legislature in its application to such Dominion railway companies, would the section be *intra vires* if amended by striking out the word "unreasonably"?

At the hearing before the Supreme Court of Canada it would seem that by consent of counsel representing the Dominion Government and the Province of Alberta respectively, a third question was submitted to the Court for hearing and consideration. It was hypothetical in form and no answer was given to it by the Supreme Court. Their lordships do not consider that such question should be regarded as forming part of the questions referred to the Supreme Court by H.R.H. the Governor in Council, or that it is included in the present appeal. No

attempt was made to argue it at the hearing, and their lordships do not propose to take further notice of it.

By sec. 92, sub-sec. 10, of the B.N.A. Act, 1867, it is enacted as follows:—

92. In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated:—

. . . . . .

(10) Local Works and Undertakings other than such as are of the following classes:—

(*a*) Lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the province with any other or others of the province or extending beyond the limits of the province.

. . . . . .

(*c*) Such works as, although wholly situate within the province are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

By sec. 91, sub-sec. 29, of the B.N.A. Act, 1867, it is enacted as follows:—

91. . . . It is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say:—

(29) Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

It has never been doubted that these words refer to and include railways such as are mentioned in 92 (10) (*a*) and (*c*) above quoted. Indeed the language seems to point to 92 (10) so expressly that the contention is frequently heard that it is intended to refer to it solely. It is not necessary to decide such point in the present case. It suffices to say that railways such as are described in 92 (10) (*a*) and (*c*) come under the exclusive legislative authority of the Parliament of Canada. The provincial legislature therefore has no power to affect by legislation the line or works of such railway. If authority were required for so plain and evident a conclusion from these statutory provisions, it is to be found in the judgment of their lordships in the case of *C.P.R. Co.* v. *Notre Dame de Bonsecours*, [1899] A.C. 367, and *Madden* v. *Nelson and Fort Sheppard R. Co.*, [1899] A.C. 626.

The provisions of sec. 82 of the Alberta Railway Act, 1907,

IMP.
P. C.
ATT'Y GEN. FOR ALBERTA v. ATT'Y GEN. OF CANADA.
Lord Moulton

do not in the opinion of their lordships necessarily clash with these rights of legislation which thus exclusively belong to the Dominion Parliament, for it is possible to give to the words "railway company" the limited meaning of a company owning and operating a railway situated entirely within the province and to that extent the legislation is *intra vires*. But sub-sec. (3), which was added by the Act of 1912 and the validity of which is under consideration, expressly extends sec. 82 so as to make it apply to a Dominion railway. With this addition the provisions of sec. 82 of the Railway Act, 1907, of the Legislature of Alberta, constituted unquestionably legislation as to the physical construction and use of the track and buildings of a Dominion railway, and that of a serious and far-reaching character. Their lordships have no hesitation therefore in pronouncing that sub-sec. 3 is *ultra vires* of the Alberta Legislature.

They are further of opinion that it would not become *intra vires* if the word "unreasonably" were struck out of the section. It would still be legislation as to the physical track and works of the Dominion railway, and as such would be beyond the competence of the provincial legislature. These are matters as to which the exclusive right to legislate has been accorded to the Parliament of the Dominion so that provincial legislatures have no power of legislation as to them and this holds good whether or not the legislation is such as might be considered by juries or Judges to be reasonable.

It was no doubt due to the almost self-evident character of these propositions that at the hearing of the appeal before their lordships but little attempt was made to support the validity of sub-sec. (3) in its entirety. To judge by the reasons given by the learned Judges of the Supreme Court in their judgments it would seem that much the same course was adopted in the argument before the Supreme Court. The true aim of the discussion seemed rather to obtain the opinion of the Court and of their lordships upon hypothetical variations of the section which would have the effect of limiting its application. Indeed, in the hearing before their lordships, counsel for the appellants practically confined their arguments to the single case of a provincial railway crossing the track of a Dominion railway. Their

lordships are of opinion that great care should be exercised in permitting questions thus referred to the Supreme Court to be varied, more especially when those questions come up on appeal for decision by their lordships. It may no doubt happen that the questions relate to matters which are in their nature severable, so that the answers given may cast light upon the effect of the deletion or alteration of parts of the provisions the validity of which is being considered. But their lordships do not desire to give any countenance to the view that counsel may vary the questions by hypothetical limitations not to be found in the provisions themselves or in the questions that relate to them.

In the present instance, however, the case chosen by counsel for the appellants as the subject of their arguments has no doubt strong claims for separate consideration, inasmuch as it is doubtless the case which was mainly present to the mind of the provincial legislature when considering sub-sec. (3). It has reference to the circumstances under which the exclusive power of parliament to legislate as to Dominion railways appears to operate most harshly on the freedom of action of the province. It was urged with great force that if the provinces have no power to authorize their railways to cross the tracks of Dominion railways they might theoretically be placed in a position of great difficulty. Regarded in the abstract it might be possible for a tract of country situated in a province to be surrounded by Dominion railways in such a way that unless crossing were permitted a provincial railway situated within that tract would be completely isolated and cut off from access to other portions of the province. But the difficulty is essentially administrative, and not one that could be cured by any decision as to constitutional rights. It is scarcely too much to say that it would not be practicable to frame the actual claim of the province in the present case in such a way that it could be a constitutional right possessed by a province. Even their own counsel admitted that the province could not give to one of their railways the right to cross a Dominion railway at any place or in any specific way chosen by them. They admitted that the place and manner must be subject to the approval of the Railway Board, a body created by a Dominion statute in the year 1903, whose powers

IMP. P. C.

ATT'Y-GEN. FOR ALBERTA v. ATT'Y-GEN. OF CANADA.

Lord Moulton

depend on a Dominion Railway Act. How could a constitutional right be measured or defined by the views or decisions of such a body—one which did not exist when the constitution was created?

It is therefore not in abstract constitutional rights but in administrative provisions that the remedy must be sought for the inconveniences which in the abstract might flow from the fact that the exclusive power of legislating as to Dominion railways is vested in Parliament. And in this respect the present form of the Dominion railway legislation indicates and in their Lordships opinion provides an effective remedy. By section 8 of the Dominion Railway Act Parliament treats in a special manner the crossing of Dominion railways by provincial railways. These portions of the provincial railways are made subject to the clauses of the Dominion railway legislation, which deal also with the crossings of two Dominion railways so that the provincial railways are in such matters treated administratively in precisely the same way as Dominion railways themselves. The Parliament of the Dominion is entitled to legislate as to these crossings because they are upon the right of way and track of the Dominion railway as to which the Dominion Parliament has exclusive rights of legislation, and moreover, as the provincial railways are there by permission and not of right, they can fairly be put under terms and regulations. But sec. 8 of the Railway Act of the Dominion and the clauses which are by it made binding on any provincial railway crossing a Dominion railway appear to their lordships to indicate that it is part of the functions of the Railway Board to permit and to regulate such crossings. They are left unfettered as to whether they will permit such crossings to be at any particular spot or to be carried out in any particular way, and this jurisdiction is essential to them as guardians of those powers of construction and operation of Dominion railways which are necessary for their existence and efficiency. But these powers of permitting crossings by provincial railways under suitable circumstances and with proper precautions have not been given to them idly and for no purpose. They bring with them the duty of using those powers for the benefit of the public whenever an occasion arises where they can be wisely used.

IMP.
P. C.
ATT'Y-GEN. FOR ALBERTA v. ATT'Y-GEN. OF CANADA.
Lord Moulton

By these provisions the Dominion legislation has in their lordships' opinion given to provincial railways desiring to cross a Dominion railway all the *locus standi* that they need for making an application to the Railway Board for permission to do so. The Railway Board is bound to exercise these powers given to it just as much as all other powers given to it so as to advance the best interests of the public. In this way the legitimate claims of provincial railways to obtain facilities for crossing Dominion railways are in fact met as fully as is practicable and this without risking the chaos of overlapping legislative powers.

Their lordships are therefore of opinion that both the questions submitted to the Supreme Court of Canada should be answered in the negative and that the decision appealed from was correct. They will accordingly humbly advise His Majesty that this appeal should be dismissed, but without costs.

Answers accordingly.

HAIGHT v. DAVIES.

MAN.
K. B.

Manitoba King's Bench, Galt, J.A. January 19, 1915.

1. MORATORIUM (§ I—1)—CROP AGREEMENT—APPLICABILITY.

An agreement for sale of lands whereby the purchaser is to pay the proceeds of one half of the wheat crop yearly until the purchase money and interest is fully paid, is within the exception of sec. 4 (*b*) of the Moratorium Act, Man., although the agreement is not for delivery of part of the crop itself; but sec. 3 of the Act applies to extend for one year the time fixed for redemption under the Master's report made before the Act came into force.

ACTION under an agreement for sale.

Statement

A. W. Bowen, for plaintiff.

GALT, J.:—In this case, heard before me at Morden, the plaintiff sues under an agreement of sale dated December 1, 1908, wherein the defendant purchased certain lands for the price of $2,500, the agreement of sale provided that the purchase money should be paid as follows:—

Galt, J

The proceeds of one half of the whole of the wheat crop grown on the demised premises in each and every year until the full purchase price, together with interest thereon, is fully paid; the first payment of principal to become due and be paid on the 1st day of December, 1910, together with interest at 7 per cent. per annum from date thereof to be paid on the said sum or so much thereof as shall from time to time remain un-

MAN.

K. B.

HAIGHT v. DAVIES.

Galt, J.

paid, whether before or after the same becomes due, and such interest to be paid yearly on the 1st day of December until the whole of the moneys payable hereunder are fully paid.

The said agreement also contained the usual acceleration clause. The statement of claim shews that only two payments have been made by the defendant, namely, one on February 28, 1912, $505.95, and one on December 16, 1912, $140. Judgment was obtained by the plaintiff on May 26, 1914, with a reference to the Master. The Master's report was made and filed on October 1, 1914, fixing the time for redemption on January 2, 1915. The present motion is for a final order of foreclosure.

The question is to what extent, if any, the Moratorium Act applies to this case. Mr. Bowen, on behalf of the plaintiff, relies upon section 4 (*b*) of the Act as removing any difficulties in the plaintiff's way. The sub-section reads:—

> Nothing under this section shall be construed so as to interfere with any rights of a vendor or a mortgagee to enforce any agreement of a purchaser or mortgagor in any such instrument to hand over a share or shares of the crops on any such land to be applied in reduction or satisfaction of the moneys, whether principal, interest or otherwise, secured by any such instrument.

The agreement in question provides, not for the handing over of any share or shares of the crop but for handing over the proceeds thereof. On the other hand, it is impossible to apply any portion of the crop from time to time in payment of principal or interest unless the value of the grain be first ascertained.

I think the meaning of this peculiar sub-section will be best arrived at by construing it in accordance with the spirit rather than the letter of it. I accordingly hold that section 4 of the Moratorium Act does not affect the plaintiff's rights. But section 3 of the Act contains the following provision applicable to the circumstances of this case

> and in all pending actions for such redemption, foreclosure or sale, in which the time fixed for redemption is after the thirty-first day of July, 1914, the same is hereby extended for one year from the date so fixed for redemption, and no final order for foreclosure or sale shall be made in any such action until after the lapse of such extended period.

The plaintiff is entitled to immediate payment of his principal, interest and costs, but no final order for foreclosure, nor for removal of caveat, can be made until after the lapse of a year from January 2, 1915.

Judgment for plaintiff.

ADAM v. RICHARDS.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. January 6, 1915.

1. LEVY AND SEIZURE (§ III C—50)—SEIZURE UNDER EXECUTION—PRIORITIES—RIGHTS OF ASSIGNEE FOR CREDITORS.

Where a sheriff under the Execution Act, B.C., sec. 13, seizes money in specie belonging to the execution debtor, but instead of holding the same for thirty days in like manner as where goods have been levied upon and sold, forthwith pays the money over to the execution creditor, an assignee for creditors under the Creditors Trust Deeds Act, R.S.B.C., ch. 13, to whom the debtor made an assignment immediately after such execution creditor got his money has no status to sue for the money on behalf of all creditors as it no longer belonged to the execution debtor after the sheriff had taken possession of same; nor had the assignee the right to sue for the enforcement of claims which other execution creditors within the thirty-day period might have had against the fund or against the sheriff under the Creditors Relief Act, R.S.B.C., ch. 60.

[*Johnson* v. *Pickering*, [1908] 1 K.B. 1; *Clarkson* v. *Severs*, 17 Ont. R. 392, referred to.]

Statement

APPEAL from an order of Gregory, J.

E. C. Mayers, for appellant.

F. A. McDiarmid, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The plaintiff sues as assignee for the benefit of creditors of the debtor. The moneys in dispute were seized by defendant sheriff under a writ of *fi. fa.* issued at the instance of the co-defendant. Some of them were paid over by the sheriff to the execution creditor in the morning, and in the afternoon of the same day the assignment to the plaintiff was executed.

The issue is a simple one. Section 14 (2) of the Creditors Trust Deeds Act gives an assignment precedence over executions not completely executed by payment. In *Sinclair* v. *McDougall* (1869), 29 U.C.R. at p. 393, Wilson, J., with whom Morrison, J., concurred, said:—

I make no distinction here between the debtor paying the money and the sheriff making it by seizure of goods and the conversion of them by sale into money or seizing the money and getting it without the act and against the will or resistance of the debtor. When once he had the money it ceased to be the money of the debtor and became the money of the creditor, just the same as if the sheriff had raised the amount by seizure and sale of goods.

See also *Clarkson* v. *Severs* (1889), 17 O.R. 392.

In the case at bar the moneys were taken in specie from the

B. C.
C. A.
ADAM
v.
RICHARDS.
Macdonald, C.J.A.

debtor's till and were, except as hereinafter mentioned, on the third day paid over as aforesaid to the execution creditor under whose writ the sheriff had seized. They were taken in the legal sense of that term against the will of the debtor and are in the same category as moneys realized on the sale of goods. From the time they came into the sheriff's hands they were moneys of the execution creditor, or of those who might become entitled to the distribution thereof under the Creditors Relief Act.

If then these moneys when they reached the sheriff's hands ceased to be the property of the debtor the assignment could not in any way operate upon them, and I think this would be so even if they had been retained by the sheriff for future payment over to the execution creditor, or for distribution under the Creditors Relief Act. The moment they ceased to be the moneys of the debtor his power to dispose of them by an assignment for the benefit of creditors or otherwise ceased.

Much of the argument was directed to the application to the facts of this case of the Creditors Relief Act, but, in my opinion, that Act has nothing to do with the case. It has to do with the respective rights of the first execution creditor and judgment creditors who were entitled to take advantage of the Act, but the rights of those persons are not in question in this action. With such an issue the assignee for the benefit of creditors is not concerned. If he cannot get the moneys in question in virtue of the Creditors Trust Deeds Act then he must entirely fail.

There remains, however, the matter of $87.00 taken from the till by the sheriff on the evening of the 27th, the day of the execution of the assignment, still to be dealt with. The facts appear to be that the sheriff left with the debtor's bartender the sum of $60.00 with which to make change, and took his I.O.U. as evidence of the fact. That night, namely, after the assignment had been executed, the sheriff took from the till the said sum of $80.60, gave $24.00 of it to the assignee, the plaintiff, with which to pay some arrears of wages to the debtor's employees, and carried off the balance—$64.05. It now becomes necessary to consider the rights of the parties in respect of this sum of $64.05 because of the reversal of the judgment below. It appears that the said sum of $60.00 was included in the sheriff's cheque of

$357.15 issued to the execution creditor that morning, and therefore in the judgment below it was not necessary to deal specifically with this sum because the assignee was given the benefit of it as included in the gross sum awarded to him. But if that judgment is to be reversed I have to consider the assignee's right to the $64.05 as a separate item. The arrangement under which the sheriff was virtually carrying on the business and seizing the earnings from day to day may have been a very beneficial one for all concerned, but it was an irregular way of executing a writ of *fi. fa.* If the $60 were loaned by the sheriff to the bartender, it passed to the assignee before it was taken from the debtor's till on that evening, and was the assignee's property.

There has been no cross-appeal, but that was unnecessary as when the judgment below is to be set aside this Court should render the judgment which ought to have been rendered below, and as I think this sum of $60.00 never passed to the execution creditor, or if at an earlier date it did so, the possession of it having been for the time being relinquished by the sheriff to the debtor, it, together with the $4.05 taken over the counter that day, passed to the assignee.

There should therefore be judgment for the plaintiff for the sum of $64.05, but without costs of the action as the plaintiff has failed in his principal claim and has succeeded only in respect of a matter as to which there was no great contest.

The appellant should have the costs of the appeal.

IRVING, J.A.:—The B. A. Trust Company on May 23, 1914, placed a writ of execution for $1,524.15 against the goods of Molony in the sheriff's hands, and on the same day the sheriff seized all the goods and chattels (including some moneys) on the premises known as the "Brown Jug." Irving, J.A.

On May 27, 1914, Molony made an assignment to the plaintiff for the benefit of his creditors under the Creditors Trust Deeds Act. On May 27, the sheriff paid to the plaintiff $382.15; this was afterwards reduced to $357.15. On May 28, the assignee made a formal demand on the sheriff for all moneys taken from the "Brown Jug." To this the sheriff on July 1, replied that the matter had been closed up some days ago. The assignee then

B. C.

C. A.

ADAM v. RICHARDS,

Irving, J.A.

brought this action for an account of all moneys received by the sheriff under the writ. The sheriff's defence was that he had paid over all moneys received by him before the assignment was executed or he had notice thereof, and that he was justified in so doing by section 13 of the Execution Act and section 20 of the Creditors Relief Act. The learned Judge gave judgment in favour of the assignee for $331.40 on the principle that priority among creditors was abolished and the assignee was entitled to everything including moneys in the hands of the sheriff under an execution not completely executed by payment.

Three statutes come in question—ch. 79, Execution Act; ch. 60, Creditors Relief Act; and ch. 13, Creditors Trust Deeds Act.

The Execution Act, ch. 79, deals with writs of execution issued out of the Supreme or County Courts and any inferior Court. The statute is a combination of the old B.C. Statute, 1 & 2 Vict. (Imp.) ch. 110, and some sections taken from the Ontario Statute. Sections 13, 14 and 15 are taken from the Imperial Statute and authorize the sheriff to seize moneys.

The object of the Creditors Relief Act, ch. 60, is to abolish priority among creditors by execution from the Supreme and County Courts, and, to secure that end, requires the sheriff when he levies money upon an execution to make an entry thereof in a book, and such sum shall be distributed rateably amongst execution creditors, and other creditors whose writs or certificates are in the sheriff's hands at the time of the levy, or within 30 days after the entry.

The Creditors Trust Deeds Act, ch. 13, relates to assignments made for the benefit of creditors. It vests in the assignee all the real and personal estate belonging at the time of the assignment in the assignor, and declares as to goods with which we are now concerned that every assignment shall take precedence of all judgments and of all executions against goods . . . not completely executed by payment, subject to a lien in favour of such execution creditors for their costs.

It was argued by Mr. Mayers that the Creditors Relief Act can have no application to a levy made on money under section 13 of the Execution Act. The history of that section is dealt

with in *Johnson* v. *Pickering*, [1908] 1 K.B. 1. Mr. Mayers' contention is that this section, being a special act in force when the Creditors Relief Act was first passed in 1902, is now to be treated as wholly outside the provisions of the Act on the principle *generalia specialibus non derogant*. That argument would bring about an anomalous state of things—that whereas moneys realized by sale of goods under a writ of *fi. fa.* would be subject to the Creditors Relief Act, money seized at the same time under the same writ would not be. When we read section 13 of the Execution Act and its history, we can see that the object of the enactment was, first, to enable the sheriff to seize that which at common law was not liable to seizure, and, secondly, to fix a time from which the money would become the property of the execution creditor. In effect, the statute did, with reference to money, what the common law had already done with reference to the proceeds of a sale of goods under a writ of *fi. fa.*—that is, put an end to the ownership of the debtor and make the amount seized or the moneys realized the property of the execution creditor, so that he could maintain an action against the sheriff therefor. That argument does not carry him very far. The words "completely executed by payment" mean payment by the debtor to the sheriff. When the goods are sold and the money received by the sheriff, the execution debtor has lost his interest in the goods. The goods belong to the purchaser; the money paid therefor belongs to the execution creditor.

If the sheriff had proceeded according to the Creditors Relief Act he would have entered it in his book and then other claimants might have come forward and taken advantage of that act. But, instead of doing so, he paid over to the execution creditor $357.15. It is on this refusal to follow the provisions of the Creditors Relief Act that the plaintiff bases his claim.

The answer is, I think, plain. The assignee had no interest in the moneys paid over before the assignment. Such moneys were not part of the assignor's estate at the time of the assignment.

The appeal must therefore be allowed.

The assignee was entitled to the money in the till on the evening of the 27th, viz., $88.05, but of that he has already received

B.C.
C. A.
ADAM
v.
RICHARDS.
Galliher, J.A.

$20 in cash. His judgment will therefore be for $65, but without costs as he failed on his main contention. The sheriff should have the costs of the appeal.

MARTIN, J.A., concurs with MACDONALD, C.J.A.

GALLIHER, J.A.:—The plaintiff is the assignee for the creditors of one H. H. Molony and the defendant is the sheriff for Victoria.

The defendant as such sheriff seized certain moneys on the premises of Molony under a *fi. fa.* issued upon a judgment for $1,500 at the suit of the *British American Trust Co.* v. *Molony*.

These moneys were seized on the 24th, 25th and 26th days of May respectively, being the daily proceeds of sales in the Brown Jug Hotel, of which Molony was the proprietor, and amounted to about $500.

On the morning of May 27, the sheriff after deducting sheriff's fees, poundage, etc., paid over to the plaintiff's solicitors the sum of $382.15, and having on May 28 discovered that he paid over too much issued a new cheque to plaintiff's solicitors for $357.15, taking back the cheque of 27th which had not been cashed.

On the afternoon of May 27, while the sheriff was still in possession, Molony executed an assignment to the plaintiff in trust for all his creditors and the sheriff went out of possession.

The plaintiff as assignee claims for the creditors this sum of $357.15, less the costs of judgment *British American Trust Co.* v. *Molony*.

At the hearing the learned trial Judge gave judgment in plaintiff's favour for $331.40, being for the amount claimed and from this judgment the defendant appeals.

Three Acts come in question—the Execution Act, R.S.B.C. 1911, ch. 79, sec. 13; the Creditors Trust Deeds Act, R.S.B.C. 1911, ch. 13; the Creditors Relief Act, R.S.B.C. 1911, ch. 60.

Under section 13 of the Execution Act the sheriff is directed to seize all moneys, etc., belonging to the execution debtor and to pay and deliver such moneys to the execution creditor.

It is contended that this clause governs and that the Creditors Relief Act has no application.

The sections of the Creditors Relief Act invoked by the respondents are section 3:—

> Subject to the provisions hereinafter contained, there shall be no priority among creditors from the Supreme Court or County Courts.

And section 4:—

> In case a sheriff levies upon an execution against the property of a debtor, he shall forthwith enter in a book, to be kept in his office open to public inspection without charge, a notice stating that such levy has been made, and the amount thereof; and the money shall thereafter be distributed rateably amongst all execution creditors and other creditors whose writs or certificates, given under this Act, were in the sheriff's hands at the time of the levy, or who shall deliver their writs or certificates to the said sheriff within one month from the entry of notice, etc.

Section 13 of the Execution Act, ch. 79, R.S.B.C. 1911, is section 13 of ch. 72, R.S.B.C. 1897, which in turn is taken from 1 & 2 Viet. (Imp.), ch. 110, sec. 12, and is prior in date to the Creditors Relief Act, ch. 17, of the B.C. Statutes, 1902, and appellants argue that the Execution Act is a special Act and is not affected by a later Act, and for that proposition cite a number of authorities.

I have read these authorities cited but they do not, in my opinion, apply in the case before us.

Section 13 of the Execution Act gave power to the sheriff to seize moneys, bank notes, etc., with certain directions as to paying over or realizing upon; additional powers not theretofore possessed.

The Creditors Relief Act abolishes priority among execution creditors and in that respect it makes no difference, to my mind, whether it is moneys seized or goods seized. Moneys when seized are cash and do not require to be converted or sold—goods are sold and converted into cash and in either event the seizure of cash in the one instance and the conversion into cash in the other, the proceeds are to be held by the sheriff to be distributed as provided in the Creditors Relief Act.

But there is another feature to be considered. Assuming that the cash seized had to be retained for 30 days by the sheriff before distribution, the assignment for the benefit of creditors intervenes between the date of seizure and the date for distribution.

Can execution creditors whose writs are in the hands of the

B. C.

C. A.

ADAM v. RICHARDS.

Galliher, J.A.

sheriff before the assignment rank in priority to creditors who can claim only under the assignment?

Breithaupt v. *Marr* (1893), 20 A.R. 689, following *Roach* v. *McLachlan* (1892), 19 A.R. 496, is authority for this, but in the *Breithaupt* case the sale of the goods seized did not take place until after the assignment, while in the case at bar the actual money was seized and was in the hands of the sheriff before assignment.

MacLennan, J.A., in his judgment in the *Breithaupt* case refers to that distinction in these words:—

> If the money were realized and the entry made in the sheriff's books before the assignment it is possible that the fund might be divisible among all creditors coming in within the limited time. But no question of that kind arises here for the sale was not made until after the assignment.

I treat the moneys seized here in the same way as I would moneys realized under a sale made before the assignment and in that view we have before us the very point suggested by MacLennan, J.A.

We of course have not the opinion of the Court on that point in the *Breithaupt* case, but in dealing with the case at bar it seems to me that when the sheriff seized the moneys before the assignment they became moneys which he was bound to distribute under the provisions of the Creditors Relief Act.

His first duty was to enter a notice in a book in his office stating that the levy had been made and the amount thereof and after such entry the other creditors who within one month from the date of such entry should deliver their writs or certificates to the sheriff were entitled to share.

In other words, these moneys had been realized before the assignment and as to them the execution was completely executed by payment before the debtor assigned: see *Sinclair* v. *McDougall*, 29 U.C.R. 388.

Further, moneys seized or moneys realized from the sale of goods before an assignment are in the hands of the sheriff not subject to disposal by the debtor in the same way as goods, but the special interest and property therein is in the execution creditor who has seized and such creditors as come in within the prescribed time to the extent of their claims, so that as to these moneys execution creditors who come in subsequently are a

special class by virtue of the statute and the only class who can claim to be entitled to share with the first execution creditor, and as neither the assignee nor those who claim through him by virtue of the assignment are within this class the assignee has no status to maintain this action in respect of these moneys.

There is a further item of $64.05 taken by the sheriff on the afternoon of the 27th, subsequent to assignment, and as to $4.05 of that there is no question that that belongs to the assignee. As to the other $60 the sheriff took that or a like amount on the 23rd, but in effect loaned it to the debtor to be used as change in carrying on the business. That, when loaned to the debtor, again became the property of the debtor and was such when the assignment took effect.

This the assignee is also entitled to. The transaction though honestly intended as in the interest of all parties was irregular, and as the assignee claims for an account and pressed this item upon us at the hearing, we are obliged to give effect thereto. In the result the appeal is allowed with costs as to the moneys paid over to the Trust Company, and the plaintiff succeeds as to the item of $64.05, but as his action fails in the main there will be no costs below.

McPHILLIPS, J.A.:—In my opinion the appeal should be allowed—the moneys seized and realized by the sheriff from day to day amounted *pro tanto* to the execution against goods being completely executed by payment—the decisions which, in my opinion, support the conclusion at which I have arrived are *Clarkson* v. *Severs* (1889), 17 O.R. 592; *Ryan* v. *Clarkson* (1890), 17 S.C.R. 251; *Thordarson* v. *Jones* (1909), 18 M.R. 223; *Newton* v. *Foley* (1911), 20 M.R. 519.

McPhillips, J.A.

In considering the above authorities it is to be noted that the Creditors' Trust Deeds Act (ch. 13, R.S.B.C. 1911), has no provision therein similar to section 9 of the Assignments Act (ch. 8, R.S. Manitoba 1902) which requires the sheriff when an assignment for the benefit of creditors is made, to deliver to the assignee all the estate and effects of the execution debtor in his hands—in British Columbia—the controlling enactment is—as contained in section 14 sub-section (2) ch. 13, R.S.B.C. 1911, which reads:—

B. C.

C. A.

ADAM v. RICHARDS.

McPhillips, J.A.

(2). Every such assignment shall take precedence of all judgments of all executions against goods, and of all attachments of debts not completely executed by payment, subject to a lien in favour of such execution creditors for their costs.

In *Clarkson* v. *Severs*, *supra*, Ferguson, J., at p. 598, said:—

The authorities are abundant, shewing, I think, that by the seizure and sale the property is changed, and not only so, but that by this act and receipt of the money by the sheriff, the writ of execution is executed. From and after that period the writ is an *execution executed*; and if the payment mentioned in the section were held to mean payment to the execution plaintiff by the sheriff, I do not see how that could be any part of the execution of the writ, or how the execution of the writ (which was complete before) could be completed by it.

In *Ryan* v. *Clarkson*, *supra*, Gwynne, J., at pp. 257 and 258, said:—

Now the statute in its 9th section enacted that an assignment for the general benefit of creditors under that act should take precedence of all judgments and of all executions not completely executed by payment; the effect of this section was to deprive a judgment creditor of all right of precedence in payment of his judgment debt as to so much of the debt as remained *unpaid or unrealized* by *execution executed*; and to give precedence to the assignment for the general benefit of creditors over all judgments, even though executions issued thereon should be in the sheriff's hands to be executed.

Some considerable stress was laid upon the action of the sheriff—in at once paying over the moneys realized—to the execution creditor, *i.e.*, not withholding same for ratable distribution under section 4 (1) of the Creditors Relief Act (ch. 60, R.S.B.C. 1911), in my opinion no heed need be given to this contention—especially in view of the evidence in the present case that no other writs of execution against the execution debtor were placed in the sheriff's hands—further, in my opinion, the Creditors Relief Act has no application when an assignment for the benefit of creditors has been made—then the controlling statute is the Creditors Trust Deeds Act—in this connection I would refer to what Mathers, J., said, pp. 226-227, in *Thordarson* v. *Jones*, *supra*, there referring to the Executions Act (R.S.M. 1902, ch. 58), which provides for a ratable distribution of moneys realized by the sheriff under an execution:—

I am not as it appears to me, concerned with the disposition the sheriff may have to make of this money after he has received it. If he were then bound to distribute it ratably amongst all the defendants' creditors as under the assignment, it might be said nothing could be accomplished by

his retaining possession of the goods. But that is not the case. At most he would only have to distribute it ratably amongst those creditors having executions in his hands.

As previously pointed out, no other executions did come into his hands.

It was not necessary that the moneys should have been paid over by the sheriff to the execution creditors—to establish "completely executed by payment" (Creditors Trust Deeds Act, ch. 13, R.S.B.C. 1911), payment to and receipt by the sheriff—fully satisfies the language of the statute, in my opinion, and I would refer to what Macdonald, J., said in *Newton* v. *Foley*, *supra*, p. 521:—

> Under section 8 of the Assignments Act, an assignment for the general benefit of creditors shall take precedence of all judgments and registered certificates of judgments and of all executions not completely executed by payment. It is urged that the words "completely executed by payment" mean by payment to the execution creditor. The words of the statute following, "Subject to the lien, if any, of execution or attaching creditors for their costs," will, however, dispel that interpretation, as, after payment to the execution creditor, there could not be any lien for costs. "Completely executed by payment" must, therefore, mean payment to the sheriff; upon payment to the sheriff, therefore, by the defendant the moneys were applied to the claim of the defendant company. The debtor therefore could not interfere with their application, and such moneys could not be affected by the assignment itself: *Clarkson* v. *Scevers*, 17 O.R. 592.

With regard to the manner in which the sheriff realized the moneys whether by sale—or payment voluntarily or involuntarily by the execution debtor—the language of Wilson, J., in *Sinclair* v. *McDougall* (1869), 29 U.C.Q.B. 388, at p. 393, is very much in point:—

> I make no distinction here between the debtor paying the money, and the sheriff making it by a seizure of goods and the conversion of them by sale into money, or seizing the money and getting it without the act and against the will or resistance of the debtor.
>
> When once he had the money, it ceased to be the money of the debtor and became the money of the creditor, just the same as if the sheriff had raised the amount by seizure and sale of goods.
>
> *Morland* v. *Pellatt*, 8 B. & C. 722, is of some force and application here.

In *Newton* v. *Foley*, *supra*, the moneys were paid to the sheriff under an arrangement made between the execution debtor and the execution creditor, and the sheriff was instructed to withdraw from possession and release the seizure and payments were later made to the sheriff. Macdonald, J., said, at pp. 107-

B. C.
C. A.
ADAM
v.
RICHARDS.
McPhillips, J.A.

108 (referring to section 9 of the Assignments Act, ch. 8, R.S. Man. 1902):—

> But it is further urged that under section 9 the sheriff shall in case of an assignment forthwith deliver to the assignee all the estate and effects of the execution debtor in his hands, and further, that if the sheriff has sold the debtor's estate or any part thereof he shall deliver to the assignee the moneys so realized by him. The moneys received by the sheriff were not at the date of the assignment part of the estate and effects of the execution debtor as they were appropriated to and became the property of the defendant company prior to the assignment to the plaintiff. They were not moneys realized by the sheriff from a sale of the debtor's estate and the plaintiff is not entitled to them as such.

Now a question arises as to the actual time when the assignment for the benefit of creditors took effect, the statute is silent as to this; section 5 of the Act (ch. 13 R.S.B.C. 1911), reads:—

> 5. No assignment under this Act shall be dated after the execution thereof by the assignor.

The assignment bears date May 27, 1914, and there is evidence that the sheriff received upon that same day $88.05, paying thereout for wages $24—leaving $64.05, and there is evidence that this money was received after the assignment. No evidence would appear to have been given as to the actual time when the assignment was made and delivered—the assignment being a deed would take effect from delivery—Patterson, J., in *Browne* v. *Burton* (1847), 17 L.J.Q.B. 49, at p. 50, said:—

> Now the rule uniformly acted upon from the time of *Clayton's case* to the present day is that a deed or other writing must be taken to speak from the time of the execution and not from the date apparent on the face of it. That date is indeed to be taken *primâ facie* as the true time of execution; but as soon as the contrary appears the apparent date is to be utterly disregarded.

And in *Jayne* v. *Hughes* (1854), 10 Ex. 430 (102 R.R. 661), at p. 433, Pollock, C.B., said:—

> We are all of opinion that the deed must be taken to speak from the time of its execution.

Therefore upon the facts, in my opinion, as to the $64.05, it cannot be said that the execution, to that amount, was completely executed by payment, and that amount the plaintiff is entitled to.

I would vary the judgment of the learned trial Judge—in this way—that the plaintiff do recover the sum of $64.05, instead of $331.40, with such costs as would in the County Court be allowed upon the recovery of such a sum—the appellant to have the costs of this appeal. *Judgment varied.*

GASS v. DICKIE.

N. S.

S. C.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., Russell and Longley, JJ. March 9, 1915.

1. SUBROGATION (§ I—1)—SATISFACTION OF LIEN BY ONE OF SEVERAL DEVISEES—RIGHTS AGAINST THE OTHERS.

Where one of the devisees, under a devise to several persons separately of certain properties to each, has paid more than his equitable share of a lien or charge in favour of a third person which by the terms of the will is imposed jointly upon all the properties in priority to the devises, such devisee is entitled to be subrogated as against the others to the claim of the lienor in respect of the excess paid over and above his rightful share.

[*Flint* v. *Howard*, [1893] 2 Ch. 54; *Re Bank of Liverpool*, 43 N.S.R. 205, referred to.]

Statement

APPEAL from the judgment of Ritchie, J.

H. Mellish, K.C., for appellant.

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

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—I am of opinion that the decision of the trial Judge, Ritchie, J., is in all points perfectly correct. The will of the testator is clear and explicit when he says:—

I further direct that the payment of the said sum of twenty dollars per year and the charge and expenses for the comfortable support and maintenance of my said wife as aforesaid shall be and remain a first lien and charge upon the respective properties devised and bequeathed to the parties who are herein directed to pay and support my said wife as aforesaid.

Nothing could exonerate the lands in question from such charge except the release of Nancy Gass, the widow. It matters not that the defendant was not aware of the existence of such charge, or that his title was warranted. The support and annual legacy have not been paid in full, and it is clear that John C. Gass expended more than Robert of such support as Nancy Gass did receive—more than his share. How much will have to be determined by a reference.

It was contended by Mr. Mellish that to the extent the support had been afforded the land now owned by defendant was relieved whether paid or furnished by John or Robert. I do not agree to such contention. I think in equity—and this is an equitable suit—Robert's share must bear his proportion of the expense and annuity and that John is entitled to be subrogated to the widow's claim in that respect. This, indeed, is the only

N. S.

S. C.

GASS v. DICKIE.

Sir Charles Townshend, C.J.

question in the case and it scarcely admits of any doubt. An examination of the authorities supports the plaintiff's, John's, contention. In Sheldon on Subrogation, p. 212, the rule is stated as follows:—

> This right of subrogation is paramount to any other claim or lien upon the property against which it is sought to be exercised if such other claim or lien was subject to the obligation which has been discharged by one debtor, or to the satisfaction of which his property has contributed more than its equitable share, but it cannot take place beyond the amount actually paid by or from the property of the one who seeks to enforce it, nor beyond the proportionate share of those who are either personally or by a pledge or mortgage of their property jointly liable with him. . . . The rule in England is now the same in this respect as to both sureties and joint debtors.

Counsel for defendant did suggest that under the will John and Robert were trustees with implied power to sell the lands, and that defendant in purchasing was protected by the Trustee Act, ch. 15, R.S., sec. 48. I hardly think it necessary to say more on this point than that the terms of the devise do not admit of such an interpretation and that they were in no sense trustees.

It was further suggested that there would be difficulties in enforcing the lien by a sale of the lands and it might be that if sold there would not be enough realized to pay the amount and to continue Nancy's support. It is quite certain that the Court can order a sale in such case, and so far as the fund admits, in case there is a surplus, will direct how it is to be disposed of, and in case of deficiency it is no reason against enforcing plaintiff's rights against the property.

I am of opinion the appeal must fail and the decree of the learned Judge below should be sustained, and further directions given on application to him.

Graham, E.J.

GRAHAM, E.J.:—This case has been greatly simplified by the death of Mrs. Gass, whose support for life was charged on the testator's lands, three different lots. Her death has been notified to us by counsel. There will be required an amendment of the statement of claim, in lieu of a supplemental bill, bringing the matter down to date.

I think Robert Gass will have to be made a defendant in order that the accounts may be taken and the amount ascertained

which John C. Gass has contributed towards her support in excess of the amount contributed by Robert Gass.

The plaintiff John C. Gass, if he has contributed more than his brother, is entitled to be subrogated to the position of Mrs. Gass in respect to the charge or lien on the land and to have the land sold to pay that excess.

But I differ from the view of the learned trial Judge that this sum should fall first on the land purchased by Dickie because that happens to be the last land sold which was subject to the charge. That was the old inverse order rule, not the law of England. All of the land bound by the charge must be marshalled in such a way that all of the lots according to their values will contribute. If Mrs. Gass released any of the land bound by that charge Dickie is entitled to have that loss taken into the account. I refer to the case of *In re Bank of Liverpool*, 43 N.S.R. 205.

It is said by Kay, J., as he then was, in *Moxon* v. *Berkley*, 59 L.J. Ch. 524, at 526:—

> If a person mortgages estates X and Y to A., and then mortgages or assigns estate X to B. and Y to C., the rights between B. and C. are to compel the payment of the first debt out of the two estates ratably, and throw it on them ratably, so that there shall be left of those estates the proper proportion for each of the separate assigns. That right exists. It is not a right which the first mortgagee can interfere with in any way. He cannot say, "I have paid myself out of this estate, and therefore the right is gone." The right is a right quite independent of him. It does not interfere with him, but if he chooses to pay himself the whole debt out of one estate, then, to the extent of the proportion of that estate as between the two separate assigns, it must be paid out of the other estate. The equity is an equity between the two separate assigns. It is the equitable mode of administering an estate which is subject to charges. Now I take it that that equity applies just as much where there is an express charge as where there is in effect a charge, because it arises from the circumstance that the first mortgagee has two funds out of which to pay himself. If A., the first mortgagee, has two funds, either or both of which he may apply in paying himself, and then one of those funds is assigned to B. and the other to C., the equity between B. and C. exists from the simple fact that A., the first mortgagee, has two funds out of which he may pay himself.

In *Flint* v. *Howard* (1893), 2 Ch. 54, Kay, L.J., then raised to the Court of Appeal, says, pages 72-73, pretty much the same thing, and he adds:—

> As so stated the rule is independent of the question whether C. had notice

N. S.
S. C.
GASS
v.
DICKIE.

of A.'s mortgage or not. Why should notice of that mortgage (A.'s mortgage) alter the right of C. against B.

This disposes of the question of Dickie's notice of Mrs. Gass's lien by virtue of the Registry of Deeds Act.

Graham, E.J.

I think the whole quotation is very applicable to Dickie's rights as against the assigns of the other lots if they have been alienated. If not, of course, they must be first resorted to to the exoneration of Dickie's lot. But if they have been alienated then the sum will be apportioned over these other lots and Dickie's *pro rata*, taking into account any loss which she should bear by having released them from her lien. John C. is standing in his mother's shoes as to the matter and has no greater rights. In my opinion the decree must be varied as indicated.

Russell, J.
Longley, J.

RUSSELL and LONGLEY, JJ., concurred with Graham, E.J.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—I concur in what my brother Graham says in regard to the apportionment.

Judgment varied.

ALTA.
S. C.

KING v. DOLL.

Alberta Supreme Court, Simmons, J.

1. ASSIGNMENT FOR CREDITORS (§ VI—50)—PROPERTY INCLUDED—SEPARATE BUSINESS—ACQUIESCENCE OF DEBTOR—SUBSEQUENT CLAIM BARRED.

Where the creditors, the assignee and the debtor had acted as if certain speculative dealings of the debtor through himself and his nominees to acquire government coal lands were not within the debtor's assignment for creditors, made specially because of a separate mercantile business, although the assignment in form included all the debtor's real estate, the acquiescence of the debtor will bar his subsequent claim that the estate through the assignee should have protected the coal lands by making payments out of the general estate necessary to prevent the forfeiture of his interests.

Statement

ACTION against an assignee for breach of trust.

W. H. McLaws and *J. C. Brokovski*, for plaintiffs.

O. M. Biggar, K.C., for defendants.

Simmons, J.

SIMMONS, J. (Oral):—The present action has been confined to somewhat narrower limits than the pleadings indicated it would be in the first place, namely, as to whether the assignee committed a breach of trust in regard to certain payments which fell due on certain coal lands in township 29, range 23, west of the 4th meridian. I do not think it is necessary for me to deal with the question of whether the land lawfully passed or not

under the assignment, although without going into the matter further than in a superficial way I would be inclined to think they did. They were an interest in land and he assigned all his interest in real estate in the assignment. But I do not think it is necessary in the view I take of the evidence to decide that although that is my opinion in that regard. Now Mr. Doll had been carrying on a jewellery business quite extensively in Calgary for many years, and in later years, say in 1906 to 1910, had branched out into the real estate business, and apparently acquired some very valuable property in the city, and during the same period of time he also entered into dealings with the Department of the Interior through his nominees and himself to acquire coal lands in township 29. One cannot take any other view of the coal land transactions and the real estate transactions in the city than this, that they were speculative transactions and they come within a different class than that of the mercantile trade; the business carried on by him in connection with this jewellery business. The assignee, according to the evidence put in by the defendant, was advised by his solicitors who were acting apparently for him (by Mr. Allison) that he should not make these payments. He was also advised by Mr. Allison that the coal lands did not pass so that if he did make a mistake in that regard it would be a mistake due to a mistake in law made by Mr. Allison as to the assignment, and if he had made a mistake in fact as to the desirability of making these payments, it was apparent he was met with that difficulty that he was advised by his solicitors not to make these payments, and also Mr. King who was acting for the creditors says that he notified him that the creditors would take that position, namely, that the coal lands had nothing to do with the assignment and were not contemplated by the parties and that he could not use any of the moneys—the product of the mercantile business—to redeem the coal lands, so that seems to establish that he acted perfectly *bonâ fide*. He acted on his solicitor's advice and under the wishes of the parties specially interested in the assignment, the creditors. They did not wish to have anything to do with the coal lands. Mr. King does not say what the legal position taken by them was; I rather inferred from Mr. King that the

ALTA.
S. C.
KING
v.
DOLL.
Simmons, J.

creditors through him thought it was a speculative transaction and one upon which they had better not venture. However, aside from that I would say that Mr. Doll acted himself as if that were the effect of the assignment, up apparently till the time that he made the application to Mr. Justice Stuart. He personally conducted negotiations with the Department of the Interior. Apparently without asking for the consent of the assignee or Mr. King he entered into negotiations with certain people for the purpose of getting offers for the sale of these lands and he refused at least one offer, Mr. Newton's, although the assignee, Mr. Doll says, thought that offer should be accepted. He took it upon himself then to lean on his own judgment rather than on that of the assignee in regard to these coal lands so that it seems very far for him to come back now and say the assignee took the wrong view and would not put up the money when he says: "I, Mr. Doll, was the person and the only person who had the right to say how and when and at what price the coal lands should be disposed of." Even aside from that I would say that on the facts it was very, very evident that Mr. Doll, associated with his wife, had the control of properties in the city of Calgary which apparently he had transferred to his wife, but over which he still had control which were not necessary for the jewellery business, which were very valuable and which were marketable. Mr. Doll used the expression something to this effect, that real estate transactions and real estate deals were rife within this period of 1908 and 1910, and even subsequently to that before this action was launched, very high prices could have been obtained for these properties and Mr. Doll absolutely fails in any attempt to shew that the assignee prevented him from disposing of properties in the city of Calgary which apparently had a good marketable value, which, in my opinion, on the evidence, would have retired all his indebtedness to the creditors, and even have paid for his coal lands if he had acted as I think would have been wise, and disposed of some of them, but I find even in regard to his coal lands, the area reserved by the Department on which his money was applied was in the neighbourhood of five hundred acres, and if the offer of Newton had been accepted that would have realized over $50,000 and that would have retired his creditors and paid

ALTA.

S. C.

KING v. DOLL.

Simmons, J.

up the government and left apparently something of a surplus. Surely under all these circumstances an assignee for the benefit of mercantile creditors would have been absolutely unjustified, in my opinion, in advancing moneys on a speculative proposition such as undeveloped coal lands. Mr. Doll was modest and put the price of these lands at $125,000 to $150,000, but one of his witnesses, Mr. Smith, put a much bigger price on them, a price which works out to about half a million. It is evident that no person was willing to buy lands at any price in that district between the time these lands were taken up and the trial of this action.

I do not think it is necessary for me to go any further than to observe that the payments in the first mortgage were accruing due in September and December, 1908, and March and June, 1909. Part of the lands comprised in the mortgage had a good market value. They all apparently had a good market value and the whole indebtedness could easily have been retired by Mr. Doll by disposing of some of these lands which were under mortgage. Apparently the creditors and the assignee offered no obstacle to Mr. Doll's adoption of what seems to me should have been the act of a prudent man. I am bound therefore to dismiss the defence and counterclaim in that regard.

There will, of course, be the accounting which both parties desire, covering the period during which the assignee was in control of the assets of the business.

Judgment accordingly.

MESSIER v. CHENERY.

QUE.

C. R.

Quebec Court of Revision, Sir C. P. Davidson, C.J., Tellier and Greenshields, JJ.

1. PRINCIPAL AND AGENT (§ II D—25)—PROPERTY OWNER—AGENT—INSTRUCTIONS—SALE CONTRARY TO—PURCHASER'S RIGHTS—RETURN OF PURCHASE MONEY—REPUDIATION.

The property owner is not bound by the act of his real estate agent in selling sub-division lots at a lesser price than his instructions warranted where there has been no approval or ratification of such sale by the owner; the purchaser in such case who has paid purchase money to the agent may sue the latter for its return on the principal repudiating the agent's promise of sale, as money received under warranty of authority.

APPEAL in review from the Superior Court, Demers, J.. Statement

QUE.

C. R.

MESSIER v. CHENERY.

Monty & Laurandeau, for the plaintiff.

Atwater, Duclos & Bond, for the defendant and plaintiff in warranty.

McKeown & Barry, for the defendant in warranty.

The opinion of the Court of Review was delivered by

Greenshields, J. GREENSHIELDS, J.:—Considering only the first ground, as the second is more fully considered in the action in warranty. The complete answer, in my opinion, to the first ground urged by the principal defendant is, that he received the principal plaintiff's money: he received that money on his own clear and distinct statement that he was fully authorized to sign the promise of sale, and fully authorized to receive the money, and it was upon that statement that the plaintiff was induced to accept the promise of sale as signed by the plaintiff in warranty and part with his money, and if what the principal defendant said to the principal plaintiff on that occasion was not true, clearly an action would lie against the principal defendant for the recovery of the money paid.

It is not, as pointed out by the learned trial Judge, a question of whether the defendant in warranty held out the principal defendant as his agent, and by such holding out rendered himself liable for the acts of the principal defendant; that might arise on an action against the defendant in warranty by the plaintiff in warranty, but the action of the principal plaintiff against the principal defendant is founded upon the alleged fact, that the principal defendant represented to the principal plaintiff that he had authority, whereas he had none, and by that representation he obtained money from the principal plaintiff, to which he was entitled. And upon that ground I am with the learned trial Judge in the opinion that the principal defendant must fail.

As to the action in warranty, the plaintiff in warranty's action cannot be maintained unless, and without a positive statement or finding that on August 15 he had complete and full authority to sell those thirty lots for $250 each. I am again with the trial Judge in the opinion, that until there had been a general approval by the defendant in warranty of the recommended selling price of each lot, or until the defendant in warranty had approved of the selling price for these individual lots, the authority of the

plaintiff in warranty was incomplete, and he was without the power of binding the defendant in warranty.

It is true, and it is reasonable that in order to facilitate a speedy sale of these lots that the defendant in warranty did consent to a certain price for certain lots, and when the promises of sale were submitted to him, he approved of the same and signed them, but I do not find in this a waiver of his right to exact an individual approval of all the lots, or an individual approval of each lot, as it was sold.

I am of opinion that the proof justifies the statement, that at one time the defendant in warranty did, in view of the fact that no project had been submitted, limit the power and authority of the plaintiff in warranty to sell lots other than in a specified area, and I am of opinion that verbal evidence is perfectly admissible upon this point. It does not vary the written agreement: it rather goes to confirm it, and all it could possibly mean, is, that awaiting that general project, followed by its approval, the defendant in warranty did consent to the sale of a certain number of lots within a certain specified area. Some lots were sold outside of this prohibited area. The defendant in warranty explains it and said he protested and told the plaintiff in warranty that he would have to get them back, or get them changed for lots outside the prohibited area, and in some cases he says he got them back by re-purchase.

It is suggested by the defendant in warranty that the whole circumstances surrounding the giving of the promise of sale for the thirty lots in question constitutes bad faith on the part of the plaintiff in warranty. He had sold up to then some 6,400 lots; he was under contract, on pain of forfeiture within two weeks more, to sell $34,000 of lots. One can, of course, see his great interest in trying to rush through this sale, which would amount to more than his previous total sales.

To conclude, I am of the opinion that under the letter of February 17, 1910, the plaintiff in warranty had no power or authority to sell any individual lot or any number of individual lots until the selling price of these lots had been approved of by his principal, the owner of the land. I am firmly convinced of the correctness of this opinion, and the fact being beyond dispute that no such approval either general or special had ever been given

QUE.
C. R.
MESSIER
v.
CHENERY.
Greenshields, J.

by the defendant in warranty, I am forced irresistibly to the conclusion that the plaintiff in warranty acted beyond his authority; that the defendant in warranty was not bound by its act; that the principal plaintiff's action against him, principal defendant, is well founded, and that the plaintiff in warranty has no recourse in warranty against the defendant in warranty; and I am to confirm the judgment for the reasons given by the learned trial Judge.

Appeal dismissed.

QUE.
S. C.

Re MEN'S WEAR LIMITED.

Quebec Superior Court, Bruneau, J.

1. CORPORATIONS AND COMPANIES (§ VI—395)—WINDING UP—LIQUIDATOR—DISINTERESTED PARTY—ADVISABILITY.

It is advisable that the liquidator for the winding up of a company under the Winding up Act, R.S.C. 1906, ch. 144, sec. 124, be a disinterested party having no claims against and no share in the company.

[*Re Central Bank of Canada*, 15 Ont. R. 309, followed.]

Statement

PETITION to appoint liquidators and inspectors.

Atwater, Duclos & Bond, for petitioner in first part.

Brown, Montgomery & McMichael, for petitioner in second part.

Bruneau, J.

BRUNEAU, J.:—The Court, having at a duly convened meeting, taken the advice of the creditors, shareholders and contributories, of the said company in liquidation, and inspectors to the property of the company in liquidation, as appears by the *procès-verbal* of said meeting of this day and having heard the said petitioner on the first part, by its counsel, asking that Charles L. Shorey, be appointed liquidator and Robert Wilson, N. G. Valiquette, inspectors and having also heard the petitioners on the second part, by their counsel, asking that E. Alexander Wright and Gordon B. Kingan, be appointed such liquidators and that George B. Gerrard, James M. Robertson & Jacob Kellert be appointed inspectors;

Considering that it is advisable that the liquidator appointed for the winding up of a company in liquidation be a disinterested party, having no claims against and no share in the company: *Re Central Bank of Canada*, 15 Ontario R. 309.

Considering that Charles L. Shorey seems to have personal interests in the company in liquidation;

Seeing that the name of the said Charles L. Shorey has been suggested as one of the inspectors;

Doth hereby appoint as liquidators E. Alexander Wright & Gordon B. Kingan and as inspectors, George G. Gerrard, banker, James M. Robertson, merchant, Jacob Kellert, merchant and Charles L. Shorey, all of Montreal, with costs of both petitions against the estate.

Petition granted.

MITCHELL v. SANDWICH WINDSOR, ETC., R.W. CO.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell and Sutherland, JJ.

1. INJUNCTION (§ I L—107)—RIGHT TO—CONSTRUCTION OF STREET RAILWAY—INJURY TO ADJOINING PROPERTY OWNER—RESTRICTING ACCESS.

A property owner on the street affected who would sustain special damage because of restricted access to his property if an electric railway line were extended along the adjoining street may sue the railway company to restrain the construction, although authorized by the municipality if no permission has been obtained from the Ontario Railway and Municipal Board by the company subject to its authority under the Ontario Railway Act, 3 & 4 Geo. V. ch. 36, sec. 250.

APPEAL from the judgment of LENNOX, J., granting an injunction and mandatory order and for damages to be assessed. Statement

I. F. Hellmuth, K.C., and *G. A. Urquhart*, for the appellants.

J. H. Rodd, for the plaintiffs, respondents.

The judgment of the Court was delivered by

CLUTE, J.:—The plaintiffs sue on behalf of themselves and all other ratepayers of the City of Windsor, and charge that the defendants have commenced to construct a line of railway from their tracks on South Windsor street, in the city of Windsor, south along Ferry street to Chatham street, thence west to Victoria avenue, and thence south to London street, and in so doing have torn up the pavement on portions of the said streets; that the work was done without authority, and has made the streets impassable. Clute, J.

The plaintiff Dresch is the owner of lot 14 on the west side of Ferry street, and is erecting a four-storey building thereon, and, by reason of the conditions caused by the defendants, he has been obstructed and delayed and hindered in his work, and

ONT.
S. C.
MITCHELL
v.
SANDWICH
WINDSOR
ETC.
R.W. CO.
Clute, J.

further charges that the value of his property has been depreciated by the construction of the line, as Ferry street is too narrow to accommodate an electric railway; and the plaintiffs ask for an injunction to restrain the defendants from proceeding with their work, and for a mandatory order requiring them to restore the streets to their original condition, and for damages and costs.

The defendants, besides denying the allegations of the plaintiffs' statement of claim, plead that they are authorised by special Acts of the Legislative Assembly of the Province of Ontario, and by by-laws of the Corporation of the City of Windsor, to construct the works aforesaid. They also state that the plaintiffs have no status to bring this action, and that the Corporation of the City of Windsor is a necessary party. They further plead that the Ontario Railway and Municipal Board has exclusive jurisdiction to interpret the various franchises granted by the city. The writ was issued on April 8, 1914.

It was held by the learned trial Judge that the by-law of April 27, 1914, of the Municipality of the City of Windsor, purporting to authorise and empower the defendants to construct the line of railway in question, not having been submitted to the people as required by law, has no legal effect, and he granted the injunction and mandatory order, with a reference to the Master to assess the damages, and held that the Corporation of the City of Windsor was not a necessary party.

Upon the argument it was urged by counsel for the appellants that, under their charter and the various agreements with the Corporation of the City of Windsor, they had a franchise and authority to do the work complained of; and that the Municipal Franchises Act, 2 Geo. V. ch. 42, has no application to their charter and does not affect their rights.

It will be necessary, therefore, to examine somewhat closely the Acts, agreements, and by-laws under which the defendants claim the right to construct the line complained of.

The learned Judge here referred to the Act to incorporate the Sandwich and Windsor Passenger Railway Company, 35 Viet. ch. 64 (O.), sec. 4 and sec. 13; 50 Viet. ch. 80 (O.), whereby sec. 1 of the Act of incorporation was repealed.

On April 17, 1893, an agreement was entered into between the Corporation of the City of Windsor, the Sandwich Windsor and Amherstburg Railway, and the Windsor Electric Street Railway Company.

The learned Judge here referred to the agreements and by-laws as follows.

Reference to 35 Viet. ch. 64, secs. 4, 13, 14; 50 Viet. ch. 80 (O.); agreement April 17, 1893, between the City of Windsor, the defendants, and the Windsor Electric Street Railway Company; by-law 783, of the City of Windsor; 56 Viet. ch. 97 (O.); by-law of City of Windsor passed June 19, 1893; agreement of July 29, 1902, City of Windsor, defendants, and the City Railway Company of Windsor; by-law of City of Windsor adopted Feb. 2, 1914; a by-law passed April 27, 1914; the Municipal Franchises Act, 2 Geo. V. ch. 42 (O.), now R.S.O. 1914, ch. 197; R.S.O. 1897, ch. 223, sec. 569, sub-sec. 1; 10 Edw. VII. ch. 81, secs. 3, 4; 3 & 4 Geo. V. ch. 36, sec. 250.

The defendants being subject to the provisions of the Ontario Railway Act, the building of the proposed extension is within the meaning of sec. 250, sub-sec. 2, and requires the sanction of the Board, and this notwithstanding the terms of the agreements between the Corporation of the City of Windsor and the defendants. The new sub-sec. 3 of sec. 250 came into force on July 1, 1913 (see sec. 304), and the acts complained of occurred in April, 1914, so that it appears that, while the assent of the council was proper and within the agreements between the city and the defendants, the authorisation of the Board was a further condition precedent imposed by the Legislature to entitle the defendants to begin the construction of their line on the streets in question.

It will be seen, upon reading secs. 232 and 250 of the Ontario Railway Act, that the first gives authority to the corporation of a city or town to equip and operate a railway along and over the highways of the city, subject to the approval of the Board, but that such power is not applicable where a previous agreement exists; and, if there is a dispute as to whether such right exists, the Board is to decide. Section 232, therefore, does not apply to this case, as was contended at bar. This is not a

ONT.

S. C.

MITCHELL v. SANDWICH WINDSOR ETC. R.W. CO.

Clute, J.

contest between the claim of the city and the defendants to construct and operate a street railway, nor does the city dispute the existence of the agreements under which the defendants claim the right to build the railway; on the contrary, the Corporation of the City of Windsor has expressed its acquiescence by resolution and by-law as to the proposed acts of the defendants. The result is, that sec. 250 applies, and it was admitted that the defendants had not obtained the consent of the Board authorising the work to be done.

The Municipal Franchises Act, 2 Geo. V. ch. 42 (R.S.O. 1914, ch. 197), sec. 3 (1), provides that a franchise shall not be granted by the council of a municipality to use a street or highway without the assent of the electors. Section 4 (1) applies this provision to an extension of works already constructed; sec. 4 (2) declares that sub-sec. 1 shall not apply to any franchise granted by general or special Act before March 16, 1909, but no such franchise or right shall be renewed nor the term thereof extended by a municipal corporation except by by-law with the assent of the electors, as provided by sec. 3. I am of opinion that this last clause as to renewal is not retroactive. The defendants' right to use the streets in question for their railway rests upon the agreements of April 17, 1893, and July 4, 1893, as modified by the agreement of July 28, 1902, validated by 3 Edw. VII. ch. 112; and, that being a special Act prior to March 16, 1909, the last clause (2) of sec. 4 excludes the application of the section to the defendants' franchise.

It is not, therefore, in my opinion, under the peculiar circumstances of this case, compulsory upon the city corporation to submit the by-law authorising the construction of the railway on the streets in question for the approval of the electors; but the sanction of the Board is necessary. The latter not having been obtained, the acts of the defendants were without authority and illegal, and created a nuisance on the streets in question.

It also appears from the evidence that the plaintiff Dresch suffered peculiar damage by reason of the acts of the defendants upon the said streets, upon which his premises front. These

ONT.

S. C.

MITCHELL v. SANDWICH WINDSOR ETC. R.W. CO.

Clute, J.

acts rendered access to his house and lot difficult, if not impossible, and increased the cost of getting material there for his building operations.

I am also of opinion that the Corporation of the City of Windsor is not a necessary party to this action.

The by-law was properly passed authorising the railway to be built, but the sanction of the Board was necessary, and was not obtained. That was wholly a matter for the defendants. It is not a case where damages alone is a proper remedy.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

DENHOLM v. GUELPH & GODERICH R. CO.

CAN.

Ry. Com.

Board of Railway Commissioners.

1. RAILWAYS (§ V—115)—DRAINAGE—ADJOINING LANDS—DAMAGES—RAILWAY ACT, SEC. 250(2).

The Railway Commission exercising the statutory power contained in sec. 250 (2) of the Railway Act, Can., to order a railway to construct a drain under its tracks for the benefit of an adjoining owner and to fix the terms and conditions, may order the work done by the railway at its own expense where the owner could have easily drained his land but for the railway intersecting the same; the statutory obligation so cast upon the railway will remain notwithstanding the land-owner's release in the conveyance of land for the right of way, of his claim for damages by reason of the exercise of the railway company's powers.

Statement.

THE application was disposed of on material on file with the Board.

The facts are fully set out in the judgment of the Assistant Chief Commissioner.

Asst. Chief Commissioner.

THE ASSISTANT CHIEF COMMISSIONER:—John Denholm has complained to the Board that the construction of the Goderich Branch of the Canadian Pacific Railway has deprived him of the proper use of a portion of his farm, on lots 27 and 28, concession 4, in the township of Hullett, because of the lack of proper facilities of drainage under the railway. The matter has been taken up by correspondence with the complainant and the railway company; and the assistant chief engineer of the Board, Mr. Simmons, having made an inspection on the ground, reports that "there is no doubt but that the pipe, which is at mileage 96.85, should be lowered about 18 inches."

CAN.

Ry. Com.

[DENHOLM v. GUELPH & GODERICH R. Co.

Asst. Chief Commissioner.

Some months ago, accompanied by a representative of the Canadian Pacific Railway Company and Mr. Denholm, I made an inspection of the property in question. A part of Mr. Denholm's farm on the north of the railway track which is low lying land cannot be used for agricultural purposes because the pipe carrying the drainage under the railway company's tracks is not low enough. I agree with our engineer that this pipe should be placed 18 inches lower than it now is. If this change was made in the culvert, Mr. Denholm's low land could be drained and made suitable for agricultural purposes. It is estimated that the cost of lowering the pipe which carries the drain under the railway would be in the vicinity of $200. The only question is, whether the drainage should be done at the expense of the railway company or Mr. Denholm.

Under sec. 250 of the Railway Act, the obligation is clearly placed upon the railway company to do just such work as is now required by Mr. Denholm.

It is contended by the railway company that in the conveyance to the Guelph and Goderich Railway Company, of the right of way through the Denholm farm from Mr. Denholm's predecessor in title, that the company is relieved from any responsibility in this matter. The language of the clause in the conveyance in question is as follows:—

"And this indenture further witnesseth that the said price or sum includes compensation to the party of the third part (the land owner), his heirs, executors, administrators and assigns, for all damages which may be sustained by the said party of the third part or any of them by reason of the exercise upon the said lands hereby conveyed of the powers of the party of the second part as a railway company, or any of them."

There is nothing in the conveyance with reference to the question of drainage; nor, is there anything to shew that it was the intention of the parties to permit the railway company to contract itself outside the provisions of the Railway Act; if, indeed, it were possible for it to do so.

Paragraph b, of sec. 250 (2) of the Railway Act states that whenever a land owner desires to obtain means of drainage under the railway, the Board may order the company to construct such drainage, and may use its discretion upon what terms and conditions the work shall be done.

CAN.

Ry. Com.

DENHOLM v. GUELPH & GODERICH R. CO.

If the railway was not there Mr. Denholm could easily drain his land. The existence of the railway prevents him from doing so. The language of the Act is quite clear; and I do not think any general clause of release from damages in a conveyance should relieve the railway company from the obligation placed upon it by the statute.

An order should go for the railway company to lower the existing pipe under its tracks 18 inches, at its own expense, and the work should be completed within 30 days.

Asst. Chief Commissioner.

COMMISSIONER GOODEVE concurred.

Com. Goodeve.

Order accordingly.

MACKENZIE v. O'CONNELL.

QUE.

S.C.

Quebec Superior Court, Beaudin, J.

1. FRAUD AND DECEIT (§ V—20)—DOMICILE—DEPARTURE FROM PROVINCE—INTENT TO DEFRAUD—WRIT OF SEIZURE BEFORE JUDGMENT.

The departure from the province of Quebec of a person domiciled in the United States and who has contracted a debt in Quebec while there for a temporary purpose is not sufficient to shew intent to defraud the Quebec creditor without evidence of special intention to defraud to maintain a writ of seizure before judgment.

ACTION to quash an attachment.

Statement

Hibbard & Gosselin, for plaintiff.

Pélissier, Wilson & St-Pierre, for defendant.

BEAUDIN, J.:—Whereas plaintiff obtained on September 18 last, 1914, a writ of seizure before judgment against said defendant, for $100 on the ground of secretion and his departure from the province, and on the 24th of the same month issued a *capias* on the same grounds with the addition that he was to leave also the Province of Ontario, the whole with intent to defraud;

Beaudin, J.

Whereas defendant has contested both proceedings by two distinct petitions by which he prays the dismissal of these proceedings because he does not reside in this province, being only here to run horses on the race circuit of Canada and the United States;

Whereas the parties have consented at the hearing that both petitions be united for hearing and evidence and be decided by one judgment;

QUE.
S. C.
MCKENZIE v. O'CONNELL.
Beaudin, J.

Considering that the defendant was and is a resident of Louisville, Kentucky, U.S.;

Considering that said defendant runs horses on the race circuit of Canada and United States; that the race horses seized were engaged in the week in which the seizure was made at the Dorval race track and were being shipped to attend the races in Toronto the next day in the ordinary course of business;

Considering that it does not appear that defendant, by that fact or by his own departure, had any *intention* to defraud said plaintiff;

Considering that the departure from the province of a person domiciled in the United States and who has contracted a debt in the province even if it be true that plaintiff is a creditor of defendant, which the Court does not decide, as it does not arise, in the opinion of the Court, does not in the absence of evidence of special intention to defraud, constitute a departure with intent to defraud;

Considering that the issue of the attachment before judgment as well as that of the *capias* is not founded in fact nor in law:—

Doth maintain both the petition to quash the said attachment as well as that of the *capias* is not founded in fact nor and set aside the said seizure before judgment, as well as the *capias*, with costs against said plaintiff.

See the following authorities: *Shaw* v. *McKenzie*, 6 Can. S.C.R. 181; *Paulet* v. *Antaya*, 10 R.L. 329; *Marcotte* v. *Moodie*, 11 R.L. 460; *Drapeau* v. *Deslauriers*, 16 R.L. 433; *Lemieux* v. *Cirque Sells*, 7 R.P. 456; *Boulet* v. *Mittenthal Bros.*, 8 R.P. 286; *Kellert* v. *Ceranza*, 4 Rev. de J., 31.

Order accordingly.

QUE.
S. C.

ROBILLARD v. SLOAN.

Quebec Superior Court, Weir, J.

1. OFFICERS (§ I E1—46)—DISQUALIFICATION OF—NOTICE OF RENUNCIATION—QUO WARRANTO PROCEEDINGS—ARTICLE 207, M.C., QUE.

The notice of renunciation provided in art. 207, M.C., Que., to be given by a disqualified municipal councillor provides a means of avoiding *quo warranto* proceedings which otherwise might be taken against him because he would be deemed to have continued in the exercise of his office unless the notice were given; the notice is by no means a condition precedent to *quo warranto* proceedings.

[*Delage* v. *Germain*, 12 Que. L.R. 149, applied; *Damon* v. *Lamy*, 44 Que. S.C. 489, doubted.]

QUE.

S. C.

2. OFFICERS (§ I E1—46)—DISQUALIFICATION OF—CONTRACT WITH MUNICIPALITY—PROFIT—COMPLETION OF WORK—ARTICLE 205, M.C., QUE.

The disqualification of a municipal councillor under art. 205, M.C., Que., because of a contract with the municipality for road repairs, from which he obtains a profit, continues after the completion of the work contracted for and the receipt of payment therefor.

ROBILLARD v. SLOAN

[*Houle* v. *Brodeur*, 18 Que. S.C. 440, and *Damon* v. *Lamy*, 44 Que. S.C. 489, doubted.]

Statement

AN inscription in law against a petition *quo warranto*.

Wright, Gamble & Smart, for the petitioner.

D. R. Barry, K.C., for the respondent.

Weir, J.

WEIR, J.:—The respondent inscribes in law against the petition on which a writ in the nature of *quo warranto* issued on the demand of the petitioner, seeking to dispossess him of his office as mayor and councillor of the township of Litchfield, on the ground that he had entered into a contract with the corporation of the township. The grounds of the inscription in law may be summarized as follows: (1) That the petitioner had no right to the writ until and unless the office held by the respondent had previously been declared vacant by the municipal council, under art. 207 of the Municipal Code; (2) that the alleged facts caused, at most, only a temporary disqualification of the respondent during the existence of the alleged contract, which ended, as alleged in the petition, prior to the issue of the writ.

The facts alleged in the petition are as follows: That on June 7, 1913, the municipal council of Litchfield passed the following resolution, to wit:—

Moved by Councillor Beamans, seconded by Councillor Lunan, that Mayor B. J. Sloan and Councillors Kavanagh and Thomas Sloan be appointed a committee to repair or build the dump or culvert at Peter Cunningham's creek, and repair or build a washout on road, west of Kearn's Hill, and to regulate the watercourse which crosses the properties of Mrs. Patrick Kavanagh, Martin Grace and Francis Hearty. Carried.

That the respondent, acting in collusion with the said councillor Kavanagh, entered into a contract or agreement with the corporation, acting by the said committee, whereby he should do the work and be paid therefor; that he was so paid by the corporation, on December 9, 1913, according to a detailed account for work and materials from which the respondent obtained a profit. The petitioner prays that the respondent be dispossessed and excluded from office as councillor, and that he be disqualified as councillor of the township for a period of five years. The order for the issue of the writ was signed on February 6, 1914.

QUE.

S. C.

ROBILLARD v. SLOAN.

Weir, J.

On the first reason of the respondent's inscription in law it appears from art. 207 of the Municipal Code that any councillor who becomes disqualified during his term of office must give notice thereof without delay and tender his resignation. If he do not so act, he is deemed to continue in the exercise of his office, and becomes liable to all penalties, prosecutions and other rights of action set forth in the Municipal Code. It is a singular deduction from this provision of law to hold that, if the disqualified councillor abstains from giving such notice, he will be exempt from any proceedings in the nature of *quo warranto*, under art. 987 of the Code of C.P. By this pretension, the latter provision of law could be made ineffectual by the abstention of the disqualified councillor from giving the notice alleging the reasons of his disqualification and tendering his resignation. He would be the arbiter of his own fate, and although, as in the present case, alleged guilty of violation of the law, remain in office free to continue his offences. The respondent supports his pretension by a reference to a recent decision of the Court of Review in *Damon* v. *Lamy*, 44 Que. S.C. 489, where it was held that:

Un conseiller municipal qui loue ses chevaux pour des travaux aux chemins faits sous la direction de la municipalité et sous la surveillance d'un surintendant nommé par elle, n'encourt pas de plein droit la déchéance de sa charge. Elle doit, au préalable, être déclarée vacante de la manière prévue à l'art. 207, C.M., et, tant que cette formalité n'a pas été remplie, il n'y a pas ouverture, contre lui, au recours du *quo warranto*.

With all respect be it said that this interpretation of the law presents great difficulties. Article 205 M.C. says that a councillor under such circumstances cannot "act as such," and art. 207 M.C. provides in effect, that if he does not resign, but absents himself and refuses to act further as councillor (through fear of *quo warranto* proceedings or for any other reason), he will nevertheless be deemed to have continued "in the exercise of such office" (and so be subject to *quo warranto* proceedings), and liable to all penalties, etc.; for example, that set forth in art. 117. The formality suggested by art. 207, far from being a condition precedent to the issue of a writ of *quo warranto*, provides the only way of avoiding it, as the writ cannot issue if the disqualified councillor has previously resigned. In *Delage* v. *Germain*, 12 Q.L.R. 149, where the *quo warranto* was quashed, it was held:

That the holder of a municipal office, who becomes subject to a legal incapacity, cannot be proceeded against for a penalty, if he have deposited

with the secretary-treasurer a notice of such incapacity, with a tender of resignation, even though such resignation be not accepted by the council for want of quorum or other cause.

It is apparent, under this reason, that if the holder of the office had not given the notice and tendered his resignation the writ of *quo warranto* would have been justified.

In support of the second reason, the case of *Houle* v. *Brodeur*, 18 Que. S.C. 440, and which was confirmed by the Court of Review, was cited by the respondent. In that case it was held that a mayor who, *in a case of urgency*, allowed the corporation employees to have some planks, joists and money, the value of which the corporation subsequently reimbursed to him, *without profit*, had not made a contract with the said corporation in the meaning of art. 205 of the Municipal Code, and had not become disqualified. It is true that the learned Judge added that if art. 205 had been applicable the incapacity resulting would have ended with the payment of his account and the seat of the mayor would not have become vacant. This important addition was of the character of an *obiter dictum*, but has since been followed by a judgment of the Court of Review, presided over by the same Judge who rendered the decision in *Houle* v. *Brodeur*. The case before the Court of Review was *Damon* v. *Lamy*, already referred to, where it was stated that:

> Un conseiller qui aurait eu avec la corporation un contrat qui a été exécuté, dont les travaux sont reçus s'il n'y a plus rien à régler et qu'il ne reste plus que le paiement à faire, n'est pas déchu de sa charge dans l'intervalle entre le règlement final et le paiement; et le fait qu'il reçoit le paiement plus tard ne peut pas, non plus, entraîner une déchéance contre lui;

and again:

> Si on examine attentivement la rédaction de l'art. 205, on voit qu'il faut qu'au moment où l'on demande qu'un conseiller soit déclaré déchu de sa charge, il l'exerce en violation de la loi municipale, de l'art. 205; or, dans l'espèce, le défendeur n'était pas en faute, il ne travaillait pas; il avait cessé de travailler le 3 juillet et le *quo warranto* n'est arrivé que le 23 septembre.

With all respect, this latter paragraph seems to carry the grammatical interpretation of a statute too far. If this principle were applied to the Criminal Code, there would be few crimes, since they are generally defined in the present tense, and, at the time of the trial, are completed events, and the indictment comes subsequently. Article 17, R.S.Q. 1909, reads as follows:—

> **17.** The law is ever commanding; and, whatever be the tense of the verb

QUE.
S. C.
ROBILLARD
v.
SLOAN.
Weir, J.

or verbs contained in a provision, such provision is deemed to be in force at all times and under all circumstances to which it may apply.

Thus, when art. 205 M.C. says that whoever receives any pecuniary allowance or other consideration from the corporation for his services cannot act as a member of the council, it does not mean that the complaint must coincide in point of time with the illegal act, and that, unless it does, the offender can continue to act as a member of the council.

Such a contention was adversely disposed of in the English case of *Rex* v. *Rowlands*, [1906] 2 K.B. 292, and in our own Courts, in the joint appeals of *Martineau & Debien, and Martineau & Dansereau*, 20 Que. K.B. 523. In *Martel & Prevost*, 6 P.R. 244, the dissenting Judges were of opinion to dismiss the *quo warranto* proceedings for the reason that:

Il n'y a aucune déchéance prononcée par la loi, et conséquemment, on ne peut pas dire qu'au moment où la requête a été présentée, le syndic exerçait illégalement sa charge.

But the majority of the Court held, in maintaining the writ of *quo warranto*, as follows:—

Que dans l'espèce, les faits allégués et offerts en preuve constituent une incapacité de droit commun, sinon statutaire, d'exercer la charge de syndic. Qu'il n'est pas nécessaire que cette incapacité soit déclarée par une disposition statutaire, pour donner lieu au recours de l'art. 987. . . . Que cette disposition du code s'applique à une incapacité survenue après l'élection ou nomination du titulaire, de même qu'à une incapacité existant lors de son élection.

The change of sovereignty in this country introduced the public law of England, including the remedy in the nature of *quo warranto* against those who misuse or abuse their positions as public officers. Blackstone (vol. 2, p. 152) says that the law tacitly annexes to grant of office "a secret condition that the grantee shall duly execute his office, on breach of which condition it is lawful for the grantor to oust him," and, speaking of the remedy by *quo warranto*, he says: "The writ commands the defendant to shew by what right he exercises such a franchise . . . *having forfeited it by neglect or abuse*," and this principle is restated in C.C.P. art. 990, when it says: "If the petition is well founded, the judgment orders the defendant to be ousted and excluded from the office." The intent to alter the common law cannot be presumed (Endlich, sec. 127). It must be expressed. Our statutes have never expressly altered the common law application of the remedy in the nature of *quo warranto*, so that the

remedy remains with its full effect. Our law does not provide for any temporary incapacity or disqualification of an offending public officer, during the existence only of the act by which he has misused his office.

The respondent's inscription in law is dismissed with costs.

Inscription in law dismissed.

QUE.
S. C.
ROBILLARD v. SLOAN.
Weir, J.

PYE v. McCLURE.

B. C.
C. A.

British Columbia Court of Appeal, Irving, Martin, Galliher, and McPhillips, JJ.A. April 6, 1915.

1. CONTRACTS (§ IV A—315)—AGISTMENT CONTRACT—PERFORMANCE—DEGREE OF CARE.

On a contract of agistment the onus is upon the agister to prove that the death of the pony, which was turned out on his range for food and shelter for the winter season, did not arise by reason of the agister's neglect to use such care as a prudent or careful man would exercise in regard to his own property.

[*Phipps* v. *The New Claridge's Hotel*, 22 Times L.R. 49; *Platt* v. *Waddington*, 23 O.L.R. 178, referred to.]

Statement

APPEAL by defendants from judgment of Thompson, Co.J.

M. A. Macdonald, for appellant.

Darling, for respondent.

Irving, J.A.

IRVING, J.A.:—I would dismiss the appeal. *Platt* v. *Waddington* (1911), 23 Ont. L.R. 178, shews that the onus was on the defendant, and, in my opinion, he has not satisfied it.

An agister owes, at least, some duty to the owner of a horse turned out, and failure to find the body for six weeks after is evidence from which negligence could be presumed.

Martin, J.A.

MARTIN, J.A.:—After a consideration of all the evidence, which I have carefully read over since the argument, I have reached the conclusion, after some hesitation, that the judgment should be affirmed, though there are certain portions of it that I cannot, with all respect, accede to, and it is not wholly consistent. But the two points of the case that tell most against the defendant are (1) that he made a misleading report of the pony's condition, thereby putting the plaintiff off his guard for the necessity of proper attention to the animal, which was not doing well, probably chiefly because of its having been infested by lice when in the plaintiff's possession; and (2) the

B. C.
C. A.
PYE
v.
MCCLURE.
Martin, J.A.

haystack (which it was admittedly contemplated the pony should have the use of) was not fit nourishment for a horse. In these two respects the defendant failed in his duty on the special agreement made between the parties, which was not entirely the ordinary one of agistment (as to which *cf.* Oliphant on Horses, 6th ed., 242), but in one respect (the representation that the hay was "good," p. 9), something more. The case has given me some difficulty in deciding, but on the two essential points of fact which the Judge has directly or inferentially found in favour of the plaintiff, I cannot bring myself to say he has been clearly wrong, so the judgment should not be disturbed.

Galliher, J.A.

GALLIHER, J.A.:—The evidence, to my mind, establishes that the defendant fulfilled his express contract with the plaintiff and unless it was incumbent on the defendant when he ascertained that the animal was suffering from an ailment, to treat it therefor, this appeal should be allowed.

The defendant before he took the animal to graze was suspicious that it had mange, but was assured by the plaintiff that it had not, and that he (the plaintiff) had been treating it with medicine procured from a veterinary for an itching at the root of the tail.

The plaintiff turned the animal over to the defendant as one in good condition to be allowed the run of the defendant's premises during the winter.

In February the animal was found dead on the premises, the plaintiff claiming it died from starvation, the defendant's theory being that it was afflicted with lice which naturally weakened its condition and rendered it more susceptible to the rigors of winter. Whether the animal died of starvation or not, it was not, as I view the evidence, from the lack of food available on the range, or from lack of shelter.

The defendant and his foreman say the animal had lice, and if we accept that, it becomes a question whether the defendant, knowing this, is liable because he did not treat the animal.

When the foreman discovered this it certainly would have been a simple matter to have applied kerosene as he did to his own cow, which he alleges caught lice from this animal.

Had the defendant or his foreman not known of this afflic

B. C.

C. A.

PYE v. MCCLURE.

Galliher, J.A.

tion I should have thought that, under the contract and the method of grazing horses or cattle on the ranges in this country, the defendant would not be liable, but having that knowledge and neglecting to apply the simple and inexpensive remedy, or at all events to inform the plaintiff of the animal's condition, constitutes negligence for which the defendant is responsible.

I would sustain the learned trial Judge but on different grounds.

McPhillips, J.A.

McPHILLIPS, J.A.:—In my opinion this appeal should be dismissed—the onus which was upon the defendant was not satisfactorily proved, *i.e.*, to prove that the death of the pony did not arise by reason of his neglect to use such care as a prudent or careful man would exercise in regard to his own property. Upon the evidence it is clear that there was absolute disregard of the welfare of the pony and the absence of ordinary diligence and further the hay which had to be turned to during inclement weather—for fodder—was not fit for food, and the pony died at the haystack, it can reasonably be said, because of the want of food, fit to sustain life: see *McKenzie* v. *Cox* (1840), 9 Car. & P. 632, 62 R.R. 762; *Reeve* v. *Palmer*, 5 C.B.N.S. 84; *Smith* v. *Cook* (1875), 45 L.J. 122. In *Phipps* v. *The New Claridge's Hotel Ltd.* (1905), 22 T.L.R. 49, at p. 50, Bray, J. said:—

> That he was of opinion that when it was once proved that this dog was placed in the defendant's custody as an ordinary bailment it was their duty to shew some circumstances which negatived the idea of negligence on their part. No such evidence had been placed before him. The story which their witnesses told was one he could not accept and he must therefore hold that they had not proved that reasonable care was taken and must come to the conclusion that there was negligence on their part.

The judgment of the learned trial Judge therefore, in my opinion, should be affirmed.

Appeal dismissed.

UNION BANK OF CANADA v. DODDS.

SASK.

S. C.

Saskatchewan Supreme Court, Elwood, J. May 29, 1915.

1. BILLS AND NOTES (§ I C)—CONSIDERATION—FORBEARANCE — ACCOMMODATION NOTE.

The forbearance of the creditor under an arrangement by which the debtor was given a reasonable time to realize on securities owned by him in order to pay the debt, is a sufficient consideration to support an accommodation note given by a third party directly to the creditor as collateral security.

SASK.

S.C.

UNION BANK OF CANADA v. DODDS.

Elwood, J.

ACTION on a promissory note.

Newcombe, for plaintiff.

W. W. Livingstone, for defendant.

ELWOOD, J.:—This is an application brought by the plaintiff to recover from the defendant a promissory note made by the defendant in the favour of the plaintiff for $500 and interest.

The statement of defence alleges that there was no consideration for the promissory note, and the defendant is a holder without valuable consideration, and, in the alternative, the consideration is illegal.

I find on the evidence that, prior to the giving of the note in question, a manager of the plaintiff had wrongfully taken money belonging to the plaintiff; that an inspector came down and discovered the shortage, and the plaintiff through this inspector and through their solicitors was pressing the manager for payment; but no mention was made of any criminal proceedings. The manager agreed to turn over to the bank, as security for his indebtedness, certain property which he owned, and that, in addition to that, the bank was urging the manager to give other security. In consequence of this, this manager and the inspector went to the defendant and the defendant in his evidence, *inter alia*, gives the following account of the reason for taking the note; he said this:—

> To make a shewing for the bank and allow him to realize on his real estate; his lots in Prince Albert, I think, and in Cutknife. He had then filed on a homestead, and had an interest in a crop of flax near Cutknife, but the Union Bank were pressing him hard and what had to be done had to be done immediately.

This manager in his evidence, *inter alia*, says:—

> The bank were pressing me for payment of this overdraft, and of course they didn't want to push me so that I would lose out, so that I could realize as much as I could on what I had, and I obtained this security and it was agreeable to the bank.

The manager, before the taking of the accommodation note, had agreed to turn over to the bank his property. The evidence is rather vague as to when this was turned over, but I find on the evidence that it was turned over to the bank after the taking of the accommodation note. There is no evidence as to what the bank did with this property. It comprised practically all of

SASK.

S. C.

UNION BANK OF CANADA v. DODDS.

Elwood, J.

the manager's assets, but I think I am justified in assuming that nothing has been realized by the bank on this property and that the bank still holds it; not absolutely, but by way of security.

It seems to me, from the evidence, that the bank, in taking the account, practically agreed to give to the manager a reasonable time to realize on the security, and that the bank not having realized on the security, nor taken any further civil proceedings against the manager, there was a forbearance on the part of the bank, and that such a forbearance is a sufficient consideration for the giving of the note: *Crears* v. *Hunter*, 19 Q.B.D. 346, seems to bear out this proposition.

There was nothing illegal in the taking of the note and, therefore, in my opinion, the plaintiff is entitled to recover, and I so hold. There will, therefore, be judgment for the plaintiff against the defendant for $500 and interest thereon at 5 per cent. per annum after maturity, and costs.

Judgment for plaintiff.

Re HARPER AND TOWNSHIP OF EAST FLAMBOROUGH.

ONT.

S. C.

Ontario Supreme Court, Riddell, J.

1. MUNICIPAL CORPORATIONS (§ II C—50)—BY-LAW—VALIDITY OF—MUNICIPAL ACT, R.S.O. 1914—RAILWAY AND MUNICIPAL BOARD—APPROVAL OF—WITHDRAWAL.

In order that the validity of a municipal money by-law shall not be open to question in any court, under the Municipal Act, R.S.O. 1914, ch. 192, sec. 295, by reason of the approval thereof by the Ont. Railway and Municipal Board, such approval must remain effective when the proceedings in which the by-law is attacked come on to be heard; the court will have jurisdiction to quash where the Board's approval order existing when the notice of motion to quash was served was afterwards withdrawn by the Board.

[*Re Fowler and Waterdown*, 7 O.W.N. 309, followed; *Re Dougherty and East Flamboro*, 6 O.W.N. 487, and *Re Shaw and St. Thomas*, 18 P.R. 454, referred to.]

Statement

MOTION by J. C. Harper, a ratepayer of the township, for an order quashing a by-law passed by the municipal council of the township providing for the issue of debentures in order to raise one-half the cost of construction of a new high school building, in the township.

J. G. Farmer, K.C., for the applicant.

W. T. Evans, for the township corporation.

ONT.
S. C.
RE HARPER AND TOWNSHIP OF EAST FLAMBOROUGH.
Riddell, J.

RIDDELL, J.:—This is an application to quash a by-law of East Flamborough: the particulars are set out in the judgment of Mr. Justice Latchford in *Re Fowler and Village of Waterdown*, 7 O.W.N. 309.

The notice of motion to quash having been served, it was discovered that the by-law had been approved by the Ontario Railway and Municipal Board: and, when the motion came on before the Chancellor, he enlarged it that the applicant might apply to the Board to have the certificate set aside. He did so with effect, and the certificate was set aside accordingly. The motion came on before me; and, on objection taken that the notice of motion was served when the by-law was inexpugnable by reason of the provisions of the Municipal Act, R.S.O. 1914, ch. 192, sec. 295(4), I enlarged the argument that counsel might consider the point.

Argument was renewed and completed to-day.

The objection is, that, as the rights of a plaintiff must be determined as of the teste of the writ: *Cornish* v. *Boles* (1914), 31 O.L.R. 505, 521; *Northern Electric and Manufacturing Co. Limited* v. *Cordova Mines Limited* (1914), 31 O.L.R. 221, 238, 243; so the rights of an applicant on such a motion as the present must be determined as of the day of the service of the notice of motion, the beginning of the proceeding: *Re Shaw and City of St. Thomas* (1899), 18 P.R. 454. No doubt, speaking generally, that is so; but I do not think that such a principle is conclusive here. The section cannot be read literally—it cannot be that, after a by-law has been approved by the Board, it is not "open to question in any court:" if the approval is withdrawn and the order of the Board set aside, no one would argue that "thereafter" a motion could not be prosecuted begun by a notice served thereafter.

Full effect can be given to the section by interpreting it as meaning that the Court cannot question the validity of a by-law which has been approved by the Board if such approval is in existence when the Court is called upon to decide. And this works both ways: if the approval of the Board were obtained after notice served and before the return thereof, I have no doubt the Court could not declare the by-law invalid.

No case has been cited in which a plaintiff, having begun

an action in ignorance of a bar existing to his obtaining his rights, but on discovery of the bar procuring its removal, is still barred because of that previous obstruction.

Were this a case of estoppel, difficult questions might arise: but, even then, there is respectable authority for the proposition that an action begun which can be met by a plea of estoppel, will lie if the estoppel be removed before the matter comes to adjudication.

Goodrich v. *Bodurtha* (1856), 72 Mass. (6 Gray) 323, referred to.

The difference between merger and estoppel I do not go into. The cases are not few in which, when the matter came on for consideration and determination by the Court, an estoppel by way of judgment existed, the fact that the judgment might be appealed as in *Doe* v. *Wright* (1839), 10 A. & E. 763, *Overton* v. *Harvey* (1850), 9 C.B. 324, *Scott* v. *Pilkington* (1862), 2 B. & S. 11, *Nouvion* v. *Freeman* (1889), 15 App. Cas. 1, or even had been appealed and the appeal was pending, as in *Harris* v. *Willis* (1855), 15 C.B. 710, was held to be immaterial. As Cozens-Hardy, L.J., puts it in *Marchioness of Huntly* v. *Gaskell*, [1905] 2 Ch. 656, at p. 667, "A judgment is . . . not the less an estoppel . . . because it may be reversed on appeal. . . ." But I know of no case in which the estoppel had been removed at the time the matter came up for adjudication, and it was held that the estoppel existing at the beginning of the proceedings still continued as a bar.

I think the motion must be heard on the merits: and on the merits I am bound by the judgment of Mr. Justice Latchford in 7 O.W.N. 309. It is argued that certain parts of the judgment of Mr. Justice Lennox in *Re Dougherty and Township of East Flamborough* (1914), 6 O.W.N. 487, are opposed to my brother Latchford's view: but these are obiter, and must have been considered in the later case in 7 O.W.N. 309.

I think the motion must be allowed with costs (including costs of the postponements).

Motion allowed.

B. C.

C. A.

DEISLER v. SPRUCE CREEK.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and McPhillips, JJ.A. April 30, 1915.

1. MINES AND MINERALS (§ I A—8)—PLACER CLAIM—LOCATION—RECTIFICATION OF LEASE.

A free miner locating a placer claim in the vicinity of lands under lease from the gold commissioner and who locates his claim outside of the boundaries described in such lease, is not deprived of his claim legally obtained by his location and record when a rectification is afterwards made of the boundaries described in the lease under the authority of an Order-in-Council, particularly where such Order-in-Council contained a clause saving the rights of free miners.

2. MINES AND MINERALS (§ I A—76)—PLACER MINING—LEASE FOR—OCCUPATION UNDER.

The marking out of the ground by the applicant for a mining lease under the Placer Mining Act, R.S.B.C., ch. 136, is merely a preliminary to the application for a lease; it does not constitute occupation and is subject to the modifications which the gold commissioner may make and to the boundaries which he may fix. (*Per* Irving, J.A.)

Statement

APPEAL from a judgment of Macdonald, J.

Bodwell, K.C., for appellant.

E. M. N. Woods, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The attack on the validity of the plaintiff's placer claim, the "Sunflower," was not sustained by the learned Judge. The evidence was conflicting upon both questions involved, namely, the date of staking and the size of the posts. The decision of these questions was eminently one for the trial Judge who saw and heard the witnesses, and I find nothing to convince me that the conclusion arrived at by him is erroneous.

The contest then turns on the alleged conflict in boundaries between the "Sunflower" and the "Vernon lease," the instrument of title under which the defendant company claims the ground in dispute. That lease is dated June 15, 1900. In May of that year the lessee staked the ground and applied for the lease, giving a description of the area applied for and attaching to the application a plan of the ground. That description and plan shewed the ground to be a rectangular parallelogram, the sides being 1,500 and 1,800 feet respectively in length. The lease as issued contained a similar description except that it does not in words state that the piece of ground is rectangular. The plan which was attached to the lease was in terms made part of the description. That plan was detached at a subsequent

time when a rectification was made in the description, and is not in evidence. That description including the plan continued to be the description of the boundaries of the "Vernon" until long after the location and record of the "Sunflower."

Now the validity of the "Sunflower" having been established, the burden rests upon the defendant company to establish the alleged overlapping of the "Sunflower" upon the "Vernon" claim. The effect of the lease was to withdraw from the category of lands open to location by free miners the area in the lease. The free miner locating a placer claim in the neighbourhood would be entitled to regard the boundaries of the "Vernon" as properly described in the lease, and if he located his claim outside those boundaries no rectification afterwards made of those boundaries could take away what he had obtained by his location and record. The real question, therefore, in my opinion is what were the boundaries of the "Vernon" as described originally in the lease? That is the issue, the burden of which the defendants must satisfy, and that I think they have not satisfied. If the verbal description contained in the lease originally be accepted for the respective length of the four sides of the claim, and it must be, and it be assumed that the plan shewed the angles to be right angles, and a survey be made from the starting point in that description, namely, the south-east corner of the "Durban No. 2," which while not an apt description of that corner must mean the one near the bank of the Creek, and running in a direction however slightly north of east, it will be found that the boundaries of such a rectangular plot will not conflict with the "Sunflower." It may be said, why assume that the lost plan would shew right angles? That would be a most pertinent query if the onus of proof were on the plaintiff, but not when the defendants come into Court with a partial description only of the area embraced by the lease. No survey has been made from the description contained in the lease. On the contrary all surveys made were made for the very purpose of establishing other boundaries.

It is conceded by counsel for the defendants that the original description in the lease was erroneous. An Order-in-Council was passed in 1904, at the instigation of the lessee, authorizing

B. C.
C. A.
DEISLER
v.
SPRUCE CREEK.
Macdonald, C.J.A.

an amendment of the description and the rectification of the boundaries, but there was a clause therein saving the rights of free miners and this saving clause is the basis of the learned Judge's decision in the Court below. I am not sure that I should go as far as the learned Judge has gone in his construction of this saving clause. I think it meant that the boundaries were not to be enlarged so as to encroach on existing placer claims, and that is enough for the purposes of my decision in this case. Had the "Sunflower" or any portion of it been within what the defendants could prove to be the boundaries as originally described I should have thought the saving clause would not help the plaintiff, but that is immaterial now in view of my conclusion that the defendants have failed to prove that any portion of the "Sunflower" is within the boundaries of the "Vernon" as originally described in the lease.

The appeal should, therefore, be dismissed.

Irving, J.A.

IRVING, J.A.:—Plaintiff as owner of the "Sunflower" mineral claim sues for trespass committed by servants (laymen) of the defendant company. The defence raised two points:—

1. Was the "Sunflower" placer claim properly staked? That is I think correctly answered by the Judge's findings of fact. It was staked on July 5, 1901, with legal stakes.

2. Was the lease known as the "Vernon" lease applied for by Murton (R.S.B.C., ch. 136, sec. 90, Placer Mining Act), in May, 1900, a bar to the plaintiff's right to stake the "Sunflower"? Mr. Bodwell relies on the granting of the lease in 1900 and claims that the defendants were in possession of the land applied for and comprised in the lease from and after the Order-in-Council of June 15, 1901, and that the defendants' title relates back to the marking out of the land in April, 1900, or at any rate to June 15, 1900.

The defeat in Mr. Bodwell's contention in my opinion is that he assumes the substantial part of the steps to be taken to obtain a lease is the original marking out of the ground by the applicant.

That marking out in my view is merely a preliminary to the application for a lease. It does not constitute occupation. It is to shew what ground the application is intended to include, but

as the Gold Commissioner may refuse or modify the terms of the application as he shall think fit (sec. 95), it is plain that it is the Gold Commissioner and not the Lieutenant-Governor who fixes the terms and boundaries of the lease. The Gold Commissioner may not grant a lease in any locality marked out without the sanction of the Lieutenant-Governor in Council. The sanction does not confer a title on the lessee to any land, but once that sanction is granted the matter devolves on the Gold Commissioner whose duty it is to see that land actually occupied by free miners, or land available for agricultural purposes is not included within the lease, and generally to make such modifications of the terms of the application as he thinks fit.

The right of the free miner to "enter on any land not lawfully occupied for placer mining purposes" would be exercisable I think after the applicant had marked out the locality he intended to apply for and until the survey of the lease was completed. The clause in the lease itself "except and always reserved out of this demise all such mining claims situate in whole or in part within the tract hereby secured as are legally held and represented by free miners" would include claims taken up after the preliminary marking out. A marking out by an applicant under sec. 90 is not a "location" of the claim. It is designed to let the free mining public know that there is a proposal that the marked out area should be withdrawn from the reach of the individual miners, so that they can make a protest to the Lieutenant-Governor in Council. The recitals shewing why it is expedient that this area should be leased indicate the reasons for permitting so large an area to be taken up as a lease.

The strongest evidence that could be put before the Lieutenant-Governor in Council that the area ought not to be withdrawn from the operation of the individual free miner would be the fact that after the marking out by the applicant a large portion of the area had been covered by the individual applications.

The fact that the applicant is given 30 days within which he is to make his application in writing is not, having regard to the absence of express words closing the area to location by free miners, proof that the area is so closed. That provision as to time may very well have been inserted for the sake of regularity of procedure and to prevent stale claims being put forward.

B. C.

C. A.

DEISLER v. SPRUCE CREEK.

Irving, J.A.

I think Mr. Bodwell's contention based on the acceptance by the Government of certain surveys is not supported by anything in the statute.

The Government is not concerned with the surveys. When the sanction is given the Gold Commissioner notifies the applicants and it is for them to locate the lands to be comprised within their lease and have them surveyed. This survey and location is generally done at one and the same time. If the applicant is negligent in this respect it is his own fault if he suffers damage. In *Chew* v. *Howe Sound*, 18 B.C. 312, a case under the Land Act, the limits had been located, and the surveys accepted after notice. The trespassers were never misled.

The defendant company here made their preliminary marking out in April, 1900, and applied in May for an identified area of 1,500 feet by 3,200 feet.

The Lieutenant-Governor in Council gave sanction for 1,500 feet by 1,800 feet, but did not identify the part which had been rejected.

The notification from the Gold Commissioner (p. 353) dated July 7, 1900, prescribed the conditions under which the lease was to issue as of June 15, 1900, viz.:—

> The ground mentioned in the said application was to be surveyed by a duly qualified Provincial Land Surveyor, who would furnish this office with plans and also a certificate to the effect that the said ground does not conflict with other leases or placer claims.

Mr. Brownlee made a survey of the location to be included in the lease, and a plan of that survey was attached to the lease which was then drawn up and executed. What that plan shewed we do not know as it was removed from the document and, therefore, the location, when it was discovered (later) that the survey of the leasehold also were wrong. After the lease had been executed with this faulty plan attached the "Sunflower" claim was located (in July, 1901).

On August 19, 1904, an Order-in-Council (p. 367) was passed, reciting that a mistake had been made in the survey of the Vernon, and authorizing the Gold Commissioner to amend the plans and descriptions so as to correct the leases "provided the amendment did not conflict with the rights of any free miner." The Order-in-Council also provided that the amended lease was to be re-executed.

B. C.

C. A.

DEISLER v. SPRUCE CREEK.

Irving, J.A.

The defendant company through their manager was in 1906 a party to the "Sunflower" being jumped, and the company having bought out the jumpers granted a lay to some men who worked the ground. This seems to me cogent evidence for believing the "Sunflower" was not within the original boundaries.

In the summer of 1908 another surveyor Wilkinson was called in and made a new survey of the lease. Station No. 23 which was the identification mark referred to in the application was not then in existence.

The land as first located by Wilkinson shewed the "Sunflower" outside of the lease.

This location was ignored, no doubt because it did not include the "Sunflower."

Then another location and survey was made which did include within its boundaries a portion at least of the "Sunflower"; thereupon an undated deed poll giving a new description of the leasehold was executed by the Gold Commissioner and attached to the lease on March 11, 1908.

In my opinion the defendants' lease could only become effective after the amendment was made and the new lease executed (if it was ever executed). It might then relate back to the date of the location and survey which was adopted by the Gold Commissioner, but I think the true date is the execution of the lease (sec. 92).

I agree with the learned Judge that the validity of the plaintiff's claim made in 1901 could not be destroyed by an amendment of the defendants' lease based on a location and survey made years later.

I would dismiss the appeal.

MARTIN, J.A., agreed in dismissing the appeal.

Martin, J.A.

McPHILLIPS, J.A.:—The defendant, the Spruce Creek Power Company, Limited, appeals from the judgment of Mr. Justice Macdonald, who held that the defendant had been guilty of acts of trespass upon placer mining ground of the plaintiff—the respondent in the appeal.

McPhillips, J.A.

The learned trial Judge in his reasons for judgment said:—

If the ground to be obtained under a lease is governed by the location of the posts placed at each corner of the claim and not by the description

B. C.
C. A.
DEISLER
v.
SPRUCE
CREEK.
McPhillips, J.A.

in the lease subsequently granted, the company became entitled to the ground within the limits of the second survey made by Wilkinson. This shews, according to exhibit 32, a substantial portion of the "Sunflower" placer claim within the boundaries of the land occupied by the Vernon lease.

The appellant holds the placer ground covered by the Vernon lease and the respondent holds the placer ground covered by the "Sunflower" placer claim—the action would seem to have proceeded and to have been determined upon the footing that if the appellant should be held to be entitled to all the placer ground covered by the amended description and plan attached to the original Vernon lease then no acts of trespass had been committed and that the action should stand dismissed—I so read the evidence.

The matter for determination upon this appeal is, therefore, resolved into small compass.

The learned Judge has held that the original staking entitled Mr. Wilkinson, the surveyor, to survey and describe the ground as covered by the amended description, and if that ground was by the act of staking and the application made therefor reserved from all other entry by other free miners, then it follows that the respondent could not from the time of the staking enter upon any of the ground so staked and stake out a placer claim, that is that the error of description afterwards corrected was a right available to the appellant and being corrected by the Crown no exception thereto is possible of being taken by the respondent and to the extent that the "Sunflower" placer claim encroaches upon the true description of the placer ground as staked and applied for and intended to be covered by the Vernon lease, there is no title in the respondent. Should this be the true position in law it follows that no acts of trespass were committed.

The application for the Vernon lease was in the following terms:—

I desire to make application for a lease of bench ground for placer mining purposes commencing at an initial post planted on the right or north bank of Spruce Creek about 100 ft north of Survey Sta. 23, and running down stream 1,500 ft, in a N.W. direction to post No. 2; thence at right angles 2,300 ft. in a N.E. direction to post No. 3; thence parallel with front line 1,500 ft. in a S.E. direction to post No. 4; thence 2,300 ft. in a S.W. direction to point of commencement containing an area of less than 80 acres.

Lease to run for 20 years and claim to be known as the Vernon bench hydraulic lease claim.

The number of my Free Miner's Certificate is 16934 B., issued at Vancouver, B.C., 31 May, 1899.

Respectfully

J. F. MURTON,

April 22nd, 1900. *Per* Wm. E. Ward, Atty.

The application as made was duly recommended to be granted by the Gold Commissioner of the District—amongst others—as contained in the recommendation of date June 2, 1900, the recommendation being in the following terms:—

Your Honour,—In accordance with para. 96 of the Placer Mining Act, I have the honour to enclose herewith applications from the undermentioned persons for hydraulic leases and would recommend the same for your favourable consideration in council:—

J. F. Murton, 80 acres.
A. P. Freimuth, 80 acres.
W. E. Ward, 80 acres.
W. C. Hall, 80 acres.
J. H. Brownlee, 80 acres.
R. C. Lowry, 80 acres.
Martha Brownlee, 80 acres.

This property is situate on Spruce Creek in the Atlin Mining Division of Cassiar District. The ground can only be worked on a large scale by reason of the depth of gravel, etc., and the cost of getting water on the ground.

Section 92 of the Placer Mining Act has been complied with and I would recommend that the rentals be fixed at $50 yearly with the usual amount of development work.

I have the honour to be,
Your Honour's obedient servant,
J. D. GRAHAM,
Gold Commissioner.

Following the recommendation an Order-in-Council was duly passed and approved by His Honour the Lieutenant-Governor on June 15, 1900, which reads as follows:—

To His Honour
The Lieutenant-Governor in Council.

The undersigned has the honour to report for the consideration of the Council the following: That applications under the Placer Mining Act have been received from the undermentioned for a lease each of 80 acres of certain ground for hydraulic purposes situate on Spruce Creek in the Atlin Lake Mining Division, Cassiar District, viz.:—

J. F. Murton.
A. P. Freimuth.
W. E. Ward.
W. C. Hall.
J. H. Brownlee.
R. C. Lowry.
Martha Brownlee.

B. C.

C. A.

DEISTER v. SPRUCE CREEK.

McPhillips, J.A.

And to recommend that inasmuch as the Gold Commissioner of the District, Mr. J. D. Graham, in submitting these applications for approval states that the ground can only be worked on a large scale owing to the depth of the ground and the cost of getting water on the ground, also that the requirements of the Act have been complied with, he be authorized to issue to the applicants a lease each of the ground applied for, for a period of 20 years, at an annual rental of $50 and subject to a yearly expenditure on development work of not less than $1,000 on each lease.

Dated this 15th day of June, A.D. 1900.

SMITH CURTIS,
Minister of Mines.

It is to be noted that the Order-in-Council reads that the Gold Commissioner "be authorized to issue to the applicants a lease each of the ground applied for for a period of 20 years."

On July 7, 1900, J. F. Murton, the predecessor in title of the appellant, is advised of the determination of the Lieutenant-Governor in Council by letter in the following terms:—

Gold Commissioner's Office,
Atlin, B.C., July 7th, 1900.

Sir,—Notice is hereby given that the hydraulic lease applied for by you on Spruce Creek will be issued upon your complying with the following conditions:—

Have the ground mentioned in the said application surveyed by a duly qualified Provincial Land Surveyor, who will furnish this office with the plans and also a certificate to the effect that the said ground does not conflict with other leases or placer claims.

If your lease is issued it will date from the 15th day of June, 1900, and it must be completed within sixty days from that date, otherwise the application will be cancelled.

Yours truly,
H. YOUNG,
For the Gold Commission.

To J. F. Murton,
Atlin.

In due course a mining lease issued in pursuance of the application made, but later all proper amendments authorized by Order-in-Council, were made as to description and plan and notations thereof duly made on the lease, and the lease with the amendments is in the following terms:—

The Order-in-Council admitting of the amendment of the plan and description of the ground covered by the Vernon lease to correspond with the survey is in the terms following:—

To His Honour

The Lieutenant-Governor in Council.

The undersigned has the honour to report for the consideration of the Council the following:—

That an application has been received from the Gold Commissioner at Atlin, asking for authority to amend the description of the ground covered by the undermentioned leases, viz.:—

186 "Hastings," 187 "Pretoria," 188 "Plumas," and 189 "*Vernon*," which were issued with descriptions prepared at the time of staking the ground, and upon surveys being made said descriptions were found to be erroneous.

And to recommend that Mr. J. A. Fraser, the Gold Commissioner of the Atlin Lake Mining Division, be authorized to amend the plans and descriptions of the ground covered by said leases so as to correspond with the surveys, and thereupon to have re-executed said leases to the lessees mentioned in said leases or to their assigns, provided such amendment to the descriptions of the ground does not conflict with the rights of any free miners.

Dated this 19th day of August, A.D. 1904.

RICHARD McBRIDE,
Minister of Mines.

The learned counsel for the respondent strongly urged that the concluding words of the Order-in-Council preserved the position of the "Sunflower" placer claim, the words being "provided such amendment to the description of the ground does not conflict with the rights of any free miners," and that the "Sunflower" placer claim as applied for on July 5, 1901, and duly re-recorded has precedence to the Vernon lease as amended, the application made by the predecessor in title of the respondent and the certificate therefor.

The governing statute with respect to the location of placer claims and the title thereto at the time of the granting of the Vernon lease and the recording of the "Sunflower" placer claim was the Placer Mining Act (ch. 136, R.S.B.C. 1897, and amendments thereto—the Placer Mining Act at present in force is ch. 165 of the R.S.B.C., 1911).

It is provided as follows in the Placer Mining Act in section 22 thereof:—

> 22. In case of any dispute as to the title of a placer claim the title to the claim shall be recognized according to the priority of such location subject to any question as to the validity of the record itself and subject further to the free miner having complied with all the terms and conditions of this Act.

Now unquestionably the appellant had the priority of location—the location date being April 22, 1900, whilst that of the respondent's predecessor in title was on July 5, 1901—the authority for the granting of the lease which issued to the appellant's

B. C.
C. A.
DEISLER
v.
SPRUCE
CREEK.
McPhillips, J.A.

predecessor in title is to be found in Part VII. of the Placer Mining Act, and the power to grant the lease extended over "any unoccupied and unreserved Crown lands for placer mining purposes," and section 95 provides that the Gold Commissioner may with the sanction of the Lieutenant-Governor in Council grant or refuse any application or modify the terms and conditions of the application.

It would appear upon the facts that the Gold Commissioner in the present case granted the application as made and that his decision was duly sanctioned by the Lieutenant-Governor in Council—it is to be noted that the application was granted, no modification thereof being imposed.

It would appear that the Vernon lease was granted before a survey thereof was made and when a survey was made it was found that as made it overlapped and encroached upon certain placer claims.

Then it was decided by Order-in-Council to have a new survey and the new survey would appear to have been carried out in complete accord with the original staking and application—that is, it was not the survey of any new or different ground in any particular, but it was the defining upon the ground by a surveyor of the actual placer ground originally staked—and that was the area of land out of the then unoccupied and unreserved Crown land the appellant's predecessor was entitled to—applied for—and was granted or intended to be granted: see *Bochner* v. *Hurtle* (1912), 46 N.S.R. 231, 50 S.C.R. 264; *Horne* v. *Struben* (1902), 71 L.J.P.C. 88.

Turning to section 128 of the Act, sub-sec. (*f*), it will be seen that power is conferred upon the Gold Commissioner in case of disputed boundaries or measurements, to employ a surveyor to mark and define the same and the survey would appear to have been made with his authority as well as by Order-in-Council.

At the time of the location of the "Sunflower" placer claim the Placer Mining Amendment Act, 1901, was in force, same having come into force on July 1, 1901, the location being made on July 5, 1901, the application for the record of a placer claim had to be under oath and in the form set out in the schedule to the Act (see sec. 23 as enacted by ch. 38, 1901, and Form H. as

set forth in sec. 37 thereof), paragraph 3 of Form H. reads as follows:—

3. That the said land is at present unoccupied for placer mining purposes.

Turning to the application as made by the respondent's predecessor in title for the record of the "Sunflower" placer claim it is seen that this paragraph (3) is in the affidavit as sworn to and called for by the Act; now as a matter of fact it is clear upon the evidence that to the extent that the "Sunflower" placer claim encroaches upon the placer ground covered by the Vernon lease —that land was not unoccupied for placer mining purposes, but in occupation for placer mining purposes and was not unoccupied and unreserved Crown land capable of being entered upon and staked—as required by sec. 20 of the Placer Mining Act (as amended by sec. 10, ch. 38, 1901)—therefore the staking and the subsequent application for the record of the "Sunflower" placer claim was in part over occupied land already duly staked and covered or intended to be covered by a then existing lease, the "Vernon mining lease," and the respondent's predecessor in title could not obtain any title thereto, and the priority in title is in the appellants (sec. 22, Placer Mining Act).

Further, in my opinion, upon the evidence the appellant being in possession and holding under a lease from the Crown the respondent failed in establishing title as against the appellant.

The land in dispute being staked by the predecessor in title of the appellant from that time—it was not unoccupied and unreserved Crown land—and was not open to any other entry, unless the free miner so staking the land fails to proceed and make an application therefor or if making application same be refused, then and then only could the land be said to be unoccupied and unreserved Crown land; section 91 of the Placer Mining Act provides that the free miner shall, after staking the ground and posting the requisite notices, within thirty days make application in writing to the Gold Commissioner—this well indicates the intention of the legislature—the land staked is upon the staking segregated from all other unoccupied and unreserved Crown land, and in my opinion the Crown is from that

B. C.
C. A.
DEISLER
v.
SPRUCE
CREEK.
McPhillips, J.A.

time onward entitled to deal with the applicant or his successor in title to the denial of all other claimed interests, save only as to those of prior right arising by priority of location, and provision is made in the terms of the lease under which the appellant holds the wording being "all such mining claims (if any) situate in whole or in part within the tract hereby secured as are legally held and represented by free miners on the day of the date of these presents," and the provision in the Order-in-Council does not in its language carry the exception or reservation any further, that is, that the "Sunflower" placer claim cannot be looked at as being a claim which is entitled to recognition, not being legally held and being after the staking and issuance of the lease.

With respect to re-execution of the lease—this in my opinion was wholly unnecessary and in any case would be a matter of form—there was full and ample authority in the Gold Commissioner to amend the lease and what was done in my opinion was amply sufficient in the way of formality and the lease in the form in which it was proved in evidence in the action must be taken as a Crown lease of the land therein described.

The powers of the Gold Commissioner are most extensive and besides all those powers specifically detailed in sec. 128 of the Act there is to be found this very comprehensive section:—

130. The Gold Commissioner shall have power to do all things necessary or expedient for the carrying out of the provisions of this Act.

In my opinion there always was from the time of the staking the granting of the application and the issuance of the lease power in the Crown to effectually vest in the free miner the land staked, applied for or intended to be applied for following upon the staking—the initial act—and that which was done was mere rectification which surely was within the power of the Crown, and in my opinion nothing more was needed than the passing of the Order-in-Council and what was done by the Gold Commissioner.

In the way of analogy, what does the Court do when a deed is ordered to be rectified? The order itself is sufficient without re-execution or a new conveyance; sometimes the Judge initials the alteration; this is, however, unnecessary. The more customary way of proceeding is to have the decree of the Court en-

dorsed on the instrument: see *White* v. *White* (1872), L.R. 15 Eq. 247; *Hanly* v. *Pearson* (1879), 13 Ch. D. 545; *Beale* v. *Kyle* (1907), 1 Ch. 564 at p. 566; *Stock* v. *Vining* (1858), 25 Beav. 235; *Jackson* v. *Bragge* (1901), 1 Ch. 28, 37; *Gifford* (*Lord*) v. *Fitzhardinge* (1899), 2 Ch. 32.

The lease, therefore, in my opinion must be looked at as a good and effective demise of the land according to the description and plan attached and its effectiveness is from the day of its date not only from the time of the amendment or rectification, and the possession of the appellant is good as against the respondent: *Glenwood Lumber Co.* v. *Phillip* (1904), 73 L.J.P.C. 62.

The predecessor in title of the appellant being the first applicant for the land in question was entitled to the land as staked and became and was entitled to a lease thereof. The respondent's predecessor in title was an applicant after the staking and application of the appellant's predecessor in title and could obtain no title thereto. In *Mott* v. *Lockhart* (1883), 52 L.J.P.C. 61, a Nova Scotia case, Sir Arthur Hobhouse said, at pp. 62 and 63:—

> On the 2nd of October, 1880, the appellants applied to the Commissioner for prospecting licenses over six blocks of land in a district not proclaimed as a gold district. No previous application had been recorded for any part of these blocks. The applications of the appellants were received and recorded and the statutory payments made by them. No licenses were issued, but on the 6th of September the appellants acting as though they were licensed began to work the ground. . . . In the month of November they applied for leases of three of the blocks. Again their applications were received and recorded and their money taken, but no lease was actually issued. . . . It appears from the evidence . . . that the non-issue of licenses was a common thing. As to the non-issue of leases that . . . was due to the pressure of business in the office. On the 9th of September, 1880, the repondents went to make application for a lease of a block of land covering portions of the appellants block.

It would appear that all that took place was verbal and a question arose as to conflict of application with the previous application, and the respondents did nothing further until March 31, when written applications were made; these applications were refused as conflicting with the Mott application. Sir Arthur Hobhouse, at p. 64, said:—

> The Supreme Court decided in favour of the respondents on two main grounds: First, they held that the appellants obtained no title because the district was unproclaimed and the appellants were explorers for minerals

B. C.

C. A.

DEISLER v. SPRUCE CREEK.

McPhillips, J.A.

and did not occupy under section 33 or acquire under the clauses relating to unproclaimed districts. Secondly, they held that the respondents did acquire title because they occupied and staked off areas and applied on the 9th of September in good time under section 33.

Their Lordships cannot quite follow the reasoning on which it is held that the appellants obtained no title. As they read the statute, it contemplates the grant of both licenses and leases in all districts, whether proclaimed or unproclaimed. The appellants were not tied down to apply for a lease under section 33. They might apply, and did apply, for licenses under section 35 and the subsequent sections. Nor is occupation and staking off a condition precedent to all leases in an unproclaimed district. Section 42 clearly confers upon licensees the right to have leases. The provisions in section 33 as to parties occupying and staking off is evidently intended to lay down a rule of priority between persons resting their rival claims on the ground that they had occupied and staked off.

As regards the title of the respondents, there are fatal objections. The Supreme Court have decided that they ought to succeed on their application of the 9th of September, 1880. But in the first place no application at all was made on that day. Application must be in writing, and must be made to the Commissioner or Deputy Commissioner (sections 14 and 15); whereas all that the respondents did was to mention their wishes to the clerk in the office, and to take his assurance that they were too late. If, however, there was an application, there was also a rejection of it, and then the respondents should have appealed. An appeal must, by section 84, be presented within twenty days. In effect the Supreme Court have entertained an appeal six months or more after the decision complained of.

The only effective application by the respondents was that of March, 1881. At that time the appellants were occupants of the disputed ground. Either they were lessees in substance and right, though not in form, which their Lordships think to be the sounder view; or their applications for leases were still pending. In either case the applications of the appellants could not, by the terms of section 14, be received.

The result is that their Lordships will humbly advise Her Majesty to reverse the decision of the Supreme Court, and to dismiss with costs the appeal from the Commissioner. The respondents must pay the costs of this appeal.

The above case affords some very considerable assistance in my opinion in arriving at a decision in the present case, although of course care must be always exercised in applying cases based upon differing statute law, still there is great similarity in the statute law as considered by their Lordships of the Privy Council and the Placer Mining Act.

Upon the whole my opinion is that the lease as amended or rectified—and in that amendment and rectification it was only the carrying out on the part of the Crown of the application which had been received and approved—is effective as against

B. C.

C. A.

DEISLER v. SPRUCE CREEK.

McPhillips, J.A.

any title in the respondent a title subsequently acquired and unavailing as against the previous application and demise following thereon—being the title which the appellant is entitled to insist upon and which in my opinion must be given effect to—the appellant is not only in possession, but in my opinion entitled to the land in dispute under the demise being a previous demise to that under which the respondent claim. Lord Mersey in *City of Vancouver* v. *Vancouver Lumber Company* (1911), A.C. 711, at pp. 720, 721 and 722, said:—

> These being the facts the defendants take up the position that they are in possession, and (as they properly may do) they rely on their possessory title. The question, therefore, turns entirely upon the strength of the plaintiff's title. Is it better than the possessory title of the defendants? The plaintiffs' title is to be found in the lease of February 14, 1899, by which Deadman's Island was by name demised to them. If that lease is a good and valid demise it must prevail over the defendants' rights, which rest in mere possession. It was argued for the appellants that it was not a good demise, firstly, because it was not granted under the Great Seal; and, secondly, because it was obtained by "deceit" practised upon the Crown within the meaning of *Alcock* v. *Cooke*, 5 Bing. 340. As to the first of these points it was intimated by their Lordships in the course of the argument that it was not open to the appellants to rely upon it inasmuch as they had never put it forward in the Courts below, although it was open to them to have done so. As to the second point it is perhaps desirable to state the rule of law on which the Court of Common Pleas proceeded in delivering judgment in *Alcock* v. *Cooke*. The rule is a rule of common law by which a grant by the King which is wholly or in part inconsistent with a previous grant is held absolutely void unless the previous grant is recited in it. But the rule is qualified to this extent, that if the subject had no actual or constructive notice of the previous grant, the second grant will be good to the extent to which it may be consistent with the first grant though void as to the rest. The rule arises out of a duty which the law casts upon the subject of making known any previous inconsistent grant of which he may himself have notice. If he neglect this duty he is held to have deceived the King when accepting the grant made to him, with the result that he takes nothing by his grant. It was sought in the argument to apply this rule to the facts of the present case. It was said that Ludgate knew, or had notice, of the grant to the appellants contained in the Order-in-Council of June 8, 1887, and the trial Judge seems to have taken this view. Their Lordships, however, are of opinion that there is no evidence to support this contention, and they think that the Chief Justice was right in finding as he did that the Court ought not to presume, and could properly presume, that the plaintiff had either knowledge or notice of the city's alleged rights at the time he obtained his lease, or that he in any way "deceived" the Crown. This being so, the case of *Alcock* v. *Cooke*, has no application and both points are disposed of.

B. C.

C. A.

DEISLER v. SPRUCE CREEK.

McPhillips, J.A.

Upon the facts of the present case—and applying the law thereto—in my opinion there can be but the one result, and that is, that the judgment of the Court below be reversed, the action dismissed with costs and the appeal being allowed with costs here and in the Court below to the appellant.

Appeal dismissed.

B. C.

C. A.

HAYES v. GODDARD.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and McPhillips, JJ.A. May 14, 1915.

1. VENDOR AND PURCHASER (§ II D—20)—DEFICIENCY IN QUALITY—DEDUCTION FROM PURCHASE PRICE.

In the absence of fraud in respect of a misrepresentation as to the width of a building lot, the purchaser sued for the balance of purchase money and not claiming rescission is entitled to an abatement for deficiency in area where the frontage was in fact only 30 feet while the contract called for a frontage of 33 feet, but the purchaser who has taken possession and made improvements covering the additional three feet to which title cannot be made is not entitled to damages by reason thereof in addition to such abatement where the sale was of an entire lot bearing a descriptive number under a registered plan of subdivision and the true boundary was shewn by the registered plan and by the stakes on the ground.

Statement

APPEAL from the judgment of Morrison, J.

C. B. McNeill, K.C., for appellant.

R. L. Reid, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The plaintiff sued to recover the balance of purchase money due her on the sale to the defendant of a wide as represented, and she claims and was allowed $200 for house and five lots. The main dispute arises in this way: Prior to the said sale plaintiff was the owner of a tract of suburban land on which was situate the house in question. Just prior to the sale the plaintiff subdivided the tract of land into building lots. Before the subdivision the sewage from the house was carried by a drain to a septic tank some distance from the house. After the subdivision the septic tank was on a lot numbered 56. The defendant's lots were numbered 49 to 53 inclusive. On the day the defendant made her purchase, one Slingerland purchased lot 56. There is no evidence as to which agreement was first in point of time. Slingerland refused to permit the defendant to use the septic tank and cut off the connection of the drain with his property. Suit was brought by the present de-

fendant against Slingerland for interference with what she claimed as an easement appurtenant to the house. She ultimately failed in that suit. About the time that suit was commenced her husband, Harry Goddard, who was her agent, complained to the plaintiff's sales agent Calland of the interference with the drain. He says that an agreement was entered into between himself and Calland that a new tank and drains should be put in at plaintiff's expense on defendant's own lots in substitution for the old septic tank, and that plaintiff should also pay compensation for the loss of the so-called easement. Calland's testimony is that he only agreed to pay for the new drains and tank, and that that agreement was carried into execution by a competent person under the personal supervision of the said Harry Goddard and that the cost was paid by the plaintiff. There is no evidence that plaintiff was apprised by Calland that Goddard was claiming compensation for the loss of the easement. She was apprised of the arrangement to put in the new tank which Calland says was done for the sake of peace, but that she never authorized Calland to enter into an agreement to make compensation for the loss of the quasi easement was not proven in evidence, nor was it shewn that she had ever held Calland out as having any such authority. In my opinion the only agreement entered into between the parties binding on the plaintiff was the agreement to instal the new system of sewage. That system was completed about June, 1910, and no demand was thereafter made upon the plaintiff for anything further in connection with the matter until this action was brought. I think therefore the judgment below was wrong in awarding to the defendant on her counterclaim $900 as compensation for the loss of the so-called easement.

The defendant also counterclaimed for compensation for a deficiency in the area of one of the lots, namely, lot 53.

The lots were sold by descriptive number and on the registered plan the area of this lot is truly shewn. Defendant, however, contended that before and at the time of sale, Calland represented that this lot had a frontage of 33 feet on the street, whereas its frontage was almost three feet less than that.

I think I must accept the finding of the learned Judge that

B. C.
C. A.
HAYES
v.
GODDARD.
Macdonald, C.J.A.

the representation was made and acted upon, and that therefore the defendant is entitled to an abatement in the purchase price. She is not asking for rescission or resisting specific performance, and the case is therefore one of abatement simply. The house and five lots were sold to the defendant for $6,000. The relative values of the house and lots were not precisely shewn, but a plan and price list of the subdivision in question is in evidence. The whole five lots and the house in question are put in the price list at $6,000, and the rest of the subdivision is priced according to lots. Lot 53 is a corner. The corner opposite on the east—lots 30 and 31, of equal size with defendant's lots 52 and 53—are priced at $1,200 for the two, and the corner on the otherwise of 52 and 53 to the west—lots 54 and 55—at $1,250 for the two, the inside lots adjoining are priced at $450 and $500 respectively. It can therefore be taken, and there is no evidence to the contrary, that lot 53 at the highest would be priced at $750. The learned Judge accepted the said Harry Goddard's evidence and the evidence of some other witnesses given on behalf of the defendant in which they estimate the value of lot 53 at $100 per front foot. This was said to be the value in 1910, a year after the sale and when property was at its highest in that locality on an inflated market. It seems to me that this method of arriving at the compensation for deficiency is radically wrong. The true basis is the value at the time of the sale.

I therefore think the sum allowed, namely, $300, by the learned Judge for deficiency in area should be reduced in the proportion of 23 to 100. The deficiency was a little less than three feet, but the fraction is slight, and I would therefore allow $69 in abatement of the purchase price on this head.

The defendant being in possession erected a small frame office building which projected beyond the true line of said lot 53, and also planted some trees beyond the same line, but within what would have been the limits of the lot had it been 33 feet wide as represented, and she claims and was allowed $200 for anticipated cost of moving back the building and the trees and building a new fence.

I am unable to see upon what principle the plaintiff can be made liable in respect of the building and trees. The alleged

misrepresentation as to the width of the lot was clearly not fraudulent. The defendant voluntarily and without ascertaining the true boundary as it was shewn on the registered plan, and by the stakes on the ground, chose to incur the expense for which she is now claiming. I can find no authority for allowing that on the principle upon which abatement is allowed on purchase price for deficiency, nor can I find authority for awarding damages.

B. C.
C. A.
HAYES v. GODDARD.
Macdonald, C.J.A.

There is some evidence that the moving back of the line of lot 53 will destroy the dilapidated fence which was there at the date of defendant's purchase. This, I think, is proper to be taken into consideration as an element in the difference in value between the lot with the fence on it as represented and the lot as it actually is. As far as I can make out from the evidence which is very vague, this loss is trivial, and I think if I allow $31, making the total amount of abatement $100, I shall be doing ample justice to the defendant.

The appeal should therefore be allowed and the judgment on the counterclaim reduced from $1,400 to $100, the appellant should have the costs of the appeal and the respondent's costs of the counterclaim should be confined to the issue respecting the deficiency in area, and the plaintiff should be given the costs of the counterclaim on the other issue, namely, that relating to the tank and drains.

IRVING, MARTIN and MCPHILLIPS, JJ.A., agree with MACDONALD, C.J.A.

Irving, J.A.
Martin, J.A.
McPhillips, J.A.

Appeal allowed.

SCHARF v. DILLABOUGH.

SASK.
S. C.

Saskatchewan Supreme Court, Lamont, J. March 5, 1915.

1. SALE (§ I B—9)—PASSING OF TITLE—CONSTRUCTIVE DELIVERY—GOODS IN POSSESSION OF THIRD PARTY.

Where there is a sale of goods which at the time of the sale are not in the possession of the vendor, but in the possession of a third party, and that party is made aware of the sale and consents to the goods remaining in his possession as the goods of the vendee, that is sufficient actual change of possession to support the sale.

[*Jones* v. *Henderson*, 3 Man. L.R. 433; *Re Cunningham*, 28 Ch. D. 682; *McNichol* v. *Brucks*, 6 Terr. L.R. 184, referred to.]

ACTION for the price of goods sold and delivered.

Statement

SASK.

S. C.

SCHARF v. DILLABOUGH.

Lamont, J.

W. *Mills*, K.C., for claimant.

W. *H. B. Spotton*, for defendant.

LAMONT, J.:—Although there was some confusion in the claimant's evidence, I see no valid reason for holding that the transaction as related by him was not *bonâ fide*. The facts of this issue as I find them are as follows: In May, 1913, one Allan Scharf, a brother of the claimant, became indebted to Dillabough, for which he gave a promissory note. Allan Scharf was also indebted to the claimant Fred Scharf. In July or August, 1913, Allan Scharf offered to sell the hearse in question and an ambulance to the claimant for $200, the amount to be credited on his account. On September 15 the claimant agreed to buy at that price, and he gave his brother credit in his books on that date. The hearse was then in a garage owned by one Kennedy, in Moose Jaw. After completing the deal with his brother, which took place, the claimant says, at Kennedy's garage, the claimant asked Kennedy if he could leave the hearse in his garage as it was too high to go into his own barn. Kennedy said he could leave it there until such time as he, Kennedy, would require the room it occupied. It was left at Kennedy's garage until November 11, at which time there was snow on the ground, when the claimant took the wheels off in order to put it on runners or skids, and took it to his own barn. He kept it there all winter, and in the following spring took it out and took it to a painter to get it painted; in June, 1914, he paid the painter $35 for painting it, and took it away. At that time his brother Allan Scharf had a garage, to which the claimant took the hearse. In December, 1913, the plaintiff Dillabough obtained judgment and issued execution against Allan Scharf. On July 29, 1914, the sheriff issued his warrant to seize the goods of Allan Scharf to satisfy the execution. The seizure was made in October, at which the hearse in question was seized. The claimant claimed the hearse, and the sheriff obtained an interpleader order. For the execution creditor it is contended that the claim is void under the Bills of Sale Act, because that Act requires that where no bill of sale is registered there must be an immediate delivery followed by actual and continued change of possession. The question here is: Was there an actual change of possession sufficient to support the sale? To start with, I think we may take as settled law the statement set

out in the last edition of Barron & O'Brien (1914 ed.), where the authors say, at p. 393:—

> Registration of a bill of goods is not necessary when the goods are in the hands of a warehouseman, who becomes the agent of the transferee and agrees to hold the goods for him.

And for that statement the learned authors cite *Jones* v. *Henderson*, 3 Man. L.R. 433, and *Re Cunningham*, 28 Ch.D. 682. In *McNichol* v. *Brucks*, 6 Terr. L.R. 184, a vendor sold certain cattle which he had in a pasture field which he had rented. On the same day he transferred to one Klump the lease of the pasture field. The following day the vendee of the cattle applied to Klump for permission to leave the cattle in the pasture, where they were looked after by the vendee and his servants. The vendor subsequently sold the same cattle to one Brucks. It was held by Mr. Justice Wetmore that there had been a sufficient actual and continued change of possession to support the sale.

As to whether or not the consent of a person who is in possession of the goods at the time of the sale to hold them for the vendee is a sufficient change of possession to support the sale, I refer again to the same edition of Barron & O'Brien on Bills of Sale, at p. 387, where the authors say:—

> And it is submitted that where goods are in an unoccupied shop or warehouse, under lock and key, the mere delivery of the key, which formerly was held to constitute a sufficient compliance with the Act, would no longer suffice, though, if notice to the landlord or his agent in charge of the building were also given, such might be considered as an open and sufficiently public change of possession.

And as authority for that they cite the case of *Gough* v. *Everard*, 11 W.R. 702. In that case the vendor sold a quantity of timber lying partly on a public wharf and partly on a private wharf owned by the vendor himself. He gave the key of the private wharf to the vendee, and notice of the sale was given to the wharfinger of the public wharf. The sheriff seized the timber under an execution against the vendor. In an interpleader issue it was held that the vendee was entitled, and the ground upon which the learned Judges who took part in the trial seem to have based their judgment, so far as the timber lying at the public wharf was concerned, and therefore in the hands of a third party, was that a notice thereof had been given to him. Pollock, C.B., says:—

> There was possession on the part of the plaintiff; no creditor could be misled. The goods had been delivered to the plaintiff; the furniture was

SASK.

S. C.

SCHARF v. DILLABOUGH.

Lamont, J.

in his possession. The timber at the private wharf was under his control, and the wharfinger had had notice that the vendor had sold the timber on the public wharf.

Martin, B., says:—

The timber was lying partly at a public wharf, and the wharfinger had notice of the sale to the plaintiff, and partly at the private wharf of the vendor, the key of which had been delivered to the plaintiff. The vendor had no apparent possession whatever; the plaintiff was as much in possession as he could be.

From these authorities I gather that the law is, that where there is a sale of goods which at the time of the sale are not in the possession of the vendor, but in the possession of a third party, and that party is made aware of the sale and consents to the goods remaining in his possession as the goods of the vendee, that that is sufficient actual change of possession to support the sale. That being so, I hold that the position of Kennedy here, and the agreement of Kennedy to allow the goods to remain there as the goods of the claimant, was a sufficient actual and continued change of possession to support the sale. The claimant's claim, therefore, will be allowed.

Judgment for claimant.

ONT.

S. C.

ROSE v. ROSE.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee and Hodgins, JJ.A., and Riddell, J.

1. TRUSTS (§ II A—43)—TRUSTEES—PURCHASING STOCK ON OWN ACCOUNT—RIGHTS OF CESTUIS QUE TRUSTENT—REMOVAL OF TRUSTEE.

A trustee is prevented not only from doing things which bring an actual loss upon the estate but from doing anything which has a tendency to interfere with his duty and to injure the trust; the fact that the trustee purchased a block of stock on his own account, and with his own money from a company controlled by the estate, in which the trustee was also a beneficiary, does not entitle the cestuis que trustent to a declaration by the court that he is a trustee for them of the shares so bought subject to a lien in his favour for the price paid; but if it be shewn that his interest and his duty conflict because of such purchase, that would be a ground for removing him from his office as trustee.

[*Hamilton* v. *Wright*, 9 Cl. & F. 111; *Bennett* v. *Gaslight, etc., Co.*, 48 L.T.R 156; *Moore* v. *McGlynn*, [1894] 1 I.R. 74; and *Re Marshall*, [1914] 1 Ch. 192, referred to.]

Statement

APPEAL by the plaintiff from the judgment of BOYD, C., at the trial, sitting without a jury, dismissing the action, which was brought to remove the defendant from his position of trustee of certain shares of the capital stock of the Hunter Rose Company Limited, a commercial company, and to declare the defendant a

trustee for the beneficiaries under the will of George Maclean Rose of 115 shares of the capital stock of the company which were allotted to the defendant by the directors of the company, subject to a lien on those shares for the amount paid by him to the company for them. Of the shares allotted to the defendant only 74 were in question, that number having been bought by the defendant in July, 1912, at par, from the company.

Statement

L. F. Heyd, K.C., for the appellant.

W. N. Tilley and *J. J. Maclennan*, for the defendant.

The judgment of the Court was delivered by HODGINS, J.A.:—

Hodgins, J.A.

. . . George Maclean Rose died on February 10, 1898, having made his will, by which he appointed the Toronto General Trusts Company executors and trustees. . . .

The will also contains provisions as to the disposition of the shares of any of his children who should predecease him. The only other provision to which reference may be made is the following: "I do not wish to interfere with the discretion of my trustees in the manner in which they shall convert my estate into ready money after my decease, but for the purpose of letting my wishes be known to them with regard to my business as printer and publisher which is at present carried on by me, but which desire or wish my trustees are not to consider as binding on them, I declare that in the selling of my business my trustees shall give my three sons, Daniel A. Rose, William W. Rose, and Frederick W. Rose, who are now engaged with me in my said business, the first opportunity to purchase same if all necessary and suitable arrangements can be made between them and my said trustees."

The respondent became trustee in place of the Toronto General Trusts Corporation on September 8, 1907, upon the terms either of the will or on those of an unsigned declaration of trust prepared contemporaneously with his accession to the trust.

On May 14, 1912, an action was begun by the present appellant and Malcolm C. Rose, a brother, to prevent the division among the family of the shares owned by the estate, 244 in number, and to compel the sale of the shares *en bloc*. A motion was made for an injunction, and on the return thereof it was arranged that it should be turned into a motion for judgment

ONT.
S. C.
ROSE
v.
ROSE.
Hodgins, J.A.

upon facts to be agreed upon. Pending this, and before any statement of facts was settled, the 74 shares in question were bought by the respondent from the company at par. The estate, owning 244 shares, had a majority of those issued, but, after the 74 were put out, the total amount of stock became 500 shares, thus leaving the estate with less than 51 per cent.

The present action was then brought, leaving the other suit pending and undisposed of.

The point for decision is, whether a breach of trust has taken place on the part of the trustee in so purchasing the remaining shares, if that depreciated or might depreciate the value of those held by him for the benefit of the estate, or, if not a breach of trust, whether the respondent should be removed from his office on the ground that his interest and his duty conflict.

No doubt, control of a limited company vested in an estate or in an individual is of importance apart from the intrinsic value of the holding.

The respondent here has not dealt with any trust property nor has he made any profit out of it. The sole ground put forward is that his personal action in acquiring other shares, validly issued, confirmed as it was by the shareholders of the company, will result in a possible depreciation of the selling value of the shares held by him as trustee, if they are to be sold *en bloc*. I am far from thinking that this is proved to be certain or even probable. Upon the evidence it would be impossible to say that depreciation in fact has taken or will take place.

The learned Judge here referred to *Hamilton* v. *Wright* (1842), 9 Cl. & F. 111, as to conflict between interest and duty; *Broughton* v. *Broughton* (1855), 5 DeG. M. & G. 160, 164; *Moore* v. *McGlynn*, [1894] 1 I.R. 74.

The principle laid down by Lord Brougham is adopted in such cases as *Thompson* v. *Havelock* (1808), 1 Camp. 527, at p. 528; *Shipway* v. *Broadwood*, [1899] 1 Q.B. 369, at p. 373; *Benson* v. *Heathorn* (1842), 1 Y. & C. Ch. 326, at p. 341; and *Tennant* v. *Trenchard* (1869), L.R. 4 Ch. 537.

Iron Clay Brick Manufacturing Co., Turner's Case (1889), 19 O.R. 113, 123.

The principle of these decisions extends, it seems to me, to

any act where it is established that there is a direct conflict, and to cases where it may be reasonably said that such a conflict may arise. I can conceive of a position arising by the acquisition of shares by a trustee to which this rule may be applicable. But this is not at present one of these cases to which the rule, if extended to cases of possible conflict, can be applied. This respondent was not appointed by the testator, but by the beneficiaries, and if he holds the estate shares as trustee for them, their rights must be determined by the terms of the trust they created. It is doubtful whether the respondent holds the shares under the terms of the will, or whether the act of the beneficiaries created an entirely new status and responsibility, evidenced by the unsigned memorandum to which reference has been made. Under either, it would be competent for the *cestuis que trust* to put an end to the trust, or for the trustee, if the time has come for winding it up, to do so. From his evidence it appears that he is anxious to do this, and that before the writ in the first action was issued he so declared himself. His intention in acquiring shares beyond what he then held may be, in one view, as much in the interest of his *cestuis que trust* as against it, for his idea seems to have been to prevent the sale to an outsider and to preserve for the estate a control through him of the situation and of the business. It would at this juncture be unjust to assume that his interest and his duty do or may conflict; a decision as to which cannot be made until the terms of his duty are ascertained and defined. If it turns out to have been his duty to divide the estate shares among the beneficiaries, it is plain that his purchase of the 74 shares could by no possibility have injured the estate. It is a strange position for the appellant to occupy, namely, that, while the respondent as trustee is anxious to put an end to the trust by distributing the shares among those entitled to them, the appellant should have pending an action to prevent him from doing this, and at the same time be endeavouring to remove him from the trust because he will not sell to an outsider, the result of which would be to give away the control of the business, against the wishes of the majority.

The relief sought, namely, to remove the respondent as

ONT.
S. C.
ROSE
v.
ROSE.
Hodgins, J.A.

trustee is just what the respondent himself is anxious to accomplish in another way. While the first action is pending, to determine whether the respondent should be compelled to sell the estate shares in a block, or whether he is not entitled to rid himself of the trust by dividing them among those entitled—in short, the very point at issue between the parties—it would be manifestly unjust to remove him.

It may be that, applying the case of *Moore* v. *McGlynn*, and having in view the possibility that the voting power on the shares of the respondent might in some event be used against that of the estate so as to depreciate their value, if it became a question of control, the respondent should relinquish the trust or be removed from it. But it must be first determined what his duty is. When that point falls to be settled, reference may usefully be made to the case of *In re Marshall*, [1914] 1 Ch. 192.

I think that the rights, if any, of the appellant, would be fully provided for by postponing decision as to any action such as that until the determination of the first pending action. It will be there adjudged whether the respondent is bound to sell *en bloc*, and in that case he may desire to have leave to bid, and that leave, if granted, would end his fiduciary position: *Coaks* v. *Boswell* (1886), 11 App. Cas. 232. The other relief sought, namely, to declare him a trustee for the estate of the 74 shares, is of course impossible upon the evidence. He became possessed of these shares, paying for them with his own money; the estate has and can have no claim upon them, unless they were in some way acquired as a gift or addition to the estate which he was disabled from acquiring in his own behalf. No such suggestion is put forward.

The appeal should be dismissed with costs, and the appellant should have the right, notwithstanding this dismissal, to apply after the final disposition of the first action, under the statute, for the removal of the respondent as trustee, if in that action the rights declared leave it open to him so to do.

Appeal dismissed.

VILANDRE v. ALLIE.

QUE.

S.C.

Quebec Superior Court, Hutchinson, J.

1. CORPORATIONS AND COMPANIES (§ V F—236)—QUEBEC COMPANIES ACT—APPLICATION FOR SHARES—MEMORANDUM OF AGREEMENT—ACCEPTANCE.

An application for shares in a company to be organized under the Quebec Companies Act and not included in the memorandum of agreement accompanying the petition for incorporation cannot be accepted two years later, so as to make the applicant, who had paid nothing upon them and had not participated in the corporate business, liable for calls where at the time of the pretended acceptance and allotment the company was insolvent and the shares valueless.

LIQUIDATOR'S petition re shares in a company. Statement

O'Bready & Panneton, for liquidators.

Choquette, Galipault, St. Laurent, Métayer & Laferté, for contestant.

HUTCHINSON, J.:—The Court having heard the parties by their respective counsel on the merits, and having examined the proceedings and record and deliberated:— Hutchinson, J.

Considering that the contestant Allie did sign an application for shares filed herein as ex. P. 5, but it is not stated at what date his application was signed, although presumably it was before the incorporation of the company: in any event, it did not form part of the memorandum of agreement which accompanied the petition for incorporation:

Considering that the Vilandré Co. was incorporated under Letters Patent of the Province of Quebec on March 14, 1911:

Considering that in February, 1913, it became evident and was known to the directors that the company was insolvent, and proceedings were taken under authority of the directors to obtain an extension of time from creditors of the company and finally to obtain any settlement whatever that would be of any advantage to the company:

Considering that on March 31, 1913, at a meeting of the directors it was resolved that the shares of this company subscribed according to the list of subscribers of record in the archives of the company, be allotted, and in the list which was prepared the present contestant was included: and at a meeting of the directors on April 12, 1913, it was resolved that certificates of shares be given to each of the shareholders according to allotment made on March 31, 1913, and that mention be made on each certificate

QUE.
S. C.
VILANDRE
v.
ALLIE.
Hutchinson, J.

what amount was paid by each shareholder on his shares in the company; and it was further resolved that a call be made for the balance due on shares, and that this call be made payable one-tenth thereof per month, commencing on June 1, 1913; the secretary-treasurer to give notice to each shareholder by registered letter;

Considering that the contestant never attended any meeting of the said company, and paid nothing whatever on the stock, nor was he asked to pay anything, and no notice of any kind was given to the contestant in regard to the stock until April 18, 1913;

Considering that the offer of the contestant was to take stock in a solvent company, but after the lapse of two years or more he is offered stock in a company hopelessly insolvent, and of no value whatever;

Considering that the allotment of stock by the said directors on the application of the contestant, and the notice given to the contestant, and the call made, did not come within a reasonable time, were too late particularly as the company was then known to be notoriously insolvent, and it was evident that the company was demanding money from the contestant without any expectation or intention of giving any value whatever for the said stock allotted to him, but on the contrary, was attempting to obtain money from the contestant, for the payment of which he was not, and is not, in any way responsible:—

Doth, therefore, dismiss the petition of said liquidators so far as the present contestation is concerned, and doth maintain the contestation of the said contestant with costs.

Petition dismissed.

ONT.
S. C.

RAYNOR v. TORONTO POWER CO.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, and Lennox, JJ.

1. MASTER AND SERVANT (§ II A 4—60)—WORKMAN—ELECTRIC TOWER—INJURY—ELECTRIC SHOCK—ASSURANCE—WIRES DEAD—NEGLIGENCE—COMPETENT FOREMAN.

A workman engaged in painting on an electric transmission tower and who is injured by an electric shock from same after he had been assured by his employers' representatives that the place where he was to work was safe and that the wires on that part of the tower were dead, although other wires on the tower carried highly dangerous currents, proves a *prima facie* case of negligence against his employers, the electric power company, when he shews that his injuries were caused by a dangerous element under the company's control at a time and place where such element ought not to have been; and if the system

adopted by the company did not afford a safe and proper place for the plaintiff to do his work, the company is not relieved from responsibility by the fact that the operations were superintended by a competent foreman.

[*Ainslie Mining Co.* v. *McDougall*, 42 Can. S.C.R. 420; *Brooks-Scanlon* v. *Fakkema*, 44 Can. S.C.R. 412, and *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, applied.]

ONT.

S. C.

RAYNOR v. TORONTO POWER CO.

APPEAL from the judgment of FALCONBRIDGE, C.J.K.B.

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

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

CLUTE, J.:—The plaintiff was employed by the defendants, under the direction of their officers, to paint certain of their towers, to which were attached wires conveying electricity, and he claims that he was informed by his foreman and the defendants' officers that the current of electricity had been shut off from the said wires, and he was directed to climb amongst the frame work of one of the towers and paint that part near to the wires; that he did as directed, and, after he had proceeded with some painting, the defendants suddenly and without warning to the plaintiff negligently caused the electric current to flow over the said wires, with which the plaintiff was obliged to be in contact to do the said painting, and thereby caused a heavy current of electricity to flow through the body of the plaintiff, and caused him to fall to a plank walk or platform 7 or 8 feet below where he was working, whereby parts of his body were burned by the electricity, and he was seriously injured. He further charges negligence on the part of the defendants in not providing a reasonably safe structure or works for the plaintiff lawfully engaged in his work, and that they negligently failed to provide any proper system of appliances for controlling the electric current in order to prevent unforeseen and extraordinary risks to the plaintiff while engaged in the said work.

Clute, J.

The defendants deny that the plaintiff was informed by their officers that the current of electricity had been shut off or that he was directed to climb up the frame work as alleged. The defendants further deny that, without warning to the plaintiff, they caused the current to flow over the said wires, and charge that the injuries that the plaintiff suffered were caused by his own neglect and want of care, and further deny that they failed to

ONT.

S. C.

RAYNOR v. TORONTO POWER CO.

Clute, J.

provide a proper system for the control of the electrical current while the plaintiff was engaged in the work in question.

The case was tried by Chief Justice Sir Glenholme Falconbridge, and he finds as follows (setting out the findings of the learned Chief Justice, as above).

The notice of appeal asks that judgment be entered for the defendants, or for a new trial, upon the grounds: (1) that the judgment is not supported by the evidence; (2) that the evidence makes it clear that the wire upon which the plaintiff's paint pot was hanging was not alive at the time of the accident; (3) that there is no liability at common law, and there is no finding of negligence on the part of any employee or superintendent of the defendant company which would make them liable under the Workmen's Compensation for Injuries Act; (4) that there is positive evidence that there was no current turned on the line where the plaintiff was working; (5) that the trial Judge has not found how the current came to be on the wire, or what, if any, theory he accepts as to how the current got there.

The case resolves itself largely into a question of fact as to whether there is evidence to support the findings in the judgment of the trial Judge.

[The learned Judge here reviewed the evidence in detail and continued.]

Upon the whole, I think that the evidence of the four witnesses referred to was quite sufficient to justify the finding that the plaintiff was injured from a current from what is called unit A (wire 3), a wire supposed to be dead. I think I should have reached the same conclusion.

That being so, there was evidence of negligence on the part of the defendants in sending the plaintiff to a dangerous place, and the onus was upon the defence, in my opinion, at that stage of the case, to satisfy the trial Judge that the defendants were guilty of no negligence. This they failed to do.

It was said by Lord Macnaghten in *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72, 75, that it is not the province of the Court to retry the question. "The Court is not a Court of review for that purpose. The verdict must stand if it is one which the jury as reasonable men, having regard to the evidence before them, might have found, even though a different result

would have been more satisfactory in the opinion of the trial Judge and the Court of Appeal."

I think that applies with equal force to a case tried by a Judge.

"When a finding of fact rests upon the result of oral evidence it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons. The former practice of Courts of Equity arose from the fact that decisions often rested upon evidence on paper, of which an appellate Court can judge as well as a Court of first instance:" *Lodge Holes Colliery Co.* v. *Mayor, etc., of Wednesbury*, [1908] A.C. 323, 326. In that case the judgment of the trial Judge was restored, against the view taken by the Court of Appeal, expressly upon the ground that the findings of the trial Judge were conclusive upon the questions of fact.

It never was intended that the plaintiff should undertake the risk of working near live wires; and if, from any cause, the wire became alive without default on the part of the plaintiff, that was not a risk which he assumed.

It is the duty of the master to keep the plant in a condition in which, from the terms of the contract or the nature of the employment, the servant has the right to expect it will be kept: *Clarke* v. *Holmes* (1862), 7 H. & N. 937 (Ex. Ch.); Halsbury's Laws of England, vol. 20, para. 255; and the extent of the master's duty varies according to the degree of danger involved in the work, and also according to the skill and experience possessed by the servants: *ib.*, para. 256.

For some reason which the defendants did not give, they did not provide the plaintiff with a safe and proper place to do his work, as they should have done, and, having shewn that his injuries were caused by a dangerous element under the control of the defendants at a time and place where such element ought not to have been with its destructive power, the plaintiff is, in my opinion, entitled to recover. In other words, he made out a *primâ facie* case of negligence which the defendants have not answered: *Ainslie Mining and R.W. Co.* v. *McDougall*, 42 S.C.R. 420. The system adopted by the defendants did not, in fact, afford a safe and proper place for the plaintiff to do his work,

ONT.
S. C.
RAYNOR
v.
TORONTO
POWER CO.
Clute, J.

and the defendants are not relieved from responsibility by the fact that the operations were superintended by a competent foreman: *Brooks Scanlon O'Brien Co.* v. *Fakkema* (1911), 44 S.C.R. 412.

It was urged on the part of the plaintiff that, electricity being in its nature a highly dangerous element when not under efficient control, a very high degree of care and precaution was necessary on the part of those who were responsible for its creation and use, and that the principle in *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, applied; for, although in this case it was not by reason of the electricity escaping from the lines and passing into a neighbouring property that the injury was caused, yet the injury was caused by reason of the fluid entering a wire where at the time it ought not to have been permitted, having regard to the work and duty assigned to the plaintiff. It is pointed out by the Lord Chancellor (Lord Cairns) in that case (pp. 338, 339), as a principle of law, that an owner or occupier of a close may lawfully use it for any purpose for which it might in the ordinary course of the enjoyment of land be used. On the other hand, if, not stopping at the natural user, the owner desires to use it for any purpose which may be deemed non-natural, for the purpose of introducing into the close that which in its natural condition was not in or upon it, and if, in consequence of so doing, or in consequence of any imperfection in the mode of their doing so, the water so introduced escaped and passed off into the close of the defendant, then that which was being done was at the peril of the party doing it, and if injury was caused thereby the person permitting it would be liable; and (pp. 339, 340) reference is made with approval to the principle as laid down by Mr. Justice Blackburn in the Exchequer Chamber as follows: "'We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God.'"

Lord Cranworth states the rule of law as follows (p. 340):

"If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage."

In *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186, Kekewich, J., after full argument by eminent counsel, held that the principle of *Rylands* v. *Fletcher* applied to an electric current.

The question was again considered in *Eastern and South African Telegraph Co. Limited* v. *Capetown Tramways Companies Limited*, [1902] A.C. 381. In this case the judgment of the Privy Council was delivered by Lord Robertson, who said (p. 391): "Now, if regard be had solely to the action of the respondents in storing electricity on their lands, it must be allowed that the analogy is very close to the illustrations given in *Rylands* v. *Fletcher* of the kind of things which a proprietor can only do at his own peril. Electricity (in the quantity which we are now dealing with) is capable when uncontrolled of producing injury to life and limb and to property; and in the present instance it was artificially generated in such quantity, and it escaped from the respondents' premises and control. So far as the respondents are concerned, it appears to their Lordships that, given resulting injury such as is postulated in *Rylands* v. *Fletcher*, and the principle would apply." Lord Robertson then points out that in the case before him neither person nor property was injured: "Certainly there is here no injury of the same genus or species with the tangible and sensible injuries which have hitherto founded liability on the principle in question, and which have always constituted some interference with the ordinary use of property." And it was there held, in regard to that section of the tramway which had been constructed under statutory authority, that *Rylands* v. *Fletcher* did not apply, because the disturbance can only occur when the cable is constructed without certain precautions which the evidence shewed had subsequently secured its immunity. It was also there held, in regard to those sections of the tramway which had been constructed under certain statutes, that the escape of electricity, being a natural incident of the operations legalised thereby, and not resulting from

ONT.
S.C.
RAYNOR
v.
TORONTO
POWER CO.
Clute, J.

a leak, within the meaning of the statutory undertaking or condition, did not impose liability on the respondents. See also *Young* v. *Town of Gravenhurst* (1910-11), 22 O.L.R. 291, at p. 302, affirmed 24 O.L.R. 467.

In *Cairns* v. *Canada Refining and Smelting Co.* (1914), 6 O.W.N. 562, it was held by this Court that the principle in *Rylands* v. *Fletcher* applies to a case where, in smelting ore, noxious gases were given off, which seriously affected the health of the plaintiff and other occupants of his lands, and injured his property.

In *Royal Electric Co.* v. *Hévé*, 32 S.C.R. 462, it was held that the defendants were liable for actionable negligence, as they had failed to exercise the high degree of skill, care, and oversight required of persons engaging in operations of a dangerous character.

In *Citizens' Light and Power Co.* v. *Lepitre*, 29 S.C.R. 1, the principle was recognised and applied that persons dealing with dangerous things should be obliged to take the utmost care to present injuries being caused through their use, by adopting all known devices to that end.

Having regard to the dangerous nature of the electric current, and the fact that the plaintiff was ordered to go to a place where, if he were not protected by the current being turned off from the wires about which he was to work, there was the greatest possible danger, it appears to me that the responsibility of the defendants is not less in their duty toward the plaintiff than it would be toward a person upon whose land the defendants had permitted the electric current to flow and injury was caused thereby.

In my opinion, the appeal should be dismissed with costs.

Mulock, C.J.Ex.
Lennox, J.

MULOCK, C.J.EX., and LENNOX, J., concurred.

Riddell, J.
(dissenting)

RIDDELL, J., dissented.

Appeal dismissed.

THE KING v. WILSON.

CAN.

EX. C.

Exchequer Court of Canada, Cassels, J.

1. EMINENT DOMAIN (§ III C—135)—EXPROPRIATION—COMPENSATION—VALUES.

Special adaptability is nothing more than an element of market value in expropriation cases; the compensation to be awarded for the property taken is to be fixed as if the scheme under which the compulsory powers are exercised had no existence.

[*Cedars Rapids* v. *Lacoste*, 16 D.L.R. 168, [1914] A.C. 569; *Canard* v. *The King*, 43 Can. S.C.R. 99, and *Sydney* v. *North Eastern R. Co.*, [1914] 3 K.B. 629, referred to; *The King* v. *Macpherson*, 15 Can. Exch. R. 215, followed.]

2. EMINENT DOMAIN (§ III C—135)—EXPROPRIATION OF WATER-LOT—COMPENSATION—VALUES—SPECULATIVE BENEFITS.

Where there is no evidence of market value to guide the Exchequer Court in assessing compensation for a water-lot expropriated for public purposes under the Expropriation Act, Can., the compensation will not be granted with reference to a hope or expectation as to the use of the property which cannot be regarded as a right of property in the claimant, *ex. gr.* the expectation of the owner of a water-lot in a public harbour being able to obtain the requisite permission by order-in-council to place erections thereon under R.S.C. 1906, ch. 115.

[*Corrie* v. *MacDermott*, [1914] A.C. 1056, and *May* v. *Boston*, 158 Mass. 21, referred to.]

Statement

THIS was a case arising out of the expropriation of certain lands for the Ocean Terminal Scheme of the Intercolonial Railway at Halifax, N.S.

T. S. Rogers, K.C., for plaintiff.

H. Mellish, K.C., for defendants.

Cassels, J.

CASSELS, J.:—This is one of several cases tried before me at Halifax, between the 8th and 22nd October last. There were a series of expropriations on behalf of the Dominion Government in connection with large works undertaken with the object of providing the city of Halifax with large terminal accommodation. Millions of dollars are being spent in connection with these works, the object being to have terminal accommodation in connection with the Intercolonial Railway. For these terminals, consisting of a breakwater, and several wharves with warehouses, slips, etc., it became necessary to expropriate a large area of land. Various disconnected properties were expropriated on the part of the Crown. The information embraces all of the properties of Wilson's expropriated. They consist of what is known as the wharf premises, this being the main property. The other properties, of which there are several set out in the information, are house property.

On p. 5 of the information the Crown sets out in the paragraphs from "a" to "g" the various sums offered for these properties.

CAN.
EX. C.
THE KING
v.
WILSON.
Cassels, J.

The total amount tendered by the Crown is the sum of $83,250. The amount claimed by the defendants in par. 5 of the statement of defence shews a total claim of $410,500.

The plan of expropriation was filed on February 13, 1913. On October 2, 1913, the Crown advanced to the defendants the sum of $30,000 on account.

[Reference to *The King* v. *Macpherson*, 15 Ex. C.R. 215; *Cedars Rapids* case, 16 D.L.R. 168, [1914] A.C. 569; *Sydney* v. *North Eastern R. Co.*, [1914] 3 K.B. 629; *Cunard* v. *The King*, 43 Can. S.C.R. 99; *Lucas* case, [1909] 1 K.B. 16; *The King* v. *Bradburn*, 14 Ex. C.R. 432.]

The water lots in question form part of the harbour of Halifax. This is conceded. Under the provisions of sec. 7, ch. 115, of R.S.C. 1906, approval of the Governor-in-Council must be obtained before the owner of these water lots can place any erections upon them. . . It is sufficient that the market value existed; and that market value may have been derived in part from the idea in the public mind that the grantee had certain rights; but assuming that there is no proof of market value, then there arises the question whether the hope, so called, of obtaining the approval above mentioned, should be taken into account as an element in arriving at the market value at the time of the expropriation.

[Reference to *Lynch* v. *City of Glasgow* (1903), 5 C. of Sess. Cas. 1174, at pp. 1180, 1182.]

In the case before me, as I pointed out, there is no obligation on the part of the Crown to approve of the construction of works. At the time of the expropriation no such right had been obtained; and if the authorities I have quoted are correctly decided, it would seem to me that this hope of obtaining such approval could not be an element within the meaning of our statute.

[Reference also to *Corrie* v. *MacDermott*, [1914] A.C. 1056; *Benton* v. *Brookline*, 151 Mass. 250; *May* v. *Boston*, 158 Mass. 21, where a similar view is expressed.]

During the progress of the case it would appear that those who valued the land allowed for certain house properties expropriated on the basis of replacement. In other words, they ascertained what it would cost to build a house as it stood—they made a certain allowance for depreciation, and then allowed the owner the balance. This course was adopted in most of the

cases, the result being that the owners were very liberally treated in most cases. In one or two of them I do not think sufficient was allowed. But in the greater number, more than sufficient as the difference between the market value which should govern, and the replacement, so styled by the witnesses, is considerable,—the market value being considerably below the replacement value.

[Reference to Browne & Allan's Law of Compensation, 2nd ed., appendix, p. 656; the case of the *Corporation of Edinburgh* v. *The North British Railway Co.*: *Corrie* v. *MacDermott*, *supra*.]

In most of the text books, notably Cripps on Compensation, 5th ed., and Browne & Allan, the case of the *School Board of London* v. *The South Eastern Railway Co.*, 3 T.L.R. 710, is referred to. "The section of the private Act was substituted for the provisions of the Land Clauses Act, which gave compensation *for the land taken*."

I know of no provisions which authorizes the application of the reinstatement doctrine to the ordinary cases of expropriation of lands as in this particular case, consisting merely of isolated dwellings and the lands upon which they were situate.

The business of Wilson is that of dealing in fish. According to his evidence, the largest part of his business is dealing in fresh fish. It is a business that has been in existence since the year 1878. The property consists of a certain quantity of land, and a certain amount of water filled in, upon which is situate the wharf with the various erections thereon. The land had a frontage of 216 feet, with a depth running out into the water of 300 feet. The grant of these water lots was prior to Confederation. The area of land, including that portion filled in, is 38,490 square feet. The area of land covered with water and not filled in is 26,310 square feet, as given by Mr. Clarke.

After the announcement of the proposed scheme of the Government, a Board was established, the members of which were Melvin S. Clarke, A. W. Stetson Rogers and J. C. Harris. The Chairman of the Board was Colonel Weston, the manager of the Eastern Trust Company, a gentleman of very large experience in connection with real estate in Halifax. The method of procedure adopted by this Board was that these three valuators would make separate and independent valuations of the different properties, and would

CAN.
EX. C.
THE KING
v.
WILSON.
Cassels, J.

then meet and agree upon a sum to be offered. To the sum agreed upon in this particular case of Wilson would be added ten per cent. for compulsory surrender, and the amount agreed upon was the amount tendered. For the wharf property and the buildings erected thereon the sum of $60,000 was tendered. The defendants claim the sum of $360,000.

In referring to the evidence, it is usually referred to as if the entrance to the harbour, namely, out towards the Atlantic Ocean, were south from the lands in question, and the lands further up the harbour north. It would be probably more correct to state south-east and north-west, but it is immaterial. I merely mention the fact in order to make plain what is continuously referred to in the evidence.

The Wilson case is put forward in the evidence to say the least of it in a very loose manner. Without any qualifications Wilson purports to place upon the water lot and the wharf property a value of $1,000 a foot frontage, making in all the sum of $216,000 irrespective of buildings. He bases his claim upon certain facts which he states gives the property a very great value for the purposes of his business. . . . These reasons are purely imaginary. It is unquestionably near to the source of supply; but the distance between this property and the property in the centre of the town is not more than a quarter of a mile. . . . The two main grounds upon which Mr. Wilson relies, namely, the first point of call, and the pure water, are purely mythical. . . .

His estimate of $1,000 a foot frontage as the value of the water lot is purely guesswork. There is not a tittle of evidence in support of such a claim. . . .

All the evidence on the part of the claimants utterly fails to substantiate any such claim as has been put forward. The evidence of the Crown witnesses establish beyond question, to my mind, that the allowances made were intended to be full and ample. . . . They have allowed for the land at fifty cents a square foot, and for the land covered with water thirty cents a square foot. They seem to have made this allowance to Wilson by reason of the fact that he was occupying the premises in question, and that to him carrying on his business it was worth this amount. . . .

Mr. Clarke in his evidence admits that he allowed too little for the cold storage plant. His allowance was $2,500. It should

be $4,000, an addition of $1,500. In addition to the sum allowed for the value of the premises to Wilson for the purposes of his business, I would add the sum of $5,000. There is no doubt there must be a certain dislocation of his business difficult of estimation. I would therefore add to the value of the wharf property the additional sum of $1,500 and $5,000 together with ten per cent., making the sum of $7,150, which added to the sum of $60,000 tendered would make the total for this property the sum of $67,150, and this amount I allow. I would refer to the case of *Pastoral Finance Ass. Ltd.* v. *The Minister*, decided by the Privy Council, [1914] A.C. 1083. . . .

I am left in considerable doubt as to any loss of profits which Wilson may have suffered by reason of the expropriation. He has been for a considerable time landing his fish for the fresh market delivery at a wharf leased to him, apparently without any loss. A well established business of this nature would have a regular trade, and it is hardly likely that any of those bringing fish to the harbour of Halifax would pass over Wilson by reason of having to travel a quarter of a mile further in a motor boat. As to his curing the finnan haddies and obtaining pure sea water, the probabilities are that this part of his business would be carried on at the outlying places referred to, Canso and Hubbards. He would there get what seems to be a requisite for properly salted and cured fish, namely, pure salt water.

Dealing with the various houses, the subject matter of the expropriation, I have had the opportunity of visiting all of these houses. . . . The only house of any possible value is the one owned by Wilson. As I mentioned before, these gentlemen have approached the subject with the desire to reimburse the various land owners for any possible loss that they have suffered. Had they approached it from a legal standpoint of market value, and allowed upon that basis, the amount allowed to Wilson would not have been nearly as much. The Crown does not object to their method, but giving these replacement values instead of the market values has put the owners in a much better position than what according to my view of the law they are entitled to. On the whole I think the amount offered for these household properties is ample, and I so adjudge.

The result is that $7,150 will be added to the sum of $83,250

CAN.

EX. C.

THE KING v. WILSON.

Cassels, J.

tendered, making in all the sum of $90,400. The defendants are entitled to interest on the sum of $67,150 to the date of judgment, as the sum tendered was insufficient for this property. No interest is allowed on the amounts tendered for the other properties, as I am of opinion the amounts tendered were ample. In adjusting the accounts, regard must be had to the amount advanced, also the rentals agreed to be paid for the occupation of the premises of Wilson after the expropriation. No doubt counsel can agree on these details.

I think no costs should be allowed to either party.

Judgment accordingly.

ONT.

S. C.

Re ROGERS.

Ontario Supreme Court Middleton, J. January 25, 1915.

1. HIGHWAYS (§ V A 1—245)—CLOSING OF—NOTICE OF TIME.

The notice which must be published by a municipality of its proposed by-law to close part of a public street under the Municipal Act, R.S.O., 1914, ch. 192, sec. 475, must state a time when the by-law will be considered so that those interested may then attend and be heard.

[*Re Birdsall and Asphodel*, 45 U.C.R. 149, followed.]

2. LAND TITLES (§ II—20)—SALE OF CLOSED HIGHWAY—INVALID BY-LAW—REGISTRATION OF TITLE.

The giving of the statutory notice under the Municipal Act, R.S.O., 1914, ch. 192, sec. 475, of intention to close a part of the highway by municipal by-law is a condition precedent to a valid by-law; and a purchaser from the municipality of the closed portion of the highway in a tract registered under the Land Titles Act, Ont., may be refused registration of his title where the notice published by the municipality was radically defective.

[*Wannamaker* v. *Green*, 10 Ont. R. 475, referred to.]

Statement

APPEAL from the refusal of the Master of Titles to register the appellant as the owner of certain lands.

E. G. Long, for appellant.

Irving S. Fairty, for city corporation.

J. R. Cartwright, K.C., for Attorney-General.

Middleton, J.

MIDDLETON, J.:—The Master bases his refusal upon what he regards as defects in the notice given under sec. 475 of the Municipal Act, R.S.O. 1914 ch. 192.

The due giving of notice under this section is clearly a statutory condition precedent to municipal action. The section itself makes this clear, and if any authority is needed it will be found in *Wannamaker* v. *Green* (1886), 10 O.R. 457.

The learned Master thinks the notice here given is not adequate because it contains no reasonable intimation of what was proposed.

What the statute requires is "notice of the proposed by-law." The notice published was, that the council would consider "a by-law to close a certain portion of Poucher street and certain lanes in connection therewith." It was then stated that the by-law and plan shewing the land affected might be inspected at the city clerk's office.

This, it seems to me, falls far short of affording notice of the by-law. The lands need not be, and in many instances ought not to be, described by metes and bounds and by reference to plans and lots, but the notice should state, in language that can be understood by one reading it, what is proposed. Reference to a document that may be seen elsewhere is objectionable, and for that reason reference to a registered plan to be found in the office of the registrar of deeds may be as bad as reference to a plan in the city clerk's office. This is in accordance with the holding that a prospectus which stated that certain contracts relating to a company's affairs might be seen at its office, was not notice of these contracts.

The Master also holds the notice insufficient as not indicating when the proposed by-law would be considered. The notice says it will be passed "on the 10th day of August, 1914, or so soon thereafter as it may be deemed advisable." I do not know from the material, and counsel were unable to tell me, whether the council met on the day named. The by-law was considered and passed on September 4, 1914.

The case of *In re Birdsall and Township of Asphodel* (1880), 45 U.C.R. 149, 152, determines that the statute requires notice of the time when the by-law will be considered to be given, so that those interested may then attend and be heard. The case has been followed, and, so far as I can ascertain, has never been criticised, so that the notice is clearly insufficient to justify action on September 4. I say nothing as to the validity of any action that might have been taken had the council met on August 10 and dealt with the matter.

I am inclined to think that the Master went too far in offer-

ONT.
S. C.
RE ROGERS.
Middleton, J.

ing to allow registration upon an indemnity to the assurance fund under the Land Titles Act, R.S.O. 1914 ch. 126, sec. 123 (10). Certainly I should not interfere with the exercise of his discretion to exact this security.

The appeal should be dismissed with costs to be paid to the Attorney-General.

Appeal dismissed.

ONT.
S. C.

Re MORROW.

Ontario Supreme Court, Middleton, J. March 29, 1915.

1. WILLS (§ III B—83)—DESCRIPTION OF BENEFICIARIES—CHILDREN—STEP-CHILDREN.

Special circumstances must be shewn to warrant the inclusion of a stepchild of a deceased sister of the testator in distributing a bequest made in terms to the children of such deceased sister.

2. WILLS (§ III B—83) — DESCRIPTION OF BENEFICIARIES — CHILDREN — GRANDCHILDREN.

The interpretation of the word "children" in a bequest can only be altered from its proper meaning so as to include grandchildren if on a proper construction of the will it is found to have been intended to bear the larger signification.

[*Re Kirk, Nicholson v. Kirk*, 52 L.T. 346, followed.]

Statement

MOTION by the executor of the will of John Morrow, deceased, for an order determining questions arising as to the construction of the will.

C. C. Ross, for executor.

G. T. Walsh, for children of a deceased brother.

J. Gilchrist, for children of another deceased brother.

B. Williams, for Ruby Livingston.

J. Nason, for Fanny Williams.

Middleton, J.

MIDDLETON, J.:—The testator, who died on January 28, 1914, by will dated October 9, 1913, divided his estate (after certain minor legacies) into seven shares and gave the shares to different relatives and the children of deceased relatives. The testator evidently knew little concerning the relatives and what had become of them; and three questions are presented for solution.

One share is given "to the children of my deceased sister Jane Lawson, formerly Jane Morrow and Jane Livingston, in equal shares." Jane Morrow married Thomas Lawson in 1862. Thomas was a widower with two children—Mary Lawson, who

died in 1889, and Mrs. Williams, who still lives, born in 1859. Jane Morrow had also a child of her own, Charles Livingston, son of a second marriage after the death of Lawson. Charles Livingston is now dead, leaving a daughter him surviving. This share is claimed by the surviving stepdaughter and by the grandchild of Jane.

I think that neither claimant can succeed. The word "children" may, in certain circumstances, include a stepchild, but no such circumstances exist here. It is not shewn that the testator had ever heard of Mrs. Williams, much less that, when he made his will in 1913, he regarded this lady, born in 1859, as a child of his deceased sister Jane. The granddaughter cannot take, as there is no gift to her, and she is not within the class protected by the Wills Act, and entitled to take the parent's share.

The case of Re Kirk, Nicholson v. Kirk (1885), 52 L.T. 346, is precisely in point. The word children may sometimes cover grandchildren if from the will it can be so ascertained; but, as there said by Pearson, J.: "I cannot substitute 'issue' or 'grandchildren' for 'children' merely on the ground that at the date of the will or testator's death the named person has no child living but only grandchildren . . . I can only alter the word 'children' from the proper meaning if on a proper construction of the will itself it is found to have been intended to bear a larger signification."

Lord Blackburn says: "The words 'child or children' primarily mean issue in the first generation only, son and daughter, to the exclusion of grandchildren or other remoter descendants:" Bowen v. Lewis (1884), 9 App. Cas. 890, 915.

It is not without significance that in this will there are gifts to the children of others, and in these cases there are children to take.

This share must be disposed of as on an intestacy.

A share was given to Anna Maria Campbell, a sister-in-law, dead before the date of the will. As to this there is also intestacy.

A share is to be distributed among the children of John Morrow. He had children and also a grandchild, issue of a deceased child. For the reasons given, the grandchild cannot take.

ONT.
S. C.
RE MORROW.
Middleton, J.

It should be declared as follows:—

1. Neither the stepdaughter of Jane Livingston (Morrow) nor the granddaughter take.

2. The devise to Anna Maria Campbell, dead at date of will, inoperative.

3. Gerard Morrow, infant grandson of Archibald Morrow, does not share.

4. Intestacy as to the shares of Ann Maria Campbell and Jane Livingston.

Costs of all parties out of these shares.

Order accordingly.

ONT.
S. C.

RIDGE v. M. BRENNEN & SONS.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. February 10, 1915.

1. EASEMENTS (§ III—32)—RIGHT OF WAY—BUILDING OVER PASSAGE—ENCROACHMENT.

The person having title only to a right of way over land the fee of which is in another, cannot maintain an action for encroachment of a cornice of an adjoining building over the passage way unless it interferes with the reasonable use of the way.

[*Rooney* v. *Petry*, 22 O.L.R. 101, referred to.]

Statement

AN appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Wentworth dismissing an action, brought in that Court, to compel the defendants to remove a cornice erected by them on their building and overhanging a strip of land over which the plaintiff had a right of way.

The strip belonged to a Mrs. Fell. The lands of both the plaintiff and Mrs. Fell were originally owned by the same person; that person conveyed the fee in one part to Mrs. Fell subject to the right of way in favour of the plaintiff over the rear 10 feet; and conveyed the fee in the other part to the plaintiff with the right of way described in the same terms.

The defendants, in repairing their building, which immediately adjoined the rear of Mrs. Fell's land, projected the cornice over the strip. The cornice was more than 17 feet above the ground, and there was no evidence that it interfered with the plaintiff's user of the way.

M. Malone, for appellant.

S. F. Washington, K.C., for defendants, respondents.

ONT.
S. C.
RIDGE
v.
M. BRENNEN
& SONS.
Meredith, C.J.O.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—We think the law is plain. The only right of the appellant is a right of way; and the law is clear that, unless the cornice interferes with the reasonable use of the way, there is nothing of which the appellant can complain.

It would be quite open to the lady who owns the fee simple of the land, subject to this easement, to take objection to the cornice, and to get rid of the difficulty which Mr. Malone suggests would arise if the cornice were to remain 20 years.

The appeal must be dismissed with costs.

Appeal dismissed.

Re GREIG AND CITY OF LONDON.

ONT.
S. C.

Ontario Supreme Court, Middleton, J. March 18, 1915.

1. INTOXICATING LIQUORS (§ II A—37)—LICENSES—REDUCTION OF—VALIDITY OF PETITION.

Where a petition for liquor license reduction under the Liquor License Act, R.S.O., 1914, ch. 215, sec. 16, was not in fact duly signed and the municipal council knew that it was not, and acted in defiance of the statutory provision or without appreciating the fact that the power of the council itself to initiate a reduction by-law which once existed had been taken from it, the by-law based on such petition must be quashed.

[*Re Williams and Brampton*, 17 O.L.R. 398, referred to.]

Statement

MOTION by Greig to quash by-law No. 4893 of the City of London, being a by-law to limit the number of tavern licenses to 20.

N. P. Graydon, for applicant.

T. G. Meredith, K.C., for city corporation.

Middleton, J.

MIDDLETON, J.:—By sec. 16 of the Liquor License Act, R.S.O. 1914 ch. 215, it is provided: "If a petition in writing, signed by at least 10 per cent. of the total number of persons appearing in the last revised voters' list of the city to be qualified to vote at the municipal elections is filed with the clerk of the city on or before the 1st day of November in any year, praying for the submission of a by-law . . . the council shall submit such proposed by-law to the electors . . ." If the majority of the electors assent, the council shall, within 6 weeks thereafter, finally pass the by-law.

A petition was prepared, and signed by a large number of persons, and lodged with the clerk of the city, and by the Board

ONT.

S. C.

RE GREIG AND CITY OF LONDON.

Middleton, J.

of Control the petition was referred to the assessment commissioner for the purpose of ascertaining whether it had been adequately signed, it being assumed that sec. 259 of the Municipal Act, R.S.O. 1914 ch. 192, applied.

The assessment commissioner, instead of following the requirements of this section and certifying that the application was sufficiently signed, made a long deliverance, finding the number of signatures on the petition, that a certain number of names did not appear on the voters' lists, and that of the remaining names the addresses given did not correspond with the addresses on the voters' list. Appended to this certificate was a list of the names appearing under these two classes. The commissioner then gave the total number of names on the voters' list, and finished thus: "I hereby certify that this statement is correct to the best of my knowledge and judgment."

Upon receipt of this document, the Board of Control referred the petition back to the commissioner "for the certificate required by the provisions of the Act," and authorised him to obtain the opinion of the city solicitor as to his procedure. The commissioner then held a court under the provisions of sec. 16 of the Local Improvement Act, which is embodied in sec. 259 of the Municipal Act, but most of the witnesses subpœnaed, it is said, refused to attend.

There was much argument and controversy before the commissioner, and in the result he found that he had made substantial errors in counting the total number of voters upon the list, and he changed his rulings as to some of the voters' names on the petition, and in the end found that the petition fell short of the adequate number of required signatures by one-tenth of one signature. Thereupon he signed a certificate, perfect in form, stating that the "petition has not been signed by at least 10 per cent. of the total number of persons," etc.

This certificate was taken before the municipal council . . . was ignored, and a by-law was passed directing the submission of the proposed by-law in due course.

The by-law was submitted, and received the approval of the majority of the electors voting, and was thereafter finally passed by the municipal council.

ONT
S. C.
RE GREIG AND CITY OF LONDON.
Middleton, J.

The motion attacks the by-law upon two grounds: first, that the petition was not in fact signed by the requisite number of ratepayers; and, secondly, that the by-law had been passed without the certificate of the assessment commissioner, which, it is contended, was necessary under sec. 259 of the Municipal Act.

It appears that the petition had been prepared by having the signatures of similar petitions obtained by different persons and at different places, and that the same course had been adopted as was followed in regard to the petition in *Re Williams and Town of Brampton* (1908), 17 O.L.R. 398: the signatures had in several instances been cut off from the heading and pasted below similar headings; and, notwithstanding the decision in that case, these signatures had been counted by the commissioner. If, as was determined in that case, these signatures should be disregarded, the petition was clearly in fact insufficiently signed.

An attempt was made to support the by-law upon the theory that the first certificate must be taken to have been a certificate in accordance with sec. 259, and that the council must be taken to have acted upon it, and that everything done by the commissioner thereafter was a nullity.

I do not think that this contention can be successfully made: for the only certificate that was ever before the council was the later one. . . . I also think that at any time before the council had acted upon the certificate it was open to the commissioner to correct any error that he might have made.

Section 259 contains a provision that in cases where it applies the certificate of the commissioner is final and conclusive. The desirability of some such provision is clearly manifest, but I think that the section as it now stands is not wide enough to reach the case of a license reduction by-law. . . It applies only where, by the Municipal Act or some other statute, "it is provided that a by-law may be passed by a council upon the application of a prescribed number of electors." There are many instances in which it is so provided, but the Liquor License Act, already quoted, provides for a totally different thing. If the prescribed number of electors petition, the council is not empowered to pass a by-law, but is required to submit it to the electorate. If the electorate carry the by-law, then the council must pass it. . . . There is the widest difference. . . . In the one case the council

ONT.

S. C.

RE GREIG AND CITY OF LONDON.

Middleton, J.

may itself act if the proper requisition is made—in the other, the council must submit the by-law to the electorate, and, if the electorate approve, must pass it.

This . . . is emphasised by the requirement of sec. 259, that the certificate shall be furnished before the by-law is finally passed. It would be most reasonable that the sufficiency of the petition under the Liquor License Act should be determined in some similar way, but the determination ought to be before the by-law is submitted to the electorate, and not only before the by-law is finally dealt with.

Sub-section 3 of sec. 16 of the Liquor License Act, imposing the compulsory duty upon the council, to be enforced at the instance of any elector, by mandamus or otherwise, contains no exception based upon the existence of the certificate.

If the municipal council had satisfied itself that the petition was signed by the requisite number of electors, and then had directed the vote, and no proceedings had been taken to interfere with the submission to the ratepayers, I should have thought that it might well be argued that, after the submission, it was too late to raise any question as to the sufficiency of the petition, and that sub-sec. 3 of sec. 16 . . . in effect superseded all possible criticism of the sufficiency of the petition; but where, as here, the petition was not in fact duly signed, and the municipal council knew that it was not, and acted in defiance of the statutory provision or without appreciating the fact that the power of the council itself to initiate a reduction by-law, which once existed, had been taken from it, I can see no course open but to quash the by-law. . . .

While the by-law is quashed with costs, I think it proper to fix the costs at a sum which will not cover . . . unnecessary material. I therefore give $80 costs.

I have said nothing as to the power of the Board of Control; but it appears to me that it has been assumed throughout that the Board of Control has a jurisdiction which it does not in truth possess.

By-law quashed.

REX EX REL. YATES v. LAWRENCE.

ONT.

S. C.

Ontario Supreme Court, Middleton, J.

1. ELECTIONS (§ II A—22)—IRREGULARITIES—STATUTORY PERIOD FOR NOMINATION—NON-COMPLIANCE.

When the definite statutory hour for nomination of municipal councillors is departed from deliberately and intentionally, the election cannot be said to have been conducted in accordance with the Municipal Act, R.S.O., 1914, ch. 192, so as to make applicable the curative provisions of sec. 150.

Statement

APPEAL by the respondents from an order of the District Court Judge, voiding their election.

C. J. Holman, K.C., for appellants.

E. F. B. Johnston, K.C., for relator.

Middleton, J.

MIDDLETON, J.:—The Municipal Act, R.S.O. 1914 ch. 192, sec. 63, provides that the nomination of candidates for municipal office shall be held at 10 o'clock in the forenoon of the last Monday in December, unless the council of a town exercises the power conferred by sub-sec. 4 of sec. 64, of fixing the hour for nomination at 7.30 p.m.

Notwithstanding the clear provision limiting the hour to which a change may be made, the municipal council of this town by by-law directed that the nomination meeting should begin at 7 o'clock. The statute provides (sec. 68) that nominations may be made at any time within an hour from the time fixed. The returning officer, obeying the by-law, held the meeting for nominations from 7 p.m. to 8 p.m. There is some evidence, which, I think, cannot be disregarded, that this prevented nominations which would have been made had the meeting been held, in accordance with the statute, from 7.30 to 8.30.

It is argued that this is a matter falling within the curative provisions of sec. 150; and that, it not appearing that the mistake affected the result of the election, the Court ought not to interfere.

It is not easy to define matters that come within the scope of sec. 150, nor do I think that it would be wise to attempt to do so. It is, however, I think, right to determine that sec. 150 does not entitle the Court to disregard the violation of an express provision of the statute. Its scope is rather to avoid the defeat of the popular will resulting from stupidity or inadvertence in

ONT.

S. C.

REX EX REL. YATES v. LAWRENCE.

Middleton, J.

an honest endeavour to comply with the numerous details incident to the conduct of an election. I lay great emphasis upon the proviso that the power conferred by this section is only to be exercised when the Court is satisfied that "the election was conducted in accordance with the principles laid down in this Act." When the definite statutory hour for nomination is departed from, deliberately and intentionally, the election cannot be said to have been conducted in accordance with the principles of the Act. If the clerk inadvertently opened the meeting five minutes late, or if he prolonged it beyond the stipulated time, this might well be a matter covered by the curative provision.

For this reason, as well as from the fact that it has been made to appear that the non-compliance may well have affected the result, the appeal must be dismissed; and I can see no reason why costs should not follow the event.

Appeal dismissed.

CAN.

EX. C.

PENINSULAR TUG & TOWING CO. v. THE "STEPHIE."

Exchequer Court of Canada, Toronto Admiralty District, Hodgins, D.L.J.

1. ADMIRALTY (§ II—5)—SALVAGE—ACTION FOR—SPECIFIC AGREEMENT—LIABILITY OF SHIP AND CARGO.

The rule upon a claim in admiralty proceedings for salvage is that unless there is a specific agreement for a sum certain, the interests in the ship and cargo are only severally liable each for its proportionate share of the salvage remuneration.

[*The "Mary Pleasants"*, Swab. 224; *The "Pyrenee,"* Br. & L. 189; *The "Raisby,"* 10 P.D. 114, referred to.]

Statement

ACTION *in rem* for salvage services.

R. V. LeSueur, for the plaintiffs.

F. F. Pardee, K.C., for the ship.

Hodgins, D.L.J.

HODGINS, D.L.J.:—It is admitted that the services were actually rendered, and that the amount charged therefore, $1,080.63, is reasonable. The sole question is whether the ship is liable for the whole amount or only for her proportion, having regard to the fact that the salvage preserved the cargo and enabled the ship to earn the freight.

This depends upon whether there was an agreement for a specific sum or whether the ship merely accepted the services of the salving vessel.

No evidence was given that any sum had been agreed upon

The bargain, whatever it was, was made not by the master or owner, but by Lomer, acting for the insurers of the cargo, and no details of it were vouchsafed at the trial. The ship therefore cannot be made liable as upon any express contract by its owner or master. The "*Cumbrian*" (1887), 6 Asp. M.L.C. 151; the "*Prinz Heinrich*" (1888), 13 P.D. 31.

The rule where no specific agreement is made for a sum certain is that the interests in the ship and cargo are only severally liable, each for its proportionate share of the salvage remuneration. See the "*Mary Pleasants*" (1857), Swab. 224; The "*Pyrenee*" (1863), Br. & L. 189.
The "*Raisby*" (1885), 10 P.D. 114.

The values given for the ship and cargo at the trial were $2,000 and $12,000 respectively and the freight earned and paid is agreed by the parties to be $661.93. Upon that basis the plaintiffs will be entitled to judgment for proportion of their claim based on a valuation of the vessel and freight at $2,661.93, as against the value of the cargo at $12,000; in other words, to judgment for $240.00.

As the importance of the exact values of vessel and cargo were probably not, in this view, present to the minds of counsel, either party may apply to me on affidavit to vary them before May 18.

The plaintiffs should have their costs of action and will be entitled to a like proportionate part of them from the cargo on the adjustment under the general average bond.

Judgment accordingly.

LUCAS v. CITY OF TORONTO.

Ontario Supreme Court, Falconbridge, C.J.K.B., Riddell, Latchford and Kelly, JJ. April 6, 1915.

1. STREET RAILWAYS (§ III B—36)—INJURY TO DOG—CONTRIBUTORY NEGLIGENCE.

For the plaintiff suing an electric railway company for having run down and killed a valuable dog owned by him, to have allowed the dog to follow the rig in which he was driving along the street car track in a city at a distance of 100 feet or more is such contributory negligence as will disentitle him to recover where the jury has found that the plaintiff did not have his dog in proper control while on the street.

Statement

APPEAL by the plaintiff from the judgment of the County Court in an action tried with a jury.

ONT.

S. C.

LUCAS v. CITY OF TORONTO.

Falconbridge, C.J.K.B.

W. E. Raney, K.C., for appellant.

S. W. Graham, for defendant corporation, respondent.

FALCONBRIDGE, C.J.K.B.:—The defendant is sued as owning and operating a street railway car on Danforth avenue, Toronto. The plaintiff alleges that his dog was struck and killed by a street car owing to the negligence of the defendant's motorman. The defendant says that the motorman of the car exercised all possible care and diligence, and that the accident occurred by reason of the negligence of the plaintiff, in that he did not observe the provisions of the by-law of the Police Commissioners which enacts that "no person shall allow his dog to run at large in the city. For the purposes of this by-law, a dog shall be deemed to be running at large when found in the street or other public place and not under the control of any person."

Questions were submitted to the jury by the learned Judge and answered as follows:—

(1) Were the plaintiff's injuries caused by the negligence of the defendant? A. Yes.

(2) If so, in what did such negligence consist? A. In not seeing the danger until too late.

(3) Was the plaintiff guilty of any negligence which contributed to the accident? A. Yes.

(4) If so, in what did such negligence consist? A. In not having his valuable dog in proper control while on the street.

(5) Could the motorman, after he first became aware that danger was imminent, have stopped the car in time to avoid the collision, by the exercise on his part of ordinary, reasonable care? A. No.

(6) At what sum do you assess the damages? A. $100.

Upon these answers the Judge was of opinion that the plaintiff was not entitled to judgment, and dismissed the action (in view of the finding of negligence against the defendant) without costs.

The plaintiff's counsel applied for and obtained an appointment for the reargument of the question whether the plaintiff or defendant would be entitled to judgment upon these findings; that argument was held, but the learned Judge was unable to see his way clear to change his opinion.

The plaintiff appeals from this judgment, on the ground that

ONT.

S. C.

LUCAS v. CITY OF TORONTO.

Falconbridge, C.J.K.B.

on the answers of the jury the plaintiff was entitled to judgment for $100 and costs; and, secondly, that the jury's finding of contributory negligence by the plaintiff is wholly unsupported by the evidence and against the law and the facts.

The dog in question was an Airedale with a very good pedigree. The plaintiff had owned him about nine or ten months at the time of the accident, and he was a little over four months old at the time he bought him.

The plaintiff was driving along Danforth avenue in a waggon drawn by one horse, and the dog was following him about 100 or 150 ft. behind. The plaintiff says that when the car was 50 ft. behind the dog, he (the plaintiff) made some effort to signal, and shouted to the driver of the car to stop, but that the motorman came on and killed the dog.

I think that there is evidence to sustain the findings of the jury, and the only question is whether the answer to question 4 as to the plaintiff's negligence is sufficient to disentitle him to succeed. I am of the opinion that, apart from the provisions of the by-law, allowing his valuable "pup"—as the plaintiff calls him—to follow him on a street car track at a distance of 100 ft. or more, was, in itself, such an act of negligence as to justify the entering of the verdict in favour of the defendant.

It is to be observed also that the negligence of the motorman, as found by the jury, is "in not seeing the danger until too late," and it seems to me that it would be placing too great a burden upon a motorman to hold that he was obliged in law to "see the danger" so as to stop his car to avoid running over a dog, whether he was a highly pedigreed animal or only a common and ordinary dog. Most dogs in Toronto know enough to get out of the way of a street railway car, and if this particular dog had not enough sense for that, his owner should have been—rather than the motorman—aware of the dog's want of sagacity, and should have had him, as the jury say, "in proper control while on the street."

I think, therefore, that the appeal fails and must be dismissed with costs.

RIDDELL and LATCHFORD, JJ., concurred.

Riddell, J.
Latchford, J.

KELLY, J., agreed in the result, for reasons stated in writing.

Kelly, J.

Appeal dismissed.

ONT.

S. C.

Re FEARNLEY'S ASSIGNMENT.

Ontario Supreme Court, Meredith, C.J.C.P. March 19, 1915.

1. ASSIGNMENT FOR CREDITORS (§ VIII A—65)—CONFLICTING CLAIMS—DETERMINATION — DIFFERENT STATUTES—ASSIGNMENT ACT—TRUSTEE ACT.

When special provisions are enacted for dealing with particular cases, these provisions are to govern, even though there may be some general provisions of another enactment wide enough to cover some of them; hence, an assignee for the benefit of creditors, under an assignment within the provisions of the Assignments and Preferences Act, R.S.O. 1914, ch. 134, is not entitled, upon a summary application to the Court, under sec. 66 of the Trustee Act, R.S.O. 1914, ch. 121, or under Rule 600, to have conflicting claims of right to rank upon the estate determined.

Statement

MOTION by an assignee for the benefit of creditors for an order determining conflicting claims to rank upon the estate of the assignor in the hands of the applicant.

G. M. Willoughby, for the applicant.

W. H. Barnum, for F. J. Fearnley, a surety.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The applicant is an assignee for the benefit of creditors, under an assignment which comes within the provisions of the Assignments and Preferences Act, R.S.O. 1914, ch. 34: and the purpose of the application is to have conflicting claims of right to rank upon the estate determined, upon a summary application in the Weekly Court.

Sec. 66.—(1) A trustee, guardian or personal representative may, without the institution of an action, apply to the Supreme Court in the manner prescribed by Rules of Court, for the opinion, advice or direction of the Court on any question respecting the management or administration of the trust property or the assets of his ward or his testator or intestate.

Rule 600. The executors or administrators of a deceased person or any of them, and the trustees under any deed or instrument or any of them, or any person claiming to be interested in the relief sought as creditor, devisee, legatee, next of kin or heir at law of a deceased person, or as *cestui que trust* under the trusts of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may apply by originating notice for the determination, without an administration of the estate or trust, of any of the following questions or matters:

(*a*) Any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin or heir at law, or *cestui que trust*.

. . .

(*g*) The opinion, advice or direction of a Judge pursuant to the Trustee Act.

(*h*) The determination of any question arising in the administration of the estate or trust.

. . .

It is said that the application is based upon the provisions of the Trustee Act, R.S.O. 1914, ch. 121—sec. 66, I suppose: and it is shewn that an application of the same character was recently made and given effect, under the provisions of Rule 600: but not without an expression of doubt as to the applicability of the Rule to such a case—a doubt which, I have no doubt, was well-founded: see *Re Battrim* (1915), 7 O.W.N. 778.

The novelty of such an application in itself raises a strong suspicion that it is misconceived: as I had and have no doubt it is.

In the first place, the contest is over the right to a dividend which has already been paid to one of the contestants. No opinion, advice, or direction that could be given upon this application, if there were power to give any, could recall the money. It is too late to throw the grass of advice or opinion at those who have the money; if anything is to be done, the time has come for throwing the stone of a writ issued out of the proper Court having jurisdiction to deal with the amount involved. The creditors who have the money have not in any way submitted their rights for consideration upon this application; they have altogether ignored it, as they had a right to do.

But it is said that there may be another dividend; and so it may be that the questions which perplex the assignee may become practical; and the opinion, advice, or direction sought really needed: and, that being so, it is necessary to consider the question whether the invocation of the Trustee Act or of Rule 600, in such a case as this, is in any way warranted; and I am yet unable to perceive how it can be.

Special comprehensive provisions are contained in the Assignments and Preferences Act for the winding-up of the assigned estate through the assignee, the assignor, the creditors and "inspectors" representing them, and the County Court Judge. Under sec. 34 of the Act, by which secs. 33 and 34 of the Creditors Relief Act are made applicable, all questions respecting distribution are provided for, in addition to such other provisions on the subject as the Assignments and Preferences Act contains.

ONT.
S. C.
RE FEARNLEY'S ASSIGNMENT.
Meredith, C.J.C.P.

When special provisions are enacted for dealing with particular cases, those provisions are to govern, even though there may be some general provisions of another enactment that might be deemed wide enough to cover some of them.

Beside this, I cannot think the Trustee Act wide enough to cover this case; nor can I see how Rule 600 can be.

Section 26(4) of the Assignments and Preferences Act provides that nothing in the two next preceding sub-sections shall interfere with the protection afforded to assignees by sec. 56 of the Trustee Act; and the protection afforded by that section is not to trustees merely, as it should be if the word "trustee" included "assignee for the benefit of creditors," but is to "trustee, assignee or personal representative." One section, and one section only, of the Trustee Act, is made applicable to assignees such as the applicant. I hold that the provisions invoked of the Trustee Act are not applicable to this case. In regard to Rule 600, it carries forward only that which was for very many years, to some extent, the practice of the Court of Chancery, applicable to the cases to which it is commonly applied; and is, as the words "without an administration of the estate or trust" shew, applicable only to cases that would be determinable properly in such an administration. Insolvent or bankrupt estates are not so administered.

However, at the urgent request of the parties who did appear upon this application, for some expression of opinion respecting the difficulties in which they think they are involved, it may not be amiss to add, but, of course, only as *amicus consultoris*:—

That it could hardly be possible to express any opinion upon facts so vaguely set out as they are upon this application. Both sides should be heard, and that can be only in proceedings which will compel the attendance of each; or else one side only heard after notice to the other in proceedings in a Court where there is the right to adjudicate in the absence of him who does not attend. An action by the surety, or the assignee, or both, may be found to be the only way of recovering part of the dividend paid, if it be recoverable.

The law upon the subject of a contest between creditor and surety as to right to rank upon the debtor's estate is simple and not unreasonable. If the surety be surety for the whole debt, he cannot rank in competition with the creditors until the whole debt is paid: why should he? His obligation is to pay the whole debt; how can he be permitted not only to fail to do this but to prevent, for his own gain, the creditor obtaining full payment from the debtor? But where the surety is answerable for part of a debt only—under no obligation as to any other part—on payment of that part, he, and not the creditor, is entitled to rank in respect of it. That debt is wholly paid to the creditor; he has no further claim on any one for it. The debt becomes the debt of the debtor to the surety, and he alone can prove it, rightly. The only difficulty that has arisen is one regarding a case in which, although the surety is surety for the whole debt, his liability is limited to a certain amount only; in that case the surety cannot rank in competition with the creditor: why should he? The arrangement is that the whole debt is to be paid, but that the creditor is to look to his other rights for recovery of any sum due to him in excess of the surety's limit of liability. What right then should the surety have to prevent, for his own benefit, the creditor's full resort to his other rights until he is fully paid? The principle is logical and right; the difficulty is in saying whether any one, who has limited his liability, has also agreed that the whole debt shall be first paid: or, put as it ordinarily is, in terms which to some may seem inconsistent, whether the surety has guaranteed the whole debt, but limited the maximum amount of his liability.

If one has done no more than give an accommodation note for a certain sum for the benefit of the creditor, it may be very difficult to shew how he has guaranteed any greater debt: but that the parties must fight out, if they cannot otherwise settle it, or have it settled, without litigation.

No order is made upon this application.

No order made.

ALTA.

S. C.

CAMPBELL v. McMILLAN.

Alberta Supreme Court, Stuart, Beck, Simmons and Walsh, JJ.

1. DAMAGES (§III J—203*a*)—CONVERSION—MISTAKE—RETURN—REDUCTION OF.

It is none the less a conversion of goods that they were taken by mistake, but their return, on discovery of the mistake, will minimize the damages to be awarded, if the owner is placed in such a position that he can use the goods.

Statement

APPEAL from an action for damages for goods taken by mistake, although subsequently returned.

J. A. Clarke, for plaintiff, respondent.

D. H. MacKinnon, for defendant, appellant.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—I think the findings of fact of the learned trial Judge resulting in his finding the defendants liable for conversion should not be disturbed. The defendants took possession of the plaintiff's potatoes by mistake. Though by mistake it was a conversion. Some days afterwards they replaced them in the car from which they had taken them. This could result not in annulling the conversion but in reducing the damages if they succeeded in placing the plaintiff in such a position that by using the potatoes he could minimize his damages—perhaps to a negligible amount. The burden of this was on the defendants and they have failed to sustain it.

I think, however, that the damages ought to have been calculated on the basis of 40 cents a bushel, that appearing to be the current price at the place and time of conversion. There were 504½ bushels. This, at 40 cents, makes $201.80. There were 301 sacks at 10 cents, making $30.10, a total of $231.90. I think interest at 8% from July 1, 1911, should be added to this. The judgment, I think, should be reduced to this amount, for which the plaintiff should have judgment with costs and with $75 costs of appeal to be paid by the plaintiff, respondent, and to be set off against the damages and costs.

Judgment accordingly.

Re B.C. PORTLAND CEMENT CO. LTD.

B. C.
S. C.

British Columbia Supreme Court, Macdonald, J. July 15, 1915.

1. CORPORATIONS AND COMPANIES (§ V G 2—291)—BOND ISSUE—POWERS OF MAJORITY—PRIORITIES.

Dissentient or absentee bondholders are bound by the action of the majority in declaring a second issue of bonds a priority over a first issue in order to raise money for the payment of pressing claims, and in conformity to the powers of a deed of trust authorizing the issue.

2. BONDS (§ III A—55)—CORPORATE BONDS—PRIORITY OF ISSUES—CREDITORS—MONEY ADVANCES.

A second issue of corporate bonds which were by a majority of bondholders declared to constitute a priority over a first issue, for the purpose of enabling the corporation to raise money in re-adjustment of its finances, will operate as a priority only in favour of holders who acquired them for present money advances to the corporation, but not in favour of creditors holding them as collateral security for past indebtedness.

Statement

ISSUES for determination of priorities.

R. M. Macdonald, for plaintiff.

S. S. Taylor, K.C., for defendants.

Macdonald, J.

MACDONALD, J.:—This is an issue directed to determine the question of priority, as between the holders of two sets of debentures or bonds of the British Columbia Portland Cement Co. Ltd. The holders of a first issue are plaintiffs and the holders of a second issue are defendants.

After the first issue of bonds the company carried on its business for a time, but claims of creditors arose which were being pressed for payment. The situation was then dealt with by the bondholders and shareholders. A trust deed was executed to secure a second issue of bonds, which purported to be in priority to the first issue. The plaintiffs, as holders of the first issue of bonds, contend that such priority does not exist, on the ground that there is no power in the first trust deed to effect this result, or even if there is sufficient power for that purpose, it was not properly exercised so as to create such priority. The further ground is taken that, even if such authority exists, and was properly exercised, the defendants did not become holders of such bonds under circumstances that entitled them to claim such priority. Dealing with the first point, I think that section 6 of the first trust deed, coupled with section 19, gives authority to a majority of the bondholders of such issue

B. C.
S. C.
RE
B. C.
PORTLAND
CEMENT
CO. LTD.
Macdonald, J.

of bonds for the purposes mentioned. I think also that the provisions of such trust deed have been properly complied with so as to enable such majority to bind the minority and create a second issue of bonds which will take priority over the first issue. The first trust deed would in that event be postponed as a security and only take effect subject to the second trust deed and the bonds properly issued and secured thereunder. Dissentient bondholders under the first issue would thus be debarred from objecting to the priority of the second issue, if the bonds comprising such issue were received and held by parties in a position to claim such benefit.

In thus forming an opinion that this power existed and was duly exercised, I have considered the necessity for clearness of the authority and the strictness required in carrying out its terms—see on this point *Mercantile Investment Trust Co.* v. *International Co. of Mexico*, reported in footnote to *Sneath* v. *Valley Gold Ltd.*, [1893] 1 Ch. 477, at 484.

If the second issue of bonds was properly secured so, as to apparently create such priority, then did they come into the possession of persons who are entitled to such priority? I will first deal with the holders of the second issue as a class and then consider two special cases differing from such class.

Assuming that dissentient or absentee bondholders of the first issue were bound by the course pursued by the majority of such bondholders, then, as between such majority and the dissentient bondholders, the control thus obtained would only operate to the extent and for the purpose indicated in the trust deed securing the second issue. The company had power to postpone or interfere with the rights possessed, by even a single bondholder under the first issue, in so far only as an authority for that purpose might be conferred by the bondholders through a proper utilization of the provisions of the first trust deed. When such authority was received the company purported to act within its scope. A trust deed, dated January 1, 1914, was executed reciting, *inter alia*, that there had been a previous issue by the company of $400,000 ten-year first mortgage bonds of which $282,000 were held through sale and allotment; that such

bonds were secured by a trust deed dated January 2, 1911, on all the undertaking and property of the company; that

it was deemed advisable by the bondholders in their own interests and in the interests of the company to raise for the purpose of the company by way of loan, a further sum not exceeding $150,000.

That a meeting had been regularly called and held by the bondholders at which the loan of $150,000 was authorized by the company, and to secure

the amount raised by a trust deed or mortgage to rank in priority to the trust deed or mortgage securing the present issue of bonds and charged on the property comprised in such trust deed or mortgage or any part thereof.

Bonds were then executed. A copy of one of these first mortgage 7 per cent. bonds (ex. H. to record) states that "the company promises to pay bearer $100," and that bonds are—

equally entitled to the benefits and are equally subject to the provisions of a trust mortgage and pledge, dated the first day of January, nineteen hundred and fourteen, made by the company to the Dominion Stock and Bond Co. Ltd., as trustees.

The second issue of bonds was not sold nor pledged, except as hereafter mentioned. The defendants, however, became the holders of a large portion thereof. They were creditors of the company and it is admitted the bonds "were issued and delivered to them as collateral security for the company's indebtedness to them." It was also admitted that the defendants became the holders of the bonds by way of collateral security "without any actual knowledge of any alleged irregularity in respect to the issuance thereof." If the company had the right to thus deal with the bonds then the defendants held them in priority in the first issue. I do not think, however, that the company or its directors had any right to thus dispose of these bonds. The notice calling a meeting of the holders of the first issue of bonds specified that the resolution to be proposed at such meeting was "to raise by way of loan a further sum not exceeding $150,000." The meeting of bondholders passed the resolution in this form. A by-law to the same effect was approved of at a meeting of shareholders on the same day and the directors were authorized "to borrow upon the credit of the company any sum not exceeding $150,000 in addition to sums already borrowed." Authority was also given to the directors to issue

B. C.

S. C.

RE B. C. PORTLAND CEMENT CO. LTD.

Macdonald, J.

bonds, debentures or other securities and "to pledge or sell the same for such sums and at such prices as may be deemed expedient." It is quite apparent that the intention, at the time, was to borrow money in the manner indicated. There was no authority given to use the bonds as collateral security for the company's indebtedness. The transfer of such second issue was thus not in accordance with the notice calling the meeting of bondholders nor the resolutions passed at such meeting. In order to bind the bondholders under first issue and create a priority, strict compliance with the authority conferred on the company was requisite. It was pointed out that the notice of bondholders' meeting shewed that it was called "to consider the raising of money to pay off pressing claims of the company and to furnish working capital." It was contended that the result sought to be accomplished had in reality been effected though in a different way. I cannot agree with this contention. If the creditors had accepted the bonds, dollar for dollar of their indebtedness, or even at a discount, it might have been considered that the bonds to that extent had been sold. There is a decided difference between such a course and the one pursued. A bondholder might be satisfied with a proposition to borrow money by issue of bonds and thus clear up the indebtedness of a company and not be agreeable to placing such bonds with its creditors as security and still leaving the indebtedness unpaid. The defendants, in my opinion, cannot obtain any priority as against the plaintiffs unless the form of the bond assists them. They are "bearer bonds." It is submitted that they are negotiable to such an extent that being termed "first mortgage bonds" they obtain priority over any previous issue by the company. The case of *Duck* v. *Tower Galvanizing Co.*, [1901] 2 K.B. 314, was cited in support of defendant's contention. I do not think it is applicable. It was an interpleader issue between the holder of a debenture and an execution creditor. The debenture was issued without authority but the holder had no notice of the irregularity. It purported to have been properly signed and sealed and was apparently in order.

There was ample authority to shew that no informality will alter the rights possessed by a *bonâ fide* holder for value upon a document that purports to be in order.

Vide Lord Alverstone, at p. 318. The company was estopped from setting up the irregularity. The execution creditor could only seize the chattels that the company as his debtor could honestly dispose of, and so failed as against the debenture holder who had a prior charge on such portion of the assets of the company. I am also referred to *Edelstein* v. *Schuler*, [1902] 2 K.B. 144, in support of defendant's position. While this case is authority as to the negotiability of the bonds there referred to, even where the original owner had been deprived of them by theft, still it does not go the length that the defendants require in order to succeed. Such bonds bore on their face the statement that they would be paid "without regard to any equities between the company and the original or any intermediate holder thereof." The holder for the time being held them with this representation and any benefit incident thereto and also with the risk that his ownership might be destroyed by some other person acquiring them for value "without any notice of infirmity in the vendor's title." Even if the second issue of bonds in question were negotiable they had no similar statement on their face and were "subject to the provisions of the trust mortgage." If this document had been examined it would be apparent that the bonds intended to be secured by such mortgage were issued in order to borrow money and not to be transferred as collateral security for an existing indebtedness to the company. They were thus not negotiable to the same extent as the bonds referred to in the case just cited. I am of opinion that the holders of the first issue of bonds have not lost their priority.

A company issued debenture stock purporting to be a first charge and which gave a floating security of all its assets. It afterwards issued debentures to other persons which also purported to be a first charge and gave a like floating security. *Held*, that the holders of the debentures, whether they had or had not notice of the issue of the stock, did not obtain priority over, but ranked after the stockholders.

Smith v. *English & Scottish Mercantile Inv. Trust*, [1896] W.N. 86.

During the course of the trial it became apparent that all the holders of the second issue of bonds were not in the same position. Two of them—T. W. Fletcher and S. J. Crowe—had

B. C.
S. C.
RE B. C. PORTLAND CEMENT CO. LTD.
Macdonald, J.

received a portion of these bonds as security for present advances to the company. They were *pledge* to them and thus came within the object sought to be obtained by the issue of such bonds. It was contended that the form of the order directed in the issue did not admit of enquiry as to these two bondholders. I doubted my right to deal specifically with them, but, in order to avoid a further application being made on their part and to save a consequent expense and delay, I thought it well to receive evidence in support of their position, so that in the event of an appeal all matters pertaining to the rights of the bondholders could be considered.

In my opinion, T. W. Fletcher and S. J. Crowe are, to the extent of the money advanced on the strength thereof, entitled to hold bonds of the second issue in priority to the first issue.

I do not require to consider the question of costs as that has been dealt with in the order directing the issue.

Order accordingly.

WOOD v. GRAND VALLEY R. CO.

CAN.
S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Anglin, and Brodeur, JJ. March 15, 1915.

1. CONTRACTS (§ VI A—410)—LIABILITIES ON—PERSONAL LIABILITY OF RAILWAY PRESIDENT—FAILURE TO COMPLETE BRANCH LINE—RIGHTS OF BONDHOLDERS.

An agreement whereby a railway president undertakes on behalf of himself and the company to build an extension line in order to secure a township the benefit of competitive freight rates, in consideration that the manufacturers and citizens of the township purchase the railway bonds, renders the president personally liable with the company to the purchasers of the bonds upon their failure to complete the line.

[16 D.L.R. 361, 30 O.L.R. 44, affirmed.]

2. DAMAGES (§ III A 1—44)—CONSTRUCTION OF BRANCH LINE—FAILURE TO COMPLETE—LIABILITY TO BOND PURCHASERS.

Substantial damages, in an amount determinable from the evidence as to the loss sustained, may be awarded to purchasers of railway bonds, for the breach of an agreement by a railway company to build a branch line which, if completed, would secure their township better freight facilities, and on the strength of which agreement the bonds were purchased.

[16 D.L.R. 361, 30 O.L.R. 44, affirmed.]

3. APPEAL (§ I A—1)—RIGHT TO—SUBSTANTIVE RIGHTS—JUDGMENT FOR REFERENCE—NON-VARIANCE OF DAMAGES—FINALITY.

The judgment of a Provincial Supreme Court which does not determine adversely the quantum of damages, but merely orders the case back for a further reference, constitutes no deprivation of a "substan-

tive right in controversy in the action" within the meaning of secs. 2(e) and 36 of the Supreme Court Act, R.S.C., 1906, ch. 139, as amended by Act, 1913, from which an appeal will lie.

[16 D.L.R. 361, 30 O.L.R. 44, affirmed.]

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (16 D.L.R. 361, 30 O.L.R. 44), setting aside the judgment of the Divisional Court (10 D.L.R. 726, 27 O.L.R. 556), and that of the trial Judge (5 D.L.R. 452, 26 O.L.R. 441).

Statement

The text of the agreement on which the action was based is as follows:—

In consideration of the purchase of the bonds of the Grand Valley Railway Co. by certain manufacturers and other citizens of St. George, Ont., and the sum of one dollar ($1) now in hand paid, Mr. A. J. Pattison, president of the Grand Valley Co., hereby undertakes and agrees on his own behalf and on behalf of the said Grand Valley R. Co., that he will make or cause to be made a through traffic arrangement with the Canadian Pacific Railway Co. making direct connection with the C.P.R. at Galt, in terms of the Railway Act of Canada in such a way that the current competitive freight rates will apply continuously from St. George on precisely the same basis as from Galt and other points in this railway district, to all points east and west in Canada.

While not undertaking anything on behalf of the C.P.R. Co. it is distinctly provided by this agreement that the said A. J. Pattison will do all things lawful to secure the agreement above mentioned, and further that should it be necessary to do so he will bring the matter before the Railway Commission of Canada with a view to the creation and enforcement of the through traffic arrangement herein mentioned.

It is further agreed that the extension of the Grand Valley Railway to St. George and the securing of the above mentioned agreement with the C.P.R. Co. will proceed with at once and with the greatest possible dispatch.

It is further agreed that the Grand Valley R. Co. will build and construct in a substantial way for the handling of heavy freight, the necessary switches and sidings connecting their system with the various mills and factories of St. George upon such terms as may be agreed upon between the respective parties.

Provided always that the terms, conditions and covenants of this agreement shall be binding upon the heirs, executors and assigns of the said A. J. Pattison and the said Grand Valley Railway Co.

Dated at St. George, Ont., June 29, 1906.

(Sgd.) THE GRAND VALLEY RY. CO.,
A. J. Pattison, Pres't.

Shepley, K.C., and *Sweet*, for appellants.

Holman, K.C., for respondent Pattison.

Grayson Smith, for respondent, The Grand Valley Railway Company.

CAN

S. C.

WOOD v. GRAND VALLEY R. CO.

Davies, J.

SIR CHARLES FITZPATRICK, C.J.:—I am of opinion that the appeal and cross-appeal should be dismissed with costs.

DAVIES, J.:—The substantial questions to be determined in this appeal, beyond Pattison's personal liability, are what damages the plaintiffs are entitled to recover by reason of the failure of the defendant to continue the construction of the Grand Valley Railway from a point on the line called Blue Lake to the Village of St. George, as contracted for; and, secondly, whether the evidence put in at the trial of the cause was ample enough and supplied sufficient data to enable the Court to fix upon and determine the measure of these damages.

The learned trial Judge thought sufficient evidence had been given and assessed the damages at $10,000.

The Divisional Court reduced these damages to $3,880, which they divided between the two plaintiff companies, allowing to the individual plaintiffs only nominal damages.

The Appellate Division being of the opinion that there was an "entire absence of evidence to supply the data upon which the amount of loss sustained by the breach of the agreement could be ascertained," vacated both judgment and directed a reference to ascertain the amount of the damages.

I understand a majority of my colleagues are of the opinion that this was, under the circumstances, the judgment which should have been given and have agreed to dismiss the appeal and confirm that judgment. While I do not formally dissent from this judgment, I think it fair, however, to say, specially in view of the appeal made to us by counsel at bar, that if we reached a conclusion adverse to the objections against the maintenance of the action altogether we would, if possible, finally dispose of the question of damages, I was personally prepared, after considering the evidence submitted, to have now and on the evidence before us disposed of this question of damages.

The conclusion I finally reached was that the judgment of the learned trial Judge was under all the circumstances and evidence a fair and reasonable one.

The reasoning of the learned Judge in the following quotation which I make from his judgment commends itself to my

mind not only as fair and reasonable, but as coming quite within the reasoning and the judgment of the Court of Appeal in *Chaplin* v. *Hicks*, [1911] 2 K.B. 786.

The learned trial Judge says:—

In this case the plaintiffs expected to receive great benefit if they could secure the construction of the railway and competition between the Grand Trunk and the Canadian Pacific. In addition they expected great convenience in the carrying on of their business by the ready access to a railway by which incoming and outgoing freight could be handled. They expected additional profit by the increased prosperity of the municipality in which they were interested. All these considerations were present to the minds of both parties at the time of the making of the agreement.

There were many elements of uncertainty. These could not be eliminated. If all that was hoped for came to pass, the advantage to the plaintiffs would far exceed the $10,000 paid. The price was not given for a thing certain, but was given for the chance of obtaining the great advantage hoped for. If I were to attempt to assess damages on the basis of the plaintiffs receiving all that they contemplated, then the damages would be many times the price paid. But, endeavouring to assess in the light of all the uncertainties and contingencies pointed out by counsel, and which were, no doubt, equally present to the minds of both parties at the time the agreement was made, I think I shall not go far wrong if I place the damages at the same sum as that which Pattison and his railway company induced the plaintiffs to give for this chance.

Had it not been for the decision of the above case of *Chaplin* v. *Hicks*, [1911] 2 K.B. 786, and the cogent reasonings of the able Judges who constituted the Court of Appeal in explaining the grounds on which they reached their conclusion I would have felt inclined to agree with the judgment appealed from on the ground of the insufficiency of the evidence.

An attempt was made to minimize the extent and meaning of that judgment of *Chaplin* v. *Hicks*, [1911] 2 K.B. 786, but the weight to be attached to it not only consists in the exact point there decided, but also in the *personnel* of the Court and the reasoning by which they supported their conclusion.

The head-note or summary of the report reads as follows:—

Where by contract a man has a right to belong to a limited class of competitors for a prize, a breach of that contract by reason of which he is prevented from continuing a member of the class and is thereby deprived of all chance of obtaining the prize is a breach in respect of which he may be entitled to recover substantial, and not merely nominal, damages.

The existence of a contingency which is dependent on the volition of a third person does not necessarily render the damages for a breach of contract incapable of assessment.

CAN.
S. C.
WOOD
v.
GRAND VALLEY R. CO.
Davies, J.

It was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs, but it seems to me to be clearly laid down there by the learned Judges that such an impossibility cannot "relieve the wrongdoer of the necessity of paying damages for his breach of contract" and that on the other hand the tribunal to estimate them whether jury or Judge must under such circumstances do "the best it can" and its conclusion will not be set aside even if "the amount of the verdict is a matter of guess work."

See last paragraph of judgment of Vaughan-Williams, L.J., pages 792-3.

Fletcher Moulton, L.J., at page 795, says, and I quote it because of Mr. Holman's argument in this appeal as to the remoteness of the damages claimed here:—

It has been contended in the present case that the damages are too remote; that they are not the natural consequences of a breach with regard to which the parties intended to contract. To my mind the contention that they are too remote is unsustainable. The very object and scope of the contract were to give the plaintiff the chance of being selected as a prize-winner, and the refusal of that chance is the breach of contract complained of and in respect of which damages are claimed as compensation for the exclusion of the plaintiff from the limited class of competitors. In my judgment nothing more directly flowing from the contract and the intention of the parties can well be found.

Again on the same page the same learned Judge says, speaking of the difficulties of establishing and fixing the damages:—

But it is said that the damages cannot be arrived at because it is impossible to estimate the quantum of the reasonable probability of the plaintiff's being a prize-winner. I think that, where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case. There are no doubt well settled rules as to the measure of damages in certain cases, but such accepted rules are only applicable where the breach is one that frequently occurs.

And again at page 796, speaking of the case he was then dealing with, he says:—

I cannot lay down any rule as to the measure of damages in such a case; this must be left to the good sense of the jury.

Farwell, L.J., at page 798, says: —

The two words "chance" and "probability" may be treated as being practically interchangeable, though it may be that the one is somewhat less

definite than the other. The necessary ingredients of such an action are all present; the defendant has committed a breach of his contract, the damages claimed are a reasonable and probable consequence of that breach, the loss has accrued to the plaintiff at the time of action. It is obvious, of course, that the chance or probability may in a given case be so slender that a jury could not properly give more than nominal damages, say one shilling; if they had done so in the present case, it would have been entirely a question for them, and this Court could not have interfered.

Applying this reasoning and these principles to the case before us and our own common sense acting as jurymen I would not have felt much difficulty on the evidence given in accepting the conclusion reached by the trial Judge as to the amount of the damages. But as I have said I will not formally dissent from the conclusion reached by my colleagues supporting the judgment of the Appellate Division referring the case back for further evidence.

One word in conclusion as to the personal liability of the defendant. I fully concur with all my colleagues and with all the Courts below in maintaining that liability. I think it is hardly open to argument.

IDINGTON, J., dissented.

Idington, J. (dissenting)

ANGLIN, J.:—Under sec. 36 and clause (*c*) of sec. 2 of the Supreme Court Act (as enacted by 3 and 4 Geo. V. ch. 51, sec. 1), only those judgments of the highest provincial Courts of final resort (rendered in the provinces other than Quebec and in proceedings other than equitable) are appealable to this Court which determine adversely to the appellant, in whole or in part, a substantive right in controversy in the action or other judicial proceeding. Such determination must be effected by the judgment appealed from—not by some former or other judgment—and the right must be a substantive right in controversy in the action.

Anglin, J.

By the judgment now in appeal the question of the liability of the defendants is determined in the appellants' favour. A reference is directed to ascertain the quantum of damages to which they are entitled. Of that direction the appellants complain, asserting that on the evidence in the record, they were entitled to a determination of the amount of their damages by the trial Court and that the judgment of that Court which fixed

CAN.
S. C.
WOOD
v.
GRAND VALLEY R. CO.
Anglin, J.

them at $10,000 should be restored. They insist that the variation of that judgment, by substituting, for the adjudication that they should recover $10,000, a declaration of liability and a reference to ascertain the amount of their damages, deprived them of a "substantive right in controversy in the action" within the meaning of that phrase in clause (*e*). With deference I am unable to accept that view. I cannot see that it makes the slightest difference what disposition of the case was made in the Court of first instance. The question as to our jurisdiction would be precisely the same if that Court had directed a reference as to damages and its judgment had been affirmed on appeal. By the judgment in appeal the plaintiffs' claim that they had a right to damages is decided in their favour; the quantum of those damages is left to be ascertained in further proceedings. The position would be precisely the same if that had been the judgment at the trial. Can it be said that the quantum of damages to which the plaintiffs are entitled—which is the substantive right in controversy in the action now being dealt with—is determined adversely to the appellants by the judgment now appealed from? I think not. That right now remains undetermined and it is immaterial what disposition of it had been made by the judgment of first instance. I am, for these reasons, of the opinion that this appeal should be quashed for want of jurisdiction; and, if that course were adopted, the cross-appeals would meet a similar fate. *Lindemark* v. *Picard*, Feb. 9, 1914, unreported.

But, in deference to the views of my colleagues, who, I understand are of the opinion that the Court has jurisdiction to entertain this appeal, I proceed to consider it on the merits.

Dealing first with cross-appeals by both defendants against the finding of their liability, I entertain no doubt that both were properly held to be parties to the contract in question and liable for damages for its breach. As to the company there can be no question that it was intended that it should be bound. Its president, Pattison, executed the instrument on its behalf, and he gives explicit evidence of his authorization to do so by the directors and of ratification of his action by the shareholders, which is uncontradicted. Moreover, it received the

moneys paid by the plaintiffs and it acted on the agreement which it would now repudiate. As to Pattison's personal liability the terms of the contract make it clear that that also was intended; and I think the proper inference from the evidence is that his signature to the document, accompanied by the descriptive word "president," which is similarly used in the body of the instrument, was intended to witness his personal obligation as well as that of the company.

Neither can I accede to the contention that the plaintiffs, other than the Jackson Wagon Company and the Brant Milling Company, are restricted to nominal damages by the particulars delivered by them and the terms of the order under which they were delivered. All the plaintiffs claimed the return of the moneys paid by them. The damages of which particulars were ordered and given were claimed in addition to and over and above the refund of the moneys demanded. At the trial it became obvious that the claim to recover the moneys paid as on a total failure of consideration could not be maintained; and the trial Judge—as he had the power to do—apparently allowed the plaintiffs to substitute for that claim a demand to recover the same amount by way of damages for breach of the agreement; and the further claims for damages, of which particulars had been given, were abandoned. No formal amendment to the statement of claim was made; but the judgment of the learned trial Judge proceeds upon the assumption that the case should be dealt with as if that had been done. It cannot be otherwise intelligently explained.

On the main appeal, the case of *Chaplin* v. *Hicks*, [1911] 2 K.B. 786, is chiefly relied upon by the appellants. But all that that case decides is that "the existence of a contingency which is dependent on the volition of a third person does not necessarily render the damages for a breach of contract incapable of assessment."

In such a case the plaintiff "may be entitled to recover substantial, and not merely nominal damages."

In that case the plaintiff had given in evidence all the material facts relative to the assessment of damages which were susceptible of proof. She had furnished to the jury all the data

CAN.

S. C.

WOOD v. GRAND VALLEY R. Co.

Anglin, J.

which it was in her power to supply. Having done that she was not required to render certain that which was contingent, or to furnish the means of measuring with exactness and precision something essentially indefinite. *Simpson* v. *London and North Western R. Co.*, 1 Q.B.D. 274; *Kennedy* v. *American Express Co.*, 22 Ont. App. R. 278, and *Jameson* v. *Midland R. Co.*, 50 L.T. 426, are other decisions similar in principle. But *Chaplin* v. *Hicks*, [1911] 2 K.B. 786, is not authority for the proposition—for which an analysis of his argument makes it clear that counsel for the appellants really cited it—that, because the realization of the plaintiff's expectations under a contract is subject to contingency, he is not bound to put the jury in possession of information in his power to enable them to appreciate what would have been the advantages to be derived by him from his expectations if realized, as a basis on which to assess the value of the chance of realization of which the breach has deprived him. It is the failure to give such information—to supply such data as were given in *Chaplin* v. *Hicks*, [1911] 2 K.B. 786—that renders the reference ordered by the Appellate Division necessary, since that Court, in the exercise of its discretion, instead of dismissing the action, as it might have done, has seen fit as a matter of grace and indulgence, to allow the appellants another opportunity to adduce the evidence which they should have given at the trial as to relevant and material facts susceptible of proof, knowledge of which is necessary to enable the assessing tribunal to estimate what would have been the value to them of the performance by the defendants of their contract as a long step towards realization of their expectations. The plaintiffs are claiming special damages. No doubt the particularity of proof required varies with the circumstances. (Arnold on Damages, pp. 3, 4, and 12.) The assessing tribunal is, however, entitled to such assistance by proof of material relevant facts as the claimant may under the circumstances reasonably be expected to afford it.

But it is said that such evidence is in the present case unnecessary because we have in the consideration given and accepted *primâ facie* proof of the value placed by the parties themselves on the contractual rights acquired by the plaintiffs. That

such a measure of damages must, in the circumstances of the case at bar, be illusory seems manifest. For divers reasons a man may be prepared to pay for a thing much more than any real pecuniary value it may have, not only to persons in general, but even to himself. Actuated by patriotic or philanthropic motives he may be willing to expend money for which he expects no return in the way of pecuniary or other material advantage. As to some of the plaintiffs there are circumstances in evidence that rather suggest that they were not pecuniarily interested. Unless in the case of a purely commercial contract, where the circumstances indicate with reasonable certainty that the price paid represents the fair value to the purchaser of the thing he bargained for, that price cannot afford a reliable basis for assessing damages for failure to deliver.

But in the present case, in addition to the contractual rights for the breach of which this action is brought, the plaintiffs for the $9,700 paid by them obtained bonds having a face value of $10,000, on which they were subsequently paid interest for five years. The actual value of these bonds at the time they were so acquired is not shewn, although it is sufficiently apparent that they had some substantial value. It is impossible on the evidence in the record to say how much of the $9,700 was in fact given for them, and what part of it the plaintiffs paid for the advantages likely to accrue to them from the fulfilment of the contract to construct the projected line of railway and to establish through connections. The value to them of the advantages to be anticipated from the fulfilment of these undertakings may have far exceeded the amount which they paid, or, on the other hand, it may have been materially less. Of that value the payment of $9,700 made to secure such advantages plus the bonds for $10,000 does not afford any criterion.

On the evidence in the record I feel that I should find myself quite incapable of fairly estimating the damages to which the plaintiffs are entitled. The value of the chance they have lost is, without further material, not susceptible of assessment. Unless the action should be dismissed, the reference to enable the plaintiffs to supplement their evidence is necessary. I think we should not interfere with the exercise of discretion by the Appellate

CAN.
S. C.
WOOD
v.
GRAND VALLEY R. CO.
Anglin, J.

Division. In conclusion I cannot do better than quote a well-known passage from the judgment of Bowen, L.J., in *Ratcliffe* v. *Evans*, [1892] 2 Q.B. 524, at 532 and 533:—

> The character of the acts themselves which produce the damage, and the circumstances under which these acts were done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.

I would, for these reasons, dismiss the appeal and the cross-appeals with costs.

Brodeur, J.

BRODEUR, J.:—I would be of opinion that the judgment of the Appellate Division of the Supreme Court of Ontario should be confirmed.

The action was for the recovery by the appellants of a sum of ten thousand dollars ($10,000) for breach of contract.

The appellants were all interested in the welfare of a place called St. George, and were anxious that that place should be connected with the line of the Canadian Pacific Railway through the Grand Valley Railway and agreed to take over $10,000 of bonds of the latter company if the respondent Pattison and the company itself would undertake to extend the Grand Valley Railway to St. George and to secure a competitive freight rate from the C.P.R. Co.

The bonds were taken over by the appellants and the company started the construction of the branch in question; but, though they had promised that by the fall of 1906 the extension of the railway would have reached St. George, the company failed to carry out their agreement.

In 1911 they instituted the present action against respondent Pattison and the Grand Valley Railway Company for the repayment of their money and for damages for breach of contract.

Pattison denied his personal liability in connection with that agreement. The three Courts below, however, have decided against him on that point; and, as it was mostly a question of fact, it is not necessary for me to deal with that phase of the situation.

I think myself that Pattison should be held personally liable under the agreement which was made on June 29, 1906.

The only difficulty remaining is with regard to damages. Particulars had been asked before the trial from the plaintiffs as to those damages. Some of them stated in answer to the order that was then given that they would claim only nominal damages. The others, namely, the Jackson Wagon Co. and the Brant Milling Co. gave particulars.

At the trial before Mr. Justice Middleton, in view of the opinion that was then expressed by the Judge, no evidence was adduced as to these specific damages claimed.

The plaintiff relied upon the case of *Chaplin* v. *Hicks*, [1911] 2 K.B. 786, and the trial Judge proceeded to assess the damages at the same sum as Pattison and the railway company induced the plaintiffs to subscribe.

The judgment was varied by the Divisional Court and nominal damages only were given to all the plaintiffs, with the exception of the Jackson Wagon Co. and the Brant Milling Co., in whose favour judgment was entered for $3,880.

An appeal was taken from that judgment to the Appellate Division. The Court maintained that the plaintiffs were entitled to recover the damages sustained by them by reason of the breach of the agreement and they ordered that the case be referred to the Master to ascertain the amount of such damages.

In view of the expression of opinion at the trial, it is pretty evident that the claim for damages was not gone into as it should have been without that. It is very much to be regretted that the parties, after having gone before four Courts will have to go again into this question of evidence as to the extent of those damages, but we have not got sufficient material before us to deal exhaustively with the subject.

I think the judgment of the Appellate Division, which ordered a reference, should be maintained and this appeal should be dismissed with costs.

Appeal dismissed with costs.

CAN.
S. C.

THE CANADIAN NORTHERN QUEBEC R. CO. v. GILBERT GIGNAC.

Supreme Court of Canada, Davies, Idington, Duff, Anglin, and Brodeur, JJ. February 10, 1915.

1. APPEAL (§ I A—1)—RIGHT TO—CONFIRMATION OF JUDGMENT BELOW — RAILWAY ORDERS—ADDING SPECIFIC DIRECTIONS—EFFECT.

An order of the Superior Court directing the construction of drainage to prevent the overflooding of lands by railway ditches, which is rendered more specific by a judgment of the Superior Court in adding thereto recourse for future damages in case of default, is in effect a confirmation of the judgment of the Court of first instance, and therefore appealable to the Supreme Court of Canada by virtue of sec. 40 of the Supreme Court Act, R.S.C. 1906, ch. 139.

[*Hull Electric Co.* v. *Clément*, 41 Can. S.C.R. 419, followed.]

Statement

MOTIONS to set aside the judgment of the registrar, and also to quash an appeal for want of jurisdiction.

The order appealed from is as follows:—

The Registrar.

THE REGISTRAR:—This is a motion to affirm jurisdiction of the Court. It would appear from the pleadings that the lands of the plaintiff, having been by the works of the defendants compelled to receive more water than they were by nature called upon to carry, the plaintiff brought an action in 1911 for redress. The parties came to an agreement on October 28, 1911, set out in the statement of claim, which provided for the construction by the defendants of certain drainage works which would relieve the plaintiff from the injuries complained of and the action was thereupon dropped, the defendants paying the costs and damages.

Subsequently the defendants altered the drainage system with the result that the plaintiff's land was again subjected to an overflow of water and the present action was taken in which the plaintiff by the 10th paragraph of his pleadings, declared himself to be the proprietor of the lands in question and, by the 11th, declared that he was not subjected to any servitude with respect to the water now being brought upon his property by the defendants. He also asked that it be declared that the defendants should make the works necessary to relieve him from the injuries complained of and in default of so doing that he, the plaintiff, be authorized to make these works at the cost and charges of the defendants and that the defendants be ordered to pay damages to the amount of $250.

The defendants denied generally the allegations of the plain-

tiff and also alleged that the works subsequently made by them and which the plaintiff now complains of were so made at his express request and that the result of the works was to carry the water in its natural channel as it existed before the construction of the railway.

The case was tried before the Hon. Mr. Justice Letellier, who gave judgment as follows:—

Nous maintenons l'action et déclarons que la défenderesse n'a aucun droit d'exercer sur la propriété du demandeur la servitude d'écoulement des eaux qui résulte des travaux de la construction de son chemin de fer; et nous lui ordonnons de cesser l'exercice de cette servitude et de cesser de faire couler dans le fossé de ligne et la décharge du demandeur, les eaux qu'elle lui envoie venant dans le fossé de ligne et conduite par le talus et le fossé du chemin de fer; et nous lui ordonnons de faire les travaux nécessaires à cette fin, et qu'à son défaut de la faire avant le mois d'octobre, 1914, le demandeur soit autorisé à faire ces travaux aux frais de la défenderesse et à ses dépens, en par lui donnant avis du temps où il fera ces travaux; et nous condamnons de plus la défenderesse à payer au demandeur la somme de $250 de dommages avec intérêt et dépens de l'action.

The defendants thereupon inscribed in review where the judgment was confirmed in the following language:—

Confirme le dit jugement avec dépens, sujet à la modification suivante du dispositif qui se lira comme suit:—

Nous maintenons l'action et déclarons que la défenderesse n'a aucun droit d'exercer sur la propriété du demandeur la servitude d'écoulement des eaux, lequel résulte des travaux de construction du chemin de fer:—Nous ordonnons de plus à la défenderesse de discontinuer l'exercice de telle servitude et de cesser de faire se déverser dans le fossé de ligne et les décharges du demandeur les eaux qui s'y écoulent par suite du talus et du fossé du chemin de fer; et nous ordonnons à la défenderesse de faire les travaux nécessaires pour mettre fin au dit trouble conformément à la transaction intervenue entre les parties le vingt-huit octobre 1911, et à défaut par elle de ce faire d'hui au premier mai prochain, la Cour réserve au demandeur tout recours pour dommages ultérieurs, et nous condamnons de plus la défenderesse à payer au demandeur la somme de deux cent cinquante piastres de dommages avec intérêt et les dépens de l'action.

The defendants now desire to appeal from the judgment of the Court of Review, claiming that no appeal lies to the Court of King's Bench and that an appeal lies to the Supreme Court of Canada under section 40 of the Supreme Court Act, which reads as follows:—

In the Province of Quebec an appeal shall lie to the Supreme Court from any judgment of the Superior Court in Review where that Court confirms the judgment of first instance, and its judgment is not appeal-

CAN.

S. C.

CANADIAN NORTHERN QUEBEC R. CO. v. GIGNAC.

The Registrar.

able to the Court of King's Bench, but is appealable to His Majesty in Council, 54-55 Vict. ch. 25, sec. 2.

It will be perceived that, substantially, the only modifications made by the Court of Review of the judgment of the Superior Court are two:—

1. That while the earlier judgment simply orders that the necessary works be done to put an end to the cause of complaint, the subsequent judgment provides that the manner of doing these works shall be that provided for in the agreement between the parties above referred to and,—

2. That in case of default instead of authorizing the plaintiff to make the works himself, it reserves to him the right of further recourse by action in the event of future damages. The question between the parties in the present motion, therefore, resolves itself shortly into this: Has the judgment in the Court of Review confirmed, although modifying, the judgment below, or has it rectified an error in that judgment? It is to be noted that the Court of Review expressly uses the words "confirme le dit jugement," and that the modification in question which the plaintiff now claims to be so material to his interests, was not asked for by him by way of a cross-appeal, but was of its own motion granted to him by the Court as a result of the defendants' appeal.

Two cases are cited by the defendants in favour of their motion. The first is *Beauchêne* v. *Labaie*, 10 R.L. 115, a decision of the Court of Queen's Bench of Quebec, which is very much in point. The judgment turned upon the interpretation which should be placed upon what now appears as art. 43 (4) of the Code of Civil Procedure of Quebec, which provides that an appeal shall lie to the Court of King's Bench, sitting in appeal, except:—

> At the suit of the party who has inscribed in review a cause in which the sum demanded or the value of the thing claimed amounts to or exceeds five hundred dollars, and who has proceeded to judgment on such inscription, when the judgment confirms that rendered in the first instance.

In that case upon an appeal by the defendant from a judgment of the Superior Court the Court of Review said:—

> Considérant que le dit jugement est correct quant au droit du demandeur Labbé au pétitoire, c'est à dire, à la propriété de l'immeuble qu'il réclame, maintient cette partie du jugement, mais quant à la condemna-

tion pour deux années de fruits et revenus, considérant que le demandeur n'a acquis l'immeuble que le 4 février, 1874, et qu'il n'a pas eu cession de fruits et revenus précédant cette date, la cour ici présente revise et renverse cette partie du dit jugement avec dépens de la cause en Cour Supérieure à Arthabaska contre le défendeur.

Notwithstanding this modification of the judgment of the Superior Court, it was held by the Court of Queen's Bench that the judgment of the Court below was confirmed by the judgment of the Court of Review and that no further appeal lay.

The defendant also relies on the case of *Hull Electric R. Co.* v. *Clément*, 41 Can. S.C.R. 419, where a judgment for the plaintiff in the Superior Court for $6,000 was, upon appeal by the defendant to the Court of Review, reduced to $3,500. The defendant, dissatisfied with this, appealed to the Court of King's Bench, where it was held that no appeal lay, because the judgment in review had confirmed the judgment below. The judgment of the Court of King's Bench was affirmed by the Supreme Court, this Court holding that the defendant, when dissatisfied with the judgment of the Court of Review, should have appealed directly to the Supreme Court, it being a case in which no appeal lay to the Court of King's Bench because the Court of Review had confirmed the judgment of the Superior Court.

The plaintiff relies on the case of *Fraser* v. *Burnette*, M.L.R. 3 Q.B. 310, but in that case the Court of Review expressly and in terms reversed the judgment of the Superior Court. He also relies, upon *Simpson* v. *Palliser*, 29 Can. S.C.R. 6, but in that case also the Court of Review in terms declared that there was error in the judgment of the Superior Court, and this is the ground upon which the Supreme Court said that no appeal lay from the judgment of the Court of Review to this Court, but only to the Court of King's Bench.

It appears to me that a review of these decisions justifies it being held that where the judgment in review confirms the judgment below in favour of the plaintiff, although some additional or other relief is also given to the plaintiff, not as a result of a cross-appeal by him, but by the Court of its own motion for the purpose of more effectively carrying out the judgment of the trial Judge, no appeal lies to the Court of King's Bench by the defendant, and, therefore, an appeal may be taken to the

CAN.

S. C.

CANADIAN NORTHERN QUEBEC R. CO. v. GIGNAC.

The Registrar.

Supreme Court of Canada, if the judgment would have been the subject of a further appeal to the Privy Council, had the case been a proper subject for an appeal to the Court of King's Bench. In the present case it is admitted that had the judgment in review simply confirmed the judgment below, the case would have been appealable to the King in His Privy Council. This is an action *négatoire* raising an issue with regard to a servitude which, under the jurisprudence of the Supreme Court is a matter concerning "titles to land" and is, therefore, appealable to the Privy Council under article 68, sub-section 2, of the Code of Civil Procedure, and is also appealable to the Supreme Court, where substantially the same language is used in sec. 46, sub-sec. (*b*), of the Supreme Court Act.

I am, therefore, of the opinion that the jurisdiction of the Court should be affirmed.

A motion is now pending returnable on the 1st day of the February session to quash this appeal for want of jurisdiction. I would have refused to entertain the present motion until the Court had dealt with the motion to quash were it not that both parties were desirous of having the present motion disposed of because, if I were against the jurisdiction of the Court, the defendant would be within the delays provided by the Code of Civil Procedure for launching an appeal from the judgment of the Court of Review to the Court of King's Bench, but the time for taking such proceedings will expire before February 2. My order as to costs, therefore, will be that the costs of this motion be costs to the defendant in any event of the cause unless the motion to quash is granted, in which event my order affirming jurisdiction will, of course, fall.

E. Belleau, K.C., for respondent, supporting the motions.
L. A. Cannon, K.C., for appellants, *contra*.

Davies, J.

DAVIES, J.:—I concurred with the judgment of this Court in the case of *Hull Electric Co.* v. *Clément*, 41 Can. S.C.R. 419, only because, as I stated, the settled jurisprudence of the Province of Quebec upon the meaning of sub-sec. 4, of art. 43, of the Code of Civil Procedure of Quebec, was that a judgment of the Court of Review confirming one of the Superior Court and affirming the right of the plaintiff to recover in the action, but

reducing the amount of damages awarded to plaintiff was a confirmation of the judgment of the Court of Review within the meaning of the article of the Code referred to and was not appealable to the Court of King's Bench.

I think the registrar was right in affirming our jurisdiction to hear this appeal direct from the judgment of the Court of Review which confirmed, but modified, that of the Superior Court; and that the appeal from his judgment should be dismissed with costs and the motion to quash the appeal should be refused with costs.

No absolute rule can, in my opinion, be laid down. The question in each case must be not simply whether there was a formal confirmation of the Superior Court, but whether the modification was a substantial modification of the judgment of the lower Court. Here, the substantial question in controversy was decided by both Courts in respondent's favour; the modification related merely to the manner in which effect should be given to that judgment.

I think, therefore, that no appeal would, under the jurisprudence of that Court, lie to the Court of King's Bench; but, as it is conceded one would lie to the Privy Council, the appeal will lie here.

Idington, J.

IDINGTON, J.:—This appeal seems to me within the principle affirmed by the judgment of this Court in *Hull Electric Co.* v. *Clément*, 41 Can. S.C.R. 419, and, hence, the motion to quash must be refused and the counter motion of appellant against the ruling of the registrar dismissed, each with costs of motion.

Duff, J.

DUFF, J.:—I concur in the result.

Anglin, J.

ANGLIN, J.:—In my opinion, the jurisdiction of this Court to entertain this appeal is settled by *Hull Electric Co.* v. *Clément*, 41 Can. S.C.R. 419. The Court of Review *pro tanto* affirmed the judgment of the Superior Court against the defendant, and from the judgment so affirmed it has a right of appeal to this Court. Unless the plaintiff should launch and maintain a cross-appeal the variation of the judgment made by the Court of Review will not be a subject for consideration in this Court.

CAN.

S. C.

CANADIAN NORTHERN QUEBEC R. CO. v. GIGNAC.

Brodeur, J.

The appellant is entitled to the costs of the motions before us to quash and by way of appeal from the order of the registrar affirming jurisdiction.

BRODEUR, J.:—Il s'agit de savoir si nous avons juridiction pour entendre cette cause.

Le demandeur intimé, Gignac, avait, en 1911, institué une action négatoire contre l'appelante en alléguant que cette dernière laissait écouler sur son terrain des eaux qu'il n'était pas tenu de recevoir. Une transaction était intervenue le 28 octobre, 1911, et la compagnie appelante avait reconnu comme bien fondées les plaintes du demandeur, Gignac, et s'était engagée de faire certains travaux.

Les travaux convenus auraient été exécutés mais ils furent subséquemment démolis par la compagnie et alors la présente action négatoire a été instituée. Cette action a été maintenue par la Cour Supérieure dans les termes suivants:—

Nous maintenons l'action et déclarons que la défenderesse n'a aucun droit d'exercer sur la propriété du demandeur la servitude d'écoulement des eaux qui résulte des travaux de la construction de son chemin de fer; et nous lui ordonnons de cesser l'exercice de cette servitude et de cesser de faire couler dans le fossé de ligne et la décharge du demandeur, les eaux qu'elle lui envoie venant dans le fossé de ligne et conduite par le talus et le fossé du chemin de fer; et nous lui ordonnons de faire les travaux nécessaires à cette fin, et qu'à son défaut de les faire avant le mois d'octobre 1914, le demandeur soit autorisé à faire ces travaux aux frais de la défenderesse et à ses dépens, en par lui donnant avis du temps où il fera ces travaux; et nous condamnons de plus la défenderesse à payer au demandeur la somme de $250, de dommages avec intérêt et dépens de l'action.

La défenderesse a porté la cause devant la Cour de Revision, où le jugement fut confirmé dans les termes suivants:—

La Cour . . .

Confirme le dit jugement avec dépens, sujet à la modification suivante du dispositif qui se lira comme suit:—

Nous maintenons l'action et déclarons que la défenderesse n'a aucun droit d'exercer sur la propriété du demandeur la servitude d'écoulement des eaux, lequel résulte des travaux de construction du chemin de fer; Nous ordonnons de plus à la défenderesse de discontinuer l'exercice de telle servitude et de cesser de faire se déverser dans le fossé de ligne et les décharges du demandeur les eaux qui s'y écoulent par suite du talus et du fossé du chemin de fer; et nous ordonnons à la défenderesse de faire les travaux nécessaires pour mettre fin au dit trouble conformément à la transaction intervenue entre les parties le vingt-huit octobre, 1911, et à défaut

par elle de ce faire d'hui au premier mai prochain, la Cour réserve au demandeur tout recours pour dommages ultérieurs, et nous condamnons de plus la défenderesse à payer au demandeur la somme de deux cent cinquante piastres de dommages avec intérêt et les dépens de l'action.

L'appelante appelle à cette cour du jugement de la Cour de Revision.

En vertu de la section 40 de l'acte de la Cour Suprême, il y a appel devant cette cour de tout jugement de la Cour de Revision confirmant celui de la Cour supérieure.

Je dois dire que par contre, en vertu de l'article 43 du Code de Procédure Civile, les jugements de la Cour Supérieure confirmés par la Cour de Revision ne sont pas susceptibles d'appels à la Cour du Banc du Roi.

Nous avons donc à décider si dans la présente cause le jugement *a quo* a confirmé celui de la Cour Supérieure.

Comme on le voit, l'action négatoire a été maintenue en Cour Supérieure et en Cour de Revision. Suivant la demande qui en avait été faite par l'action, la défenderesse fut condamnée, en outre, à faire certains travaux.

En Cour Supérieure on avait ordonné *de faire les travaux nécessaires.*

En Cour de Revision on a spécifié que les travaux *devraient être faits suivant la convention des parties.* Mais dans son principe le jugement de la Cour Supérieure est le même; on a simplement spécifié plus clairement la nature des travaux à faire.

Il n'y a pas de doute que la partie du jugement qui maintenait l'action négatoire puisse être portée devant cette cour. En effet, la Cour de Revision sur ce point a confirmé simplement le jugement de la Cour Supérieure et la compagnie appelante n'aurait pas le droit d'aller devant la Cour du Banc du Roi pour faire renverser cette partie du jugement.

C'est du moins la pratique suivie par la Cour du Banc du Roi depuis la décision rendue en 1876 dans la cause de *Beauchêne* v. *Labaie*, 10 R.L. 115. Et la Cour Suprême a décidé dans le même sens dans la cause de *Hull Electric Co.* v. *Clément*, 41 Can. S.C.R. 419.

L'autre partie du jugement qui détermine comment les travaux devront être exécutés n'est que la conséquence de l'action négatoire elle-même. Elle ne touche pas à la substance

CAN.

S. C.

CANADIAN NORTHERN QUEBEC R. CO. v. GIGNAC.

Brodeur, J.

du litige, mais elle rend plus explicite l'ordonnance de la Cour Supérieure.

Elle enlève, il est vrai, au demandeur la faculté d'exécuter lui-même les travaux. Mais il ne se plaint pas de cela. Le jugement *a quo* d'ailleurs déclare formellement que l'on confirme celui de la Cour Supérieure.

Dans le cas où un jugement de la Cour Supérieure est partiellement confirmé ou infirmé par la Cour de Revision, la Cour Suprême devra exercer sa discrétion pour décider si l'appel doit être porté directement devant elle, ou bien s'il doit au préalable être soumis à la Cour de Banc du Roi.

Garsonnet, Procédure Civile, vol. 5, p. 328.

Le législateur a voulu évidemment éviter les appels trop nombreux et alors il a décrété que les jugements confirmés par la Cour de Revision seraient immédiatement portés au Conseil Privé ou à la Cour Suprême. Dans les jugements partiellement confirmés, la Cour Suprême rencontrera certainement mieux les vues du législateur en permettant de suite l'appel qu'en ordonnant aux parties de passer par la Cour de Banc du Roi.

Les motions doivent être renvoyées avec dépens.

Motions refused with costs.

Solicitors for the appellants: *Taschereau, Roy, Cannon, Parent & Fitzpatrick.*

Solicitors for the respondent: *Belleau, Baillargeon & Belleau.*

B. C.

C. A.

WILSON v. BRITISH COLUMBIA REFINING CO.

British Columbia Court of Appeal, Irving, Martin, and McPhillips, JJ.A.
May 14, 1915.

1. CORPORATIONS AND COMPANIES (§ V C 1—191)—TRANSFER OF STOCK—RIGHTS OF PLEDGEE.

Sec. 53 of the B.C. Companies Act, 1897, ch. 44 [R.S.B.C. 1911, ch. 39, sec. 40] has no reference to a case where a transfer of shares is made but applies only where the shares appear to have been pledged as collateral security and where the owner's name and not the name of the pledgee remains on the books of the company as the holder of the shares; it does not enable the company to set off against a dividend a debt due by a person who was a shareholder but whose transfer of the shares to a bank manager in trust for the bank as collateral security for a loan to such shareholder had been accepted and registered by the company and a new certificate issued in respect thereof in the name of the bank manager; the company might have declined, under its articles (Art. 10, Table A, Companies Act, 1897), to register

any transfer of shares made by a member who was indebted to it, but having registered, it must treat the transferee as the owner of dividends thereafter payable.

[*Wilson* v. *B.C. Refining Co.*, 20 D.L.R. 418, reversed.]

B. C.
C. A.
WILSON v. B. C. REFINING CO.

APPEAL from judgment of Murphy, J.

Sir C. H. Tupper, K.C., for appellant.

Ritchie, K.C., for respondent.

IRVING, J.A.:—Plaintiff sues for a half dividend payable in respect of 22,655 shares registered in his name, which dividend was declared on December 21, payable as to one-half on February 1.

Irving, J.A.

The writ was issued on March 17, 1914, the other half dividend being payable on May 1, 1914.

The company was incorporated on September 2, 1908, under the B.C. Statutes then in force.

We had in the case of *Rose* v. *B.C. Refining Co.* (1911), 16 B.C.R. 215, some experience of this company.

By two letters, dated respectively November 12, 1913, and December 9, 1913, the company were invited to transfer from Melekov, who was then the registered holder of these 22,655 shares, to "Maurice W. Wilson, in trust," that is as to 21,905 shares: as to the 750 shares the words "In trust" were not used.

From the letters it is quite apparent that the request was being made by the Royal Bank of Canada. The transfer was at once made and on November 13, 1913, a certificate certifying that 21,905 shares were vested in "Maurice W. Wilson in trust" was delivered to the bearer, presumably a messenger from the bank, and later a certificate for 750 shares was also sent to the plaintiff. On December 13, the defendants declared a dividend, the first half of which would amount to $1,132.75. On February 3, the defendants sent to the plaintiffs a cheque for $37.50, being half of the dividend on the 750 shares, and in the course of time claimed to retain the balance of the dividend for a debt which they alleged to be due to them from Melekov. They as a matter of fact, it may be stated, held the note made by Melekov for $1,576.90, which note was dated November 4, 1913, payable 60 days after date, and therefore it will be seen not

B. C.
C. A.
WILSON
v.
B. C. REFINING CO.
Irving, J.A.

due at the time the shares were transferred on November 13, 1913.

The defence claimed *inter alia* that the plaintiff was not the registered holder of these 21,905 shares, that the company claimed a lien on them as Melekov owed them the sum of $1,576.90; that the plaintiff held them in trust for the Royal Bank of Canada, which in turn held them as collateral security for a debt due to the bank from Melekov, who was the real owner. Further, the transfer to the plaintiff of November 13 was a mistake; that the secretary was under the impression that the words "in trust" meant in trust for Melekov, and had he known that it was in trust for the Royal Bank of Canada, the transfer would not have been allowed to go through.

The defendants counterclaimed to have this mistake set right, but the counterclaim was dismissed and no appeal has been taken on that point.

The learned trial Judge (Mr. Justice Murphy) held that it had been established that the plaintiff was the holder of the certificates issued: on that point I agree with him. He also held that Melekov was indebted to the company in the sum of $1,576.90: upon that point I agree with him, but Melekov was not indebted to them, in my opinion, until after the transfer made for the reason that I have already indicated in the dates above given.

The learned Judge directed judgment to be entered for the defendants. From this decision the plaintiff appeals and argues first, that it was not proved by satisfactory evidence that Melekov was indebted to the company. I think, on reading the evidence that Melekov was indebted to the company. I think, on reading the proceedings at the trial, that that point was there conceded, and it is not now open to the plaintiff to bring forward that argument.

The second point was that assuming that the first one be given against the plaintiff, and that the debt amounts to $1,576.90, it is said that the company had no right to deduct the amount of Melekov's debt to the company from a dividend which was payable in respect of shares held by the plaintiff, and it is on that point that the argument chiefly turns.

B. C.

C. A.

WILSON v. B. C. REFINING CO.

Irving, J.A.

By the company's articles, Table A. of the Act of 1897 applies so far as the points involved in this case are concerned.

Article 8 provides that the instrument of transfer shall be executed by both parties, and until the name of the transferee is entered in the register book the transferor shall be deemed to remain the holder of such shares.

Article 10: The company may decline to register any transfer of shares made by a member who is indebted to them.

Article 75 provides that the directors may deduct from the dividends payable to any member all such sums or money as may be due from him to the company on account of calls or otherwise.

Section 35 of the Act provides that no notice of any trust shall be entered on the Register.

Section 43 of the Act provides that a certificate under the Common Seal of the company shall be *primâ facie* evidence of the title of the member to the shares specified.

These articles and sections are taken from the English Companies Act, 25 & 26 Viet. ch. 89, secs. 30 and 31.

The Act also contains the following sections which have been copied from the Ontario Statutes:—

52. No person holding shares, stock or other interest in the company as executor, administrator, guardian or trustee, shall be personally subject to liability as a shareholder; but the estates and funds in the hands of such person shall be liable in like manner and to the same extent as the testator or intestate or the minor, ward, or person interested in the trust fund, would be if living and competent to act and holding such shares, stock, or other interest in his own name.

53. No person holding shares, stock or other interest as collateral security, shall be personally subject to liability as a shareholder; but the person pledging such shares, stock or other interest as such collateral security shall be considered as holding the same, and shall be liable as a shareholder in respect thereof.

This 53rd section seems to me inconsistent with the general policy of the English Act, particularly with section 53.

It is unfortunate that sections from the Ontario Statutes are so often grafted on to English statutes complete in themselves when they are reproduced in this Province. The result often is a misfit. These unnecessary insertions give rise to a great deal of litigation by reason of their not falling in with the scheme of the English Act.

B. C.
C. A.
WILSON
v.
B. C.
REFINING
CO.
Irving, J.A.

Assuming the following facts are not in dispute (1) that Melekov was indebted to the company; (2) that prior to the declaration of the dividend the shares had been transferred to the plaintiff "in trust;" (3) that the plaintiff who was the manager of the Royal Bank of Canada holds them as trustee for the bank; and that (4) the bank received them as collateral security for a debt due the bank from Melekov, the learned Judge, reading article 75 authorizing the directors to make the deduction, in connection with the Ontario section 53 just set out, came to the conclusion that the company was entitled to make the deduction.

With deference to his opinion, I have arrived at a different conclusion.

In my opinion, section 53 can have no reference to the case where a transfer of shares is made. On its face it can only apply where the shares appear to have been pledged as collateral security, and the real owner's name remains on the books of the company.

The 75th article can only apply to the person whose name is on the books of the company as a member: see on this section Lindley on Company Law, 6th ed., p. 610.

Having regard to the provisions of the 53rd section a person making a loan and taking as security shares of a company, and who must be guided by the form of the company's memorandum and articles and certificate tendered to him by the borrower as security, would have two courses open to him in preparing his security.

In the case of a share certificate where the shares are not fully paid up, he would take a charge and give notice to the company and so have the advantage of section 53.

In the case of fully paid up shares he would take a transfer and rely on the general policy of the company's Act which is plainly expressed in *In re Perkins* (1890), 24 Q.B.D. 616, by Coleridge, C.J., who says:—

> . . . Companies have nothing whatever to do with the relations between trustees and their *cestui que trust* in respect of the shares of the company. If a trustee is on the company's register as the holder of shares, the relations which he may have with some other person in respect of the shares are matters with which the company have nothing whatever to do;

they can look only to the man whose name is upon the register. It seems to me that, if we were to throw any doubt upon that rule, we should make the carrying on of their business by joint stock companies extremely difficult, and might involve those companies in very serious questions, and the ultimate result would be anything but beneficial to the holders of shares in such companies themselves.

The company in the event of the transfer being applied for where the shares are not fully paid up, or where the transferor is indebted to the company, might decline to register a transfer under article 10, but where the transfer is actually made, the company would, I think, be bound to look to the registered member. He, in turn, would, if compelled to pay expect to be indemnified by his *cestui que trust*. In the absence of express words the company has no lien on a member's shares for debts owing by him. The company's remedy is to refuse to transfer.

Irving, J.A.

Although the statute, section 41, directs that no notice of trust shall be entered on the register, nevertheless the practice in British Columbia of using the words "in trust" seems to be a common one.

In this case, as in the case of *London, etc.* v. *Dublin*, [1893] A.C. 506, the words "in trust" must, having regard to the letter covering the application, have informed the secretary of the defendant company that the plaintiff was applying for registration in trust in respect of the bank of which he was manager, and there was nothing to suggest that he was acting as a trustee for Melekov.

The object of the section is to free not only the company but also the creditors from inquiring from those other persons for whom the shares are held: *Chapman* v. *Barker's Case* (1867), L.R. 3 Eq., at 336. The entry "in trust," if made, would be for the benefit of the beneficiaries and not of the trustees or of the company: see *Muir* v. *City of Glasgow Bank* (1879), 4 A.C. 360, a Scotch case where the practice is to insert a memorandum shewing that the shares are held in trust.

I would allow the appeal.

MARTIN, J.A., agrees in allowing the appeal.

Martin, J.A.

McPHILLIPS, J.A.:—This appeal, in my opinion, should be allowed.

McPhillips, J.A.

Section 40 of ch. 39, R.S.B.C. 1911 (identical with section

B.C.
C. A.
WILSON
v.
B. C.
REFINING
CO.
McPhillips, J.A.

53 of ch. 44 R.S.B.C. 1897), declares that a person holding shares as collateral security shall not be personally subject to liability as a shareholder—but the person pledging the shares shall be so liable—the enactment was no doubt framed to enable the pledgee of the shares or the mortgagee thereof to escape the liability which would otherwise fall upon any such pledgee or mortgagee if he should become the registered holder of shares upon which any liability existed or could subsequently be imposed. It is settled law that the registered holder of shares is liable in respect of anything unpaid on the shares and it matters not whether the registered holder is beneficial owner thereof or a mere trustee—and even where a trustee to the knowledge of the company—*Chapman* v. *Barker's Case* (1867), 3 Eq. 361.

In the present case the plaintiff has been registered as the holder of the shares in question—"in trust"—and the evidence is that the plaintiff holds the shares for the Royal Bank.

In placing the plaintiff upon the register as the holder of the shares "in trust"—the company acted in contravention of section 35 of the Companies Act, ch. 39, R.S. (1911) (identical with sec. 41 of ch. 44 R.S.B.C. 1897), and, in my opinion, this entry is to be ignored and is without any legal effect.

The attempt here is not to charge the *cestui que trust*—the Royal Bank—with any liability as a shareholder—in any case any such attempt would be fruitless—see *Bragg's Case* (1865), 2 Dr. & Sm. 452-460, 143 R.R. 229; *Somervail* v. *Cree* (1879), 4 App. Cas. 648; but it is attempted to retain dividends payable upon the shares—under section 75 of Table A. of the Companies Act (ch. 41, R.S.B.C. 1897), which reads as follows:—

> 75. The directors may deduct from the dividends payable to any member, all such sums of money as may be due from him to the company on account of calls or otherwise.

The shares standing in the plaintiff's name issued as fully paid and were transferred as such, and the plaintiff was registered as the holder thereof—as and being fully paid shares.

It cannot be said that the amount claimed to be due to the company by Melekov the transferor of the shares, is at all well defined and whether for calls or in what way the same is due and payable to the company, however, the claim is that there is the

right to deduct any indebtedness and the amount due and owing is represented by a promissory note of Melekov, overdue and unpaid of $1,576.90, with interest at 7 per cent., being dated November 4, 1913, payable sixty days after date to the order of the company.

This is to be noted though, that no proof of calls being in arrears or unpaid was given, the manager of the company, J. A. Cunningham, upon cross-examination for discovery, was asked the following questions:—

Q. In paragraph 8 of your defence, you say that on the 9th of December —that would be the date when you were requested to transfer the 750 shares to Mr. Wilson? A. Yes.

Q. You say at that date Mr. Melekov was indebted to the defendant company. Now, what was the indebtedness of Mr. Melekov at that time? A. $1,576, covered by note.

Q. $1,576 with interest at 7 per cent. What was that indebtedness for? A. It was for purchase of stock, part of which was the stock that was transferred in trust to Mr. Wilson.

Q. Now, was the 4th of November, 1913, the first time that Mr. Melekov became a shareholder in your company? A. Oh no; he has been a shareholder since the inception of the company.

The company apparently took the promissory note in connection with a purchase of stock and the closest statement we have is "part of which was the stock that was transferred in trust to Mr. Wilson."

Now the question is, can the company, notwithstanding that it has registered the plaintiff as the holder of fully paid shares —successfully contend that they are not fully paid? In *Re Concessions Trust*, [1896] 2 Ch. 757, it was held that where the secretary certified to the instrument transferring the fully paid shares, the company was estopped and in the present case the secretary so certified.

Were this a case where it was proved that the secretary had unauthorizedly certified, then, according to the decision in the House of Lords in *George Whitechurch & Co.*, [1902] A.C. 117, there would be no estoppel.

The plaintiff being placed upon the register as the holder of the shares became a member of the company: Fry, L.J., in *Nicols Case* (1885), 29 Ch.D. 421, said at p. 447, that the section referring to the 23rd section of the Act (1862) (sec. 32,

B. C.

C. A.

WILSON v. B. C. REFINING CO.

McPhillips, J.A.

Companies Act, ch. 39, R.S.B.C. 1911), "makes the placing of the name of a shareholder on the register a condition precedent to the membership."

The plaintiff having acquired membership in the company, must be looked upon as the member holding the shares, and the dividends in question in this action must be dividends due and payable to him, and there is no proof whatever that he is indebted to the company, with all respect and deference to the learned trial Judge, I am quite unable to agree with the view that in section 75 of Table A. "member" must be read as meaning shareholder.

Now it is unquestionable admitted law—unless it be otherwise provided—that once the transferee is upon the register then the transferee becomes liable to pay all moneys subsequently becoming payable, however, according to the Companies Act in British Columbia we have seen that shares held by way of collateral security are specially dealt with and in such cases the pledger or mortgagor remains liable as a shareholder the pledgee or mortgagee being exempted from such liability, whilst this is the case, it by no means follows that by indebtedness for which the company has a lien, the intention of the Legislature is plain—if there was to be liability, say on non-fully paid up shares, the shares would be incapable in most cases of being utilized in obtaining any advances thereon, so provision was made against any such liability falling upon the transferee, to construe section 75 of Table A. as contended for, would, by another method be destroying the value of the shares as security to perhaps even a greater degree, in that indebtedness of the transferor to the company at the time of the transfer or subsequent thereto would be chargeable against any dividends—the spirit, intention, and meaning of the statute law, in my opinion, can be gleaned and the proper construction to be placed on same is—that whilst even after registration in the transferee, when shares are held by way of collateral security, there is no liability upon the transferee as a shareholder, yet as the member of the company in whose name the shares are registered, he is entitled to the dividends, save it be that there is the right to any deduction to be made therefrom for calls payable by him

or he is otherwise liable as such member (Companies Act, ch. 44, R.S.B.C. 1897), under clause 10 of Table A. the company may decline to register any transfer of shares made by a member who is indebted to them, in the present case although the company makes the claim that Melekov, the transferor, was indebted to them at the time of the transfer, nevertheless assents to the transfer and registers the plaintiff as the member entitled to the shares, and further as entitled to fully paid shares.

Now there is no evidence whatever that the plaintiff is indebted to the company nor is it so contended, but the right of deduction made is based upon the fact that Melekov, the transferor is indebted to the company, in my opinion by approving of the transfer of the shares to the plaintiff and registering him as the member entitled to the shares, coupled with the fact that the shares are fully paid shares no lien can be said to now exist as against the shares registered in the name of the plaintiff, this, in my opinion, constitutes a clear waiver of any lien: *Bank of Africa* v. *Salisbury Mining Co.* (1892), 61 L.J.P.C. 34; *Higgs* v. *Northern Assam Tea Co.* (1869), 4 Ex. 387; *Northern Assam Tea Co.* (1870), 10 Eq. 458; *Re McMurdo* (1892), 8 T.L.R. 507.

Section 40 of ch. 39 (R.S.B.C. 1911, and the identical section 53, ch. 44, R.S.B.C. 1897), may be construed in another way, *i.e.*, until registration, the transferee incurs no liability in respect to any calls or is otherwise liable in respect thereof—undoubtedly pending registration the transferee is possessed only of an equitable right to the shares—the legal ownership is only effectuated when the transferee is entered on the register, and that the Legislature intended to protect the person who had shares, by way of collateral security, transferred to him, and who was equitable entitled thereto, from the payment of calls in respect thereof, it might be said, why legislate as to that which is admitted law, that until registration, there is no liability upon the transferee, and that it is a saving provision intended only to cover exemption from liability after registration? Unquestionably this has force, but when the history of the legislation is looked at, bearing in mind that the law some years ago was not

B. C.

C. A.

WILSON v. B. C. REFINING CO.

McPhillips, J.A.

so well settled, the legislation, viewed in this way, does not seem so singular; section 40 above referred to may be followed back in the legislation of this Province to ch. 5, sec. 35, of the statutes of 1878, and appears in somewhat similar language, as section 33 of the Companies Act, ch. 21, of the Consolidated Statutes of British Columbia, 1888.

To even yet indicate uncertainty as to liability, it is only necessary to refer to Palmer's Company Law (1911) 9th ed., p. 132:—

> It is not clear that the registration of the transfer divests the liability of the transferor for calls in arrear (*Hoylake Rail Co.*, 9 Ch. 257); but where the transfer is in the usual form it seems the company may sue the transferee for the calls in arrear (*Herbert Gold Limited* v. *Huycraft* (C.A.), 27th March, 1901), and it is clear that the transferee takes the shares on the footing that the call has not been paid, and cannot vote in respect thereof if the articles provide that no member shall be entitled to vote at all if any calls or other sums of money shall be due and payable to the company in respect of the shares of such members: *Randt Gold Mining Co.* v. *Wainwright*, [1901] 1 Ch. 184.

If this view were adopted then the plaintiff, after registration, would be liable to the company in respect of any calls in arrear, but none have been proved, and further, how contradictory for the company to contend that there are moneys due in respect of calls in arrears, where the shares are stated to be fully paid?

In my opinion no liability can be imposed upon the plaintiff even adopting this view.

Then proceeding to the further consideration of clause 75 of Table A., the deduction may be made "for the dividends payable to any member," now upon the declaration of a dividend each shareholder is entitled to claim his proportion thereof, in the present case, unquestionably the plaintiff is the person entitled and he was entitled to sue therefor, but the contention is that nothing is due to him because of the indebtedness of Melekov to the company, and clause 75 is invoked, the dividend though is not payable to Melekov but to the plaintiff, and to deduct the indebtedness of Melekov to the company offends against section 40 of the Act, which enacts that

> No person holding shares . . . as collateral security shall be personally subject to liability as a shareholder,

and a liability as set forth in clause 75 "on account of calls or otherwise" is undoubtedly a liability as "a shareholder," a liability which is upon Melekov, a liability the plaintiff is by statute exempted from, and not being liable therefor, it is, in my opinion, impossible to make any such deduction.

To admit of the company taking the dividend would be to admit of the company taking the money of the plaintiff to pay a liability imposed by statute upon the transferor, Melekov alone, a liability which the plaintiff is expressly and by statute relieved against, although he is the registered transferee of the shares, to take the moneys of the plaintiff to pay the calls or moneys otherwise payable by Melekov as a shareholder, assuredly would be imposing a personal liability upon the plaintiff.

No calls were even proved to be due or in arrears, or other indebtedness *as a shareholder* by Melekov, the most that was proved was that part of the consideration for the $1,576.90 promissory note, had relation to some of the shares transferred by Melekov to the plaintiff, in my opinion, this was even on the basis of liability upon the plaintiff, insufficient evidence. I may further add, that, in my opinion at most, all that could be deducted, would be moneys payable in respect of calls or otherwise payable in respect of the shares as a shareholder, not debts otherwise contracted.

In the present case, in my opinion, the facts entitle it to be held that the plaintiff is the transferee of fully paid shares and that the shares were properly issued as fully paid, but that even if improperly issued, the company, by issuing same as fully paid and approving of the transfer thereof as such and registering the plaintiff as the transferee thereof, is estopped from now setting up as against the plaintiff that there is any sum due in respect of calls or otherwise, for which the plaintiff can be in any way held liable, the company has its recourse against the transferor Melekov, as provided by statute, but no recourse against the plaintiff. In *Page* v. *Austin* (1884), 10 S.C.R. 132, at p. 154, Strong, J., said:—

> When, however, shares improperly issued as paid up have come into the hands of a subsequent transferee as a *bonâ fide* purchaser for value,

B. C.
C. A.
WILSON
v.
B. C. REFINING CO.
McPhillips, J.A.

who has taken them upon the representation of the proper officers of the company made to him directly, either in answer to enquiries or otherwise, or upon the faith of a written representation appearing on the certificates, that the shares are paid up, it is well established that no liability, either at law or in equity, attaches to the shares in the hands of such an innocent purchaser. Numerous cases, both in England and the United States, warrant the decision of this Court in *McCracken* v. *McIntyre*, to the effect just mentioned, and it is manifest that were it not for such a rule the transfer of property in shares would be so affected as greatly to impair the value.

Also see *Burkinshaw* v. *Nicolls* (1878), 3 App. Cas. 1004; *Rowlands Case*, W.N. (1880), 80; *Markham* v. *Dauter's Case*, [1899] 1 Ch. 414, and *Bloomenthal* v. *Ford*, [1897] A.C. 162.

The two certificates that issued to the plaintiff covering the shares issued respectively November 13, 1913, for 21,905 shares and December 15, 1913, for 750 shares, and not until June 23, 1914, by way of counterclaim in this action does the company claim rectification of the register of members. This delay in itself is a formidable objection to giving any effect to the contention made that the transfer of the shares and the certificates were without the authority of the directors and not binding upon the company, and, in my opinion, is inadmissible.

Lord Blackburn in *The Bradford Banking Company Limited* v. *Henry Briggs Sons & Company, Limited* (1886), 56 L.J. (H.L.) 364, at p. 368, said:—

> The Legislature are competent to exact that a trading company of this sort should have the right to disregard the ordinary rules of justice and charge what they knew was one man's property with another man's debt, if only that property consisted of shares in the company; but I do not think it possible to construe section 30 (section 35, ch. 39, R.S.B.C. 1911) as an enactment to that effect. The Earl of Selborne in *The Societe Generale de Paris* v. *Walker* (54 L.J.K.B. 177, L.R. 14 Q.B.D. 424), said: "I think that according to the true and proper construction of the Companies Act, 1862, and of the articles of this company there was no obligation upon the company to accept or preserve any record of notices of equitable interests or trusts if actually given or tendered to them and that any such notice if given would be absolutely inoperative to affect the company with any trust." I do not think it necessary to express any opinion as to this, for I do not think that the appellants in this case seek to affect the respondents with a trust they seek no more than to affect them in their capacity of traders with knowledge of their (the appellants) interests.

In the present case the shares are the property of the plaintiff, the dividends are the moneys of the plaintiff, and in construe-

ing the statute law, here required to be construed, I cannot arrive at the conclusion that the property and moneys of the plaintiff are chargeable with "another man's debt," that is the debt of Melekov, which was the decision of the learned trial Judge, with which, with the greatest respect, I cannot agree.

It therefore follows, in my opinion, that the plaintiff is entitled to the shares registered in his name freed of any lien thereon in favour of the company. Firstly, holding the shares as collateral security the liability as a shareholder rests alone upon the transferor, Melekov; secondly, if I should be in error in this then the company in approving when it might have disapproved of the transfer of the shares and registering the plaintiff as the transferee thereof, the shares being certified as fully paid, is estopped from saying that they are not fully paid shares and waived any lien or right to deduct moneys due for calls or otherwise by the transferor Melekov. Thirdly, the company being aware of the fact that Melekov had transferred his shares, and that they were held by the plaintiff in trust for the Royal Bank of Canada, and that he had ceased to be the owner of the shares, is disentitled to deduct moneys due by way of dividends upon shares of which he is no longer the owner. I would therefore allow the appeal, the plaintiff to have the costs here and in the Court below.

Appeal allowed.

ROYAL BANK OF CANADA v. WHIELDON.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Galliher, and McPhillips, JJ.A. April 6, 1915.

1. CHATTEL MORTGAGE (§ II A—7)—CONSIDERATION—BONA FIDES—STATEMENT OF.

A chattel mortgage in which the consideration was stated to be "a loan of $1,200 on promissory note of even date" is not voided under the Bills of Sale Act, B.C., where in fact a promissory note for that amount was then given by the mortgagor to the mortgagee and the whole amount went to his credit subject to a deduction of an overdue account of more than $1,100; the consideration is to be held as truly set forth although such overdue debt was not disclosed.

[*Credit Co.* v. *Pott*, 6 Q.B.D. 295, applied.]

2. BANKS (§ VIII C—181)—STATUTORY SECURITIES—ASSIGNMENT OF CHATTEL MORTGAGE.

An assignment of a chattel mortgage by a mortgagee, a trust company, to a chartered bank on the latter taking over the trust company's securities and giving credit therefor is not contravention of

B. C.

C. A.

ROYAL BANK OF CANADA v. WHIELDON.

sec. 76 of the Bank Act (Can.), if the transaction was entered into with good faith and without any intention of evading the provisions of that Act.

[*Bank of Toronto* v. *Perkins*, 8 Can. S.C.R. 603, referred to.]

APPEAL from a judgment of Murphy, J.

MacInnes, for appellant.

Sir Charles Hibbert Tupper, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The plaintiff's rights in this action are founded upon the chattel mortgage given by the defendant Whieldon to the Peoples Trust Company and assigned as the plaintiff alleges to it. The action was commenced to restrain the defendant Ball from disposing of goods and chattels of his co-defendant Whieldon, and which the plaintiff alleges to be covered by the mortgage. Ball's title depends upon an agreement entered into between himself and his co-defendant subsequent to the mortgage by the terms of which Ball was authorized to dispose of the goods and chattels in question and to hold the proceeds in trust to pay the costs of the sale, to pay himself (Ball) an indebtedness which his co-defendant owed him, and to pay one May an indebtedness owing to May by defendant Whieldon, and if anything should remain it was to belong to defendant Ball. By consent the goods and chattels were sold by Ball and sufficient of the proceeds paid into Court to satisfy the plaintiff's claim if it should succeed in this action. Ball was in possession at the time the action was commenced and therefore the plaintiff must succeed if at all on the strength of its own title.

The defendants attacked the mortgage on several grounds: they said the consideration was not truly set forth in the mortgage as required by the Bills of Sale Act. It appears that Whieldon owed the Peoples Trust Co. on an overdue account $1,119.92. He gave a promissory note to that company for $1,200 and gave the mortgage to secure the note. This paid off the indebtedness and left a small balance to his credit. In the mortgage the consideration was stated to be "a loan of $1,200 on promissory note of even date." Therefore, any creditor or other person interested in Whieldon's estate looking at the mortgage would, I think, be justified in concluding that the mortgage was given for a present advance. I think that is the effect of the statement of the consideration.

In the absence of authority I should have thought that when a statute declares that the true consideration should be set forth otherwise the mortgage should be void, that it meant the true consideration in substance and not merely in form, and that if the real object was to secure a past debt, the concealment of that fact by stating the consideration to be money lent on the security of a promissory note of even date with the mortgage would be an evasion of the statute. But I think I am bound by authority to hold otherwise. I refer to *Credit Co.* v. *Pott* (1880), 6 Q.B.D. 295, which has been referred to without disapproval in a number of subsequent cases.

Further attack was made on the ground that the promissory note was not attached to the mortgage. The mortgage, however, contains a full description of it, and I think that is sufficient.

It was also contended on behalf of the defendants that the description of the chattels in the mortgage was insufficient. Were this case governed by statutes similar to those in force in Ontario and Manitoba I think this objection would be fatal. But our statute does not require a description of the chattels and, therefore, if the instrument described the chattels in such a way as to leave their identity capable of ascertainment I think it is sufficient. In other words, unless the description is so indefinite as to render the instrument void for uncertainty I ought to hold the description sufficient.

The chattels are described as a certain number of horses and cows and 150 tons of hay, and all other goods and chattels in and upon the premises occupied by the mortgagor, or in and upon any other premises the property of the mortgagor, together with all other goods and chattels that may hereafter be brought upon the said lands in addition to renewal or substitution of the above enumerated goods and chattels, all of which is then described as being in and upon lands therein specified.

Again, it was said that there was not sufficient evidence that the goods taken possession of by the defendant Ball and subsequently sold by him, were the goods or any of the goods described in the mortgage.

I think the learned Judge was entitled to draw the inference that the goods sold by Ball and which realized between four and

B. C.

C. A.

ROYAL BANK OF CANADA v. WHIELDON.

Macdonald, C.J.A.

five thousand dollars, were all the goods and chattels on the premises of Whieldon, at all events that these were more than sufficient of the goods covered by the mortgage to satisfy the plaintiff's claim.

It was further contended that there was no legal assignment of the mortgage to the plaintiff. I think the document of January 13, 1913, was a sufficient assignment, hence it is unnecessary to consider the effect of the subsequent assignment of the Peoples Trust for the benefit of their creditors, and the later order for the winding up of that company's estate. The contention that the assignment should be accompanied by an affidavit of attestation and an affidavit of *bona fides* is not in my opinion a sound one. By the Bills of Sale Act it is provided that an assignment need not be registered. It is, therefore, in a different category to the bill of sale itself.

The only other substantial ground of attack upon the mortgage was that the transaction between the Peoples Trust Co. and the plaintiff, evidenced by the agreement of January 13, was so far as this mortgage is concerned, a violation of sec. 76 of the Bank Act. I do not think it is. The law is not quite settled on the point, but it was discussed in the *Bank of Toronto* v. *Perkins* (1883), 8 S.C.R. 603. Mr. Justice Gwynne in that case appears to adopt the dicta of Chief Justice Robinson in *Commercial Bank* v. *Bank of Upper Canada* (1859), 7 Gr. 430, in which the *bona fides* of the transaction between the bank and its customer is made the test. It is there said that if the mortgage was really and in truth taken to secure the loan upon the bill, and not that the bill was created for the purpose of upholding and giving colour to the mortgage, the transaction should be sustained. That question was treated as a question of fact, and deciding the question of fact in this case I have no doubt that as between the Peoples Trust Co. and the plaintiff, the transaction was one in which neither party had any intention of evading the provisions of the Bank Act.

I think, therefore, the appeal must be dismissed.

Irving, J.A.

IRVING, J.A., concurred with Macdonald, C.J.A.

Galliher, J.A.

GALLIHER, J.A.:—This case has caused me no little trouble to decide, more especially upon one point, but on the best con-

sideration I can give to it I have come to the same conclusion as the Chief Justice, in whose reasons for judgment I concur.

The point I refer to is whether the mortgage truly sets forth the consideration.

Had it not been for the decision in *Credit Company* v. *Pott* (1880), 6 Q.B.D. 295, which seems exactly in point here, I must confess I would have inclined to the view that the consideration was not truly set forth; however, I feel that I must defer to the better judgment of the eminent Judges of appeal who tried that case—approved of as it is in later cases in the English Court of Appeal.

McPHILLIPS, J.A.:—In this case the appellant Ball claims that the chattel mortgage and assignment thereof upon which the Royal Bank (the respondent) bases its claim to the money in Court (the goods and chattels were sold and to the extent of $1,082.18, paid into Court to await such disposition thereof as might be made in this action) is invalid and void upon a number of grounds; as to the chattel mortgage the consideration is not truly set forth, being collateral security to the promissory note—the promissory note not attached thereto—subject to a defeasance not expressed, affidavit of attestation defective in that chattel mortgage now marked as exhibit; affidavit of *bona fides* not made by authorized officer nor does it truly set forth consideration; description of the goods and chattels insufficient; and no proof that the promissory note was ever made or delivered. As to the assignment of the chattel mortgage—that same is not duly attested by affidavit and is without the affidavit of *bona fides* called for by the Bills of Sale Act—and was not executed by the proper officer of the Westminster Trust Company—liquidator of the Peoples Trust Co. Ltd.—as required by sec. 30 of the Winding Up Act (R.S.C., ch. 144, 1906), that the Peoples Trust Co. Ltd. having on January 29, 1913, executed a general assignment of all its assets real and personal to assignees for the benefit of creditors—same became vested in the assignees inclusive of the chattel mortgage in question and, therefore, could not assign the chattel mortgage to the bank on September 15, 1912—that the bank cannot set up any title to the goods and chattels under the agreement of January 13, 1913, in that same

McPhillips, J.A.

B. C.
C. A.
ROYAL BANK OF CANADA v. WHIELDON.
McPhillips, J.A.

was not pleaded and in any event invalid by reason of section 76 of the Bank Act (R.S., ch. 29, 1906), and that the bank failed to identify the goods and chattels sold by the appellant Ball and there was failure to prove the specific goods and chattels of which conversion was alleged or the measure of damages sustained by the bank.

The appeal was very exhaustively argued by counsel for the appellant, but in my opinion the appeal really resolves itself into exceeding small compass, as presented by the learned counsel for the bank.

All the objections both as to substance and technicality to the chattel mortgage and the assignment thereof may at once be swept away when it is seen that the appellant Ball was in no way a purchaser for value or otherwise entitled to the goods and chattels sold by him, the document under which title was claimed clearly disproves this, being the agreement of surrender of lease of date, August 11, 1913, paragraph 2 thereof reading as follows:

> 2. The party of the first part (the appellant Ball) shall on or before the 31st day of October, 1913, cause to be sold by public auction which shall be well and sufficiently advertised for a period of two weeks preceding the sale, all the said goods, chattels and effects being crop farm stock of whatsoever nature the property of the party of the second part (the defendant Whieldon) and situate on the premises hereinbefore described or either of them.

It will be, therefore, seen that the appellant Ball in making the sale of the goods and chattels was selling not his goods and chattels, but the goods and chattels of the defendant Whieldon, and there is no evidence whatever to substantiate any claim that the goods when sold under distress for rent or that the appellant Ball was in any other way rightly entitled to the goods and chattels.

In the result of things the sale was really a sale by the appellant Ball with the authority of the defendant Whieldon, the mortgagor under the chattel mortgage to the Peoples Trust Co. Ltd., which chattel mortgage was duly assigned to the bank—this being the situation of matters, it is plain that all the exceptions taken as to the validity of the chattel mortgage wholly fail. However, were it necessary for me to decide upon the many exceptions taken to the validity of the chattel mortgage and the assignment thereof I do not hesitate to say that none of them

have merit or in any way impugn the full force and validity of the chattel mortgage and the assignment thereof.

The defence which was most strongly pressed before this Court and the Court below was the invalidity of the transaction —and reliance was placed upon sec. 76 of the Bank Act—and that the transaction was one of lending money on goods in consideration of a present advance.

I have carefully and anxiously scanned, weighed and considered the agreement of January 13, 1913, between the Peoples Trust Co. Ltd. and the bank, and have come to the conclusion that it is an agreement that can be well supported in the light afforded as to what the law really is in respect to matters of this character, and it must be recollected that it plainly was not the intention of Parliament to render impossible that which is necessary in the carrying on of banking business and the safeguarding of business and financial affairs generally. The authorities which support the transaction here impeached in my opinion are the following: *Re Ontario Bank, Bank of Montreal's Claim* (1910), 21 O.L.R. 1; *McFarland* v. *Bank of Montreal and Royal Trust Co.* (1911), 80 L.J.P.C. 83; *Ontario Bank* v. *McAllister* (1911), 43 S.C.R. 338. Mr. Justice MacLaren *Re Ontario Bank*, *supra*, at pp. 32 and 33, said:—

> These banks, being corporations created by the Bank Act, have, in addition to the powers conferred upon them by that Act, the power under the Interpretation Act, R.S.B.C. 1906, ch. 1, sec. 30, "to acquire and hold personal property or removables for the purposes for which the corporation is constituted, and to alienate the same at pleasure."
>
> By sec. 76 of the Bank Act, "the bank may . . . (c) deal in, discount and lend money and make advances upon the security of, and take as collateral security for any loan made by it, bills of exchange, bonds, debentures and obligations of municipal and other corporations, whether secured by mortgage or otherwise, or Dominion, provincial, British, foreign and other public securities; and (d) engage in and carry on such business generally as appertains to the business of banking."
>
> The powers conferred by these two sections are wide enough to include the transaction in question. Clause 2 of the agreement speaks of it as being a "purchase by way of discount and rediscount." Strictly speaking, it is not a sale by the Ontario Bank and a purchase by the Bank of Montreal of the assets in question. There is no price named, nor do we find the other *indicia* of a sale. It is in substance rather a loan or advance by the Bank of Montreal of the money necessary to meet the liabilities of the Ontario Bank as they become due, and the Bank of Montreal is to apply the

B. C.

C. A.

ROYAL BANK OF CANADA v. WHIELDON.

McPhillips, J.A.

money realized from the securities transferred to it towards meeting those liabilities and repayment of these advances with interest.

Under the above mentioned sections there is, in my opinion, ample authority for the agreement in question. It was in reality a borrowing by the Ontario Bank and a lending by the Bank of Montreal, a dealing in the bills of exchange, promissory note, and other negotiable securities, an alienation by the Ontario Bank and an acquisition by the Bank of Montreal, and it was surely such business generally as appertains to the business of banking. This Court decided in *Montgomery* v. *Ryan*, 16 O.L.R. 75, that a bank incorporated under our Bank Act could sell either the account of one of its customers or the promissory note which evidenced the debt. See also *Allen* v. *Sharp* (1848), 17 L.J. Ex. 209, at p. 212, and Halsbury's Laws of England, vol. 1, pp. 629, 631.

This is not a case of the Royal Bank entering into a transaction with another bank subject to the Bank Act as the Peoples Trust Co. Ltd. is not so subject, but that does not really affect the question of law. The Peoples Trust Co. Ltd. had engaged in business—in some respects analogous to that engaged in by a bank subject to the Bank Act—but not in contravention of it, and to acquire the business so carried on was, in my opinion, the doing of something by the Royal Bank appertaining to the business of banking.

It is contended that because of the fact that the promissory note of the defendant Whieldon was secured by the chattel mortgage in question that the Royal Bank in taking over the promissory note of the defendant Whieldon and the chattel mortgage securing the same contravened sec. 76 of the Bank Act, when the Royal Bank in conformity with the agreement of January 18, 1913, took from the Peoples Trust Co. Ltd. the promissory note endorsed as agreed upon for $30,341.31, that note to be deposited to the credit of the Peoples Trust Co. Ltd. in a special account to be opened as the Peoples Trust Co. Ltd. account in trust for depositors of South Hill branch, but the Peoples Trust Co., nor the directors thereof, were not to be at liberty to withdraw any portion of the proceeds of the promissory note until the whole of the depositors had been paid in full and the liability of the Peoples Trust Co. Ltd. and the directors to the Royal Bank and the liability to the depositors of the Peoples Trust Co. Ltd. was completely discharged and only thereafter such sum as remained should be paid over.

This in effect amounted to what might be termed a guarantee

to cover the amounts due to the depositors, it being a matter of estimate though that the deposit accounts would be met by the amount outstanding upon loans secured by promissory notes, bills of exchange and other securities, of which the chattel mortgage in question in this action was one, the amount of the loans being $25,578.50, the difference between this amount and the $30,341.31 being provided by the Peoples Trust Co. Ltd. paying the Royal Bank as well in cash $4,762.81, that is the amount of the loans being got in with this cash payment the total amount due the depositors would be met.

The agreement cannot be said to be one easy of construction, yet after all it would really seem to be more one of purchase than one of the borrowing by the Peoples Trust Co. Ltd., and a lending by the Royal Bank, in fact it can be said to be the former, but if the latter I am of the opinion that it is supportable and not affected by sec. 76 of the Bank Act.

It was in the agreement provided that within a period of six months certain of the promissory notes, bills of exchange and securities might, at the election of the Royal Bank, be rejected, but at the expiration of that period they were deemed to be taken over by the bank and the Peoples Trust Co. Ltd. then became entitled to credit therefor and amongst others so taken over and the securities held therewith was the promissory note and the chattel mortgage securing the same of the defendant Whieldon.

The evidence is that the agreement was carried out and the transfers made of the various properties real and personal by the Peoples Trust Co. Ltd. to the Royal Bank and the cash payments made by the Peoples Trust Co. Ltd. to the Royal Bank—at least I so understand the evidence and it was not contended otherwise upon the argument of the appeal, viz., the $4,762.81 provided for in paragraph 8 and the $12,500 provided for in paragraph 16 of the agreement—therefore we have a completed agreement and an effective purchase which in my opinion the Royal Bank was at liberty to make and the transaction was not *ultra vires* in its nature and does not offend in my opinion any of the provisions of the Bank Act, but is a transaction which can be said to be one in ordinary course in the discharge of the business of banking and appertaining thereto.

B. C.
C. A.
ROYAL BANK OF CANADA v. WHIELDON.
McPhillips, J.A.

The present case has few features differing from that of *Re Ontario Bank* and *McFarland* v. *Bank of Montreal and Royal Trust Co.*, *supra*, and in my opinion it is unnecessary to further enlarge upon the analogy and similarity of the facts, it must be taken as an assumed fact that in all cases where a transaction of the nature of that between the Montreal and Ontario Banks takes place—that there will be securities which will be transferred—no doubt properly taken in the discharge of banking business and in conformity with the Bank Act, and when in their nature mortgages upon real or personal property so taken for debts past due to the bank, and unquestionably these securities would be capable of being enforced. In the present case the chattel mortgage which in my opinion the Royal Bank is entitled to claim under, was taken in due course by the Peoples Trust Co. Ltd. when an advance was made, that company not being subject to the Bank Act and it was a security it was entitled to take and being transferred to the Royal Bank under the provisions of the agreement of January 13, 1913, it becomes a security enforceable by the bank in the carrying out of the terms of that agreement.

In *Ontario Bank* v. *McAllister* (1911), 43 S.C.R. 338, the Chief Justice of Canada (the Right Honourable Sir Charles Fitzpatrick) said, at pp. 347-348, when dealing with the contention that there was a violation of the Bank Act:—

> With respect to the alleged violation of the section of the Bank Act which prohibits trafficking in or carrying on the business of buying and selling goods, wares and merchandise, this was an isolated transaction entered into to enable the bank to realize the amount of an indebtedness which had been legally contracted and anything done for that purpose cannot affect the legality of the transaction under which the bank acquired the assets of the company and assumed its obligation under the lease.

How destructive of the possibility of the entry into such an agreement as is in question in this case, to hold that the security under which the Royal Bank is claiming is unenforceable, an agreement which is in no way attached—a *bonâ fide* agreement—and all to the end and purpose that the depositors of the Peoples Trust Co. Ltd. be paid the moneys due and owing to them out of the assets of that company.

Further, we have Mr. Justice Davies saying, at p. 353 of *Ontario Bank* v. *McAllister*, *supra*:—

Banking business in Canada must from the very circumstances of the case, I should imagine, be conducted upon a broader and somewhat more elastic basis than in fully developed business communities such as Great Britain and in construing the powers conferred upon banks to carry on *such business generally as appertains to the business of banking*, it is fair that Canadian conditions should be fully considered and allowed for.

In my construction of sec. 76 of the Bank Act the taking of the assignment of the chattel mortgage called in question in the present case was not *ultra vires* of the Royal Bank and that the chattel mortgage was and is enforceable security.

That the chattel mortgage was well and sufficiently assigned in my opinion cannot be successfully gainsaid; the assignment was duly carried out—following the terms of the agreement of January 13, 1913—by the Peoples Trust Co. Ltd., by its liquidators, the Westminster Trust Limited, through one J. J. Jones, its principal officer, designated by the Court pursuant to the order of Gregory, J., under date of February 24, 1914, and was in my opinion sufficiently authorized.

That the appellant Ball is not to be admitted to contest the legality or validity of the chattel mortgage and the assignment thereof has already been passed upon—it being my opinion that he cannot—he was merely the agent for the sale of goods and chattels the property of the defendant Whieldon in no way a purchaser thereof for value or otherwise entitled to them, and as the defendant Whieldon admittedly cannot take any exception in the matter it is clear that the appellant Ball cannot (*Gray* v. *Stone* (1893), 69 L.T. 282), the conversion was wrongful and the Royal Bank in my opinion was and is entitled to the moneys lodged in Court being representative of the goods and chattels—to which the Royal Bank was entitled—and wrongfully converted and sold.

In the result, in my opinion, the judgment of Mr. Justice Murphy, the learned trial Judge, should be affirmed and the appeal dismissed.

Appeal dismissed.

B. C.

C. A.

DUMPHY v. CARIBOO TRADING CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. April 6, 1915.

1. BROKERS (§ II B 2—16)—REAL ESTATE BROKERS—COMPENSATION—FAILURE TO COMPLETE TRANSACTION—LEASE MADE BY PRINCIPAL.

Where a real estate broker's claim for commission is based upon his having procured a purchaser ready, willing and able to carry out the deal upon the terms specified, and that the vendor himself made a lease which prevented the carrying out of the proposed sale, the broker must shew that, had it not been for the lease, the proposed purchaser was ready and willing to carry out the deal on the terms upon which the property was listed.

Statement

APPEAL by defendant from decision of Macdonald, J.

Harvey, K.C., for appellant.

Ritchie, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A., agreed with GALLIHER, J.A.

Irving, J.A. (dissenting)

IRVING, J.A., dissented.

Martin, J.A.

MARTIN, J.A., agreed with GALLIHER, J.A.

Galliher, J.A.

GALLIHER, J.A.:—In my opinion, this appeal narrows down to a consideration of whether the plaintiffs procured a purchaser ready, willing and able to carry out the deal upon the terms specified.

As to whether the purchaser was able to carry out the deal, while I might not have come to the same conclusion as the learned Judge, I am not prepared to say he was wrong.

There is only left for consideration then whether he was ready and willing.

Accepting the learned trial Judge's view that Cunliffe should not have entered into the lease, and by so doing prevented himself from carrying out the arrangements which he made with the plaintiffs (as the Judge finds) that is not a complete answer —the plaintiffs must shew that, had it not been for the lease, the proposed purchaser was ready and willing to carry out the deal on the terms set out.

The purchaser Turner says he was, and if that answer stood alone it would be an end of the matter, but I think we should consider all the evidence and circumstances applicable to this answer.

It is to be noted that when Turner and his agent Eldridge

were up at the property, they left without giving any intimation that they were desirous of purchasing or making any direct offer of purchase, and while they looked over the land and stock in a general way they did not go into the matter so as to ascertain whether there was approximately the quantity indicated in the memorandum on which the lump sum of $185,000 was based —not feeling desirous of purchasing, as they say, as the lease stood in the way.

Nevertheless one year afterwards Turner swears he would have purchased but for the lease.

I can hardly understand that. I could understand it if he had said that, finding the lease in the way I did not consider the other features at all so as to say whether I would or would not have purchased, had not, for instance, the number of cattle, quantity of hay or stock of goods in the store been below the mark.

How could he truthfully say he would have completed the deal but for the lease, if he had never placed himself in a position to judge of the amount and values of the chattels which formed a very considerable item in the transaction.

A discussion arose on this very point and the evidence of both Turner and Eldridge is clear that they were claiming that they would deduct for any shortage and Cunliffe refused to agree to this, saying the sale was for a lump sum and he would not in effect guarantee the quantity.

Take for instance the item of cattle. There was supposed to be 550 head, and these on the hoof were valued at $85 per head or a total of $44,750.

Cunliffe said, "I think there is that many more or less, but if not I will not stand for deduction for shortage," and Eldridge in Turner's presence claimed that he would deduct $85 per head for every head short and in like manner regarding the other chattels.

If Turner had gone on and satisfied himself that approximately the goods and chattels were there or was there anything to shew that he had decided to take a chance, or in other words, that there was in his mind then the purpose to close the deal but for the lease, I might take a different view on this branch,

B. C.
C. A.
DUMPHY v. CARIBOO TRADING CO.
Galliher, J.A.

but in the light of the evidence and the surrounding circumstances I feel that I cannot accept the bald statement that he would have purchased but for the lease.

Of course I feel the difficulty I am in as the learned trial Judge has accepted this as sufficient, but this is hardly a case of demeanour of witnesses or contradictory evidence, but rather of drawing an inference from circumstances and uncontradicted evidence.

Although not necessary to the decision on this point I cannot say that the manner in which the plaintiff admits he proposed dickering for the first payment by exchange of Vancouver property impresses me very strongly as to the genuineness of his intention to purchase on the vendor's terms.

I would allow the appeal.

McPhillips, J.A. (dissenting)

McPHILLIPS, J.A., dissented.

Appeal allowed.

B. C.
C. A.

ROYAL TRUST v. HOLDEN.

British Columbia Court of Appeal, Irving, Martin, Galliher, and McPhillips, JJ.A. April 6, 1915.

1. SET OFF AND COUNTERCLAIM (§ I D—20)—TRUSTEE AND CESTUI QUE TRUST.

There may be a set-off against the trustee of a debt due from the *cestui que trust* in respect of the fund to which the latter would be entitled on its coming into the trustee's hands. (*Per* Irving and Martin, JJ.)

[*Bankes* v. *Jarvis*, [1903] 1 K.B. 549, 72 L.J.K.B. 267, followed.]

Statement

APPEAL from judgment of Clement, J.

R. M. Macdonald, for appellant.

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

Irving, J.A.

IRVING, J.A.:—The plaintiff sues for $2,000 on the defendant's covenant contained in an agreement dated February 5, 1912, made between Annette Holden, of the first part, and the defendant of the second part, and the plaintiff therein called the trustee of the third part.

The agreement contains the following recital:—

Whereas differences have arisen between the parties of the first and second part, and an action is now pending between them in the Supreme Court of British Columbia, wherein the party of the first part has made certain claims against the party of the second part, which claims the

party of the second part does not admit, but in order to settle all matters in difference between the parties, and to make a provision for the support and maintenance of the party of the first part, the party of the second part has consented to enter into the arrangement hereinafter set out.

By the first clause it was agreed that the plaintiff should pay $1,000 on the execution of the document and costs to be taxed and also—and this is the money sued for—at the expiration of every six months thereafter the sum of $1,000 in cash, until the aggregate amount . . . shall amount to $8,000.

The third clause provided as follows:—

As and when the said sums are received the trustee shall pay the same to the party of the first part, but it is hereby mutually agreed between all the parties hereto, that the trustee shall not recognize any assignment of the said moneys, whether due or accruing due at any time made or purporting to be made by the party of the first part to any other person or persons, but the party of the first part shall, in each instance, satisfy the trustee that the said payments are being made to the party of the first part personally, and for her sole use and benefit (nothing herein shall prevent the party of the first part from bequeathing the same to any of her relations), and in consideration of the premises and of the agreements hereinbefore contained on the part of the party of the second part, the party of the first part doth hereby for herself, her heirs, executors, and administrators hereby release and forever discharge the party of the second part, his heirs, executors and administrators of and from all manner of action, causes of action, debts, accounts, covenants, contracts, claims and demands whatsoever which the party of the first part ever had, now has, or which her heirs, executors, administrators or assigns or any of them hereafter can, shall or may have against the party of the second part, or his heirs, executors or administrators, for or by reason of any cause, matter or thing whatsoever, existing up to the present time.

The defendant pleaded that the said Annette Holden was by virtue of a judgment of this Court, dated June 10, 1912, indebted to him in the sum of $1,082; and, by virtue of an order of the Privy Council, dated August 8, 1911, was also indebted to him in the sum of £42 4s. 2d, or $205, and claimed to set off these sums against the amount sued for.

The defendant paid into Court the difference, viz., $700. At the trial, the learned Chief Justice upheld the defence of set off and gave judgment for $700.

The next point for our decision is, can the defendant set off against the trustee a debt due from the *cestui que trust?*

The plaintiff's contention is that as these are not mutual debts, nor in the same right, there can be no set off.

B. C.
C. A.
ROYAL TRUST v. HOLDEN.
Irving, J.A.

It would appear that prior to the statutes of set off, Courts of equity did not exercise any jurisdiction as to set off, unless some peculiar equity intervened, independently of the mere fact of mutual unconnected accounts.

At common law there was originally no right of set off at all (declining to follow in this respect the Civil Law where compensation was freely allowed). That it was not till the statute of set off in the reign of George II. that there was any such right established, and they only applied to cases of mutual debts.

Equity followed and even extended the law, the Courts of equity holding that certain cases were within the equity of the statute although not within their actual words.

Sir George Jessel, M.R., tells us in *Re Whitehouse*, 9 Ch.D. 597, that Courts of equity did allow set off, but the Court of equity, following the spirit of the statute would not allow a man to set off, even at law, where there was an equity to prevent his doing so, that is to say where the rights, although legally mutual, were not equitably mutual.

Now, as the plaintiffs are the representatives of Annette Holden, and suing for her benefit, I can see no equity to prevent the defendant setting off her debt to him against the plaintiff's claim. On the other hand I think the relationship of the trustee to Annette Holden constitutes some equitable ground for the defendant being protected against the plaintiff's demand.

There are many instances of a trustee suing on behalf of another being met with a set off: *Bankes* v. *Jarvis*, [1903] 1 K.B. 551, 72 L.J.K.B. 267, is one, and that case seems to me to be in defendant's favour.

The argument that is based on the theory that this was "an inalienable provision for her" like the pension in *Gathercole* v. *Smith* (1880), 17 Ch.D. 1, cannot be supported on the agreement of the parties. The "provision" in that case was exempt from set off by reason of public policy laid down by statute.

The expression "mutual debts" is somewhat hard to understand according to the old cases, but when we see in the ancient and approved form of plea given in *Bullen* v. *Leake*, 3rd ed., 682, viz.:—

> That the plaintiff, at the commencement of the suit was and still is indebted to the defendant in an amount equal to the plaintiff's claim . . .

we are relieved to find that "mutual debts" mean practically debts due from either party to the other for liquidated sums, or money demands which can be ascertained with certainty at the time of pleading—*per* Kennedy, L.J., in *Bennett* v. *White*, [1910] 2 K.B. at 648, 79 L.J.K.B. 1133.

I do not think the form of the judgment to be taken against a married woman enters into the question we have to decide.

I would dismiss the appeal.

MARTIN, J.A.:—By an agreement under seal dated February 5, 1912, Annette Holden and the defendant arrived at a settlement of certain recited claims of hers against the defendant then in litigation in an action in the Supreme Court of British Columbia, and

> in order to settle all matters in difference between the parties and to make a provision for the support and maintenance of said

Annette Holden the defendant agreed to pay to the plaintiff company as trustee for her, a certain sum in cash and $1,000 every six months until $8,000 in all were paid. In consideration of the foregoing Annette Holden in the same instrument gave the defendant a general release of all demands, but there was no corresponding release by defendant to her. It was the duty of the trustee to pay the moneys over to her "personally" upon being satisfied that she had not assigned them. Two instalments due August 5, 1913, and February 5, 1914, have admittedly not been paid, but the defendant claims to set off against them certain costs due to him by said Annette Holden in unsuccessful actions brought against him by her as appears by three certificates and allocaturs filed; the orders or judgments upon which these were issued are not before us.

So far as the right to set off against the plaintiff, the trustee, is concerned, the case is governed in principle by *Bankes* v. *Jarvis*, [1903] 72 L.J.K.B. 267, in favour of the defendant. And I am unable also to take the view that in these circumstances anything turns here upon the question of any particular form of order or judgment, even if we had them before us. In fact, I cannot see how any question of separate estate arises at all seeing that it is a question merely of the woman being person-

B. C.

C. A.

ROYAL TRUST v. HOLDEN.

Martin, J.A.

ally liable to the plaintiff for costs of her unsuccessful actions against him, which debts he sets off against money in his own hands which is payable to her "personally."

Something was said about the appropriation of the money for the specific purpose of the woman's maintenance distinguishing this case, but even if that were so the difficulty here is that it was to be paid for two purposes, viz., (*a*) to settle the action, and (*b*) for maintenance, and who can say how much was to be appropriated for either purpose. In such indefinite circumstances there could be no definite, or any, appropriation.

In my opinion, the appeal should be dismissed.

Galliher, J.A.

GALLIHER, J.A.:—Under the agreement of February 5, 1912 (A.B. 35), the parties of the first and second part have agreed upon a sum certain in settlement of the claims made by Annette Holden and for providing for the support and maintenance of the said Annette Holden.

Whether William Holden was or was not at that time obliged to provide for the maintenance and support of Annette Holden he has entered into an agreement to do so and is estopped from raising that question—in fact if truly read, I think the consideration for the granting of moneys for support and maintenance was the settlement of all claims and disputes between them.

In a case where the agreement was for maintenance and support only—could the defendant set off as against moneys payable under that agreement any debt which he might recover against Annette Holden? I think not. The moneys were to be applied to a specific purpose and in such a case mutual credits could not arise. The parties have agreed to a sum necessary and sufficient for a specific purpose, and it has been so allocated, and to divert any part of those moneys would be contrary to the express intent and agreement of both parties, nor do I think the defendant is in any better position by reason of the fact that the agreement recites in addition to the provision for maintenance and support that it is also in settlement of all claims and disputes between the parties.

In re Pollett, ex parte Minor (1893), 62 L.J.Q.B. 236, a solicitor having a bill of costs already owing to him by a debtor

refused to do further work unless a certain sum was paid him for future services, and the debtor having paid him £15 for this purpose, certain work was done, and before the sum was exhausted and while there was some £12 still in the hands of the solicitor the debtor was adjudged bankrupt. This sum of £12 was claimed by the trustee in bankruptcy.

It was held that this money became due to the trustee at the moment of bankruptcy.

The solicitor claimed the right to set off the amount of his prior debt against this money in his hands and the Master of the Rolls, whose judgment was concurred in by Lindley, and Smith, L.JJ., deals with the claim at p. 238, in these words:—

> It was also contended that this is a case of mutual credit and that the residue of the £15 ought to be set off against the amount due from the bankrupt to the solicitor in respect of work previously done. But the money was paid for specific purpose, and that being so, there could not be any mutual credit.

See also remarks of Williams, J., in *Mid-Kent Fruit Factory* (1896), 65 L.J. Ch. 250.

But if these cases are distinguishable as being in proceedings under the Bankruptcy Act, which I do not determine, there is another clause in the agreement which, coupled with the recital is, I think, a complete answer to the defendant's contention.

The portion of clause 3 which I refer to is as follows:—

> As and when the said sums are received, the trustee shall pay the same to the party of the first part, but it is hereby mutually agreed between all the parties hereto, that the trustee shall not recognize any assignment of the said moneys, whether due or accruing due at any time made or purporting to be made by the party of the first part to any other person or persons, but the party of the first part shall, in each instance, satisfy the trustee that the said payments are being made to the party of the first part personally, and for her sole use and benefit.

The effect of this clause which all parties mutually agree to is to prevent Annette Holden from in any way anticipating payment of these monies and what William Holden is now attempting to do is in effect to anticipate payments.

I would allow the appeal.

McPHILLIPS, J.A., agrees with GALLIHER, J.A. McPhillips, J.A.

Appeal dismissed.

ONT.

S. C.

ACKERSVILLER v. COUNTY OF PERTH.

Ontario Supreme Court, Meredith, C.J.C.P.

1. HIGHWAYS (§ IV A 1—120)—REPAIR OF—FINANCIAL ABILITY—REASONABLE STATE FOR TRAFFIC REQUIREMENTS.

The statutory duty of a municipality to keep its highways in repair may be limited by its financial ability in view of the limitation placed by statute upon its borrowing powers; the duty of the municipality is to keep the roads under its control in a reasonably sufficient state for traffic requirements.

2. HIGHWAYS (§ III—104)—MUNICIPALITY RAISING ROADWAY—COVERING DITCH—SUBSTANTIAL DANGER—WING WALL OR GUARD.

Where a municipality in order more easily to perform its duty to repair, raises the roadway or lowers a ditch across it so as to create a substantial danger, it is its duty to provide a guard (*ex. gr.* a "wing wall") on the culvert so as to prevent vehicles going off the road into the ditch.

Statement

ACTION to recover damages for personal injuries sustained by the plaintiff and for injury to his motor car, by reason, as he alleged, of the negligence of the defendants, the Corporations of the County of Perth, the Townships of Downie and South Easthope, and the City of Stratford, in failing to keep a highway in repair.

R. T. Harding and *M. G. Owens*, for the plaintiff.

G. G. McPherson, K.C., for the defendants the county and township corporations.

R. S. Robertson, for the defendant city corporation.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The main facts of the case are plain; I have no doubt about them: the plaintiff had proceeded in his motor car along the highway which forms the boundary line between the city of Stratford and one of the two defendant townships, until he had reached, and just crossed, the highway in question, which runs between the said two townships to the place in question, whence it runs into the city of Stratford. Having reached that point, the plaintiff stopped, and then backed into the highway in which the accident happened, with a view to turning around and going back on the same highway by which he had come. In thus backing around he reached the edge of the bank at the culvert, on the left hand side of the road, with the result that the car turned over into the ditch; he went too far on that tack, thereby

making the drop into the ditch inevitable. Nothing, as I find, depended on the width of the road or its condition in any respect, except that there was no device of any kind to prevent anything or any one going into the ditch if it or he went far enough in that direction: if the road had been adamant, and extended to the end of the culvert—another 18 inches—I have no manner of doubt that the plaintiff would have gone over the bank, and have gone over without the little chance that the wheel beginning to sink on the edge of the soft earth gave him to recover ground by a swift forward movement. The night was dark; the man had no means of seeing just where he was, even if he had looked behind; his one guide was his position as indicated by the light of the lamps of his car thrown upon the road in front of him; he had not, I find, completed his intended backward turn, when the sinking of the wheel indicated his danger: then, I am satisfied, he applied the powerful lever brake, called the emergency brake, which was found, after the accident, to be firmly set; but then it was too late; the car was then on too frail ground for any such action to save it; the only chance, if there were indeed any, was immediate forward movement. . . .

The one substantial question in the case is: Were the defendants, or any of them, guilty of negligence in regard to the plaintiff in not having placed an efficient guard of some kind at the side of the road at the place where the accident happened?

The statute-imposed duty of a municipality in regard to the care of highways is to keep them in repair: the Highway Improvement Act adds the word "maintain," but unnecessarily, as it seems to me, for to keep in repair necessarily includes maintenance, whilst maintenance does not necessarily include all that must be done to *keep* in repair: in other words, a road, or anything else, may be maintained, though not in a sufficient state of repair; and keeping in repair necessarily includes renewal; and so it is that, under the one word, whilst a blazed line through the woods may be a sufficient state of repair under some circumstances, nothing short of the best of road construction will do under other circumstances. The stat-

ONT.

S. C.

ACKERSVILLER v. COUNTY OF PERTH.

Meredith, C.J.C.P.

ute does not say that any municipality shall pave its streets, but it says that which necessarily compels pavement where pavement is needed: the municipality shall keep the road in repair; and where the traffic is great that injunction can be obeyed only, in places of great traffic, by the construction of paved ways. That is, as it seems to me, quite plain; and has been, as I have always understood it, the law in this respect as it has always been administered in this Court. But that duty may be limited by the money means which the municipality has; and that is not Court-made law: another statute limits the money-raising power of every municipality: the two statutes are of equal authority and must not be interpreted to conflict with one another; hence it is commonly said, with substantial accuracy, that the municipality must, having regard to its means, keep the roads under its control in this respect, in a state reasonably sufficient for the requirements of the traffic over them.

It was an important road with a good deal of traffic over it, as the action of the county municipality in assuming it, and the fact that the place in question is a place of junction of the whole four defendant municipalities, shew. And at this place the defendant county municipality made a ditch, four feet deep, with a culvert, four feet in height, running into it, and left the ditch without any guard-rail or other protection against person, animal, or vehicle going over the bank into it—an obviously dangerous exploit, especially in the case of a heavy carriage such as the plaintiff drove over it. . . .

It may be, indeed it must be, difficult to draw the line between the place that must be and that which need not be guarded, in order to keep a highway in repair. Different places have their different circumstances, and each must be dealt with as it arises; dealt with, not according to the notion of the particular Judge before whom it is tried, but according to the evidence; but where a municipality, in order more easily to perform their duty to repair, raise the road, or lower the ditch, so as to create a substantial danger, I would, generally speaking, find it to be their duty reasonably to guard it.

Upon the evidence adduced in this case, I find that the defendant county municipality owed a duty to the plaintiff,

and to all other persons lawfully travelling upon the road in question, to provide some efficient guard against the accident which happened, and all like accidents arising from the danger which the unguarded ditch creates: that neglect of that duty was the proximate cause of the accident and of all the injury which was the result of it; and that, if there were any negligence on the part of the plaintiff, it was not a proximate cause of the accident, nor was it contributory negligence disentitling the plaintiff to recover in this action.

It is proved that "wing-walls," built up so as to have afforded ample protection, would have cost but from $30 to $35, and, as I have said, there is no evidence that this wealthy county would have been hampered, in any money sense, if it had expended that sum at the place in question, and any other sums of money required to give the like protection in all other places, if any, requiring it, upon any of the highways which this municipality is statute-bound to keep in repair.

The plaintiff is, accordingly, entitled to recover from the defendant county municipality damages—reasonable compensation under all the circumstances of the case—for the injuries he sustained in the accident; and the other defendants are entitled to have this action dismissed as to them.

In regard to damages: the plaintiff's motor car was much injured; the bill for repairing it is $298; and the plaintiff himself sustained painful bodily injuries: he was in the hospital for a week; it was nearly two months before he went to work again; he has not yet quite recovered from all the ill effects of his injuries; and the medical gentlemen, who testified in his behalf, expressed the opinion that he is under some permanent physical disability, caused by the accident, which "will be stationary from now on:" this they attribute to some injury to some nerves of the spine; but it is not said that he is hampered by it in his business of driver of a motor car for hire; and before the accident he was advised to give up his occupation of teamster because of disability which was attributed to lumbago; and gave it up accordingly. This ailment, in his back, had been of so severe a character that his medical adviser had sent him to London for a more thorough examination than could be had where he

ONT.

S. C.

ACKERSVILLER v. COUNTY OF PERTH.

Meredith, C.J.C.P.

was; the result is said to have been that nothing more than lumbago was discovered, though the searchlight of X rays was employed in the diagnosis.

The plaintiff's expenses at the hospital and for medical advice and treatment for his injuries sustained in this accident were altogether $41; and, as I have said, his pain and suffering were considerable.

After his car was repaired, there was no reason why it might not have been employed in his business; drivers of such cars are numerous and obtainable for reasonable wages. The business of owner and driver, as the plaintiff is, of a touring car, cannot be a very profitable one.

I assess the plaintiff's damages at $1,000; made up of these items: actual outlay, $350; the items I have mentioned amount to $339, but there must have been other small expenses, not enumerated, for which the additional $11 are allowed: there is not sufficient evidence to enable me to allow any damages for unrepaired and unrepairable injury to the car; it would be quite too speculative and uncertain to add anything for this. I positively refuse to guess at any substantial damages. $150 for loss of earnings; about $3 a day net; which under all the circumstances of the case seems to me to be enough; and $500 for personal injury, including "pain and suffering:" I am hopeful, and satisfied, upon the whole evidence, that the plaintiff is already very little worse in health and physical strength than before his accident; and that, before long, he shall be as well as he would have been had there been no such accident.

There will be judgment for the plaintiff against the defendants the Corporation of the County of Perth, and $1,000 damages, with costs of action; in other respects the action will be dismissed, without costs.

If any party desire it, there will be the usual stay of proceedings, upon this judgment, for 30 days.

Judgment for plaintiff.

APPEAL by the defendant the Corporation of the County of Perth from the judgment of MEREDITH, C.J.C.P., 22 D.L.R. 666.

April 26, 1915. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

Glyn Osler, for the appellant corporation.

G. G. McPherson, K.C., for the defendants the Corporations of the Townships of Downie and South Easthope.

R. S. Robertson, for the defendant the Corporation of the City of Stratford.

R. T. Harding, for the plaintiff, the respondent.

The judgment of the Court was delivered by

GARROW, J.A.:—The learned Chief Justice, in what was evidently a very carefully considered judgment, found in favour of the plaintiff against the defendant the Corporation of the County of Perth and dismissed the action against the other defendants.

GARROW, J.A.

The defendant the Corporation of the County of Perth appealed. There was apparently no formal appeal by the plaintiff against the judgment in so far as it dismissed the action against the other defendants; but on the hearing before us all four defendants were represented by counsel, and the argument proceeded as if such formal appeal had been duly made.

The main difficulty in the case seems to be, not so much as to what may be called the merits of the plaintiff's claim, as to which of the four municipalities should be held responsible.

The contention by counsel for the county is, that the Downie road, which runs north and south, and is the township boundary-line between the townships of South Easthope and Downie, as assumed by the county, ends towards the north at the southerly limit of Lorne avenue, which runs east and west, and is the boundary-line between the two townships on the south and the city of Stratford on the north. And sec. 19 of the Highway Improvement Act, R.S.O. 1914, ch. 40, and the dictionaries as to the meaning of the word "intersects" in that section, were referred to before us. The meaning of that section is, I think, quite plain; "intersect" is used in the sense of "crossing" or "passing across," with the result that there is "county road" on each side of the highway so intersected. That, however, is clearly not this case; and the section has, therefore, in my opinion, no application.

The by-law passed by the county on assuming the highway describes it as "the town-line between Gore of Downie and South

ONT.

S. C.

ACKERSVILLER v. COUNTY OF PERTH.

GARROW, J.A.

Easthope, facing the 3rd, 4th, 5th, and 6th concessions." The 1st and 2nd concessions lie to the north of Lorne avenue, and are therefore now within the limits of the city of Stratford. The culvert and the ditch into which the plaintiff fell are situated in the line of Downie road, but to the south of the middle line of Lorne avenue.

Nothing in the language of the by-law, in my opinion, compels us, acting upon legal principles of construction, to adopt the contention of the defendant the county corporation as to the northerly limit of the highway assumed thereby.

The parties were not dealing with a mere paper line, or with a paper highway, but with an actual long-travelled and leading road from the south into the city of Stratford. It was doubtless the intention, in passing the by-law assuming that road by the county, to put it into a better state of efficiency than it had been when under the control of the township councils. That is the apparent and indeed the avowed object of the statute under which the county acted in assuming the road. And, under the circumstances, it is, I think, quite unreasonable to suppose that it could have been intended that there should remain, as suggested, the hiatus, under the control of the township councils, of the few feet between the northerly terminus of the highway, as assumed by the county, and the northerly extension of that highway into and within the boundaries and jurisdiction of the City of Stratford. Nor, if there is any doubt about the proper construction of the language of the by-law, is it unimportant to observe that the parties themselves did not so interpret it, for it is in evidence that after the by-law was passed the county removed the former culvert built by the townships, and built the present one on its site, at an expense, it is said, of something over $100. True, the County Clerk at the trial deposed that this was done in error, but no explanation was given by the witness as to how the error came to be committed or by whom it was actually made, for it was not, I suppose, made by the witness himself.

Altogether I am very much inclined to doubt the alleged error, and to suspect that its suggestion is of the kind known as wisdom after the event.

I am, therefore, of the opinion that the conclusion of the learned Chief Justice, placing the responsibility for the plain-

ONT.
S.C.
ACKERSVILLER v. COUNTY OF PERTH.
Garrow, J.A.

tiff's injury upon the county corporation, was correct. I also agree generally with his reasoning and conclusion as to what I have before called the merits of the plaintiff's claim, and have very little to add. The one point upon which I had some doubt was as to whether the conduct of the plaintiff on the occasion in question was so reasonable as to excuse him from the charge of having contributed to the result from which he suffered. The night was dark. He apparently, although residing in the adjoining city, was not familiar with the ground, and there is, to me at least, the suggestion of recklessness in what he did.

My doubt, however, is not sufficiently strong to justify me in dissenting from the conclusion in the plaintiff's favour upon the issue of contributory negligence.

For these reasons, I would dismiss the appeal of the county corporation with costs.

Appeal dismissed.

CAMPBELLFORD, LAKE ONTARIO, Etc., R. CO. v. MASSIE.

CAN.
S.C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin and Brodeur, JJ.

1. ARBITRATION AND AWARD (§ III—16)—EXPROPRIATION OF LAND—VALUATION—VALIDITY.

The mere permission to a majority of the valuers to examine witnesses does not necessarily make the submission one of arbitration rather than a valuation; each case must be determined according to its particular circumstances.

[*Re Carus-Wilson*, 18 Q.B.D. 7, applied.]

Statement

APPEAL from *Re Laidlaw and Campbellford, etc., R. Co.*, 19 D.L.R. 481, a decision of an Appellate Division of the Supreme Court of Ontario maintaining an award in a matter of expropriation of land for railway purposes.

MacMurchy & Spence, for the appellants.

Cassels, Brock, Kelley & Falconbridge, for the respondents.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—I agree with MR. JUSTICE DUFF.

Davies, J.

DAVIES, J.:—I agree that this appeal should be dismissed and concur with the judgment of the Appellate Division that the case should go back for trial with a declaration "that the agreement between the parties provides for a valuation by the valuers named therein or a majority of them and expresses the true agreement between the parties."

CAN.

S. C.

CAMPBELLFORD LAKE ONTARIO, ETC., R. CO. v. MASSIE.

Davies, J.

The question argued before us is whether the agreement of reference in question provides for an arbitration or for a valuation and whether it can be fairly construed as providing for a decision by any two of the valuators named or must be unanimous.

I think this case is one of those intermediate cases referred to by Lord Esher in *In re Carus-Wilson and Greene*, 18 Q.B.D. 7, where though a dispute has actually arisen it is not intended that the persons appointed to decide it shall be bound to hear evidence and that it must be decided not on any general principle, but on its own particular circumstances.

Reading the agreement as a whole and with reference to the subject-matter of the reference and the circumstances under which it was entered into, I have reached the conclusion above stated.

The question to be determined by the valuators was the "amount of compensation for land and damages which the respondents were entitled to as owners of lands taken by the appellate railway company."

The agreement named three "valuers" to whom that question was referred. It provided that if the valuer appointed by either party died he might substitute a new valuer, and if the "third valuer" died the other valuers might agree upon a third valuer in his stead, "and in that case the decision of any two of the valuers should be conclusive and binding without appeal." Then follows a covenant that the decision of the valuers should be observed and should be binding and conclusive upon the parties and "should not be subject to appeal from the decision of the said valuers or any two of them."

The agreement further provided that

> the valuers may view the property and may at their discretion call such witnesses and take such evidence or statements on oath or otherwise as they or *a majority of them* may think proper and shall give such weight, if any, to such evidence or statements as they in their discretion think proper.

Considering the one thing referred to them, namely, the fixing of the compensation to be given the land-owner for his land taken and damages sustained, the fact not without significance that the parties are called "valuers" all through the instrument and not arbitrators, and the special provision that the valuers might view the premises and decide the question submitted to them without the aid of witnesses, or if they determined to do so might hear statements from witnesses not under oath, I reach the conclusion

that the submission was a valuation only and not an ordinary judicial arbitration.

Then as to the power of two of them to make a binding decision, I revert again to the provision that in case of the death or incapacity of the third named valuer, Judge Morgan, and the inability of the two remaining valuers to agree upon an amount, it was provided that they might agree upon a third valuer, and in that case, that is where a third valuer was appointed by the other two, the decision of *any two of the valuers* should be conclusive and binding without appeal.

I think that the appellant attaches more weight to this change of language than it deserves. It seems absurd and without reason to hold that in the case of the *named* valuers unanimity should be required, while in the other case of the death or incapacity of one of the named valuers, and the appointment in his place of a third by the other two, such unanimity was dispensed with. It is clear that in the latter case any two of the valuers could make a final and conclusive decision and if it was intended to change that important fact with respect to the decision of any two of the named valuers, very clear and explicit language would be required to shew such change.

As I have said, while the language used is inapt I think it fairly bears the construction placed upon it by Mr. Justice Hodgins speaking for the Appellate Division, and that it may fairly be paraphrased thus, "shall be final and conclusive and shall not be subject to appeal."

For these reasons I would dismiss the appeal with costs.

IDINGTON, J., for reasons given in writing, was also of opinion that the appeal should be dismissed. Idington, J.

DUFF, J.:—I think the appellants are entitled to have their motion to set aside the award heard and disposed of; but as a majority of the Court are for dismissing the appeal, it is not necessary to consider what would be the most convenient form of order for giving effect to the view above expressed. Duff, J.

ANGLIN and BRODEUR, JJ., were also of opinion that the appeal should be dismissed. Anglin, J. Brodeur, J.

*Appeal dismissed with costs.**

*On the same day judgment was given in *Campbellford, etc., Railway Co.* v. *Laidlaw*, in which the court held that a similar agreement was a submission for valuation only, affirming the judgment of an Appellate Division (19 D.L.R. 481, 31 O.L.R. 209).

SASK.

S. C.

BOYD v. DEAN.

Saskatchewan Supreme Court, Newlands, J. February 13, 1915.

1. WRIT AND PROCESS (§ II A—16)—SERVICE OUT OF JURISDICTION—RENEWAL OF WRIT—NEW AVERMENTS.

If a material representation upon which the leave to serve out of the jurisdiction was obtained in the first instance turns out to be unfounded, the plaintiff ought not to be allowed, when an application was made by the defendant to discharge the order for the issue of the writ and service, to set up another and a distinct cause of action which was not before the Judge upon the original application.

[*Parker* v. *Schuller*, 17 T.L.R. 299, referred to.]

Statement

APPEAL from decision of Acting Master in Chambers.

P. H. Gordon, for appellant.

V. R. Smith, for plaintiff.

Newlands, J.

NEWLANDS, J.:—This is an appeal from the decision of the Acting Master in Chambers on an application to set aside a writ for service out of the jurisdiction, on the ground that defendant has assets to the extent of $200 in the province.

The affidavit upon which the order was granted stated that the plaintiff was advised and believed that the defendant had on deposit $4,300 in the Merchants Bank of Canada at Regina. As this application came under sub-section 9 of Rule 23, this was the only ground that gave the Court jurisdiction. Upon this affidavit the Master ordered the issue of the writ. The defendant moved to set aside the service of the writ upon him on the ground that the above statement was not correct and he swore that the money in question did not belong to him and was held by the bank in escrow, to pay to another party on the performance of certain conditions. This ground of jurisdiction having failed, the plaintiff then set up that defendant had an equitable interest in certain real estate in the province worth more than $200.

That such an interest would be assets under the meaning of that rule I have no doubt, but I am of the opinion that plaintiff having got his order upon one state of facts cannot now, when he finds that they are untrue set up another state of facts to give the Court jurisdiction. He must stand or fall upon the grounds upon which the order was granted.

In *Parker* v. *Schuller et al.*, 17 T.L.R. 299, the Court of Appeal so held. Romer, L.J., at page 300, says:—

SASK.

S. C.

BOYD v. DEAN.

Newlands, J.

Moreover, in my opinion, an application for leave to issue a writ for service out of the jurisdiction ought to be made with great care and looked at strictly. If a material representation upon which the leave was obtained in the first instance turns out to be unfounded, the plaintiff ought not to be allowed, when an application was made by the defendant to discharge the order for the issue of the writ and the service, to set up another and a distinct cause of action which was not before the Judge upon the original application.

I am therefore of the opinion that the appeal should be allowed, and that the order for and the service of the writ should be set aside with costs.

Appeal allowed.

ROTHESAY PARK COMPANY v. MONTGOMERY BROS.

SASK.

S. C.

Saskatchewan Supreme Court, Lamont, J. February 8, 1915.

1. BROKERS (§ II B—10)—REAL ESTATE BROKERS—COMPENSATION TO—UPON DEFAULT OF PURCHASER.

In the absence of any stipulation to the contrary, a real estate agent is entitled to his commission although the vendor has taken back the property and forfeited the purchaser's rights under the contract of sale for default in paying the second instalment of purchase money.

[*McCallum* v. *Russell*, 2 S.L.R. 444, followed.]

ACTION for an accounting.

Statement

N. R. Craig, for plaintiff.

G. E. Taylor, K.C., for defendant.

LAMONT, J.:—This is an action in which the plaintiffs seek to have the defendants account for moneys collected by them for and on behalf of the plaintiffs. The defendants admit having made the collections for the plaintiffs, but contend that the plaintiffs owe them a large sum of money as and by way of commission on sales of land made by them as agents for the plaintiffs.

Lamont, J.

The plaintiffs listed their land with the defendants for sale, and made them their agents to find purchasers. The defendants' remuneration was to be the difference between the selling and the net prices as set out in the schedules to the agreement. For this remuneration the defendants were to find purchasers, and they agreed that they would collect the instalments of purchase-money from the purchasers found by them. They found purchasers for some twenty parcels of land in respect of which

SASK.

S. C.

ROTHESAY PARK CO. v. MONTGOMERY BROS.

Lamont, J.

commissions are claimed. The purchasers paid the first payment, but, failing to pay the second, the plaintiffs cancelled the contracts. The plaintiffs having cancelled the contracts and thus prevented the defendants from collecting the balance of the instalments, the defendants contend they are entitled to their full commission.

In *McCallum* v. *Russell*, 2 S.L.R. 444, the Court *en banc* held that an agent was entitled to his commission where the vendor cancelled the contract, even though the agent had agreed to wait for his commission until the purchaser obtained a loan or sold the property. That case, in my opinion, is in point here. It was contended by the plaintiffs that, under the terms of this agreement the defendants' remuneration became due only as the instalments were paid. In my opinion this view cannot be supported. When we look at the terms upon which the agreement bound the defendant to sell, and the clause by which the agreement was terminated at the expiration of six months unless renewed, it seems clear that it could not have been contemplated that the defendants' remuneration would depend upon their collecting the subsequent instalments, for in that view, if the plaintiffs did not renew the agreement, the defendants' commission, excepting one-half of the first payment, would never become due. Furthermore, if such had been the intention, the agreement should have so stipulated. The plaintiffs stated that the cancellation notices sent out were merely for the purpose of stimulating collections, and that the defendants agreed to their being sent out for this purpose. The correspondence does not bear out this assertion. The defendants' letter of August 7, 1913, which refers expressly to some of the notices of cancellation in respect of which commission is now claimed, is a protest against these notices being sent out. In their reply, under date of August 14, the plaintiffs do not say that the defendants agreed thereto, but seek to defend their action in sending out the notices on the ground that they needed the money. I am therefore of opinion that the defendants are entitled to their commission on the sales made by them which were cancelled by the plaintiffs.

It was contended that the claim of the defendants for their

commission should have been by way of counterclaim. The defendants set up all the facts, but they did not expressly counterclaim for their commission. As the plaintiffs are in no way prejudiced, I will treat the matter as though the defendants had counterclaimed for their commission. The plaintiffs will therefore have judgment for the amount admitted due by the defendants, with costs, and the defendants will have judgment on their counterclaim for the amount of their commissions, with costs, with the right to set the same off as against the plaintiffs' judgment. If the parties cannot agree as to the respective amounts due to each of the parties, there will be a reference to the local registrar to ascertain the same.

Judgment accordingly.

SASK.
S. C.
ROTHESAY PARK CO. v. MONTGOMERY BROS.
Lamont, J.

BANK OF OTTAWA v. STAMCO LIMITED AND BANK OF BRITISH NORTH AMERICA.

SASK.
S. C.

Saskatchewan Supreme Court, Elwood, J. April 10, 1915.

1. ESTOPPEL (§ III A—41*a*)—ESSENTIALS OF—CHANGE OF POSITION.

To found an estoppel it must be shewn that the party for whose benefit it is claimed altered his position because of the representation or act of the other.

2. EVIDENCE (§ IV K—440)—DOCUMENTARY EVIDENCE—ADMISSIBILITY OF LETTER.

Marking a letter with the words "without prejudice" does not necessarily exclude it from being given in evidence against the writer; the letter is to be excluded if the writer is in dispute or negotiation with another and is offering terms without prejudice for the settlement of the dispute or negotiation, but to determine whether these conditions exist the trial Judge may look at the letter marked "without prejudice."

[*Re Daintrey*, [1893] 2 Q.B. 119, distinguished.]

ACTION on a promissory note and counterclaim. Statement

H. Y. MacDonald, K.C., and *A. R. Tingley*, for plaintiff.

P. E. Mackenzie, K.C., for defendant bank.

ELWOOD, J.:—At the conclusion of the trial hereof, it was practically conceded on the argument that the only question to be determined was whether or not the plaintiff, by its letter to the defendant bank of September 11, 1914, is estopped from alleging that Stamco of Regina, Limited, was at the time of the giving of the mortgage referred to in the pleadings in insolvent circumstances or unable to pay its debts in full or knew that it Elwood, J.

SASK.

S. C.

BANK OF OTTAWA v. STAMCO LIMITED AND BANK OF BRITISH NORTH AMERICA.

Elwood, J.

was on the eve of insolvency. It was contended that the question of estoppel was not sufficiently raised by the pleadings. I am of opinion that that question is sufficiently raised by the pleadings. The letter in question contains in print the following: "Without prejudice to the bank or the writer." *In re Daintrey, ex parte Holt*, [1893] 2 Q.B. 116, Vaughan-Williams, J., at p. 119, says as follows:—

> In our opinion the rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation, and it seems to us that the Judge must necessarily be entitled to look at the document in order to determine whether the conditions, under which alone the rule applies, exist.

The above seems to me to be directly in point; and I hold on the authority of the above that the letter which is claimed to constitute the estoppel was not privileged.

The evidence shews that some time in August, 1914, the branch of the defendant bank at Saskatoon, which had a large claim for moneys advanced against Stameo Limited, which was a different corporation from Stameo of Regina Limited, received from Stameo Limited as collateral to its indebtedness four promissory notes made by Stameo of Regina Limited in favour of Stameo Limited. One of these promissory notes for $500 was overdue, another one fell due on September 4, and two others at later periods. On September 1, Stameo of Regina executed to Stameo Limited, as security for the payment of the four promissory notes, the mortgage complained of. On or about September 7, the defendant bank wrote to Stameo of Regina Limited demanding payment of the note for $3,061.15, which fell due on September 4. On September 9, Stameo of Regina Limited wrote stating that they had made direct settlement with Stameo Limited by way of the mortgage. On the following day the branch of the defendant bank at Regina wrote to the plaintiff bank asking for a report as to the means, standing, etc., of Stameo Limited of Regina. The result was the letter of September 11, 1914, which was communicated to the defendant bank at Saskatoon. On September 15, Stameo Limited assigned to the defendant bank the mortgage complained of. This was received by the defendant bank without any knowledge or notice

of any defect in the mortgage and in the belief that Stameo of Regina Limited was solvent; and I find as a fact that that belief was at any rate largely caused by the letter of September 11. That letter is as follows:—

> The most recent statement of the affairs of this firm is dated December 31, 1913, in which they shew a paid-up capital and surplus of $29,092.76. They appear to be doing a very good business and are at least holding their own. Since Stameo Ltd. at Saskatoon have been closed down, this branch has enjoyed a great deal of business which otherwise would have gone to the parent company. They are suffering from a lack of capital, but as the business is now managed in a very efficient and economical manner, they should make money.
>
> For The Bank of Ottawa,
> Broad St., Regina.
> E. R. H. SMITH,
> *Manager.*

I also find as a fact that the defendant bank would not have accepted the mortgage had it not believed Stameo of Regina was solvent. On September 21, the defendant bank wrote to Stameo of Regina advising of the assignment of the mortgage and asking to have a fresh mortgage made direct to the bank. On September 22 Stameo of Regina Limited wrote advising the defendant bank that a new mortgage could not be given; and in that letter is the following:—

> At the time I executed the mortgage, our bank here was going to have same set aside, which is in their power to do within a certain time, but as I explained that the mortgage was to Stameo Limited, covering our account, and that they had agreed to accept same, they allowed it to rest. You will readily see that it is absolutely impossible for me to execute a new mortgage in place of same. . . . The mortgage given to Stameo Limited is good, as our property can easily stand same, and if our bank here takes no further steps Stameo Limited has excellent security.

At the time that the mortgage was given, September 1, the plaintiff objected to Stameo of Regina Limited about the mortgage, but they finally consented to let it stand, as their solicitor informed them that they could attack it within sixty days, and it was also anticipated that before the sixty days the plaintiff would be able to realize its claim by various assignments which it held. On September 5, the plaintiff obtained from Stameo of Regina Limited an hypothecation of collections and an assignment of accounts. Nothing further was done towards having a new mortgage executed to the defendant bank. The assignment

SASK.

S. C.

BANK OF OTTAWA v. STAMCO LIMITED AND BANK OF BRITISH NORTH AMERICA.

Elwood, J.

of September 15 was not registered: the evidence is not clear as to why, but I gather on account of some defect in the assignment which prevented its being registered. On October 23 a fresh assignment was executed, which was on the same day sent for registration, and was registered. On October 24, the defendant bank received from the solicitors of the plaintiff a letter giving notice that the mortgage in question would be attacked on the ground that it was a preference and contrary to the Act respecting Assignments and Preferences by Insolvent Persons, ch. 142 R.S.S. The defendant bank had no notice that there was any conditions attached to the consent by the plaintiff to the execution of the mortgage. On October 20, a fire destroyed a portion of the property of Stamco of Regina, Limited, and the insurance, amounting to about $4,000, was subsequently paid to the plaintiff. The evidence does not shew how it was that the plaintiff obtained this insurance.

I am of the opinion that the letter of September 11, constituted in effect a statement that Stamco of Regina Limited was solvent, and I am also of opinion that any person receiving that letter would come to the conclusion that Stamco of Regina Limited was solvent. The evidence shews that in May, 1914, the line of credit which Stamco of Regina Limited had with the plaintiff bank had expired, that the bank refused to renew the credit, and that the reason it did refuse to renew it was that the report referred to in the letter of September 11, 1914, did not shew a satisfactory condition of the affairs of Stamco of Regina Limited. The manager, who signed this letter and who gave evidence at the trial, stated that he was satisfied no other bank would take the account. On September 5, as I have above stated, the bank took an assignment of practically all the assets of Stamco of Regina Limited; and under all of the circumstances I am of opinion, and find, that when the letter of September 11, was written, the defendant bank knew and believed that Stamco of Regina Limited was not solvent, and I also find that the letter of September 11, was not a fair or true report of the financial condition of Stamco of Regina Limited. I find, as the result of the receipt of that letter, and by accepting the assignment of the mortgage, the position of the defendant bank was altered. It

is quite true that a day or so after September 22, the defendant bank had before it the letter of Stameo of Regina Limited from which I have quoted above, but that letter, it will be observed, conveyed the information that the plaintiff had decided to let the mortgage stand, and although it refers to the possibility of the bank attacking the mortgage, yet, in view of the letter of September 11 from the bank it might quite well be that the defendant bank would not imagine that it would be attacked on the ground that it was a fraudulent preference. On September 28, the defendant bank wrote to Stameo of Regina Limited to see the Bank of Ottawa and explain matters, and nothing further appears to have been heard until October 24, and after the fire which had destroyed part of the assets of Stameo of Regina Limited. In the meantime the plaintiff had abstained from taking any proceedings under the overdue notes against Stameo of Regina Limited which they held.

In *Knights* v. *Wiffen*, L.R. 5 Q.B. 660, the facts were briefly as follows: the defendant, having a quantity of barley in sacks lying in his granary, which adjoined a railway station, sold 80 quarters of it to M. No particular sacks were appropriated to M., but the barley remained in the granary subject to his orders. M. sold sixty quarters of it to the plaintiff, who paid him for it and received from him a delivery order addressed to the stationmaster, as was usual in such cases. The plaintiff sent this order in a letter to the stationmaster, saying, "Please confirm this transfer." The stationmaster shewed the delivery order and the plaintiff's letter to the defendant, who said, "All right, when you get the forwarding note I will put the barley on the line." M. became bankrupt, and the defendant, as unpaid vendor, refused to deliver the barley when the forwarding note was presented to him by the stationmaster acting for the plaintiff. The evidence shewed that prior to the presentation of the delivery order the plaintiff had paid M. for the barley sold to the plaintiff. At p. 665 Blackburn, J., says:—

> In the present case the money had been paid before the presentation of the delivery order, but I think, nevertheless, that the position of the plaintiff was altered through the defendant's conduct. The defendant knew that when he assented to the delivery order the plaintiff as a reasonable man would rest satisfied. If the plaintiff had been met by a refusal

SASK.

S. C.

BANK OF OTTAWA v. STAMCO LIMITED AND BANK OF BRITISH NORTH AMERICA.

Elwood, J.

on the part of the defendant, he could have gone to Maris and have demanded back his money. Very likely he might not have derived much benefit if he had done so, but he had a right to do it. The plaintiff did rest satisfied in the belief, as a reasonable man, that the property had been passed to him. If once the fact is established that the plaintiff's position is altered by relying on the statement and taking no steps further, the case becomes identical with *Woodley* v. *Coventry* and *Hawes* v. *Watson*. . . . In the present case the plaintiff altered his position relying on the defendant's conduct when the delivery order was presented. The plaintiff may well say, "I abstained from active measures in consequence of your statement, and I am entitled to hold you precluded from denying that what you stated was true."

See also judgments in the same case of Mellor, J., and Lush, J.

The above case seems to me to be the strongest possible authority for the proposition that in this case the position of the defendant bank had been altered, and I so hold and find. The result will be that there will be judgment dismissing the plaintiff's claim with costs.

It was practically conceded at the trial that the defendant bank could not succeed on the counterclaim, and there will therefore be judgment dismissing the counterclaim with costs.

Judgment accordingly.

ALTA.

S. C.

MAGRATH-HOLGATE v. COUNTRYMAN.

Alberta Supreme Court, Ives, J.

1. DEDICATION (§ I B—12)—SELLING LOTS WITH RESPECT TO MAP OR PLAT—SUBDIVISIONS—RIGHTS OF PURCHASER.

The vendor of six acres of land sold *en bloc* has no right afterwards to register a subdivision of the land with its incidental concession of lanes and streets through it against the will of the purchaser, although the contract contained a clause "plan to be similar to City View addition adjoining."

2. SPECIFIC PERFORMANCE (§ II—40)—DECREE—RIGHT OF VENDOR TO—CONFIRMATION OF TITLE—RIGHT OF VENDEE FOR COSTS PRO-TANTO.

The vendor suing for specific performance may make title even at the trial and if he does so and there has been no repudiation, he is entitled to a decree for specific performance, but the defendant purchaser where title has not previously been made is entitled to costs up to and including confirmation of report on title.

[*Halkett* v. *Dudley*, 76 L.J. Ch. 330, [1907] 1 Ch. 590, followed].

Statement

ACTION by vendor for specific performance.

H. H. Parlee, K.C., for plaintiffs.

G. B. O'Connor, K.C., for defendant, Manning.

G. E. Winkler, for defendant, Countryman.

IVES, J.:—On August 6, 1912, by agreement in writing, the plaintiff agreed to sell to the defendants certain lands described in the agreement. The purchase price was $6,000, of which $2,000 was paid down, or within a few days of the agreement, and the balance was to be paid in three deferred instalments together with interest at 8 per cent. The final payment matured on February 6, 1914. Only $300 has been paid on the purchase price in addition to the down payment of $2,000.

The plaintiffs claim a balance of $4,306.20 and specific performance of the agreement by the purchasers.

In February, 1913, the plaintiffs caused the said quarter section to be subdivided and registered the plan thereof as 6106 A.O., and in this subdivision the lands in question were included and became lots 23 to 44 inclusive in block 7 and lots 1 to 44 inclusive in block 8.

It is not clearly shewn when defendants first became aware of the subdivision, but in any event the fact came to their knowledge in July, 1913, when one Smith, a real estate agent, with whom defendants had listed the lands for sale, ascertained, on going to the Land Titles Office, that a subdivision had been made. Prior to the plan being filed the defendant Countryman had transferred her interest in the lands and agreement to her co-defendant Manning, who had assumed her obligations thereunder. I cannot construe the agreement to give plaintiffs any right whatever to subdivide the land sold *en bloc*. I find, therefore, that the land must be delivered *en bloc*.

Certainly there is no refusal here on plaintiffs' part to perform their part of the agreement.

Nothing further appears to have been done or any step taken until the action was commenced in June, 1914.

At the trial, an order made by the Chief Justice, and dated November 25, 1914—two days before the hearing—was filed by plaintiffs.

This order cancels the plan in so far as the lands in question are concerned, and enables the plaintiffs to deliver title to the six acres *en bloc*, as provided in the agreement. Each party was allowed to amend their pleadings to meet the result of the cancellation of the plan. Upon the authority of *Halkett* v. *Dudley*, 76 L.J. Ch. 330, 336, [1907] 1 Ch. 590, and the cases cited there

ALTA.

S. C.

MAGRATH-HOLGATE v. COUNTRYMAN.

Ives, J.

in the judgment, it would seem very clear that the vendor may make title even at the trial, and if he does so and there has been no repudiation, the vendor is entitled to a decree for specific performance of the contract, but the defendant purchaser is entitled to costs up to and including confirmation of report on title.

The title of plaintiffs is admitted, and they will have judgment against the defendants for specific performance of the contract.

Upon the admission of facts filed by defendant Manning, the defendant Countryman shall have judgment against him for such sum as may be paid by her under plaintiffs' judgment with costs; the plaintiffs to pay defendant Manning the costs of this action up to and including the trial.

Counterclaim of defendant Manning is dismissed without costs.

Judgment for specific performance.

COLE v. REED.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Martin, JJ.A.

1. CONTRACTS (§ IV A—315)—PERFORMANCE—BREACH—DISCLOSING TERMS.

Parties to a joint venture owe an obligation to each other not to do any act which will prevent or render less probable the contingency which will make the venture successful, and the one who throws over the opportunity of himself closing the transaction in which he is to divide the profits with another working in the same interest so as to enable a third party to secure the benefit which is the object of the venture because of the latter's offer to divide with him may be compelled to pay out of the profits so received to his partner in the venture the amount which the latter would have been entitled to receive had the defendant made the deal himself.

[*Inchbald* v. *Western, etc., Coffee Co.*, 17 C.B.N.S. 733, referred to.]

Statement

APPEAL from the judgment of Hunter, C.J.B.C.

J. W. de B. Farris, for appellant, plaintiff.

Ritchie, K.C., for respondent, defendant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The plaintiff, who appears to have had some influence with the Kitsilano band of Indians, entered into an arrangement with the defendant, the effect of which, as I gather it from the evidence read, in the light of the conduct of the parties, was that if they could bring about a sale to the province of the rights of the Indians in their reserve, from which they anticipated a large profit, the plaintiff should receive from the

defendant $20,000. The plaintiff had already opened negotiations with the Indians and with the Attorney-General, acting for the province, and in furtherance of their scheme he brought about a meeting of the Indians on the reserve, at which, and at subsequent meetings, the plaintiff and defendant attended. In further pursuance of the scheme, defendant had an interview with the Attorney-General, and ascertained from him the sum which the province would likely pay for the Indians' rights. At this interview the Attorney-General informed the defendant that H. O. Alexander had in the previous year devoted some time to a like enterprise without success, and intimated that defendant should associate Alexander with the present scheme. On his return from that interview the defendant informed plaintiff of this suggestion, to which he assented, and also mentioned it to Alexander. The latter professed to deride the idea that the plaintiff and defendant should reach an agreement with the Indians.

Defendant promised Alexander that if he, the defendant, succeeded, he would give half what he made to Alexander. This inspired in Alexander a reciprocal impulse of generosity, which led him to say a day or two later:—

> Reed, you made me a sporting proposition the other day. I will tell you what I will do if I ever put that through at any future day, I will give you half what I make.

Some days later plaintiff and defendant were negotiating with the Indians at a meeting of the band, and had reached a critical stage of the negotiations when defendant made an excuse, left the meeting, and returned to Vancouver, leaving the plaintiff with the Indians. On arriving at his house the defendant telephoned to Alexander that he had failed with the Indians. This was on Saturday night. On Monday or Tuesday Alexander got from defendant the form of agreement which defendant had been endeavouring to get the Indians to accept, and, taking defendant with him "as a witness," they attended a meeting of the Indians, which appears to have been a continuation of the one which defendant had left. They procured the exclusion of the plaintiff from the assembly, and secured the consent of the Indians to the contract in the form prepared by defendant, but on somewhat more liberal terms to the Indians.

The transaction was subsequently carried out by the Indians and the Provincial Government, and resulted in a profit to the

B. C.

C. A.

COLE v. REED.

promoters of slightly under $80,000, of which Alexander made defendant a "present" of half. When the plaintiff demanded his share defendant dismissed him with this letter:—

> This is to confirm what I have stated to you, namely, that Alexander does not recognise you at all in the transfer of the Kitsilano reserve.

Macdonald, C.J.A.

Plaintiff then brought this action for the said $20,000.

The impression which the evidence leaves on my mind is very unfavourable to the defendant. I do not suggest that Alexander was a party to defendant's attempted betrayal of the plaintiff: he merely assisted in bringing the sale to completion, and divided with defendant the profit which resulted from that sale. The defendant in effect transferred the conduct of the matter to Alexander, because, as I am convinced, from what he learned at the meeting of the band he felt that his hands would thereby be strengthened.

But, assuming that but for Alexander's assistance the Indians could not have been induced to make the sale, the defendant could not rid himself of his obligations to the plaintiff by professing to relinquish the transaction and taking advantage of Alexander's "sporting proposition" of a "present" of half the profits. Defendant may have concluded that plaintiff's assistance was of little or no value; indeed, that appears to have been the learned trial Judge's view of it; but that cannot affect the plaintiff's rights, which depended not on the value or degree of his influence with the Indians but on the success of the common enterprise.

The appeal should be allowed, and judgment should be entered for the plaintiff for $20,000 and costs here and below.

Irving, J.A.

IRVING, J.A., for reasons given in writing, concurred with MACDONALD, C.J.A.

Martin, J.A. (dissenting)

MARTIN, J.A., dissented.

Appeal allowed.

WEYBURN SECURITY BANK v. MARTIN AND DIEMERT.

SASK.
S. C.

Saskatchewan Supreme Court, Brown, J. February 24, 1915.

1. JUDGMENT (§ I F 1—46)—SUMMARY JUDGMENT—LIQUIDATED DEMAND.

An application for summary judgment upon a liquidated demand should not be granted where there is any serious conflict as to matter of fact, or any real difficulty as to matter of law.

[*Jacobs* v. *Booth's Distillery Co.*, 85 L.T. 262, followed.]

Statement

APPEAL from order of the Local Master on an application for summary judgment.

J. C. Martin, for appellants.

Williams, for respondents.

Brown, J.

BROWN, J.:—This is an appeal on the part of the defendants Martin from an order of the Local Master at Weyburn on an application by the plaintiffs for summary judgment. The action is for the amount due on a promissory note which the defendants Martin made in favour of the defendant Diemert. The plaintiffs allege that they are the holders in due course of this note, and that they obtained same before maturity in good faith for value and without notice of any defect in title. The appellants set up that the note was given as collateral security for the purchase price of land, that Diemert covenanted to give good title to the land free of encumbrance, and that as a matter of fact he cannot give good title. They allege that the plaintiffs were fully aware of the conditions under which the note was given to Diemert (and the material as a whole would indicate that such is the case). On the argument before the learned Local Master, it seems to have been admitted that the real trouble is that while Diemert can give title he is not able to give it free of encumbrance. Now, as between Diemert and the Martins, the Court would not give judgment in Diemert's favour for the amount of this note without seeing that they were protected in getting a good title free of encumbrances. The Martins would be entitled to defend any action which he might bring in respect to the notes on the ground which they have set up, and it seems to me that in parting with this note knowing that his title was encumbered and that he was not able to lift such encumbrance, Diemert might well be said to have committed a breach of faith. But do these allegations also entitle the Martins to defend as against the plaintiffs? Section 56 of the Bills of Exchange Act reads as follows:

SASK.

S. C.

WEYBURN SECURITY BANK v. MARTIN AND DIEMERT.

Brown, J.

A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:

(a) That he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact;

(b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

2. In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

As the bank had full knowledge of the circumstances surrounding the making and delivery of this note, and took the same with such knowledge, it seems to me to be at least arguable that they took it subject to the same equities as Diemert held it subject to. I am not deciding that this is not a good defence; I do not feel called upon to do so on this application. It is sufficient for the purpose of the application if the defendants have a fairly arguable defence. It has been laid down by several authorities that the summary jurisdiction under which applications of this kind are made must be used with great care; that a defendant ought not to be shut out from defending unless it is very clear that he has no defence in the action under discussion. Summary judgments should not be granted when there is any serious conflict as to matter of fact, or any real difficulty as to matter of law: *Jacobs* v. *Booth's Distillery Co.*, 85 L.T. 262; *Sheppards* v. *Wilkinson*, 6 Times R. 13; *Crawford* v. *Gillmor*, 30 L.R. (Ir.) 238; *Alloway* v. *Pamranke*, 1 S.L.R. 127; *Graves* v. *Mason*, 1 A.L.R. 250.

The Local Master has pointed out in his judgment certain defects in the appellant's statement of defence, but these defects should not, in my opinion, deprive him of the right to defend and of so amending his defence as to harmonize with the facts.

In the result the appeal will be allowed, with costs, and the plaintiff's application for summary judgment dismissed with costs, the appellants to have leave to amend their defence as they may be advised.

Appeal allowed.

STANOSZEK v. CANADIAN COLLIERIES.

B. C.
C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. April 6, 1915.

1. NEW TRIAL (§ II—9a)—IMPROPER ADMISSION OF EVIDENCE—EXTRACT OF MINING REPORTS.

It is a ground for a new trial in an action for injury at a mine through alleged breach of statutory rules, that the trial Judge gave credence to extracts from the mining company's report to the government, although the report itself was not put in evidence, the plaintiff not wishing to be bound by all of the statements made therein, and the defendant company objecting that the entire report must go in or none of it.

Statement

APPEAL by defendant from decision of Murphy, J.

V. P. Harrison, for appellant.

A. Leighton, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A., concurred with IRVING, J.A.

Irving, J.A.

IRVING, J.A.:—The accident in respect of which this action was brought, took place on Monday morning shortly before 11 o'clock. The negligence charged is a breach of the duty imposed by Rule 12, which rule forbids a second hole being loaded before the adjoining hole has been fired. The plaintiff's case was that on Friday night four holes had been drilled in the face of the coal and that they had all been loaded in defiance of Rule 12. That of these four holes one had exploded, the next had missed fire, and of the other two one was allowed to remain loaded from 11 o'clock on Friday night, when the misfire took place, until Monday morning when the accident occurred by which the plaintiff was injured.

The misfire incident took place on the 3-11 p.m. shift on Friday, when Schultz and Povitch were working, Sutherland being the fire boss. They were succeeded on the 11 p.m. Friday to 1 a.m. Saturday shift by the plaintiff and Savonick, Pickup being the fire boss on that shift. The 7 a.m. to 3 p.m. Saturday shift was taken by Schultz and Povitch with Sutherland as fire boss, and after 3 p.m. Saturday, no work was done in the mine, except an inspection which was conducted by Pickup. On the Monday morning the plaintiff and Savonick went on at 7 a.m. where they found a straight place with three cars of fallen stuff which they shovelled out. The plaintiff drilled

B. C.

C. A.

STANOSZEK v. CANADIAN COLLIERIES.

Irving, J.A.

four holes which were duly exploded. He then says he began the 5th hole about 10.30 when the accident occurred as he was making a hole in the face for his drill.

The defence was that all the holes put in on Friday had been exploded, and, further, that all the coal in the four holes loaded on the Friday night had been worked out between 11 o'clock Friday night and 3 o'clock Saturday morning, so that the face had been advanced to such an extent that it was impossible for any part of the loaded holes to remain. Further, the defence undertook the task of shewing that the accident was due to the explosion of a cap on the floor and not from a hole in the face. There was much evidence given on both sides and, in ordinary cases, the finding of the learned trial Judge would prevail: *Lodge Holes Colliery Co.* v. *Wednesbury Corpn.* [1908] A.C. 326; *Khoo Sit Hop* v. *Lim Thean Tong*, [1912] A.C. 325.

In this case there occurred something which I think makes the rule laid down in those cases inapplicable.

The first witness for the defence was Clinton, the superintendent for the defendant company. On his cross-examination the following occurred:—

Q. You have to make a report to the Government as to the cause of the accidents? A. We do.

Q. And you always make a pretty full enquiry? A. We try to; we cannot always get a full account, but we have to make that within 24 hours, and sometimes a report is made out and afterwards we find out some other information that it might have been caused otherwise.

Q. You know that there was a missed shot there? A. I know they had a missed shot, but I also know that shot was cut out and the place was driven eight or nine feet further on, between the date of this missed shot, and the date of the accident, far beyond where that accident could have been.

Q. Did you know, when you made the report to the Government, that it was reported that it was an old missed shot? A. Peacock made that report; he was manager at the time at No. 8.

Q. And he signed the report? A. He signed the report, or at least I expect he did. I could tell if I saw his signature, probably.

Q. This is a copy furnished me by your solicitor? A. Yes, there is no doubt he signed it.

Mr. Leighton: I want to put in part of that. It is partly in the form of question and answer. I do not want to be bound by all the answer.

Mr. Harrison: I submit the whole of it should go in.

Q. This is correct, is it: "There was an old missed shot, powder never shot in Joe Stanoszek's place and as he was in the act of mining the place, must have struck the piece of explosive with the point of his pick, thus "causing the injury." A. That is absolutely wrong, but I believe he made that report at the time, believing that he was right.

COURT: That is the report you say that was sent to the Government?

Mr. Leighton: Yes, my Lord.

Mr. Harrison: But that he said further that he struck this with his pick; I submit that the whole document should go in, or nothing. It is what he reported from start to finish, or nothing at all; he cannot take a few words here and there.

COURT: Are you going to call Peacock?

Mr. Harrison: No, he is not here.

COURT: If you put the report in, you will have to put it all in.

Mr. Leighton: I have asked if that is a correct statement in the report that was made, and he says it is.

Witness: We afterwards found that that statement was not so.

Mr. Leighton: But that is the report he made at the time? A. That is the report that went into the Government.

Q. Where is Mr. Peacock now? A. He is at Cumberland.

As I understand the ruling of the learned Judge, the report was *not* to go in unless the whole of it went in: see also p. 50, line 27, where the Court says you cannot put in part and not the other. But whether this is right or not the Judge looked at the report—either the whole of it, or the part of it read to the witness—and in weighing the testimony of Pickup, the man who was present immediately after the misfire took place on Friday and who made the inspection of the face on the Sunday, whose evidence, if believed, strongly supported the defendants' case, came to the conclusion that he (Pickup) was unworthy of belief and that he (Pickup) was entirely responsible for the accident. He proceeded to say that he believed the plaintiff the more readily because of the report that was made to the Government.

As this report is not in the appeal-book we must, I think, infer that the conclusion was reached by the learned Judge acting on the extracts of the report read by the counsel.

In my opinion, that was a wrong way to deal with the report for three reasons. The first is that the report was not in; the second is that you cannot seize on a portion of a report and decide a case on that without reference to the other statements in the report; and the third is that Collins had no authority

B. C.

C. A.

STANOSZEK v. CANADIAN COLLIERIES.

Irving, J.A.

to make an admission that the part read to him by counsel for defence was the cause of the accident.

As a matter of fact, he made no such admission. He asserts that the extract read appeared in the report and also stated that the report contained this, the plaintiff stated he did "not know what had happened, unless he struck a cap with his pick."

The report having been misused in the way I have described and the probabilities (of which we can judge as well as the learned trial Judge) being that the face had been advanced, I think we should order a new trial.

Martin, J.A.

MARTIN, J.A., agreed that their should be a new trial.

Galliher, J.A. (dissenting)

GALLIHER, J.A., dissented.

McPhillips, J.A.

MCPHILLIPS, J.A., would dismiss the appeal—no written reasons.

New trial ordered.

SASK.

S. C.

SHIERMAN v. HARRIS AND CRASKE.

Saskatchewan Supreme Court, Lamont, J. April 16, 1915.

1. INSURANCE (§ VI—240)—FIRE INSURANCE — PROOF OF LOSS—STATUS OF LIABILITY.

A claim against an insurance company under a policy of fire insurance is not a debt due or accruing due until the amount of the loss is fixed; it is a claim of indemnity for loss, and until the loss is ascertained, by the admission of the company or otherwise, the claim under the policy is one of damages rather than of debt.

[*Hartt* v. *Edmonton Steam Laundry Co.*, 2 A.L.R. 130, applied.]

2. GARNISHMENT (§ III—66)—NON-APPEARANCE OF GARNISHEE—PRESUMPTIONS AS TO LIABILITY.

Where a garnishee fails to appear to a garnishee summons under the Saskatchewan Practice, his failure raises against him and in favour of the creditor the presumption that he owes the debtor the amount of the claim sued for, but such failure cannot be considered an admission of liability as against any one except the creditor in the particular case in which he failed to appear.

[*Dickson* v. *Van Hummell*, 16 D.L.R. 774, considered.]

Statement

APPEAL from an order of a local Master.

L. B. Ring, for appellant.

C. M. Johnston, for respondent.

Lamont, J.

LAMONT, J.:—On November 25, 1914, the plaintiff issued a garnishee summons and served the same upon the defendant,

SASK.

S. C.

SHIERMAN v. HARRIS AND CRASKE.

Lamont, J.

and the garnishees. Prior to this date a number of creditors had sued the defendant and garnisheed moneys supposed to be due from the garnishees to the defendants. The last of these, wherein one Mills was plaintiff, had been served on November 21, 1914. The garnishees did not appear to these summonses. A motion was made to set aside the summons on November 21, on the ground that at the time it was served there was no debt due or accruing due from the garnishees to the defendants. The learned Master found that no admission of liability had been made by the garnishees prior to November 28, and consequently that there was no garnishable debt due before that date. An appeal was taken from this order to the Chief Justice in Chambers, who dismissed the appeal. An application was then made to the Master for an order setting aside the garnishee summons of the plaintiff herein served November 25, on the same ground, that there was no debt due when the summons was served. No judgment had been signed against the garnishees. The Master ordered the summons to be set aside. From that order this appeal is brought.

For the plaintiffs it is contended that the order was wrong, for two reasons, (1) that the learned Master erred in finding as a fact that the garnishees had not admitted liability until November 28, 1914, and (2) that in any event the failure of the garnishees to file an appearance to a garnishee summons issued by one Mills, and served in March, 1914, was a sufficient admission of liability on their part to uphold the plaintiff's summons served November 25.

On the first of the above grounds the appellant must fail. The law is well settled that a claim against an insurance company under a policy of fire insurance for loss suffered is not a debt due or accruing due until the amount is fixed and liability therefor admitted by the company. In *Randall* v. *Lithgow*, 12 Q.B.D. 525, Williams, J., in giving the judgment of the Divisional Court, said:—

> In the first place it is clear that the claim of the judgment debtor Lithgow against the insurance company which resulted in an award in his favour was not at the date of the garnishee order an attachable debt. It is not a debt either present or accruing; it is a mere claim for unliquidated damages and was not the subject of attachment in the hands of the insurance company.

SASK.

S. C.

SHIERMAN v. HARRIS AND CRASKE.

Lamont, J.

In *Hartt* v. *Edmonton Steam Laundry Company*, 2 A.L.R. 130, Harvey, J., said:—

> It seems clear on principle as well as on authority that the claim against the insurance company under such circumstances is one of damages and not of debt. It is a claim of indemnity for loss, and the fact that it arises out of a contract does not make it anything else. It might at a certain stage be converted into a debt by the amount being ascertained and agreed on and liability admitted, but these circumstances do not exist here.

No garnishable debt, therefore, existed prior to the admission of liability by the company which the Master found (and properly so) was first made on November 28.

Then was the failure of the company to file an appearance to the garnishee summons of Mills, served in March, 1914, an admission of liability binding on them as against the plaintiff? I am of opinion it was not. Where a garnishee fails to appear to a garnishee summons, his failure raises against him and in favour of the creditor a presumption that he owes the debtor the amount of the claim sued for. This presumption is sufficient to entitle the creditor to sign judgment in default against him. It may be said to be an admission of liability, which is the language used in *Dickson* v. *Van Hammell*, 16 D.L.R. 774. But it is an admission only in the sense that in the particular case in which he failed to appear the plaintiff may proceed upon the assumption that he admits liability. It cannot be considered an admission of liability in fact binding on the garnishee as against anyone except the creditor in the particular case in which he failed to appear. Even against such creditor it is a presumption which may be rebutted upon an application to set aside the judgment by explaining the failure to appear and shewing that in fact no debt was due or accruing due to the debtor when the summons was issued.

The appeal will therefore be dismissed with costs.

Appeal dismissed.

MOORE v. DEAL.

B. C.

C. A

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. April 6, 1915.

1. STAY OF PROCEEDINGS (§ I—13)—NON-PAYMENT OF COSTS—SIMILAR ACTION.

To justify an order staying an action on the ground that costs awarded in favour of the same defendant against the same plaintiff in a previous action had not been paid, the second action must be for the same or substantially the same cause of action as the first.

[*Higgins* v. *Woodhall*, 6 T.L.R. 1, followed.]

APPEAL by plaintiff from the judgment of Morrison, J. Statement

Killam, for appellant.

Haviland, for respondent.

MACDONALD, C.J.A.:—I think the judgment appealed from was right in ordering that those portions of the statement of claim relating to the Copper Mountain, Copper Mountain No. 1, and Bank of Vancouver mineral claims should be struck out. As to the relief claimed in respect of these three mineral claims, the doctrine of *res judicata* must be applied, and a subsequent action for the same relief should be dealt with under the provisions of Rule 288 of the Supreme Court Rules. Macdonald, C.J.A.

As to the balance of the order appealed from, I think the learned Judge was in error. From the statement of claim it appears that the plaintiff and defendants were respectively interested, either severally or together, in a number of mineral claims. In 1906 the plaintiff executed powers of attorney in favour of each of the defendants, for the purpose of enabling them, in the plaintiff's absence, to deal with said mineral claims.

In 1908 the plaintiff brought an action against the defendants to set aside a transfer of the said Bank of Vancouver mineral claim made by defendant Deal to his co-defendant under his power of attorney, and for an account. That action was dismissed with costs. In the following year the plaintiff brought another action against the defendants to set aside transfers of the said Copper Mountain and Copper Mountain No. 1 mineral claims made by defendant Deal under the said power of attorney to his co-defendant, and for an account. This action also was dismissed with costs. None of these costs have been paid by the plaintiff.

The present action was commenced in 1912, and in his statement of claim the plaintiff repeats the allegations made in the

B. C.

C. A.

MOORE v. DEAL.

Macdonald, C.J.A.

previous actions respecting the said mineral claims, Bank of Vancouver, Copper Mountain and Copper Mountain No. 1, and claims the relief previously claimed in the other actions. These, I think, were frivolous and vexatious claims, and were properly struck out of the statement of claim. But, in addition to these claims, the plaintiff set up that the defendants had fraudulently dealt with the following mineral claims belonging to the plaintiff or in which the plaintiff had an interest, namely, Copper Cliff, Copper Cliff No. 1, and Copper Cliff No. 2, and a mineral claim at Welcome Pass, which, in his affidavit in these proceedings, the defendant Saulter appears to identify as Copper Islet or Copper Islet No. 1. The plaintiff also claims to have advanced to the defendants the sum of $2,726 in connection with their said dealings or interests. He alleges that defendants have received large sums of money in connection with these claims, and prays for an account. That these latter claims constitute an entirely different cause of action from those litigated in the two previous suits does not, in my opinion, admit of the slightest doubt. What authority is there, then, for ordering a stay of this action until the plaintiff shall have paid the costs of previous actions brought against these defendants, not for the same or substantially the same, but for quite separate causes of action? I have been unable to find any. On the contrary, in every case in which a stay has been granted until costs of a previous action should have been paid, the relief was grounded upon the fact that the second action was for the same or substantially the same cause of action as the first. In *Higgins* v. *Woodhall* (1889), 6 T.L.R. 1, the Court of Appeal, consisting of Lord Halsbury, L.C., and Lord Esher, M.R., and Lindley and Lopes, L.JJ., on an appeal from a Divisional Court, refused a stay. The Lord Chancellor, whose remarks were concurred in by the other members of the Court, said he had no doubt that the Court had jurisdiction to interfere, but that the jurisdiction would only be exercised in the case of vexatious proceedings, and that a judicial discretion must be exercised as to what proceedings were vexatious. He is reported to have said:—

> The court must not prevent a suitor from exercising his undoubted rights on any vague or indefinite principles. It was clear that the Court ought not to interfere in this case. It had been urged that the cause of action was the same in both actions, but that is not so.

B. C.

C. A.

MOORE v. DEAL.

Macdonald, C.J.A.

Turning to the Rules of the Supreme Court adopted by the legislature, I find that rule 293 provides that if any subsequent action shall be brought before payment of the costs of a discontinued action *for the same or substantially the same cause of action*, the Court or a Judge may grant a stay.

Such a case is exactly analogous to this one. One who has had his action dismissed with costs is not logically in any worse position, in respect of the question under consideration, than one who has chosen to discontinue with costs. If, in the one case a plaintiff is only to be stayed if his new action is for the same or substantially the same cause of action as the old one, why, in the other case, should he be stayed when his action is for a separate cause of action? This rule is in harmony with the principles adopted by Courts in the exercise of their undoubted inherent jurisdiction to prevent an abuse of their process, and I think I am right in saying that the Courts have not carried the doctrine any further generally than the legislature has carried it in the particular case provided for in said rule 293.

Cases like the present must not be confused with those in which a stay is granted for the purpose of preventing multiplicity of actions. If two actions are pending at the same time, and all the relief claimed in both may be obtained in one, the second action will be stayed, and the parties allowed to settle their differences in the one action: *Earl of Paullett* v. *Vincent Hill* [1893], 1 Ch. 277, and *Williams* v. *Hunt* [1905], 1 K.B. 512. I can see a very clear distinction in principle between staying an action until the costs of a previous action for substantially the same cause of action shall have been paid, and staying an action where the previous one was for a separate cause of action. Courts are loath to put obstacles in the way of a plaintiff seeking to enforce his rights, and the imposition of a condition that he shall pay money before proceeding may, in effect, amount to a prohibition in the case of a plaintiff without means. That consideration has no application, however, where he has already litigated the same right. Cases of this nature can now seldom arise, except under said rule 293 and in actions of ejectment, or where there has been a non-suit.

The appeal should be allowed to the extent of removing the stay.

B. C.

C. A.

MOORE v. DEAL.

Irving, J.A.

Martin, J.A.

IRVING, J.A.:—I think the learned Judge was right beyond question in striking out the matters relating to the first actions.

Having done that, I am of opinion he was not justified in staying the action.

I would allow the appeal on that point.

MARTIN, J.A.:—Though the present action is not in all respects for the same causes of action as those which have been determined in two former actions, yet I think it is really so "substantially the same" within the meaning of rule 293 that it would be vexatious to allow it to proceed except on terms. Now, Lord Justice Fletcher Moulton said, in *Re Connolly Bros. Ltd.*, [1911] 1 Ch. 731, at 743:—

> It is quite clear that the Court has felt justified in exercising this jurisdiction where it is satisfied that it would be vexatious to let the other action proceed. Just as fraud assumes innumerable shapes so vexations may assume innumerable shapes.

Having regard to the matters alleged in the first action begun on November 21, 1908, and the second one begun on July 16, 1909, it is obvious—indeed, it was conceded at the argument—that all charges of fraud respecting the collusive conveyance of the three mineral claims then disposed of, but now again revamped, should have been struck out of this new record. But, in addition, it was also asked in the prior actions that the plaintiff should be recognized as the sole owner of said three claims and the transfers of his interest cancelled, and this dual claim is again advanced, after all these years, in the present action, only now it is put forward as a "sole or joint" ownership. It is true that other claims are now included and a partnership set up, but, from a perusal of all the pleadings and proceedings in the three actions, it is difficult to resist the inference (in the absence of any real explanation in the affidavit of the plaintiff) that the present amplification of the original causes of action is not merely an attempt to escape the consequences of the two former failures. The statement in par. 5 of said affidavit that the claim in the present action is "entirely different" from the former ones is obviously untrue.

Viewing the matter as a whole, I think the learned Judge was right in regarding it as a case where there was so much of the original "substance" left that it would be vexatious to allow

it to proceed unless the costs of the former actions were paid. It is true that the second clause of the order dealing with the three said claims is, apparently by inadvertence, a little wider than the former pleadings and issues would justify, and it should be restricted to the alleged collusive transfers thereof. Otherwise the order should stand, and, though the appeal must be allowed to said extent, it should, in my opinion, be without costs.

Martin, J.A.

GALLIHER, J.A.:—I think the order appealed from is right as to the mineral claims already adjudicated upon, but that the appeal should be allowed as to the balance.

Galliher, J.

The order below should be varied accordingly, costs to the appellant.

McPHILLIPS, J.A., agrees with MACDONALD, C.J.A.

McPhillips, J.A.

Appeal allowed in part.

Re ONTARIO AND MINNESOTA POWER CO. AND TOWN OF FORT FRANCES.

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

1. TAXES (§ III D—138)—ASSESSMENT—REVIEW—APPEAL.

The effect of the repeal of sec. 52 of the Ontario Railway and Municipal Act of 1906 by Ont. Stat. 3 & 4 Geo. V. ch. 37, on the re-enactment of that Act, May 6, 1913, was that as to a subsequent decision of the Court of Revision of a town in a territorial district assessing a power plant either the right of appeal directly to the Ontario and Municipal Board was taken away until the new Municipal Act, 1913, 3 & 4 Geo. V. ch. 43 came into force on July 1, 1913, or the right of appeal, left as it existed before the statute of 1906, was one to a judge in Chambers, even if sec. 13 of the Assessment Amendment Act of 1913 did not impliedly repeal the provisions as to appeal contained in the Act relating to territorial districts.

[*Re Fort Frances Assessment*, 11 D.L.R. 564, 27 O.L.R. 622, referred to.]

Statement

MOTION by the company for leave to appeal from an order or decision of the Ontario Railway and Municipal Board, of the 16th June, 1914, dismissing, upon the ground of want of jurisdiction, an appeal to the Board by the company from the decision of the Court of Revision of the Town of Fort Frances affirming the company's assessment for the year 1913.

Glyn Osler, for the company, the applicant.

E. E. A. Du Vernet, K.C., for the town corporation, the respondent.

ONT.

S. C.

RE ONTARIO AND MINNESOTA POWER CO. AND TOWN OF FORT FRANCES.

Meredith, C.J.O.

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—This is a motion by the Ontario and Minnesota Power Company for leave to appeal from an order or decision of the Ontario Railway and Municipal Board, dated the 16th June, 1914, dismissing an appeal to the Board by the applicant from the Court of Revision of the Town of Fort Frances, upon the ground that the Board had no jurisdiction to hear the appeal.

The applicant appealed to the Court of Revision against its assessment for the year 1913, and its appeal was dismissed on the 20th June, 1913.

The applicant gave notice of its intention to appeal to the Ontario Railway and Municipal Board from its assessment as confirmed by the Court of Revision; the notice of appeal was addressed to the Board, and was received by it on the 4th July, 1913; a copy of the notice was served upon or filed with the clerk of the municipality between the 23rd and the 28th June, 1913, but upon what day is not shewn. The appeal came on to be heard before the Board on some day prior to the 16th June, 1914, but on what day does not appear; and the further consideration of it took place on the 16th June, 1914, when the decision from which the applicant desires to have leave to appeal was given.

The view of the Board was that the result of subsequent legislation was to take away the right which previously existed of a person assessed to appeal directly from the Court of Revision to the Board, and that the only appeal which it had jurisdiction to hear and determine was an appeal from the decision of the Judge of the District Court on an appeal to him from the decision of the Court of Revision.

[The learned Judge here referred to the Act respecting the establishment of Municipal Institutions in Territorial Districts, R.S.O. 1897 ch. 225, secs. 40-59; the Assessment Act, R.S.O. 1897 ch. 224, sec. 75, sub-secs. 2 and 7, and sec. 84; the Assessment Act of 1904, 4 Edw. VII. ch. 23, sec. 76; the Act of 1904, Edw. VII. ch. 24, by sec. 5 of which sec. 40 of R.S.O. 1897 ch. 225 was repealed and a new section substituted for it, and secs. 43 and 45 were amended; the Act of 1905, 5 Edw. VII. ch. 24, by sec.

1 of which sec. 45 of R.S.O. 1897 ch. 225 was repealed and a new sec. substituted; by sec. 2 of which secs. 46-48 and 49 were amended; and by sec. 3 of which there was added to ch. 225 a new section, 48(*a*); the Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII. ch. 31, sec. 52; and the Act of 1910, 10 Edw. VII. ch. 88, sec. 19, repealing sec. 76 of the Assessment Act of 1904, and substituting for it a new section.]

The result of this legislation was, that a person assessed in a municipality in a territorial district had the right to appeal in respect of his own or any other person's assessment to the council of the municipality, and the right of a further appeal to the District Judge, whose decision was final; but that, if the person desiring to appeal from the council or the Court of Revision was assessed upon one or more properties to an amount aggregating $10,000, he had the right, instead of appealing to the District Judge, to appeal to the Ontario Railway and Municipal Board; but, notwithstanding this right of appeal to the Board, a ratepayer had the right, according to the decision of the Court of Appeal in *Re Fort Frances Assessment*, 11 D.L.R. 564, to appeal to the District Judge as provided by sec. 43 of ch. 225, as amended by 4 Edw. VII. ch. 24, sec. 5 (2), and there was a further appeal to the Court of Appeal from the decision of the Board upon a question of jurisdiction or law, if leave to appeal should be given by the Court (6 Edw. VII. ch. 31, sec. 43).

I apprehend that the effect of the amendments to ch. 225 was impliedly to repeal sec. 76 of the Assessment Act of 1904; but whether it did or not is immaterial, as the only part of the section which was applicable to territorial districts was sub-sec. 2, which provided for an appeal to the Judge of the County Court of the county to which the district was attached for judicial purposes, and the district in which the applicant's land lies is not so attached to any county.

It was, I have no doubt, intended by sec. 13 of the Assessment Amendment Act of 1913 (3 & 4 Geo. V. ch. 46), and by the repeal by the Municipal Act of 1913 (3 & 4 Geo. V. ch. 43) of ch. 225, and the repeal of the Ontario Railway and Municipal Board

ONT.
S. C.
RE ONTARIO AND MINNESOTA POWER CO. AND TOWN OF FORT FRANCES.
Meredith, C.J.O.

Act of 1906, and the re-enactment of it, omitting sec. 52, by 3 & 4 Geo. V. ch. 37, to get rid of the anomaly which resulted from the decision in the *Fort Frances* case, and to provide that there should be no right of appeal directly from the Court of Revision to the Ontario Railway and Municipal Board; but, unfortunately perhaps, while the Assessment Amendment Act of 1913 and the new Ontario Railway and Municipal Board Act came into force on the 6th May, 1913, the new Municipal Act did not become law until the 1st July, 1913.

The result of this, it is argued, is that the right of the assessed property-owner to appeal directly from the Court of Revision to the Ontario Railway and Municipal Board was not taken away until the repeal of ch. 225 took effect on the 1st July, 1913.

Section 13 of the Assessment Amendment Act of 1913 (3 & 4 Geo. V. ch. 46) repeals sec. 76 of the Assessment Act, as enacted by sec. 18 of ch. 88 of 10 Edw. VII., and substitutes for it a new section, which provides that the appeals for which the section makes provision, both in municipalities in territory without county organisation and in other municipalities, shall lie from the decision of the Judge to the Ontario Railway and Municipal Board, and until ch. 225 was repealed the effect of this was merely to provide that an appeal should lie from the decision of the Judge to the Board—in other words, that where the person assessed appealed to the District Judge he should have a further appeal to the Board.

It is unnecessary, in the view I take, to decide whether the section has the effect of impliedly repealing the provisions of ch. 225 as to appeals and the amendments to that Act to which I have referred; for, assuming that they are not repealed, there remains in the way of the applicant the fact that sec. 52 of the Ontario Railway and Municipal Board Act of 1906, which provided for the appeal to the Board, was repealed before the decision of the Court of Revision was given, and that this resulted either in taking away altogether the right to appeal directly from the Court of Revision or in leaving the right as it existed before that Act was passed, that is, to appeal to a Judge of the High Court in Chambers.

It follows from this that the appeal to the Board was not competent, and that the Board rightly determined that it had no jurisdiction to hear it; and the result is, that the application must be dismissed, and I would dismiss it with costs.

Appeal dismissed with costs.

ONT.

S. C.

RE ONTARIO AND MINNESOTA POWER CO.

Meredith, C.J.O.

McDONALD v. MORGAN.

N. S.

S. C.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Russell, Longley and Ritchie, JJ. February 13, 1915.

1. BILLS AND NOTES (§ VI C—160)—DEFENCES—MISREPRESENTATIONS—TIME OF PAYMENT.

Where there has been no deceit as to the actual terms of the note, fraud is not shewn upon which to invalidate the sale of goods by the selling agent's representation that the buyer would not have to pay anything on the price until May 1, while at the same time the agent obtained the buyer's signature to a promissory note maturing at an earlier date, which note remaining in the possession of the payee, the buyer was not in fact called upon to pay sooner.

APPEAL from the judgment of Meagher, J.

Statement

H. Mellish, K.C., for appellant.

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

SIR CHARLES TOWNSHEND, C.J.:—This is a motion to set aside the findings of the jury in favour of the defendant and for a new trial; also, to reverse and set aside the judgment on the counterclaim against the plaintiff.

Sir Charles Townshend, C.J.

The action was brought on two promissory notes admittedly made by defendant to the plaintiff and in the alternative on an agreement between the plaintiff and the defendant for the leasing to defendant of a player piano for the same amount for which the two notes were given. In other words, what has been termed a hire and sale agreement by which among other things defendant on payment of the amount was to become the owner of the player piano. A number of defences were originally set up to this claim. The only one important to notice here is that she was induced by the fraud and misrepresentation of plaintiff to sign the agreement. The fraud alleged in the particulars of defence was that owing to her defective eyesight she was unable to read the agreement and that the one set out in the statement

N. S.

S. C.

McDONALD v. MORGAN.

Sir Charles Townshend, C.J.

of claim totally and essentially differs from that which was read over to her when she signed the same. It is not important to say more on this matter than to point out that in the defence of fraud as originally pleaded and up to and during the trial it was not specified that one of the terms of the agreement as well as the making of the notes was that they were not to be paid until May 1, 1913. During the trial the defendant swore that the plaintiff's agent so read the agreement and the notes as to induce her to believe that they were payable on May 1 then next, whereas in the agreement and notes they were payable respectively in and thirty days after they were signed on January 29, 1913. The learned trial Judge permitted the defendant to add a defence setting up this new ground and further put to the jury as the ninth question:—

> Did Belyea make to defendant before she signed the agreement and notes a representation that the notes were not payable until 1st May or anything to that effect and did she act upon it, to which the jury answered, Yes.

One of the chief grounds urged for setting aside the verdict is that "questions upon which findings were made and were asked were improper questions about matters not raised by the pleadings or in issue."

It must be confessed that the whole result of this trial is most unsatisfactory. The mode in which the case was placed before the jury in my view, had a tendency to confuse their minds as to the real issue and most of the questions, it seems to me, were immaterial and unnecessary. There was really only one substantial defence if true, that is to say, did the plaintiff or his agent fraudulently misrepresent to the defendant the terms of the agreement and notes and if so, in what respect. It may be said that the ninth and tenth questions cover the same ground. No doubt they do, and it will be necessary to enquire how far the evidence sustains their answers.

I have already called attention to the fact that as originally pleaded the claim of defendant that the notes were read to her as not payable until May 1 was not alleged. The same as respects the agreement. Now, this was and now is, perhaps, the most important factor in her defence. Again, she insisted in her

testimony that the pianola was not to be paid for until May 1 and yet this fact does not seem to have been communicated to her solicitor, nor to have been alleged until the trial. Coming to the evidence she is supported by one witness only, and that witness not very clear or satisfactory, as to the alleged misreading of the agreement and notes. On the one hand is the clear circumstantial statements both of Belyea and Langley that there was no misrepresentation whatever and that the terms both of the agreement and notes were correctly read and explained and then we have these two witnesses with the documents bearing her admitted signature. It seems to me that the answers are against the weight of evidence and considering this with the manner in which the issues were placed before the jury, which were before alluded to, I think there are ample reasons why this case should be submitted to another jury.

It follows that the judgment on the counterclaim in defendant's favour should be set aside.

Russell, J.

RUSSELL, J.:—Accepting the version of this transaction given by the defendant and her witness, the defendant bought a pianola for $400 and an organ of which she was the owner. She had until May 1 to pay for it and could exchange the pianola for a piano if she thought fit. She did make an exchange and plaintiffs took the pianola away, but did not give her the piano, as they had not been paid for it. Notes of hand were given for the $400, one for $5 and the other for $395 at 30 days. Plaintiff now claims that the notes were void for fraud as it was represented to her that they were drawn payable on May 1. But she does not clearly prove the fraud as to this. Her witnesses say that the agent told her she would not have to pay anything till May 1, when she was suited with a piano. The most she says herself, and that only after she was worked up to it, is that the agent told her, the note was payable on May 1. Her first statement was that she was to sign the note for $400 and she would not have to pay a cent before May 1 which is quite consistent with his not having deceived her as to the actual terms of the note. She was not, in fact, called upon to pay the note before May 1. I see no defence to the note.

As already stated, before May 1 the defendant exchanged the

N. S.

S. C.

McDONALD v. MORGAN.

Russell, J.

pianola for a piano. The lien for the price of the pianola had been lost. Whether or no there was a lien on the piano for the unpaid price need not be determined as there is no counterclaim for refusal to deliver it. What the defendant claims is that the whole transaction has been rescinded and she can recover as she has done for the value of her organ. I cannot see that this is the case. I think plaintiff should recover on the note and the counterclaim for the value of the organ should be dismissed. The piano is the defendant's property whether subject or not to a lien for the price, I am not now asked to say.

Whether there should be a new trial or judgment for the plaintiff on the note may be debatable. A judgment for the plaintiff will be consistent with all the findings of the jury except the ninth, and it would be consistent with that finding if it only means that it was represented that the notes were not to be paid until May 1 and not that they were so made payable on their face. As there was evidence to support the finding in the latter sense, although it was produced by a process of ingenious leading, I fear it may be necessary to set aside the finding referred to before judgment can be entered. If the terms of the note were fraudulently misread, it is probably the legal result that the note was a void instrument on which no recovery could be had. If so, it might be as well to set aside the findings which, although innocuous, are nonsensical as well, such as that the notes were given to bind the sale, and that the consideration therefor was to enable Belyea to complete the sale.

In my opinion the appeal should be allowed with costs and a new trial ordered.

Graham, E.J.
Longley, J.
Ritchie, J.

GRAHAM, E.J., and LONGLEY and RITCHIE, JJ., concurred.

Appeal allowed with costs, and new trial ordered.

ONT.

S. C.

VOLCANIC OIL AND GAS CO. v. CHAPLIN.

Ontario Supreme Court, Lennox, J. March 8, 1915.

1. COSTS (§ II—35)—STATUTORY TARIFF—APPLICATION OF.

The new tariff of costs in Ontario which became operative September 1, 1913, applies to all taxations between party and party after that date.

[*Re Solicitors*, 6 O.W.N. 625, followed.]

Statement

APPEAL by the plaintiffs from the taxation by the Senior Taxing Officer.

ONT.

S. C.

VOLCANIC OIL AND GAS CO. v. CHAPLIN.

Lennox, J.

H. S. White for plaintiffs.

Forgie, for defendants.

LENNOX, J.:—I am not satisfied that good reason has been shewn to support the 2nd, 3rd, and 4th objections to the taxation of the Senior Taxing Officer of this Court. The circumstance that he taxed $300 for counsel fees to the plaintiffs, when they appeared to be successful, does not shew that a subsequent allowance of $500 as counsel fees to the defendants for the same Court was wrong. The inference is just as strong that too little was allowed upon the first taxation as that too much was allowed on the second. The same is true as to the costs in the Divisional Court; and as to both it is argued and not strenuously questioned that more effort was made to shew the Taxing Officer the actual conditions upon the later than the earlier taxation. As to the $1,000 allowed for counsel fees before the Appellate Division, it is alleged that, under the direction of the Court, several days of two counsel were spent in preparing a statement to aid the Court. With this explanation, the sum allowed does not appear to be extravagant. Aside from all this, the long experience and judgment of the Senior Taxing Officer should count for a good deal, in matters peculiarly within his province.

The first objection taken, however, rests upon entirely different considerations. Here the question is the tariff applicable to the taxed bill—a question of principle. The officer was bound to tax it according to law. He had no discretionary power. He was at least bound by the decisions of Judges of this Court as I am bound by the judgment of a Judge of co-ordinate jurisdiction. It was held by the Chief Justice of the Common Pleas in *Re Solicitors* (1914), 6 O.W.N. 625, that all taxations after the 1st September, 1913, are governed by the tariff of costs which came into force on that day. With very great respect, I am of opinion that the Senior Taxing Officer was bound to follow this judgment, and erred in taxing under the former tariff.

There will be a reference back to the Taxing Officer with a direction to tax the bills of costs in question under the present tariff of costs; and upon the other objections taken the taxation is confirmed. I make no order as to costs.

Order accordingly.

ONT.

S. C.

Re HISLOP.

Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Riddell, Latchford, and Kelly, JJ. March 9, 1915.

1. CO-TENANCY (§ II—5)—CREATION—TESTAMENTARY GIFT—EQUAL DIVISIONS.

A testamentary gift "to be divided" between two or more, means an equal division and creates a tenancy in common.

[*Re Hislop*, 7 O.W.N. 614, affirmed.]

Statement

APPEAL by an executor from the judgment of MIDDLETON, J.

L. Harstone and *R. S. Robertson*, for appellant.

W. Davidson, K.C., for representatives of Euphemia Moody.

N. W. Rowell, K.C., for executors of Janet Glover.

R. S. Hays, for David Hislop.

J. W. Graham, for Margaret Hislop.

Kelly, J.

KELLY, J.:— . . . The part of the will out of which the questions arise is the following devise: "To my brother John Hislop I leave the disposition of all my real and personal estate of which I may die possessed to be divided by him the said John Hislop according to his best judgment amongst my two brothers the said John Hislop and my brother David Hislop . . . and my three sisters, namely Margaret Hislop . . . Janet Glover . . . and Euphemia Moody . . ."

The will was made on the 23rd March, 1910, and the testator died on the 30th June, 1913. Euphemia Moody died intestate in November, 1912, and Janet Glover died on the 22nd January, 1914, leaving a will.

Mr. Justice Middleton states the first of these questions thus: "Has John Hislop an absolute and uncontrollable discretion which enables him to divide the testator's property among those entitled, in such shares and proportions as he may see fit, or is the testator's intention that the property shall be divided equally, and is John Hislop's function limited to apportioning so as to bring about that which, in his judgment, would constitute equality?" The appellant's contention is, that the testator's direction that the division be "according to his (the executor's) best judgment" confers upon him power to make the division amongst the five named persons in such proportions as to him seem best. I can find no such meaning in that language,

particularly when read in connection with the other words used by the testator in making the devise. That to which his best judgment was to be applied was not the proportion in which the named persons should take, but the mode of making the division, as, for instance, what assets should each get as his or her share of an equal division. Had the testator said in express language that the executor should make the division in such proportions as in his best judgment he thought proper, or words to that effect, the result might have been otherwise.

Authority is not wanting that the language employed imports an equal division. A testamentary gift "to be divided" between two or more, means an equal division and creates a tenancy in common: Stroud's Judicial Dictionary, p. 559, citing *Peat* v. *Chapman* (1750), 1 Ves. Sr. 542, referred to in the judgment appealed from.

In *Liddard* v. *Liddard* (1860), 28 Beav. 266, where leaseholds were conveyed to trustees, and it was declared that when the settlor's eldest son attained 21 years, they should be in trust for him, and that they should be assigned accordingly, but so that the settlor's wish that his other children "might be allowed by the eldest son to participate with him in the same," should be observed by him, it was held that the younger children were entitled to equal shares with the eldest, as tenants in common. The Master of the Rolls (Sir John Romilly) said (p. 271): "It is true the settlement says that the children are to be *allowed* by their brother to participate with him, but that does not invest him with the right of determining whether they shall participate with him at all, or only to such extent as he may think fit to allow. . . . The question then is, whether, in the absence of any direction as to the mode of participation, the participation is not to be in equal shares and proportions. I am of opinion that it is."

Anything which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of a joint-tenancy, and to create a tenancy in common: Jarman on Wills, 6th ed., p. 1791; *Robertson* v. *Fraser* (1871), L.R. 6 Ch. 696. A different intention does not follow from the use of the additional words "according to his best judgment."

ONT.
S. C.
RE HISLOP.
Kelly, J.

So strongly is the word "divided" when used in this connection held to mean equally, that where a direction was to pay, assign, and divide a sum to certain legatees as joint tenants, a tenancy in common was held to be created: *Booth* v. *Allington* (1857), 27 L.J. Ch. 117.

And so in earlier cases, a devise to A. and B. between them (*Lashbrook* v. *Cock* (1816), 2 Mer. 70), and a bequest unto and among certain persons (*Richardson* v. *Richardson* (1845), 14 Sim. 526), were each held to create a tenancy in common.

There is good ground for holding that the division contemplated by the testator was to be based on an equality, and that a tenancy in common was created. That being so, the answers given by the judgment appealed from to the other questions submitted must be held to be correct.

The appeal should, therefore, be dismissed with costs.

Falconbridge, C.J.K.B. Riddell, J.

FALCONBRIDGE, C.J.K.B., and RIDDELL, J., concurred.

Latchford, J.

LATCHFORD, J.:—John Hislop, his brother David, his sister Margaret, and the personal representatives of his deceased sister Euphemia, are under the decision appealed from entitled respectively to an equal one-fourth share in the estate of the testator.

By appealing John Hislop obviously manifests an intention of not dividing the estate in equal shares.

Upon the argument his counsel admitted that the words of the devise imported that he would be obliged to give some part of the estate to each of the brothers and sisters who survived the testator, but contended that, while such part should not be illusory (how little would be illusory he declined to say), the amount of it was in the discretion of the executor—who, being one of those entitled, might apportion to himself more than he thought proper to allot to the others entitled. Considered apart altogether from the facts and circumstances attending the making of the will, the very words of it import, in my opinion, an intention on the part of its maker to benefit equally his brothers and sisters—all of whom he named. His whole estate was given to the executor to be divided among the only five persons who stood in equal relation to him. Upon the authority cited in the

judgment appealed from, a division between two must be an equal division; and, in the absence of anything to indicate an intention to the contrary, a division among a number of persons standing in the same relation to the testator must also be equal.

ONT.
S. C.
RE HISLOP.
Latchford, J.

Appeal dismissed with costs.

CROSSMAN v. MOSELY.

N. S.
S. C.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Russell, Longley, and Drysdale, JJ. January 2, 1915.

1. AUCTION (§ I—5)—SALE OF FARMING EFFECTS—TERMS—PROMISSORY NOTE.

On an auction sale of farming effects on advertised terms of six months' credit, three months without interest, on approved joint note, a buyer who obtains delivery on a promise to pay cash in a few days and refuses to give an approved note on the advertised terms, may be sued forthwith on defaulting in his promise, and cannot set up in answer that the three months' credit term had not expired.

APPEAL from the judgment of Patterson, Co.C.J. Statement

H. Mellish, K.C., for appellant.

F. L. Milner, K.C., for respondent.

SIR CHARLES TOWNSHEND, C.J.:—This is an appeal from the County Court Judge's decision on questions of fact. It is only in exceptional cases on well settled rules that this Court interferes with the findings of the Judge below. In this case I think he was clearly in error in his conclusion. The terms of the sale as advertised were notes at 6 months. The defendant did not give his note but stated that he would pay cash in a few days, and to this the plaintiff agreed. When called on for the money a day or two after the sale defendant says he told plaintiff that he would pay after his return from Toronto where he was then going, and from which place he did not return for some weeks. There is no evidence that plaintiff assented to this, nor was any time mentioned within which he would return. As defendant did not comply with the terms of sale and did not pay cash for the purchase in a few days, by his default the debt became payable, and plaintiff was entitled to sue for the same when he did. If defendant's statement is to be accepted it must be pleaded and proved. No such defence is set up by the defendant as that

Sir Charles Townshend, C.J.

N. S.
S. C.
CROSSMAN v. MOSELY.
Sir Charles Townshend, C.J.

he was only to pay on his return from Toronto, nor does the evidence shew that plaintiff so agreed. Indeed the evidence of the defendant on that point was wrongly received when there was no plea to justify it. It will be observed that defendant pleads that he was entitled to six months' credit by terms of the sale, but as already shewn he had entered into a different contract, even on his own contention. The Judge below bases his decision on the ground that defendant was entitled to six months' credit in which he was wrong. That is evident from the admitted fact that he gave no note and promised cash.

In my opinion, the judgment below should be set aside and judgment for the plaintiff for the price of the cattle in addition to the other item allowed below, plaintiff to have costs of this appeal, and all costs below.

GRAHAM, E.J.:—This is an action among other things for the price of two cows and some other articles for $110.

This paragraph from the judgment shews the ground on which the learned trial Judge decided against the claim:—

The first claim is for the price of two cows and other articles sold and delivered by plaintiff to defendant. Neither the price nor the delivery is denied, but defendant says he bought the cows at auction upon a six months' credit and the six months had not elapsed when action was brought. Plaintiff admits it was a term of the sale that six months' credit should be given, but says defendant waived this term and entered into other arrangements. Upon the facts—rather it is a mixed question of law and fact—I cannot find that defendant waived the credit term and as far as this item is concerned plaintiff cannot recover.

It is proved that the plaintiff was selling off his stock by auction and it was advertised by handbills and the terms on the bills were six months' credit, three months without interest on approved joint note, or, as is said in another place, "approved security."

The prominent feature of the case is that the defendant having purchased the articles never came forward with a joint note for the price but took away the articles. Evidence was given by plaintiff:—

He said he was not going to give me a note, he would pay me the money. I said "when?" He said "first of the week." I said "all right." He said he was going to Port Elgin and I better not come for my money

on Monday but to come on Tuesday. I went to his place Tuesday night. No one home. Didn't see him till Thursday night. I gave him bill. Never said anything.

The learned Judge did not disbelieve him but says that he could not find that defendant waived the credit term. But the defendant, in effect says the same thing:—

Before I brought cows away I had a conversation with plaintiff. I said "I won't go in and give you note. I'll come and see you again." He said, "all right."

John Corbett says:—

Live at Tidnish. Know plaintiff and defendant. Remember sale on July 26th. Present at sale. Saw defendant as he was leaving. I heard defendant tell plaintiff he wouldn't give a note for stuff he bought but would pay money first of week or in a few days. Plaintiff replied that would be all right.

Robert Crossman says:—

Son of plaintiff. Present at his sale. Saw defendant at sale. Saw him as he was about leaving. Plaintiff and last witness there. Heard defendant say he would not give a note but would pay him first of following week. Father said that would be all right.

Now, having obtained possession of the animals on such a representation that he would pay him the cash the first of the week he cannot possibly hark back to the original terms of credit. The defendant, instead of paying, went away to Toronto and two months and seven days after the sale plaintiff was obliged to bring this action.

Now a new defence is started in this Court, namely, that there was an agreement before he went to Toronto that the plaintiff gave him time, that is until he returned from Toronto, to pay this claim of $110. There is this against that theory: First, it is not in the pleading, therefore unlikely to have taken place. This is the pleading as to this item, and it is the only pleading as to that:—

1. As to the claim for two cows and other articles purchased by defendant at public sale held by plaintiff, the defendant says that the same were sold upon terms of credit set forth in the advertisement of the sale, namely, upon the terms that the defendant should pay for them three months after the said sale and the said period of credit had not expired at the time of action brought.

N. S.
S. C.
CROSSMAN v. MOSELY.
Sir Charles Townshend, C.J.

2. As to the claim for two cows and other articles purchased by defendant at public sale held by plaintiff, defendant says that the same were sold upon the terms set forth in the advertisement of the sale that they should be paid for by note to be made by the defendant in favour of the plaintiff for the payment of the price of the said goods to the plaintiff three months after the date of the said sale and the action was commenced before the time at which the said notes would have become payable.

Then the probability of it is displaced by the defendant's own letter. But before coming to that let us look at what the plaintiff says: I resume his evidence:—

Next day or the day after he came to my place; said he was going away to Toronto. I said "What about my bill?" "Well," he said, "what about it?" I said "You are going away and I want it fixed or money." He said he was going to pay money before he went. He went away without paying me. Received G/P 1 from defendant on day it was written. Brought by his sons. Gave them the cows. Went to house with letter. He refused to pay me anything for keeping cows.

This is the letter G/P. 1. It will be remembered that the plaintiff had given him a bill and the defendant testifies, "Never saw bill till time I went to tell him I was going away."

Tidnish, N.S., October 21st, 1913.

Mr. Lewis Crossman, Tidnish, N.S.

Dear Sir,—You will please let the bearer have the three cows to take up to the farm as it is too rough for them to be out at nights besides the trouble you have milking them this wet weather. If you will call at my son's house he will pay your account in full.

I should like to have seen you before I go away as I have several things to talk to you about.

Yours truly,

(Sgd.) THOMAS MOSELY.

In the face of these difficulties I think it is too late to start a new defence on the hearing of the appeal. I am of opinion there was no such agreement.

As to the item of pasturing and milking three cows of defendant in the months of August and September, 1913, at 25c. a day, $15.12, he really pastured them, the Judge finds. But the learned Judge finds that the service was gratuitous. This finding is unreasonable on the evidence and must be set aside, but the plaintiff is only entitled to service up to the date of action. The other three items are admitted.

The appeal will be allowed and judgment given for the plaintiff for the sum of $129 with the costs in this Court and in the County Court.

LONGLEY, and DRYSDALE, JJ., concurred.

RUSSELL, J., dissented.

Appeal allowed with costs.

N. S.
S. C.
CROSSMAN v. MOSELY.
Russell, J. (dissenting)

Re SINGER.

ONT.
S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. April 26, 1915.

1. WILLS (§ III G 7—150)—MAINTENANCE OF CHILDREN—DISCRETION AS TO—MARRIAGE OF CHILD—EFFECT ON BEQUEST.

A clause in a will directing the payment to a widow the net income of an estate for the maintenance of herself and the children of the testator during her widowhood, vests the discretion in her, if exercised in good faith, as to the manner and extent to which provision should be made to each child, and does not obligate her to take into consideration the need of support of children who had become forisfamiliated or had married.

2. WILLS (§ I F—60)—CODICIL—LIMITATION AS TO TIME OF DISTRIBUTION —EFFECT ON PREVIOUS TERMS OF WILL—TIME OF VESTING.

A will providing the equal division of an estate amongst the children of the testator upon the death or re-marriage of the widow, in the event of their attainment of a certain age, modified by a codicil that the real property shall not be divided among the beneficiaries until after ten years from the death of the testator, has the effect of suspending the conversion of the real estate for purposes of distribution, upon their attainment of that age, for the period mentioned in the codicil, unless to prevent loss by depreciation or to pay incumbrances or debts.

APPEAL from the judgment of Middleton, J. Statement

G. H. Watson, K.C., and *S. J. Birnbaum*, for appellant Annie Singer.

C. J. Holman, K.C., for Max Singer and others.

H. E. Rose, K.C., and *J. W. Pickup*, for Israel Singer and Alexander E. Singer.

G. S. Hodgson, for M. J. Singer, the surviving executor.

M. H. Ludwig, K.C., for the widow of Solomon Singer.

F. W. Harcourt, K.C., Official Guardian, for the infants.

MEREDITH, C.J.O.:—This is an appeal by Annie Singer from the judgment dated the 20th January, 1915, which was pronounced by Middleton, J., on an originating motion for Meredith, C.J.O.

ONT.
S. C.
RE SINGER.
Meredith, C.J.O.

the construction of the will and codicil of Jacob Singer, and a cross-appeal by Israel Singer and Alexander E. Singer from the same judgment.

Jacob Singer died on the 13th November, 1911, and left surviving him his widow, Annie Singer, and eleven children, the eldest of whom, Mrs. Miller, is forty-two years of age, and the youngest, Fannie, seventeen. Of the children, eight were sons, and three of them, Moses, Max, and Israel, have attained the age of thirty. The will is dated the 16th May, 1904, and the codicil bears date the 31st October, 1911.

The first question for decision is as to the effect of the following clause of the will: "I direct my said trustees to pay to my wife Annie Singer during the term of her natural life and as long as she will remain my widow the net annual income arising from my estate for the maintenance of herself and our children. Should however my said wife re-marry then such annuity shall cease."

It is not a little singular that at this time of day there should be any reason for doubts as to the legal effect of this provision. Thousands of wills containing a similar provision have been made, and it is a form commonly in use by testators desiring to provide for the maintenance of their wives and children.

Apart from authority, I should have no doubt as to what the testator meant or as to what the language he has used to express his wish imports, and that is, that his wife should be entitled during her widowhood to receive the income, subject to an obligation on her part to maintain the children out of it, but leaving to her discretion the manner in and the extent to which provision should be made for any child, a discretion not subject to control or interference by the Court so long as it should be exercised in good faith; and that, as I understand the decision of the Court of Appeal in *Allen* v. *Furness*, 20 A.R. 34, was that Court's view of the effect of such a provision as the will in question contains. In that case the appeal was from the judgment of the Chancellor, and he and Maclennan, J.A., who delivered the judgment of the Court of Appeal, referred with approval to the decision of Vice-Chancellor Kindersley in *In re Robertson's Trust* (1858), 6 W.R. 405.

In that case the bequest was of a sum of £7,000 to the nephew of the testator "for the maintenance and support of himself and his family," and the Vice-Chancellor in delivering judgment said that he had not "the smallest doubt that the testator intended the legacy to be paid to the legatee, taking it for granted that, like any other father, he would maintain and support himself and his family thereout. That being so, he did not mean to express any trust, and therefore there must be a direction that the £7,000 be paid to the petitioner, in the words of the will, namely, 'for the maintenance and support of himself and family;'" and the Vice-Chancellor added that "the only effect would be that, in case any child was not maintained, he might apply to the Court."

This last observation was quoted by Maclennan, J.A. (20 A.R. p. 41), and he does not suggest that he does not agree with it.

Referring to *Lambe* v. *Eames*, L.R. 6 Ch. 597, Maclennan, J.A. (p. 41), said that he was unable to distinguish the case with which he was dealing from that case; adding: "The words, 'to be at her disposal in any way she may think best', which were contained in that devise, but not in the present one, can, I think, make no difference, for they add nothing to the effect of a simple gift, and the remaining words are in substance the same as the present, for 'family' means 'children.'"

In *In re G.* (*Infants*), [1899] 1 Ch. 719, the trustees were directed to pay the annual income of the trust estate to the testator's wife during her life if she should so long continue his widow, "she maintaining, educating, and bringing up such of" his children . . ; and Kekewich, J., referring to this provision, said that it was urged on behalf of the children, and not denied on behalf of the mother, that it imposed upon her an obligation enforceable by the Court; and, dealing with the character of the obligation, he said: "It matters not how the enforceable obligation ought technically to be defined. It may be regarded either as a trust or as an implied contract. There is a close analogy between cases of this character and those where a gift of property has been coupled with an obligation to repair. Some cases of the latter class have recently been commented on by the Lord Chief Justice in *Blackmore* v. *White*, [1899] 1 Q.B. 293, and he

ONT.
S. C.
RE SINGER.
Meredith, C.J.O.

seems to treat the right of enforcing such obligation as resting on implied contract, and that view is at least consistent with the judgment in *In re Skingley* (1851), 3 Macn. & G. 221, which for some time was treated, and perhaps may still be treated, as the leading authority on the subject. North J.'s decision in *In re Booth*, [1894] 2 Ch. 282, and that of Knight Bruce, V.-C., in *Longmore* v. *Elcum* (1843), 2 Y. & C. Ch. 363, both of which are cases of the class here under consideration, treat the obligation as founded in trust and enforceable by exercise of the jurisdiction which the Court has over trustees. But they equally treat the obligation as enforceable, and, as already mentioned, that is not denied."

In *In re Pollock*, [1906] 1 Ch. 146, a widow to whom property was devised in trust during her widowhood for the benefit and maintenance of herself and of the children of her deceased husband and herself, and the proper bringing up of the children, was held to have the powers of a tenant for life under sec. 58, sub-sec. 1 (vi.), of the Settled Land Act, 1882, and it was held, or at all events assumed, that the interest of the widow was charged with the maintenance of the children.

I do not read *In re Booth* (*supra*) as deciding anything different from what was decided in *Allen* v. *Furness*. In both cases the Court had to deal with a case in which it was sought to make available for the benefit of the creditors of the beneficiary the whole of what was given to the beneficiary, in the one case "for her use and benefit and for the maintenance and education" of the testator's children, and in the other "during his life for the support and maintenance of himself and his (three) children;" and what the Court did in *Allen* v. *Furness* was to refuse to give to the creditor equitable execution except upon the terms that what the Court deemed to be a reasonable sum should be applied for the support and maintenance of the children; and what was done in the other case was to direct an inquiry as to "whether any and if any what provision ought to be made for the maintenance of any, and if any which, of the children of the testator out of the income of the testator's estate."

Mr. Justice North says in *In re Booth* ([1894] 2 Ch. at pp.

284-5): "The words" (i.e., "for the maintenance and education of my children") "are, in my opinion, inserted with the view, not that she should spend the income for any purpose she liked, but that she should have it for her use and benefit, and also 'for the maintenance and education of my children.' That was the object to which the money was to be applied. In my opinion, those words were inserted for the purpose of shewing the object, or intention, or trust, whichever you choose to call it, with or upon which the testator made the gift to his wife. Suppose the gift had been made to a stranger for his use and benefit, and for the maintenance and education of the testator's children, could there have been any doubt that he would have taken the income subject to a trust for the maintenance and education of the children? No doubt the widow takes a share in the income; but I cannot say that the children are excluded from all interest, any more than I could if the widow had been a trustee—for she is a trustee—for any other persons."

These observations seem to indicate that, in the view of the learned Judge, the wife took the income subject to a trust for the maintenance and education of the children; and, if that is the effect of his decision, it is opposed to *Allen* v. *Furness*, and we must follow that case in preference to *In re Booth*.

Nothing, however, was decided in *In re Booth* that is inconsistent with the view that, had the widow not become bankrupt and the income had been claimed by her creditors, the Court would not have interfered with the exercise of her discretion, if it were exercised in good faith, as to the manner in which and the extent to which she should provide for the maintenance and education of the children.

The next question is as to whether the widow, in carrying out the object with which the income was given to her, is bound to take into consideration the need of support of children regardless of whether or not they have become forisfamiliated or have married.

In *Cook* v. *Noble*, 12 O.R. 81, it was decided by Proudfoot, J., after a review of the authorities, that, where the right to maintenance and support is given in general terms, it will cease with the marriage or forisfamiliation of a child.

ONT.
S. C.
RE SINGER.
Meredith, C.J.O.

I am not aware of any subsequent case in which the decision of Proudfoot, J., has been questioned, except perhaps by the present Chancellor in *In re Miller* (1909), 19 O.L.R. 381, who said he doubted the value of the decisions on which Proudfoot, J., proceeded, as regarded in the light of later decisions, and added: "The law now seems to be that an annual sum or a provision for maintenance and education is not to be limited to unmarried children. Those married may share if the need exists: *In re Booth*, [1894] 2 Ch. 282. *Cook* v. *Noble* was decided in 1886. *Frewen* v. *Hamilton*, 47 L.J. Ch. 391, decided in 1877, was not cited in *Cook* v. *Noble*."

It seems to me, and I say so with great respect, that the Chancellor has overlooked the fact that in *Frewen* v. *Hamilton* the children were purchasers for valuable consideration; and that fact is emphasised by Malins, V.-C., who said (p. 394): "This is not under a will, as in the case that was cited of *Bowden* v. *Laing* (1844), 14 Sim. 113, where maintenance was to be paid to the mother out of her own income, but here the children are purchasers for valuable consideration."

It is to be observed also that in that case the provision was for maintenance and education, and that a distinction is made in some of the cases between such a provision and a provision for maintenance only.

We should, I think, adopt the rule laid down in *Cook* v. *Noble*. The case was decided more than a quarter of a century ago; it is probable that during that period many wills have been drawn relying upon the law being what it was held by Mr. Justice Proudfoot to be; and for that reason, and because, in my opinion, the construction which he placed upon words similar to those which were used by the testator in this case, having regard to conditions and the mode of life in this country, gives effect to what a testator who has used such language to express his wishes really meant, that construction should be adopted.

The next question is as to the rights of the sons when they have reached the age of thirty years.

The will provides as follows: "I direct my said trustees to pay to each of my sons who shall reach the age of thirty years a sum equal to half that portion of my estate to which such son is

entitled under this my will upon the death of his mother, such portion to be valued at the time of each son attaining his thirtieth year, the valuation to be made by my executors and trustees and shall be final. Such payment to be considered as a loan from the estate."

In order to understand the effect of this provision it is necessary to see what provision is made as to what the sons shall be entitled to at the death of their mother, and that is to be found in the following provision of the will: "Upon the death or re-marriage of my said wife I give devise and bequeath all the rest and residue of my estate not hereinbefore specifically disposed of, to my said children, share and share alike, and I direct my said trustees to pay to each of my said children upon his or her attaining the age of twenty-one years his or her share of my estate, deducting, however, therefrom any sum or sums which shall already have been advanced to such child, and in the event of any of my said children predeceasing my said wife without leaving lawful issue him or them surviving, then his, her or their share or shares shall be divided equally between my surviving children who shall attain the age of twenty-one years, but in the event of my said children who shall so predecease my said wife leaving him or them surviving lawful issue then I direct that such issue shall stand in the place of and be entitled to the share of the parent so deceased."

It was argued on behalf of the sons who have attained the age of thirty years that they are entitled to be paid a sum equal to half the value of the share of the estate to which they would become entitled, in the event of their being then living, on the death or re-marriage of the wife, and that they are entitled to be paid that sum without being required to give security for it and without any obligation to pay interest upon it.

It was argued on behalf of the widow and those of the children who take the same ground as she does that the right of the sons under this provision is by the codicil postponed until ten years from the date of the testator's death, or at all events is so postponed except as to the personalty and the proceeds of such of the lands as the executors and trustees may in their discretion determine to sell and do sell, and that the sons are not

ONT.
S. C.
RE SINGER.
Meredith, C.J.O.

entitled to any payment unless upon giving satisfactory security for the amount they receive and for the payment of interest upon it until they become entitled to their shares of the estate.

The provision of the codicil which is relied on is the following:—

"10. I hereby further direct that my real property shall not be divided among the beneficiaries as directed by my will until after the lapse of ten years from my death, and I further direct that the business of managing my real estate shall be carried on by my sons as it has been carried on heretofore, and I direct that my sons shall receive such salaries as shall seem just in the discretion of my executors in remuneration for their services."

It appears that between the date of the will and the making of the codicil the testator had become the owner of a large number of house and other properties—between 300 and 400 of them—and that these form practically the whole of the estate that will be left after payment of the funeral and testamentary expenses, the succession duties, and the debts other than those which are secured by mortgages on the lands, which amount to a very large sum.

The solution of the question for decision is surrounded with difficulties. If a son who attains the age of thirty years is entitled to be paid a sum equal to one-half of his prospective share, without being required to give security or to pay interest, the result will be that the widow's income will be reduced by so much of it as would have been derived from the investment of what is paid to him, and it may be that a son who ultimately is not entitled to a share of the estate because he has predeceased his mother may leave nothing after him which can be made available to repay what has been advanced.

After much consideration, I have come to the conclusion that the effect of paragraph 10 of the codicil is to postpone the right under the will of the sons who attain the age of thirty to be paid the one-half of their shares, except in so far as it may be practicable to make payments to them out of the personalty and the proceeds of such of the real property as the trustees may have sold.

It is reasonably clear that the intention of the testator was that, as far as it should be practicable to do so, his lands should be retained in specie and should be managed by his sons, and that the division of his estate, as far as it consisted of real property, which was to have taken place upon the death or re-marriage of his wife, should be postponed, if either of these events should happen within ten years after his death, until the expiration of that period; and that, I think, is the effect of the provisions of paragraph 10 of the codicil. If I am right in that view, it follows, I think, that the direction of the will as to the payment to the sons is inconsistent with it, and is *pro tanto* revoked; and that that would be the result apart from the provisions of paragraph 14 of the codicil, which directs that anything in the will which is at variance with the provisions of the codicil "shall be subservient and subject" to the codicil.

It follows also that the executors and trustees are not bound to convert any of the real estate for the purpose of making payments to the sons, and I do not think that they would be justified in converting it unless perhaps it was prudent to do so to prevent loss by depreciation of the property, or if it should be necessary to convert to pay incumbrances or debts.

If there should be money available for making payments to the sons, I do not think that they can be required to give security for what they may receive, or to pay interest upon it. The direction that what they receive is to be considered as a loan from the estate, coupled with the provision for the deduction, upon the ultimate distribution of the estate, from the share of any child to whom advances shall have been made, of the amount of the advances, was intended to make it clear that a son who received any money under the direction as to payments to sons who attain the age of thirty years, should not, in addition, receive a full share of the residue to be divided, when the division came to be made.

This consideration, and the absence of anything being said as to the loan bearing interest, or of an addition of interest to the sum to be deducted from the share, lead me to the conclusion that interest is not payable on the sum which a son may receive, and that he cannot be required, as a condition of making a payment to him, to give security for it.

ONT.
S. C.
RE SINGER.
Meredith, C.J.O.

It is true that the effect of this view being given effect to will be to reduce the amount of the income which the widow will receive, but that is a result which follows from the dispositions the testator has made, and there is no help for it. It may well be, I think, that the testator, when he made the codicil, had in view that this would be the result of the provisions he had made by his will, and that one of his objects in providing that there should be no division of his real property for ten years after his death was to prevent that from happening, by keeping his real estate, from which the bulk of income would be derived, intact for that period.

I express no opinion as to whether what I have said as to the duty of the trustees as to converting the real estate is applicable to the payments to the daughters on their marriage, because that question was not argued.

It was not proper, I think, upon the motion before my brother Middleton, to direct the inquiry which he directed to be made as to an allowance for maintenance to the children. It will be time enough after the true construction of the will and codicil has been determined, if any child thinks that the discretion of the widow has not been exercised in good faith, and that he is prejudicially affected, to take such steps as he may be advised to enforce any right he may claim to have to the intervention of the Court; and it would be most unjust to the widow to make any such direction as has been made until she, with the knowledge that as the result of the litigation she will have obtained as to her rights and duties, has failed to perform any duty which may rest upon her.

I do not differ from him as to the rights of the widow and the children in respect of the annual income of the estate, except in two particulars. In my learned brother's view, the discretion which the widow is entitled to exercise as to the application of the income to the maintenance of the children is limited to deciding what amount shall be applied for the maintenance of each child, and that she is not entitled to exercise a discretion as to whether or not a child needs or should receive an allowance for maintenance; while I am of opinion that she is entitled to exercise her discretion both as to whether a child needs and ought

ONT.

S. C.

RE SINGER.

Meredith, C.J.O.

to receive an allowance for maintenance and as to the amount of the allowance, if she deems the case one in which an allowance should be made; and that her discretion, if honestly exercised, is not open to review or to be overridden because a Court may happen to take a view which differs from hers.

The other matter as to which we differ is as to the children whose claims for an allowance for their maintenance it is her duty to consider. As I understand my learned brother's reasons for judgment, a child who has left the parental home and is living away from it has a right to have his claim considered and dealt with by his mother; while I am of opinion that he is not so entitled, and that a child who is forisfamiliated or has married has no such right; and I would vary the judgment by adding to it a declaration to that effect.

As already intimated, I do not think that the inquiry which has been directed by the 3rd paragraph of the judgment should have been directed. By paragraph 3 it is ordered that it be referred to the Master in Ordinary to inquire whether any and if so what allowance for maintenance should be made to each of the children of the said Jacob Singer out of the income of the estate.

As I have said, an inquiry of that nature should not be directed until after the rights of the parties have been finally determined, and the widow has then had an opportunity of exercising her discretion, when any child who is entitled to have his claim considered by the widow, if he is able to establish that the widow has not honestly exercised her discretion, will be in a position, in a proper proceeding, to seek the intervention of the Court for the redress of any wrong he may have suffered.

I would also add to the 4th paragraph of the judgment a declaration that the executors and trustees are not bound to convert any part of the real estate for the purpose of making payments to the sons who have attained the age of thirty years, and ought not to do so merely for that purpose.

For these reasons, I would vary the judgment in the manner I have indicated, and I would strike out the 9th paragraph of it, which provides for the disposition of the costs of the reference directed by the 3rd paragraph; and, with these variations, I

ONT.

S. C.

RE SINGER.

Magee, J.A.

would affirm the judgment and make the same order as to the costs of the appeal as is made by it as to the costs of the motion.

MACLAREN, J.A.:—I agree.

MAGEE, J.A.:—The testator's will of the 16th May, 1904, stated shortly if inexactly, gave his real and personal estate to his executors in trust with full powers to sell or mortgage, and, after certain pecuniary legacies, directed his business to be continued and the profits paid to his wife during widowhood and the net income of the residue of his estate to be paid her during widowhood, for the maintenance of herself and the children, and, on her death or re-marriage, the whole estate was given to the children share and share alike, the trustees being directed to pay each child upon attaining the age of twenty-one years his or her share, deducting any sum or sums already advanced to such child; the issue of any child dying before the mother taking such deceased child's share; or, if no issue, such deceased child's share going over to the survivors; but the trustees were directed, as each daughter married with her mother's consent, to settle on her a sum of $6,000 and pay her $1,000, and as each son attained the age of thirty years to pay him a sum equal to one-half of his prospective share—to be valued at the time he attained that age—such sum to be considered as a loan.

The will was made in 1904, when the testator's wife was about fifty-two years of age. He had three daughters, the two youngest being respectively twenty-one and seven years old, and nine sons, of whom the oldest was twenty-nine or thirty years old, and five were under twenty-one years, the youngest being twelve. Had no codicil been made, I apprehend that each son, on attaining the age of thirty years, would have been entitled to receive the sum directed to be then paid him, just as clearly as each daughter would have been entitled to her $7,000 on being married. It would have been the duty equally of the trustees to raise the money, whether for son or daughter, by exercise of the powers to sell or mortgage which were given to them; and, if delay occurred in raising it, the son or daughter would have been entitled to interest on the amount during the delay.

One question here is, whether this right of the sons has been

interfered with by the codicil, made seven years later, directing that "my real property shall not be divided among the beneficiaries as directed by my will until after the lapse of ten years from my death." The state of affairs at the date of the codicil, the 31st October, 1911, was practically the same as at the testator's death on the 11th November, 1911. His wife was then fifty-nine years old. Two of his daughters were married, and the other was a girl of fourteen. Of his nine sons, four or five were married, five were under thirty years of age, the youngest being a minor aged nineteen. The testator had, a few years previously, discontinued the business the profits of which were under the will to go to the wife during widowhood. That discontinuance would increase the income from the general residuary estate. If with the business capital he increased his real estate it did not lessen the personalty available for payments, inasmuch as under the will the capital was specifically tied up for the wife's sole benefit.

The realty (apparently including some leaseholds) was valued—not probably too highly—at about $800,000, and included over 300 houses of various sorts; but there were mortgages existing against it amounting to about $310,000. He owed his bankers and others in all about $30,000, but he held mortgages to about $37,000, and shares, life insurance, and accrued rents to about $10,000. The pecuniary legacies given by will and codicil outside of his children were about $8,200. There would be expenses and succession duty to pay. The war, which is said to have caused some depression in the real estate market, was then unthought of, and no depression at that time is shewn.

Each of the twelve children might look forward to receiving say $40,000 or more in the event of the mother's marriage or death. For the purposes of the advance to the sons, such portion was "to be valued at the time of each son attaining his thirtieth year." This valuation of a reversionary interest might not, in the case of some of the sons, amount to more than half of the prospective $40,000. In the case of the youngest, who would not attain thirty years till his mother would be seventy, the valuation would of course then be greater. Thus the total amount of the advances to sons called for by the will would be much less than one-half of the ultimate values of their several

ONT.
S. C.
RE SINGER.
Magee, J.A.

shares, and would be spread over a period of eleven years from the date of the codicil. It would not, therefore, involve undue sacrifice of property or the borrowing of unduly large amounts at one time. I cannot see that any of these payments to individual children at different successive periods could be considered, or are likely to have been by the testator considered, as a division of his real estate. The only division indicated by the will is that which would occur on the death or re-marriage of the testator's wife, and this division it is, and this alone, which, in my opinion, the testator postpones for ten years from his death.

That this is more likely may appear from another consideration. When his will was made, it directed that each child should receive payment on attaining twenty-one years. Six of his children were minors, the youngest being only seven years old. In the natural course of things, then, several years would have elapsed before his estate could be all distributed. In 1911, when he made the codicil, only one son and one daughter were minors, and this may have induced him to fix the ten years as the minimum time to elapse before the division. There is nothing to shew that the condition of the land market would render it more advisable in 1911 than in 1904. Nor are there any other circumstances or any provisions in the will or codicil which, so far as I can see, render it necessary to give to the word "divided" a meaning other than that which seems to be the only obvious one. Bearing in mind that his estate available for his children was practically all real estate, it seems to me very unlikely that, desirous as he was that his sons should have some capital on attaining the age of thirty, he should leave them without any source from which it could be got, during a further period of ten years or less. I would therefore construe the codicil as not interfering with the provision in the will for payment by way of loan to the sons on attaining the age of thirty years.

In other respects I agree with the conclusions of my Lord the Chief Justice.

Hodgins, J.A.

HODGINS, J.A.:—I agree with the judgment of my Lord the Chief Justice.

ONT.

S. C.

RE SINGER.

Hodgins, J.A.

The only difficulty to my mind is created by the direction to pay to each of the sons who reach the age of thirty "a sum equal to half that portion of the estate to which such son is entitled under this my will," upon the death of his mother; having regard to the terms of the codicil, which directs that the real property is not to be divided among the beneficiaries as directed by the will until after the lapse of ten years from the testator's death.

It is to be observed that in the codicil the postponement of the division of the real property relates to some division directed by the will, and, on looking at the will, that division is to occur upon the death or re-marriage of the wife, when and as each of the children attain twenty-one years of age. The direction to the trustees is to pay the share of the estate to the beneficiaries, just as in the clause firstly referred to the direction is to pay a sum equal to half the sons' share.

I think, judging from the language of the will and codicil, that it must have been intended by the testator to postpone the division as directed by the will, in so far as that involved the real estate, which might be taken by the beneficiaries in specie, if they all consented. The managing of the real estate and the direction that the sons shall receive such salaries as shall seem just in the discretion of the executors, and the fact that the amount of the share is to be ascertained by a valuation, a term properly applied to real estate, would seem to enforce this view.

Under the circumstances, I think that the conclusion come to by my Lord the Chief Justice upon this branch of the case is more nearly in accordance with what the testator intended than any other view which has been suggested.

Judgment below varied.

Re DE BLOIS ESTATE.

N. S.

S. C.

Nova Scotia Supreme Court, Graham, E.J., and Russell, Longley and Drysdale, JJ. February 13, 1915.

1. CONTRACTS (§ III C—329) — FORGERY — RATIFICATION — COMPOUNDING CRIME.

The forgery of another's name may be ratified by the party whose name has been attached without his authority unless such ratification involves an agreement to stifle a prosecution.

[*Scott* v. *Bank of New Brunswick*, 23 Can. S.C.R. 277, 283, applied; for previous decisions see 6 D.L.R. 119, 8 D.L.R. 68.]

N. S.

S. C.

RE DE BLOIS ESTATE.

Drysdale, J.

APPEAL from an order confirming the report of the referee.

W. E. Roscoe, K.C., and *W. F. O'Connor*, K.C., for creditors.

T. S. Rogers, K.C., for the executrices and trustees.

The judgment of the Court was delivered by

DRYSDALE, J.:—Under an originating summons herein there was a reference to Mr. Ross as referee to take evidence as to the amount of the indebtedness of William M. De Blois to the estate of his deceased father and to certify the amount of such indebtedness. The said referee took evidence and reported the amount of such indebtedness at $10,509.01. This report came before His Lordship the Chief Justice and was confirmed. Counsel for creditors of William M. De Blois asserted an appeal against the order of the Chief Justice confirming such report in so far as such report allows $2,311 and interest a portion of the said sum of $10,509.01 as indebtedness of William H. De Blois to his father or rather the appeal is against the confirmation of the report involving the whole amount, but specific items are objected to amounting to $2,311 and interest, as improperly allowed in making up the amount certified by the referee.

The question is not whether these sums were or were not paid by the late Mr. De Blois, but whether they were made on the request of William H. De Blois. It is not said that the amounts were not paid by the late Mr. De Blois, but it is alleged there is no proof of any request by William H. De Blois of such payments and that consequently they cannot rank as an indebtedness of William H. to his father.

The amounts in dispute consist of promissory notes made by William M. De Blois to which Henry D. De Blois appears to be a party. It is said the name of Henry D. De Blois was a forgery and that the payment or lifting of these notes by Henry D. De Blois does not create indebtedness on the part of William to his father.

Assuming the name of Henry D. De Blois to have been forged by the son or attached by the son without the father's authority, I see nothing to prevent the ratification of the son's act by the father so as to create liability on the part of the son unless any such ratification involves an agreement to stifle a prosecution,

N. S.
S. C.
RE DE BLOIS ESTATE.
Drysdale, J.

which is not suggested here. I think *Scott* v. *The Bank of New Brunswick*, 23 Can. S.C.R. 277, 283, is authority for this proposition.

Again, I am of opinion that the circumstances disclosed here justified the referee in holding that the payments were made on request. A request should, I think, be implied under the circumstances. The son was represented by Mrs. McCormack, who held from the son a general power of attorney authorizing her to transact the son's business. She seems to have conferred with Henry D. De Blois respecting the payment of all moneys claimed. The son sent Mrs. McCormack a list of his debts, and between Mrs. McCormack and the father conferences seem to have been had respecting the son's liabilities. The referee has held that the amounts in question should be considered as payments of the son's obligations by the father and as payments made on request. In this I think he was warranted by the evidence disclosed under the reference. I would dismiss the appeal.

Appeal dismissed.

MEAGHER v. MEAGHER.

ONT.
S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee, and Hodgins, JJ.A. April 26, 1915.

1. WILLS (§ III G 2—126)—LIFE ESTATE—POWERS—EXERCISE OF—APPOINTMENT TO ONE'S SELF—"OR OTHERWISE."

A devise by a testator of all his estate to his daughters *nominatim*, to hold for themselves and to make such disposition thereof from time to time among his children *or otherwise* as the daughters may decide, creates a life estate with a general power of appointment as to the residue which might be exercised by the appointment to themselves—the words "or otherwise" referring to the time of disposition as well as to the objects of the gift.

APPEAL from the judgment of Lennox, J. Statement

A. C. McMaster and *J. H. Fraser*, for the appellant and the respondents George Meagher and Thomas Meagher.

I. F. Hellmuth, K.C., and *E. T. Coatsworth*, for the respondents Mary Ann Meagher and Margaret Ellen Meagher.

E. C. Cattanach, for the Official Guardian.

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—This is an appeal by the defendant John Joseph Meagher from the judgment of Lennox, J., dated the Meredith, C.J.O.

ONT.
S. C.
MEAGHER
v.
MEAGHER.
Meredith, C.J.O.

14th May, 1914, which was directed to be entered after the trial before him, sitting without a jury at Toronto, on the 10th March, 1914; and the appeal is limited to that part of the judgment which declares the true construction of the 5th clause of the will in question.

The action is brought by George Meagher, one of the sons of Thomas Meagher, deceased, to have the probate of an instrument bearing date the 27th December, 1910, alleged to be the last will and testament of the deceased, set aside and delivered up to be cancelled, or in the alternative for the determination of the true construction of clause 5 of the will, the effect of which, as alleged, is that the respondents Mary Ann Meagher and Margaret Ellen Meagher hold the property mentioned in that clause upon "a secret trust" for the children of the deceased.

The learned trial Judge determined in favour of the validity of the will, and held that, upon the true construction of it, the respondents Mary Ann Meagher and Margaret Ellen Meagher take beneficially and absolutely the property mentioned in the fifth clause.

The will is as follows:—

"The last will and testament of Thomas Meagher, of the township of York, in the county of York, farmer, is as follows:—

"1. For the purpose of carrying out the trusts contained in this my will I give devise and bequeath all the estate real and personal of which I die seized or possessed or to which I may be entitled at the time of my decease unto my daughters Mary Ann Meagher and Margaret Ellen Meagher upon trust as follows:—

"2. Immediately after my decease to pay all my debts, funeral and testamentary expenses.

"3. To pay Rev. Father Canning my Parish Priest one hundred dollars for masses.

"4. To pay each of my grandchildren one hundred dollars.

"5. To hold all my property in lots eight and nine in the third concession from the bay in the township of York together with all stock crops furniture and other goods and chattels and personal property thereon for my said daughters Mary Ann

Meagher and Margaret Ellen Meagher for themselves and to make such disposition thereof from time to time among my children or otherwise as my said daughters decide to make they my said daughters in the meantime to have all the rents and profits therefrom.

"6. I desire my said trustees to sell my east part of the west half of lot one in the third concession east of Yonge street in the township of York giving my son Michael Meagher the first right of purchase and to divide the proceeds thereof between my sons Michael Meagher and James Meagher in equal proportions.

"7. I direct that no part of my real estate shall be mortgaged.

"8. All the rest and residue of my estate I desire my trustees to sell and convert into cash and divide the proceeds in equal shares among themselves and all my other children.

"9. In dealing with my estate I desire my said trustees to be guided by the advice of Emerson Coatsworth of Toronto one of His Majesty's counsel.

"10. I appoint my said trustees the executrices of this my will hereby revoking all former wills.

"In witness whereof I have hereunto set my hand this twenty-seventh day of December A.D. 1910."

It is settled law that where property is devised or bequeathed upon trust, and the trustee is empowered or directed to dispose of it as he may deem best, without the object of the trust being further defined, the trust is void for uncertainty, and the trustee does not take beneficially; and it is argued for the appellant that that is the case here unless the word "otherwise" is used with reference to the time, and not the objects, of the disposition which is directed to be made, and that if it is to be so read the trust is for the benefit of all the children in equal shares.

Two other views as to the meaning of the clause are suggested: the one, that adopted by the learned trial Judge; and the other, that the disposition of the corpus of the property is to be made by the two daughters, not as trustees, but in their personal capacity, as they may decide, and that they are tenants for life with a general power of appointment over the corpus.

ONT.

S. C.

MEAGHER v. MEAGHER.

Meredith, C.J.O.

In my opinion, the appellant's contention is not entitled to prevail.

The whole of the testator's property is, no doubt, vested in the two daughters upon trust, but the purpose of the fifth clause is to designate the persons who are to take beneficially the property mentioned in it, and what the clause says is that the trust is "to hold . . . for my said daughters Mary Ann Meagher and Margaret Ellen Meagher for themselves and to make such disposition thereof from time to time among my children or otherwise as my said daughters decide to make they my said daughters in the meantime to have all the rents and profits therefrom."

If the clause had ended with the names of the daughters, it would of course be clear that they took the whole beneficial interest in the property, and the words which follow may mean either that the two daughters, individually and not as trustees, are to make the disposition, or that the trustees are to make it in accordance with the directions of the two daughters as individuals and not as trustees.

The daughters are to have the property for themselves and to make such disposition of it from time to time among the children of the testator or otherwise as they may decide to make; and the former is, I think, the meaning of this provision; but it is immaterial which of these two views is the correct one, for in either case the disposition is to be made in accordance with the directions of the two daughters.

It is important to observe that there is a gift of the beneficial interest in the property to the two daughters. The trustees are "to hold" it "for my said daughters Mary Ann and Margaret Ellen Meagher," and the purpose for which the testator says they are to have it is "for themselves and to make such disposition . . .;" and in this respect the case differs from *Yeap Cheah Neo* v. *Ong Cheng Neo*, L.R. 6 P.C. 381, in which it was said by Sir Montague E. Smith (p. 390): "In trying to reach its meaning" (i.e., the meaning of the clause of the will disposing of the residue), "it is to be observed that it contains no words of gift, but directions to the executors, and that they

are mentioned by that title, and not by name. The first direction is to collect and receive the residue; the next, 'that they, their heirs, successors, representatives, or descendants, may apply and distribute the same (all circumstances duly considered) in such manner and to such parties as to them may appear just.' These are neither usual nor apt words of absolute gift; on the contrary, they indicate an intention to impose a trust to distribute the funds among persons other than, or at all events, in addition to, themselves."

And again at p. 392: "Several cases were cited in the argument, in which various forms of expression, conferring unlimited and unconditional powers of disposition, were held to amount to absolute gifts. It is unnecessary, however, to discuss these decisions, or to consider what would be the proper construction of the discretionary power in this will if it had been coupled with plain words of gift, uncontrolled by other parts of the will. Their Lordships' decision, founded on the whole will, is, that a trust was intended to be created, which has failed for want of adequate expression of it."

In my opinion, no trust as to the disposition of the beneficial interest in the corpus of the property is created. If it had been intended to create a trust, one would have expected very different language to have been used. It will be observed that it is not the trustees, but the testator's two daughters *nominatim*, who are to make the disposition, and it is they and not the trustees who are to decide as to the disposition which is to be made. Where anything is to be done by the two daughters in their capacity of trustees, it is so stated. In clause 6, dealing with a farm owned by the testator which he intends shall be sold and the proceeds of it divided in equal proportions between his sons Michael and James, the persons who are to sell and divide the property are "my said trustees." So in clause 8 it is "my trustees" that he desires shall sell and convert into cash and divide the proceeds of the rest and residue of his estate, and so also in clauses 9 and 10.

If it were not for the provision as to the two daughters being entitled to the rents and profits until the disposition should be

ONT.
S. C.
MEAGHER
v.
MEAGHER.
Meredith, C.J.O.

made, I should have agreed with the learned trial Judge that the two daughters take beneficially and absolutely, but that provision is, I think, inconsistent with an intention that they should so take; and my opinion is that the two daughters take beneficially for life, with a general power of appointment over the corpus. There is not much difference in the result between the two views, because, if my view is correct, the two daughters may make an appointment in their own favour and so became entitled to the whole property. The power to appoint cannot be read as a power to appoint only among the children of the testator. The words "or otherwise," while they may refer to the time of making the disposition, also include the objects of the gift.

The meaning of the testator in this case, as of testators in all cases, must be gathered from the whole will, and one of the reasons for the decision in *Yeap Cheah Neo* v. *Ong Cheng Neo* was that it was evident from the whole will that it was not the intention of the testatrix to give an indefinite and unlimited power of disposition, but that her intention was to create a trust to carry into effect the purpose she had of benefiting two families, and that that was "apparent both from the general frame of the will and its particular provisions" (p. 391).

Gibbs v. *Rumsey* (1813), 2 V. & B. 294, was distinguished upon the ground that there was there a clear gift of the residue, introduced by the apt words "I give and bequeath," to the trustees and executors, whose names were given in a parenthesis, with absolute power of disposition, and without any indication of the families or persons whom the testatrix desired to benefit.

It may be said that the testator in the case at bar desired to benefit his children, and that according to the Privy Council case that prevents the two daughters from taking beneficially, but I do not understand that such a reference as the testator makes to his children is such an indication of a desire to benefit them as to bring the case within the principle of that decision. In that case the power to apply and distribute was "(all the circumstances duly considered) in such manner and to such parties as to them may appear just," and what was really decided was

that, as the testatrix had indicated in the opening part of her will whom she intended to benefit, the words "to such parties" meant to such parties as the testatrix had indicated her intention to benefit. In this case the testator expressly authorises the disposition to be made among his children "or otherwise."

Gibbs v. *Rumsey* has been observed upon in *Ellis* v. *Selby* (1836), 1 My. & Cr. 286, and in *Buckle* v. *Bristow* (1864), 10 Jur. N.S. 1095; and it is said in Jarman on Wills, 6th ed., p. 902, that it was at one time supposed that if the property was not expressly given in trust, the donees took beneficially, mentioning *Gibbs* v. *Rumsey* as a case in which that was the view taken, but that distinction has been disapproved—citing *Buckle* v. *Bristow*, *Yeap Cheah Neo.* v. *Ong Cheng Neo*, and *Fenton* v. *Nevin* (1893), 31 L.R. Ir. 478, in support of the statement in the text.

While that may be the case, *Gibbs* v. *Rumsey* has not been overruled, and it may be observed that nothing was said, in any one of the three cases referred to, to indicate that the fact that the gift is to the trustees not by that title but *nominatim* is not a circumstance properly to be considered in determining whether the intention is to create a trust.

For the reasons I have already given, the case at bar is a stronger case for holding that the two daughters take beneficially than was *Gibbs* v. *Rumsey* for holding that the wife in that case so took.

Referring to a contention that a father to whom the trustees of the will were directed to pay dividends "during his life, nevertheless to be by him applied for or towards the maintenance education or benefit" of the children of his wife, took the dividends upon a trust to apply them for those purposes, the Master of the Rolls said, in *Byne* v. *Blackburn* (1858), 26 Beav. 41, 44: "In this case, the testator himself appointed trustees of the fund, and he therefore could not have intended the father to act as a sub-trustee, and if he intended the children to have a direct and positive interest in the fund during the life of their father, he would have directed his own trustees to make the payment to the children. But he positively directs the payment to be made to the father."

ONT.

S. C.

MEAGHER v. MEAGHER.

Meredith, C.J.O.

Applying these observations to the case at bar, if the testator had intended that his trustee should make the disposition of the property mentioned in clause 5, he would not have directed it to be made by the two daughters *nominatim* but by his trustees.

Besides this, even if the disposition had been required to be made by the trustees, they were to make it as the two daughters, as beneficiaries and not as trustees, should decide that it should be made, and the trust would have been to hold the property for the persons to whom the trustees should direct that the disposition should be made. It cannot be doubted that, if the trustees had been directed to make such disposition of it as the testator's son Thomas should direct, the son Thomas would have had power to appoint as he might choose, and no trust would have been created, and I do not see why there should be a different result in this case merely because the trustees are the same persons who were to decide as to the disposition to be made, not as trustees but in their personal capacity, and as a right conferred upon them in addition to the interest in the property which they were to take.

If, as I think, the two daughters are given a power to make such disposition among the testator's children or otherwise as they may think fit, the power is a general one, and may be exercised by appointing to themselves: Farwell on Powers, 2nd ed., p. 8.

For these reasons, I would vary the judgment of the learned trial Judge by substituting for the declaration which it contains as to the true construction of clause 5 a declaration that the respondents Mary Ann Meagher and Margaret Ellen Meagher are entitled beneficially to an estate for the lives of themselves and the survivor of them in the property mentioned in clause 5, with a general power of appointment over the corpus giving them the right to appoint either to themselves or to any other person as they may think fit.

In other respects the judgment should be affirmed and the appeal dismissed, and the appellant should pay the costs of the appeal.

Judgment below varied.

SCHUCH v. MELDRUM.

ONT.

S. C.

Ontario Supreme Court, Middleton, J. January 20, 1915.

1. PLEADING (§ I P—130)—STATEMENT OF CLAIM—FILING TIME—RULES OF COURT—CONTRAVENTION OF.

The Court has a discretion to permit a statement of claim to stand where the Statute of Limitations has not intervened although the statement of claim was delivered too late under the Ont. C.R. 1913, and notwithstanding that this was deliberately done for the purpose of avoiding a trial at the first available assize.

Statement

APPEAL by the defendants from an order of the Master in Chambers.

R. C. H. Cassels, for defendants.

S. Davis, for plaintiffs.

Middleton, J.

MIDDLETON, J.:—By the writ of summons the plaintiffs claim damages for libel and slander, and an injunction. The writ was issued on the 9th October, 1914; appearance being entered on the 26th October. The statement of claim was not delivered within the time limited by the Rules, but, without any extension of time being obtained, was delivered on the 8th January. This was not the result of oversight or of any slip on the part of the solicitor, but was a course deliberately taken with the view of avoiding a trial at the winter assizes at Toronto.

The libel alleged is, in substance, that the first-named plaintiff, who is the president of his co-plaintiff, the Ontario Metal Products Company Limited, is an alien enemy, and that for this reason Canadians ought not to do business with him. This, it is said, was defamatory, because the plaintiff was and is a British subject. The reason for avoiding the trial was the fear that strong feeling against alien enemies would prevent a fair trial being had. It may be observed that, if there was any such feeling, the plaintiff Schuch would not be injured, if, as he alleges, he is a British subject.

I do not think the course pursued was proper. If the excuse given was entitled to any weight, it ought to have resulted in a motion to postpone. The plaintiffs were not justified in adopting the irregular course they took, with a view of precluding the defendants from bringing the action to trial at the present sittings; but, admittedly, the defendants had no desire for an early trial, and I can see no good purpose which

ONT.
S.C.
SCHUCH v. MELDRUM.
Middleton, J.

would be served by dismissing this action, where it is open to the plaintiffs, if so advised, to issue another writ immediately.

If the Statute of Limitations had intervened, I should have dismissed the action, as what was done is an abuse of the practice; but I do not think I should now interfere, for the Master has exercised his discretion in case of the plaintiffs.

The appeal fails and must be dismissed; but, in the circumstances, I do not give costs.

Appeal dismissed.

N.S.
S.C.

HERTLE v. JENNY.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Russell, Longley and Ritchie, JJ. February 13, 1915.

1. SALE (§ I B—5)—SALE OF GOODS—DELIVERY—DUTY OF SELLER.

In the absence of a counter agreement the seller is not bound to send or carry the goods to the buyer; he does all that he is bound to do by leaving or placing the goods at the buyer's disposal so that the latter is able to remove them.

[*Smith* v. *Chance*, 2 B. & Ald. 753; *Wood* v. *Tassell*, 6 Q.B. 234, referred to.]

Statement

APPEAL from the judgment of Wallace, Co. C.J.

H. C. Morse, for appellant.

R. T. Macilreith, K.C., for respondent.

Ritchie, J.

RITCHIE, J.:—The action is brought for work and labour in converting a row boat into a motor boat and making a cover for the engine in another boat. So far as the work on the row boat is concerned, the learned County Court Judge has found the sum of $20 to be sufficient. I agree with him and on this branch of the case the appeal must fail.

So far as the cover for the engine is concerned the Judge has disallowed the claim holding that the plaintiff was bound to deliver or tender the cover to the defendant and finding that he did not do so. The contention of the plaintiff is that his claim is for work and labour and not for goods sold and delivered and that, therefore, no tender or delivery was necessary. It is a question of some difficulty as to whether or not the plaintiff is right in his contention, but in the view which I take of this case it is a question which it is not necessary to decide. I treat the case as the Judge below did, as a case of goods sold and delivered, and

dealing with it on that basis I am of opinion that the plaintiff is entitled to recover. When the cover was completed the legal question is was the plaintiff bound to deliver or tender the cover, or was it sufficient for him to notify the defendant that the cover was finished and ready for him to come and get it. I think that notification is all that was necessary, the cover being finished and at the plaintiff's place of business. I cannot find any evidence, any contract expressed or implied that the plaintiff was to send the cover to the defendant.

Sec. 30 of the Sale of Goods Act is as follows:—

Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract expressed or implied between the parties. Apart from any such contract expressed or implied, the place of delivery is the seller's place of business if he have one, and if not, his residence.

The cover was finished and was in the loft of the plaintiff's workshop. The section of the Sale of Goods Act which I have quoted is the same as sec. 29 of the English Act. Commenting on that section Mr. Benjamin in his Book on Sales, at p. 682, says:—

In the absence of a counter agreement the seller is not bound to send or carry the goods to the buyer. He does all that he is bound to do by leaving or placing the goods at the buyer's disposal so that the latter is able to remove them.

It would seem that at common law apart from the statute the presence of the goods at the seller's place of business ready to be delivered, the defendant being notified, is equivalent to delivery. In *Smith* v. *Chance*, 2 B. & Ald. 753, at 755, Holroyd, J., said:—

A party cannot maintain an action for goods sold and delivered until he has either delivered them or ordered something equivalent to delivery as for instance, if he has put it in the vendee's power to take away the goods himself.

In 2 Kent's Commentaries, 12th ed., p. 505, it is said:—

The store of the merchant, the shop of the manufacturer or mechanic and the farm or granary of the farmer at which the commodities sold are deposited or kept must be the place where the demand and delivery are to be made when the contract is to pay upon demand and is silent as to the place.

I also refer to *Wood* v. *Tassell*, 6 Q.B. 234. The law being in my opinion as I have stated it, I turn to the facts.

It is clear that the cover was finished and that it was at the

N. S.

S. C.

HERTLE v. JENNY.

Ritchie, J.

plaintiff's workshop. Did he notify the defendant that the work had been completed? There is no finding on this point. It was not if the Judge's view as to delivery is correct necessary to make such a finding. The plaintiff says:—

> I notified Jenny that the whole work was nearly completed; there came a wet day. After I notified him that all the work was done and gave him the bill, he took the boat away. The engine cover was in a loft over the boat.

The defendant says: "Hertle did not say to me that all the work was finished, he simply handed me the bill."

The bill was for all the work. I cannot come to any other conclusion than that the rendering of the bill was a clear intimation that the cover was finished and ready to be taken possession of by the defendant. And it certainly does seem likely when the plaintiff handed the bill to the defendant that he would make some reference to the completion of the work. I think he did, and as I have said, there is no finding the other way. Both parties having partially succeeded and partially failed, I think the appeal should be dismissed as to the work done on the row boat and allowed as to the engine cover without costs.

The result will be unsatisfactory to both parties, but if it has the effect of discouraging litigants from fighting to the bitter end cases in which trifling sums of money are involved the litigation will have served a useful purpose.

Graham, E.J.
Russell, J.
Longley, J.

GRAHAM, E.J., RUSSELL and LONGLEY, JJ., concurred.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J., dissented.

Appeal allowed in part.

ONT.

S. C.

EDWARDS v. TOWN OF NORTH BAY.

Ontario Supreme Court, Meredith, C.J.O., Garrow, Maclaren, and Magee, JJ.A. March 15, 1915.

1. HIGHWAYS (§ IV A 6—155)—ICY SIDEWALK—INJURIES TO PEDESTRIAN—LIABILITY OF MUNICIPALITY.

The gross negligence required by sec. 450, sub-sec. 3 of the Municipal Act, R.S.O. 1914, ch. 192, is established in an action for injury to a pedestrian by falling on an icy sidewalk in a town where the ice on a sidewalk in front of a store on a busy street was lumpy and formed a slope and it was shewn that within a period of five days three other persons fell at the same place, notwithstanding which the town corporation did nothing to remedy the dangerous condition of same.

ONT.

S. C.

EDWARDS v. TOWN OF NORTH BAY.

GARROW, J.A.

APPEAL by the plaintiff from the judgment of KELLY, J.

S. H. Bradford, K.C., for appellant.

G. H. Kilmer, K.C., for defendant corporation.

The judgment of the Court was delivered by GARROW, J.A.:— The action was brought to recover damages said to have been caused to the plaintiff by falling upon a sidewalk on Main street in the town of North Bay, which it is said was out of repair owing to the negligence of the defendant corporation. The accident occurred on the evening of Wednesday the 12th February, 1914. The plaintiff's injuries as a result of the fall were quite severe. Her left wrist was broken, and she was also injured internally, but not, I think, upon the evidence, in either respect permanently.

The negligence complained of was permitting an accumulation of ice and snow to be and remain upon the sidewalk upon which the plaintiff fell. Kelly, J., dismissed the action with costs, upon the ground that gross negligence had not been established, as required by sec. 450, sub-sec. 3, of the Municipal Act, R.S.O. 1914 ch. 192—a provision which has long formed part of the municipal law of the Province.

In discussing the evidence in his judgment delivered at the trial the learned Judge seemed to be of the opinion, based upon the evidence of certain witnesses called for the defence, that the account given by the plaintiff and her witnesses of the condition of the sidewalk at the time of and shortly before the accident was erroneous, or at least overstated, although not deliberately so. This does not, in my opinion, amount to a definite finding against the credibility of the plaintiff and her witnesses, but is rather a balancing of the plaintiff's case against that presented in defence, with a final inclination towards the latter upon the weight of evidence. The learned Judge having, therefore, himself supplied the corrective for the exaggerations, if any, on the part of the plaintiff, I have the less diffidence in expressing my own view, derived from a careful perusal of the evidence, upon the question of fact presented, which, with deference, differs from the conclusion arrived at by the learned Judge.

The condition of the sidewalk at the time of the accident, as

ONT.

S. C.

EDWARDS v. TOWN OF NORTH BAY.

Garrow, J.A.

given in evidence by the plaintiff, is, that she fell in front of Campbell's drug store, "the ice being lumpy and slanted there, and very slippery, and a slope from the inside out to the street." . . .

If the case stood as it did at the close of the plaintiff's evidence, the plaintiff's right to recover could scarcely, it seems to me, be in doubt. She had, it appears to me, proved very clearly that upon one of the busiest streets in the town there was, where she fell, an obstruction caused by an accumulation of ice and snow which rendered its use in that condition dangerous, as is evidenced by the undisputed fact that within a period of five days three other persons all fell at the same place. No one on behalf of the defendant has offered a single suggestion to explain why they should all have fallen at that particular place.

The case thus made is not, in my opinion, fairly met or displaced by the evidence given on behalf of the defence, largely and indeed entirely negative in its character, of persons who did not see what the plaintiff's witnesses described or do not remember the conditions as they then existed. There was no particular reason why they should observe or should remember. Probably they would have had a more lively recollection if they too had slipped and fallen, as did the plaintiff and her witnesses.

Upon the whole, the evidence seems to me to establish a reasonably clear case of gross negligence within the meaning of the statute, entitling the plaintiff to recover.

There having been no assessment of damages, I have also had to consider that question; and, dealing with it as I best can, I think the sum of $500, suggested from the Bench on the argument of the appeal, is upon the whole a fair amount. And for that sum the plaintiff should, I think, have judgment. She should also have her costs here and below.

Judgment accordingly.

GREGOIRE v. MARKHAM CO. LTD.

ALTA.

S. C.

Alberta Supreme Court, Beck, J. January 16, 1915.

1. EXECUTION (§ I—3)—CHEQUE TO DEBTOR BEFORE DELIVERY—SEIZURE OF—RIGHT TO.

A cheque by the sheriff in favour of the judgment debtor for the latter's remuneration on his employment by the sheriff to feed and care for certain horses seized as to which an interpleader was pending is not subject, while still in the sheriff's hands before delivery to the debtor payee, to seizure by the sheriff under Alberta practice rule 359 considered without reference to the new rule 615.

[*Courtoy* v. *Vincent*, 21 L.J.Ch. 291, 51 E.R. 626, followed.]

Statement

ACTION to recover a cheque seized by the sheriff.

G. G. Dunlop, for execution creditors.

C. C. McCaul, K.C., for execution debtors.

Beck, J.

BECK, J.:—The defendants Markham Co. Ltd. and other creditors severally obtained judgments and executions against one McDougall. The sheriff made a seizure of a band of horses, and owing to the pendency of interpleader proceedings, employed the defendants, Markham Co. Ltd., to take care of and feed the horses. In the result the sheriff became indebted to the defendants Markham Co. Ltd. in the sum of $600 odd. The horses were found to be subject to the executions and were accordingly sold.

The sheriff subsequently issued a cheque in favour of the defendants Markham Co. Ltd for the $600 odd; the cheque was never delivered to the company but always remained in the possession of the sheriff. Shortly after issuing the cheque the sheriff purported to seize it under an execution in his hands against the defendants the Markham Co. Ltd. I have to decide whether the seizure was effective. I think it was not.

The Rule 359 under which the seizure is sought to be supported is as follows:—

> The sheriff having the execution of any writ of execution against goods may seize any money or bank notes, any *cheques*, bills of exchange, promissory notes, bonds, mortgages, specialties, or other securities for money belonging to the execution debtor, etc.

This is substantially to the same effect as the English statute, 1 & 2 Vict. ch. 110, sec. 12.

The new rule 615 has an important addition to the list of

ALTA.

S. C.

GREGOIRE v. MARKHAM CO. LTD.

Beck, J.

things seizable, but is not applicable to the present case as it was not in force at the time of the seizure.

In *Courtoy* v. *Vincent*, 21 L.J. Ch. 291, 15 Beav. 486, 51 E.R. 626, it was held that a cheque of the Accountant General in favour of the execution debtor still remaining in the office of the Accountant General, *i.e.*, undelivered to the execution debtor could not be seized by the sheriff under the English statute mentioned.

The Master of the Rolls said:—

> I have communicated with the Accountant General and I find that in *Watts* v. *Jefferyes*, 3 Mac. & G. 422, the cheque had actually been delivered out. I think that a cheque remaining undelivered in the hands of the Accountant General is not the property of the debtor, so as to entitle the sheriff to seize it.

Reference may be made also to *Clarke* v. *Easton*, 14 U.C.R. 251.

I think the case of *Courtoy* v. *Vincent*, meets the present case, and I see no reason for not following it. I would therefore answer in the negative the question submitted to me, viz., whether the cheque was under the circumstances capable of being seized by the sheriff under the said writ of execution.

Judgment accordingly.

N. S.

S. C.

McDONALD v. CAMPBELL.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Russell and Longley, JJ. February 13, 1915.

1. NEW TRIAL (§ III B—15)—GROUND FOR ORDERING—CONTRADICTION—OVERWHELMING MASS OF TESTIMONY—DOCUMENTARY EVIDENCE.

It is a ground for ordering a new trial that on one essential portion of the case the successful party in the court below is found by the Appellate Court to be contradicted by the overwhelming mass of testimony, particularly where the documentary evidence supports such contradiction.

Statement

APPEAL from a judgment of Ritchie, J., on a promissory note.

H. Mellish, K.C., and *Hugh Ross*, K.C., for appellants.

W. F. O'Connor, K.C., and *D. A. Cameron*, K.C., for respondent.

The judgment of the Court was delivered by

Russell, J.

RUSSELL, J.:—I think there should be a new trial in this case. The judgment of the learned trial Judge cannot be re-

versed except upon the testimony of a witness whom the learned Judge regarded as unsatisfactory, and of whom he says that in drawing conclusions as to his evidence, he has to take into account the impression he formed of him as a witness. On the other hand, the defendant's account of the matter is extremely unsatisfactory. His evidence is in important respects contradicted by overwhelming evidence from other witnesses and on the question at issue between the parties is opposed to all the inherent probabilities of the case.

The Harrington Co. Ltd. was desirous of selling out one of the businesses which constituted the assets of the company and on December 13, 1911, passed a resolution providing for the sale of the business in question to the defendant on the terms of the purchaser giving his note for a sum equal to the par value of his stock in the company which was $11,800, the stock to be assigned to the company as collateral security for the note, the balance to be paid in cash.

A meeting of the shareholders was to be held and was held on December 22, 1911, at which the defendant, who was a director in the company, was present, when the same terms substantially were affirmed as those on which the purchase and sale should be made. A note for $11,800 was accordingly drawn up and signed by the defendant, although he now contends that he signed the note in blank and in several parts of his evidence he speaks of it as if it had been a note for $11,000 only.

The terms of the purchase could not be carried out by the defendant and the learned Judge is no doubt correct in saying that the sale was off in consequence of the inability of the defendant to comply with the terms. But it is certain that negotiations continued between the parties with reference to the business and a verbal proposal seems to have been made by the defendant which on December 29, 1911, was accepted, *provided Mr. Campbell pays* $1,000 *to-day*. In the event of Mr. Campbell not completing the sale the managing director, F. G. Konig, was authorized to take whatever steps were necessary to liquidate the business.

The plaintiffs contend that they never gave up the direction

N. S.

S. C.

McDONALD v. CAMPBELL.

Russell, J.

of the business and would have been unwilling to do so until the $1,000 in cash was paid. The defendant's contention is that he was put in charge of the business in the first instance in pursuance of the resolution of the directors, but went out of possession again after his alleged notification to the managing director that he would not carry out the terms of the arrangement.

A second sale was made in March, 1911, and the only dispute with reference to it relates to the terms upon which the defendant was to take over the business. He contends that the terms were that he was to surrender his stock to the extent of $11,000, retaining $800 of his stock, to give notes for a cash balance of $2,319.93 and pay $1,000 cash. The notes were given and the cash paid and the notes were afterwards paid, I assume, in due course.

The plaintiff's contention is that the original note for $11,800 was to be taken in part payment for the business at the sum of $11,000, $800 being credited on the note and treated as a payment on account, being included in the notes that were given for the balance of $2,319.93. Konig, the managing director, refers to this as a payment of $800 on the note for $11,800; the defendant says that no such payment was made. These varying statements can, of course, be easily reconciled by the explanation that the $800 was in fact included in the balance of $2,319.93 shewn as the result of the accounting.

It is quite incredible to my mind that the company would have been willing to accept the defendant's stock as a payment on account of the business at its par value when they must have been aware and certainly were aware that it was not worth anything like par value and, moreover, had been advised that they could not legally accept the stock in payment of the merchandise and real estate which they were handing over to the defendant.

Besides all this, the documentary evidence is entirely opposed to the contention of the defendant. In making up the account or memorandum upon which the transaction was to be based after setting out the value of the real estate, merchandise and what is called the running gear, they place on the other side of

the account, among other things, "Note, $11,000." The defendant, of course, must be assumed to have perused this memorandum and to have assented to its terms, and I conceive it to be hardly doubtful that, whether he so understood the matter or not, it was the understanding of the plaintiffs that the note must be considered to be and intended to be in their hands a valid and continuing obligation for the sum of $11,000. In other words, I think it was their understanding that the terms of the original bargain which were the only ones upon which the managing director was authorized to carry out the sale, were adhered to accepting in so far as it was necessary to modify them because of the stock in trade having been depleted in the interval between December and March.

The learned Judge professes not to deal with or in any way adjudicate upon the facts in connection with the second sale, but to leave them open and untouched by his judgment and not in any way concluded or determined thereby. But it is impossible to separate the two transactions. If it should turn out on an investigation respecting the second sale that the plaintiff's contention is correct and that this note for $11,800 was meant to stand as payment on account of the business, the difficulty is that effect could not be given to such a finding because the plaintiffs would be precluded by the judgment of the learned trial Judge from recovering on the note, the matter being *res judicata*. In fact they would be precluded if the present judgment were affirmed from setting up this contention.

I have said that on one essential portion of the case the defendant is contradicted by an overwhelming mass of testimony. I refer to his statement that the stock certificates were delivered to the managing director, Konig, in connection with the second sale. The evidence is clear beyond question that they were given in connection with the first sale in December, that they were handed over to the Canadian Bank of Commerce together with the note for $11,800 and remained in the custody of the bank from that date until some time in the year 1914.

I should have regarded the evidence of the defendant as being very unsatisfactory and self contradictory, and I think it

N. S.

S. C.

McDONALD v. CAMPBELL.

Russell, J.

quite remarkable that Norman McDonald, who was present at several of the interviews between Konig and the defendant was unable to give evidence which would have set at rest the questions of fact at issue between them.

I think the appeal should be allowed and a new trial ordered, the costs to abide the event.

Appeal allowed.

ONT.

S. C.

MURDOCK v. KILGOUR.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee, and Hodgins, JJ.A. March 15, 1915.

1. INTOXICATING LIQUORS (§ I C—33)—REGULATION OF LIQUOR TRAFFIC—TEMPERANCE—ELECTION—VALIDITY—JURISDICTION TO DETERMINE.

The Supreme Court of Ontario has no jurisdiction to determine the validity of an election held under the Canada Temperance Act R.S.C. 1906, ch. 152, respecting the regulation of traffic in intoxicating liquors, the scrutiny of which is by secs. 67 (c), 69 and 70 conferred in Ontario, on the Judge of the County Court, whose decision is declared final.

[*Chapman* v. *Rand*, 11 Can. S.C.R. 312; *McPherson* v. *Mehring*, 47 Can. S.C.R. 451, referred to.]

Statement

APPEAL from the judgment of Lennox, J.

James Haverson, K.C., for the appellant.

W. E. Raney, K.C., for the plaintiff, respondent.

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendant Kilgour from the judgment of Lennox, J., dated the 2nd November, 1914, which was directed to be entered on a motion for judgment upon a statement of facts agreed upon by counsel for the appellant and for the respondent, and embodied in a memorandum filed.

The respondent, who brings the action, is an elector entitled to vote under the Canada Temperance Act and the Election Act of Canada, in the town of Welland, in the county of Welland, and is a resident of that town, and voted on the submission of the petition for the taking of the votes of the electors of the county on the question of the bringing into force in the county of Part II. of the Canada Temperance Act.

The action is brought against the appellant, who is the president of the Welland County Hotelkeepers' Association, Hugh A. Rose, the returning officer, and L. B. Livingstone, Judge of

ONT
S. C.
MURDOCK
v.
KILGOUR.
Meredith, C.J.O.

the County Court of the County of Welland; and the claim of the respondent as endorsed on the writ of summons is "for a declaration that the proceedings had and taken in the county of Welland on and prior to the 29th day of January, 1914, for a polling of votes under the Canada Temperance Act, were not pursuant to or in accordance with the proclamation of the Governor in Council in that behalf or to the said Act, and that on or after the 29th day of January, 1914, certain of the ballot boxes used in connection with the said proceedings were tampered with so as to make it impossible to determine what ballots were actually cast by electors and how they were marked, and that the said proceedings did not and do not constitute a polling of votes under the said Act, and were and are invalid and void, and ought not and do not operate to prevent the issue of a new proclamation by the Governor in Council upon the petition upon which the said former proclamation was issued, or the putting of a similar petition to the vote of the electors of the said county at any time; and to prohibit the defendant L. B. C. Livingstone, as Judge of the County Court of the County of Welland, from determining or certifying as a result of the pending scrutiny under the said Act whether the majority of votes given on the said proceedings was or was not in favour of the petition to the Governor in Council; and for an injunction restraining the defendant Hugh A. Rose, as returning officer under the said proclamation, from transmitting any return to the Secretary of State with reference to such proceedings except such return as this Honourable Court may be pleased to order."

The respondent moved for an order prohibiting the Judge until the trial or determination of the action from determining or certifying, as a result of a scrutiny pending before him under the Act, whether the majority of votes given on the proceedings taken in the county of Welland on and prior to the 29th day of January, 1914, pursuant to a proclamation of the Governor in Council for a polling of votes under the Act, was or was not in favour of the petition, or, in the alternative, for an injunction to the like effect, and for an injunction restraining the returning officer until the trial and final determination of the

ONT.

S.C.

MURDOCK v. KILGOUR.

Meredith, C.J.O.

action from transmitting any return to the Secretary of State with reference to the question as to whether or not the majority of the votes was in favour of the petition, or, in the alternative, for an order prohibiting the returning officer from transmitting his return.

On the motion coming on to be heard, it was turned into a motion for judgment, on the facts stated in the memorandum to which I have referred, and judgment was pronounced declaring "that the proceedings had and taken in the county of Welland on and prior to the 29th day of January, 1914, for a polling of votes under the Canada Temperance Act were not pursuant to or in accordance with the proclamation of the Governor in Council for the taking of the votes of the electors of the said county for and against the petition to the Governor in Council for the bringing into force in the said county of Part II. of the said Act, and were not pursuant to or in accordance with the said Act, and that the said proceedings did not and do not constitute a polling of votes under the said Act, and were and are invalid and void, and ought not to and do not operate to prevent the issue of a new proclamation by the Governor in Council upon the petition upon which the former proclamation was issued, or the putting of a similar petition to the vote of the electors of the said county at any time," and by the judgment it was ordered "that the defendant Hugh A. Rose be and is hereby perpetually restrained from transmitting any return to the Secretary of State with reference to the said proceedings, except a return that the said proceedings were invalid and void as declared by this judgment;" and it was further ordered that the action be dismissed as against the defendant Livingstone.

The facts admitted in the memorandum are the following:—

"1. The plaintiff is an elector entitled to vote under the Canada Temperance Act and the Dominion Election Act, in the town of Welland, in the county of Welland, and is a resident of the said town, and voted on the submission of the petition hereinafter referred to.

"2. Pursuant to a petition in that behalf, under the Canada

Temperance Act, the Governor in Council issued his proclamation on the 8th day of November, 1913, for the taking of the votes of the electors of the county of Welland on a petition to the Governor in Council for the bringing into force in the said county of Part II. of the Canada Temperance Act, and proceedings in the nature of a poll of the electors of the said county on the said petition took place on the 29th day of January, 1914.

"3. On or about Monday the 2nd day of February, 1914, the defendant Hugh A. Rose, as returning officer, proceeded to open the ballot boxes that had been used in the said proceedings and to sum up the votes, and as a result of such summing up announced that the petition had been defeated by a majority of six votes.

"4. Thereafter on the 17th and 18th and on the 25th, 26th, and 27th days of February, 1914, a scrutiny was had before the defendant L. B. C. Livingstone, Judge of the County Court of the County of Welland, pursuant to provisions of the said Act.

"5. The said scrutiny was had on the application of the plaintiff herein, who is secretary of the committee which had in charge the preparation of the said petition and the submission of the same to the electors. The defendant Kilgour, who is an elector under the said Acts in the said town of Welland, was and is president of the Welland County Hotelkeepers' Association, which was and is an organisation opposed to the submission and to the adoption of the said petition in the said county.

"6. All the ballots found in the ballot boxes, the contents of which were examined on the said scrutiny, were in the form marked exhibit A to the affidavit of John Franklin Gross, filed herein.

"7. In a number of the polling places the deputy returning officers did not give out the ballot papers with the counterfoils attached, as required by section 37 of the Canada Temperance Act.

"8. In three of the polling places where proceedings in the

ONT.
S. C.
MURDOCK
v.
KILGOUR.
Meredith, C.J.O.

nature of a poll were taken on the said 29th day of January, 1914, the deputy returning officers placed numbers on the ballots, instead of upon the counterfoils, the said numbers corresponding with numbers either on the voters' list or in the poll book for the polling subdivisions, in such manner that the said ballots could be identified as ballots that had been marked by individual voters. The number of ballots thus marked was 185.

"9. As a result of the scrutiny aforesaid, the County Court Judge found that 3,616 ballot papers had been marked for the petition, and 3,731 ballot papers against the petition, and is prepared to certify that the petition was defeated by a majority of 115 votes."

The form of the ballot paper mentioned in the 6th paragraph of the memorandum was that prescribed by the Act, except that the following words were omitted:—

"19.

"Voting on the petition to the Governor General for the bringing into force of Part II. of the Canada Temperance Act."

The appellant's contention is, that the Supreme Court of Ontario has no jurisdiction to inquire or determine, by action or otherwise, as to the validity of the voting, or of any other of the proceedings taken under the Act, and also that the respondent had no status to maintain an action, if an action is maintainable, and that the validity of the voting could not properly be determined in an action in which only the appellant, the returning officer, and the Judge of the County Court are defendants.

It was conceded by counsel for the respondent that he could not support that part of the judgment by which the returning officer is restrained from transmitting his return to the Secretary of State, as required by sec. 64, but he argued that the action, so far as it sought an inquiry into the validity of the voting, was maintainable, and that the action was properly constituted.

No case was cited which supports the contention of the respondent's counsel, and none was referred to, nor have I

found one in which the interference of a Provincial Court was sought to obtain such an adjudication as that which was made in this case.

The Canada Temperance Act provides its own code of procedure; and the provision which it makes for an inquiry as to whether or not a majority of the votes was or was not given in favour of the petition to the Governor in Council affords, in my opinion, the only way in which, by a judicial proceeding, the result of the voting can be inquired into.

But for the decision of the Supreme Court of Canada in *Chapman* v. *Rand*, 11 S.C.R. 312, I should have thought that the powers of the Judge of a County Court in holding a scrutiny under sec. 69 were larger than by that case they were decided to be, but by that decision we are bound unless the subsequent case of *McPherson* v. *Mehring* (the *West Lorne Case*), 47 S.C.R. 451, has overruled or modified it. Accepting the construction which the Supreme Court in that case put upon the section, I cannot escape from the conclusion that the draftsman of the Act thought, erroneously, as the result has shewn, that he had given to the Judge upon a scrutiny the powers which in that case it was unsuccessfully argued were conferred upon him by what is now sec. 69; and this view is fortified by the provisions of what is now sec. 105.* No "tribunal having cognizance of the question" is provided for by the Act, unless it be the tribunal before which the scrutiny takes place, which in Quebec is a Judge of the Superior Court, in British Columbia a Judge of the Supreme Court of that Province, or a Judge of the County Court, and in any other Province, except Saskatchewan and Alberta, the Judge of the County Court.

In *Chapman* v. *Rand*, in the course of the argument of counsel for the respondent, he pointed out that if sec. 62 (now 69)

*105. No polling of votes under this Part shall be declared invalid by reason of a non-compliance with the provisions of this Part, as to the taking of the poll or the counting of the votes, or of any mistake in the use of the forms contained in the schedule to this Act, if it appears to the tribunal having cognizance of the question that the polling of the votes was conducted in accordance with the principles laid down in this Part, and that such non-compliance or mistake did not affect the result of the polling.

ONT.

S.C.

MURDOCK v. KILGOUR.

Meredith, C.J.O.

were construed to give the Judge only the power to recount and declare the numerical majority of ballots, sec. 70 (now 105) is meaningless, because, as he argued, there would be no tribunal having cognizance of the question, *i.e.*, of the validity or otherwise of the poll. This argument was not dealt with by any of the Judges except Henry, J., who appears to have agreed with it, for he said (pp. 320-1): "Whether the ballot is right or wrong; whether parties are guilty of corruption or not, are matters into which there is no provision made by the Act to inquire, unless it can be done under the scrutiny." Then, after mentioning the provisions of sec. 62, he went on to say: "Now, what is the meaning of that? Nobody else has any authority to try out the question." And later on he said: "If the judgment of the Court below is wrong, then corrupt or illegal practices will not avoid an election such as this." And there was no dissent from these views expressed by any other member of the Court.

It would be highly inconvenient if the powers of a Provincial Court could at any time be invoked to stay, or to set aside, any of the proceedings leading up to the issue of the proclamation bringing the Act into force, or to set them aside. If that were permissible, those opposed to the bringing of the Act into force might be able to prevent the vote from being taken at the appointed time, or to delay the proceedings for bringing it into force until the end of the litigation they had begun, which might not arrive until the case had reached, and had been decided by, the Privy Council.

The provision for the scrutiny and the absence of any other provision for questioning the result or the validity of the voting, point clearly, I think, to the conclusion that Parliament did not intend that any other means should be available for questioning the result of the voting than the scrutiny for which—inadequately as it has turned out—the Act provides.

It may be said that, if this is the correct view, there is no remedy where such irregularities as in this case have been found to have occurred, or perhaps worse ones, have taken place; but, if that be the case, the remedy must be sought in

ONT.

S. C.

MURDOCK v. KILGOUR.

Meredith, C.J.O.

Parliament; and, as I understood the statement of counsel upon the argument, Parliament has already supplied the remedy by an amendment of the Act; and I may add that I do not see why it was not open to the Judge on the scrutiny, if the form of ballot paper used rendered a ballot void—as to which I express no opinion—to have rejected it in making his count, nor do I see why it was not open to him to reject any ballot paper which was numbered as stated in the memorandum, if that was a ground for rejecting it; and, if that be the case, his decision as to the count, even if erroneous, was final (sec. 70).

Having come to the conclusion that my brother Lennox acted without jurisdiction, it is unnecessary to consider the question raised as to the constitution of the action.

I would allow the appeal, reverse the judgment appealed from, and substitute for it a judgment dismissing the action, and leave each party to bear his own costs of the litigation.

Garrow, J.A.

GARROW, J.A., concurred.

Maclaren, J.A. Magee, J.A.

MACLAREN and MAGEE, JJ.A., agreed in the result.

Hodgins, J.A.

HODGINS, J.A.:—I agree in the main with the judgment of my Lord the Chief Justice, which I have had the privilege of reading.

The provisions of Parts I. and II. of the Canada Temperance Act, R.S.C. 1906, ch. 152, seem to give to the electors qualified to vote for members of the House of Commons the initiative in promoting local prohibition in the county or city to which they belong. In the Governor in Council is vested the right to accede to the request or petition, provided a majority of those electors vote in favour of it. The sections relating to the commencement of these proceedings shew that it is the Governor in Council who must be satisfied that the signatures to the petition are genuine and sufficient; and thereupon the Governor in Council may issue his proclamation, which, in addition to the usual provisions, can include "such further particulars, with respect to the taking and summing up of the votes of the electors, as the Governor in Council sees fit to insert therein" (sec. 11, clause *j*.)

ONT.
S.C.
MURDOCK
v.
KILGOUR.
Hodgins, J.A.

By sec. 15 the right to vote is defined as belonging to all persons qualified to vote at an election of a member of the House of Commons, and under secs. 18 and 19 the returning officer prepares and furnishes the voters' lists upon which the poll is taken. Provision is also made by sec. 39 for cases where no voters' list exists. By sec. 54, the deputy returning officer's decision upon any objection to a vote is final, subject only to reversal on a scrutiny; and the returning officer is bound to count only such votes as are allowed by the deputy returning officers (sec. 59), except where ballot boxes have disappeared. In that case he is (sec. 61) to ascertain the number of votes "by such evidence as he is able to obtain." He is bound, in making his return, to mention the mode by which he ascertained the number of votes given in each interest (sec. 61). By sec. 65, his return is to be accompanied by the statements of the deputy returning officers, as well as the ballot boxes, etc.

A scrutiny, if applied for, may, in Ontario, be had before the County or District Court Judge, who, "upon inspecting the ballot papers and hearing such evidence as he deems necessary, and on hearing the parties, or such of them as attend, or their counsel, shall, in a summary manner, determine whether the majority of votes was, or was not, in favour of the petition to the Governor in Council;" and his decision is final (secs. 69 and 70).

Many prohibitions and penalties are provided for in the Act. Under sec. 64, the returning officer, in making his return, whether a scrutiny has taken place or not, "shall send with it a report of his proceedings, in which he shall make any observations he thinks proper as to the state of the ballot boxes or ballot papers as received by him." This is in addition to the requirements already pointed out, viz., the mode in which he ascertained the number of votes under sec. 60.

Under these provisions, and having regard to sec. 105 (which corresponds to the well-known curative section in the Ontario Municipal Act), it appears to me that the tribunal which alone has cognizance of the question therein mentioned may well be the Governor in Council, in whom is vested the right or duty,

if the petition "has been adopted by the electors," of declaring that Part II. of the Act shall be in force.

The return, if it complies with the statutory requirements, will afford all the information necessary; and there is no reason, if doubt still exists, why the Governor in Council should not call for further information before proclaiming Part II. Section 106 can be read as applying to a criminal prosecution for any offence under the Act, or to a civil action for penalties under sec. 102.

It may be that, but for the view taken by the Supreme Court of Canada, as mentioned by the Chief Justice, sec. 105 might also be held to govern the proceedings on the scrutiny.

The duties of the deputy returning officers, the returning officer, and the County or District Court Judge, respecting the votes polled, while in part judicial, finally result only in forming a foundation for the return which is to be made to the Governor in Council. See secs. 62, 63, and 64. The proclamation, however, depends, not on the return, but on the fact of adoption by the electors, which has to be decided by some tribunal, if the elements mentioned in sec. 105 enter into the question.

If Part II. is finally proclaimed, then the consequences provided in sec. 110 must necessarily follow. In the event of an adverse vote, as in the present case, where there would be, in consequence, no proclamation, sec. 108 enacts that no similar petition shall be put to the vote within three years. But there is nothing to prevent such a petition from being prepared, signed, and presented. And, if satisfied that what had taken place was not saved from invalidity by sec. 105, the discretion to act or not to act seems to me to have been left to the Governor in Council. If not, who can say whether the petition is to be acted on or not? This is a situation which arises after a scrutiny by the County Court Judge, and therefore he cannot intervene. It only confronts the executive, who must therefore decide, as it appears to me. It is a small matter to leave to the discretion of the Governor in Council, compared to the judicial

ONT.
S. C.
MURDOCK
v.
KILGOUR.
Hodgins, J.A.

duties devolving upon that body under the British North America Act in relation to education, and under the Dominion Railway Act.

I am, therefore, more inclined to the view that the tribunal referred to in sec. 105 is the Governor in Council, owing partly to the narrow limits of the County Court Judge's powers, but particularly because there are larger duties imposed by the Act, and involved in the exercise of the rights it confers, than are comprehended in the scrutiny sections.

If I am right, then I do not know of any power in the Courts of this Province to inquire into the exercise of this discretion, nor to entertain an action against the Governor in Council. The thing is unheard of; and, if it cannot be done directly, it hardly needs to be stated that it cannot be done indirectly.

The Secretary of State, to whom the return is to be made, cannot act upon it: that must be done by the Governor in Council. I had thought during the argument, having regard to such cases as *Shafto* v. *Bolckow Vaughan & Co.* (1887), 34 Ch. D. 725, *Dyson* v. *Attorney-General*, [1911] 1 K.B. 410, [1912] 1 Ch. 158, *Burghes* v. *Attorney-General*, [1911] 2 Ch. 139, [1912] 1 Ch. 173, *Thornhill* v. *Weeks*, [1913] 1 Ch. 438, [1913] 2 Ch. 464, that proceedings might lie against the Secretary of State for a declaration as to the proper construction of sec. 108. Such an action would determine whether that section referred to the result of the vote as certified, or the result as determined by some judicial decision. But, upon further consideration, I do not see that those cases can apply to the situation here. In two of them there was either a threat that penalties would be imposed or sued for, and in the others the defendant was said to be interested in making and asserting a right as against the plaintiffs. In the case at bar, the Secretary of State has nothing to do with the penalties, which are either recoverable by a common informer or are imposed in the course of administering the criminal law, which in Canada is enforced by the Provincial authorities. In the English Finance Act cases, the penalties are said to be recoverable in the High Court, and are treated as part of the demand made by the Commissioners or as intended to be enforced by them.

ONT
S. C.
MURDOCK
v.
KILGOUR.
Hodgins, J.A.

But, whatever view may be taken of the Dominion Temperance Act, it certainly does not warrant the proceedings which have been instituted here. In a matter affecting the electors of the county of Welland, of whom 7,347 voted on one side or the other, the judgment of the Court has been obtained at the instance of one elector against two gentlemen who have not the remotest status either to uphold or to contest the result. Mr. Kilgour happens to be an elector, and is likewise president of the Welland Hotelkeepers' Association, a body commercially interested, and eminently unsuited to represent the 3,731 electors voting against the petition. It is fair to assume that fully nine-tenths of those who voted against the petition must have been free from any pecuniary interest. The other defendant, Rose, is the returning officer, whose duties are defined by statute, and who, occupying that position, has no possible interest in the result and ought not to have been forced into this law-suit.

The result is, that an injunction has been granted against him which would prevent him from performing his statutory duty—a result not supported before us by counsel for the respondent. The County Court Judge was also made a party. What right have any one or all of these defendants to represent the electors of the county of Welland, and how is it possible, if they have no such right, that the Court should make a declaration which, if effective, takes matters out of the hands of the Governor in Council and practically abrogates the provisions of sec. 108 of the Canada Temperance Act?

I am not aware of any practice that enables a plaintiff to pick out some one individual and litigate with him so as to affect the rights of others not represented by him in law or in fact. The rule of Court under which alone a plaintiff may avoid joining all parties interested is Rule 75, which gives no warrant for this proceeding, and indeed was not even pressed into service.

It is true that in cases under the Liquor License Act of Ontario a practice has obtained of asking the Court to make declarations that the whole poll has been invalid. In *Hair* v.

ONT.

S.C.

MURDOCK v. KILGOUR.

Hodgins, J.A.

Town of Meaford, 20 D.L.R. 475, 31 O.L.R. 124, I considered myself bound to defer to the opinions expressed, in the cases to which I have referred, by Judges of experience. But I am constrained to say that my own opinion is decidedly against what I regard as a course leading to greater evils than those it is designed to cure. I endeavoured in that case to indicate some of the considerations which led me so to think, and also the principle which ought to govern when declarations are sought against individuals which are intended to govern the public rights of others; and it is unnecessary in this case to enlarge upon them. I mention those cases because they were cited to us as authority for the extraordinary frame of this action.

In *Stoddart* v. *Town of Owen Sound*, 8 D.L.R. 932, Lennox, J., made a declaration of the kind I have mentioned, but apparently with some hesitation, and he remarks upon the difficulty occasioned by the fact that the council of the municipality, and of necessity its advocate, represented both those for and those opposed to local option. He therefore allowed counsel for one party to aid in the defence. In *Carr* v. *Town of North Bay*, 13 D.L.R. 458, the learned Chancellor dismissed the action, but on the ground that the allegations of impropriety were not proved. While the town of North Bay was a defendant, the only one who appeared at the trial and argued was referred to by the Chancellor as "a defendant added by special order, B. N. Mulligan." In an earlier case of *Re Vandyke and Village of Grimsby*, 19 O.L.R. 402, Mulock, C.J., reviewed the proceedings at and prior to the voting on a local option by-law and decided that they were invalid, allowing two electors to intervene, as the Council of Grimsby announced that they did not intend to take part in the motion.

In all three cases, which seriously affected the rights of the electors at large on an important public question, the municipality, which alone could claim in any sense to represent them, was either absent or indifferent, and the Court had to rely largely upon assistance volunteered by individuals interested in the result.

The constitution of this case is, if possible, more open to

ONT.

S.C.

MURDOCK v. KILGOUR.

Hodgins, J.A.

objection, as the action has not the merit of possessing as a defendant any one who even technically represents anybody but himself.

Both for the reasons given in the judgment of my Lord the Chief Justice, and those I have mentioned, I think this appeal should be allowed and the action dismissed. But, as both parties have participated in a proceeding which, in my opinion, has no real foundation and should not have been pursued, they may well be directed to bear their own costs throughout.

Appeal allowed.

EARLEY v. WINNIPEG ELECTRIC R. CO.

MAN.

C.A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, and Haggart, JJ.A. May 10, 1915.

1. NEW TRIAL (§ III B—15)—ERRONEOUS VERDICT—ACTION BY HUSBAND AND WIFE—INDEFINITENESS AS TO PLAINTIFFS.

The verdict in a negligence action must be certain in that it must shew in whose favour it was given where two plaintiffs, husband and wife, sue for separate causes of action, one by the wife and one by the husband; a new trial must be ordered if the verdict is brought in "for the plaintiff" in a fixed sum of damages where there is nothing to shew for which plaintiff the verdict was given in an action by the wife for damages for her injuries in falling from a street car, and an action by the husband for medical expenses and the loss of his wife's society and services.

Statement

APPEAL from the judgment of the trial Judge in a negligence action.

E. Anderson, K.C., and *R. D. Guy*, for defendants, appellants.

E. A. Cohen, and *A. S. Douglass*, for plaintiffs, respondents.

The judgment of the Court was delivered by

Richards, J.A.

RICHARDS, J.A.:—The plaintiffs are husband and wife. The action is for damages resulting from alleged negligence on the part of the defendant's servants in starting up one of the defendant's street cars while the wife, who had been a passenger on it, was getting out. It is claimed that, by such negligence, she was thrown to the ground and injured.

The suit is brought on separate causes of action, one by the wife and one by the husband. That by the wife is to recover

MAN.
C. A.
EARLEY
v.
WINNIPEG ELECTRIC R. CO.
Richards, J.A.

damages for her injuries, pain, suffering and impaired health, laying the damages at $7,000. The husband claims $3,500 for loss of his wife's society and services and for his expenses in procuring medical attendance for the wife, and otherwise.

It is claimed by counsel for defendants that the jury did not bring in a verdict of at least nine of their members. But, assuming for the present purposes that nine of them did concur, the verdict they did bring in was *for the plaintiff*, fixing damages at $2,500.

On that verdict which does not say, as will be noticed, for which plaintiff the jury found, the learned trial Judge entered judgment in the wife's favour for the whole $2,500, giving no judgment either for or against the husband.

The defendants appealed, taking several objections to the judgment, only one of which was argued, as the Court thought it fatal, viz., that the verdict was not one on which the judgment could be supported.

On the appeal the plaintiff's counsel offered to disclaim, on the husband's behalf, all right to the verdict. That, however, if necessary to the validity of the judgment, and if it would have helped matters, which I doubt, should have been done before judgment was entered.

There is very little authority to be found. There is no doubt, however, that a verdict must be certain in this, that it must shew in whose favour it was given. Here there are two distinct actions—one by each plaintiff. There is nothing to shew for which plaintiff the verdict was given. It might, so far as we can tell, have been meant wholly for the husband. If so, the effect of the finding would be that the wife had no cause of action. But if she had none, neither had the husband, because his right of action could only arise from the wrongs that gave rise to hers.

The judgment must be set aside, and a new trial had. The costs of the appeal are to be costs in the cause to the defendants in any event. The costs of the trial already had are to abide the ultimate result of the action.

Judgment accordingly.

DOYLE v. MOIRS LTD.

N.S.

S.C.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Longley, and Drysdale, JJ. March 9, 1915.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—INJURY IN COURSE OF EMPLOYMENT.

An accident caused by the tortious act of a fellow workman having no relation whatever to the employment cannot be said to arise "out of and in the course of the employment" under the Workmen's Compensation Act, 1910, N.S., ch. 3, sec. 5.

[*Challis* v. *London and S.W.R. Co.*, [1905] 2 K.B. 154, distinguished.]

2. MASTER AND SERVANT (§ II E 6—275)—SERVANTS AT PLAY—INJURY TO FELLOW SERVANT—LIABILITY OF MASTER.

If some servants leave their work and indulge in "larking" to the injury of a fellow servant, that does not infer liability on the employer for damages at common law or under the Employers' Liability Act, N.S., or the Workmen's Compensation Act, 1910, N.S., ch. 3.

[*Armitage* v. *Lancashire & Yorkshire R. Co.*, [1902] 2 K.B. 178, *Fitzgerald* v. *Clarke*, [1908] 2 K.B. 796, applied.]

Statement

APPEAL from the judgment of Ritchie, J.

J. J. Power, K.C., for appellant.

H. Mellish, K.C., for respondent.

The judgment of the Court was delivered by

Graham, E.J.

GRAHAM, E.J.:—This is a claim under the Workmen's Compensation Act, 1910 (N.S.), ch. 3, sec. 5. We have to decide whether the case is one of "personal injury by accident arising out of and in the course of employment caused to a workman."

The contention of the defendant and the decision of the trial Judge is that it was not. The learned Judge has adopted the testimony given by Doyle. Doyle it appears was in the employ of the defendant manufacturers, in what is called the hard candy department. He and the other lads, Graves and Armitage, rather older than he, who were concerned in the injury are what are called helpers. They had no position over him. This is what the plaintiff says:—

I was rolling a batch of molasses kisses and when I was done rolling I took them away from the machine. Graves sent the girl to the other end of the room. These few strips were left and he told me to put them in the pan, which was not my work. I walked away paid no attention to him. I left the table where I was working and went to Fred Purcell and asked him could I pull his strip of candy and he paid no attention and I went around a post going to the sink to get a drink. Graves overtook me and told me to go back and he was going to force me back. Just then Armitage came along and took up these shears and put them in my hand, me

N. S.
S. C.
DOYLE
v.
MOIRS LTD.
Graham, E.J.

guessing what he meant, and he said, "Go at him like that" (fencing). I did not have them three seconds when Armitage gave them a quick jerk out of my hand and they flew open and one end went in my eye.

The eye was destroyed and it is for this injury that he claims against the employer.

The learned Judge finds that the act of Armitage was mischievous and tortious but not criminal.

The plaintiff relies on the case of *Challis* v. *London and S.W. R. Co.*, [1905] 2 K.B. 154. That was the case of a locomotive engineer on his locomotive who was injured by stones thrown at the locomotive from an overhead bridge by mischievous boys. And it was held that it arose out of the employment as an engine driver and that the throwing of stones at a passing train was incidental to that employment though it might not be incidental to other employments. The Court of Appeal with the same Judges had decided the earlier case of *Armitage* v. *Lancashire and Yorkshire R. Co.*, [1902] 2 K.B. 178, and they expressly affirmed that case and distinguished it. In that case while Armitage and the other boys were engaged in the paint department of the company one boy for a lark pushed another boy into a pit. The latter in anger threw a piece of iron at the former, but it missed him and hit Armitage in the eye. It was held that the accident did not arise out of the employment.

It is rather fortunate that both of these cases came up for decision in a later case in the Court of Appeal and with other Judges, except the Master of the Rolls, when distinctions had to be made and observations occur in respect to these two decisions. I refer to the case of *Fitzgerald* v. *W. G. Clarke & Son*, [1908] 2 K.B. 796.

In that case a practical joke was played upon the applicant by two of his fellow workmen on the scene of the employment, attaching the hook of a hoist to his collar and he was hoisted up and in falling was injured, and it was held that this accident did not arise out of the employment. The Master of the Rolls at 798 said, referring to the *Armitage* case:—

> It was there argued as it has been argued here that when a number of young boys are employed together at works, it is a common experience that they will, when the foreman's back is turned, occasionally engage in larking, and it was submitted there that if two boys in the same employ-

N. S.

S. C.

DOYLE v. MOIRS LTD.

Graham, E.J.

ment got larking over their work and injury is accidentally thereby occasioned to a third who is engaged upon his work the accident may be said to arise out of and in the course of the employment. That argument was dealt with and repudiated by every member of the Court in the year 1902. So far as I am aware that case has never been questioned or challenged in this Court or in the House of Lords.

There is nothing inconsistent with this decision in the subsequent case of *Challis* v. *London and South W.R. Co.*, [1905] 2 K.B. 154, which has been referred to. In my view if this point is intended to be raised it must be raised elsewhere, and it is not for us to go back upon the delivered and unanimous decision of this Court in *Armitage* v. *Lancashire & Yorkshire R.W. Co.*, [1902] 2 K.B. 178.

Buckley, L.J., at 799, in dealing with the expression, "Out of and in the course of the employment," says:—

The words are used conjunctively not disjunctively. . . . The workman must satisfy both the one and the other. . . . The words "out of" point, I think, to the origin or cause of the accident; the words "in the course of" to the time, place and circumstances under which the accident takes place. The former words are descriptive of the character or quality of the accident. The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words "out of" involves, I think, the idea that the accident is in some sense due to the employment. It must be an accident from a risk reasonably incident to the employment.

Kennedy, L.J., at 801, approves of something said by Cozens-Hardy, L.J., as he then was, in the *Armitage* case, [1902] 2 K.B. at 183. There, Cozens-Hardy had said:—

I think that some meaning must be given to the words "out of" in the section. They appear to point (this is the quotation in the opinion of Kennedy, L.J.) to accidents arising from such causes as the negligence of fellow workmen in the course of the employment or some natural cause incidental to the character of a business. (The Master of the Rolls continued). An accident arising out of the dangerous nature of a business carried on and not involving any human agency such, for instance, as spontaneous combustion of some material might be said to arise out of the employment, but I do not think that an accident caused by the tortious act of a fellow workman having no relation whatever to the employment can be said to arise out of the employment.

Kennedy, L.J., says:—

If I were to venture to add anything that somebody might not carp at the expression "natural," having regard to the case of *Challis* v. *London and South Western R. Co.*, [1905] 2 K.B. 154, it would be to add to the word "natural" the words "or common."

There has not, I think, been anything subsequently varying this. *Trim* v. *Kelly*, [1914] A.C. 667, while very interesting on

N. S.
S. C.
DOYLE
v.
MOIRS LTD.
Graham, E.J.

the expression "accident" has no bearing on this case, and *Plumb* v. *Cobden Flour Mills Co.*, [1914] A.C. 62, while not belonging exactly to this class of cases has some bearing on this case. Lord Dunedin, with whom the other law Lords agreed, at 67 says:—

> In the cases in which there is no prohibition to deal with the sphere (of employment) must be determined upon a general view of the nature of the employment and its duties. If the workman was doing those duties he was within. If not he was without or to use my own words, in the case of *Kerr* v. *William Baird and Co.*, [1911] S.C. 701, an accident does not arise out of the employment if at the time the workman is arrogating to himself duties which he was neither engaged nor entitled to perform.

I have not access to the Scotch Reports, but the case of *Falconer* v. *London and Glasgow Engineering, etc., Co.*, 3 Ct. of Sess. Cas. (5th ser., 564), decided by all the Judges of the Court of Sessions is referred to approvingly by Collins, M.R., in *Challis* v. *London and South Western R. Co.*, at p. 158, where he says:—

> Lord Trayner said, "if some servants leave their work and indulge in horse play to the injury of a fellow servant that does not infer liability on the employer. It cannot be said to be incidental to his business or one of the hazards attached to it.

A text writer, Dawbarn, on Employers' Liability, at p. 116, distinguishes between the Armitage and the Challis classes of cases as follows: —

> The difference between these two classes of cases is subtle but very real. Being injured by a fellow workman acting foolishly has really nothing to do with the employment; whilst many employments are subjected to the special risks of outsiders behaving wickedly or idiotically.

In my opinion this case is very much nearer the *Armitage* case than to the *Challis* case, and for that reason I think the appeal must be dismissed with costs.

Appeal dismissed.

ONT.
S. C.

SOBOLOFF v. REEDER.

Ontario Supreme Court, Leamox, J. March 4, 1915.

1. VENDOR AND PURCHASER (§ I C—13a)—DEFECTIVE TITLE—BUILDING RESTRICTIONS—SPECIFIC PERFORMANCE.

> Failure of the vendor to specifically disclose building restrictions under the registered conveyance to him will not constitute an answer to an action for specific performance where the offer to purchase was prepared by the purchaser's agent on his own printed form containing a stipulation that the purchaser "takes the property subject to any covenants that run with the land."

ONT.

S. C.

SOBOLOFF v. REEDER.

Lennox, J.

ACTION by the vendor for specific performance of an agreement.

A. Cohen, for plaintiff.

J. J. Gray, for defendants.

LENNOX, J.:—The action is for specific performance, and is founded on a written agreement to purchase land in Toronto from the plaintiff, entered into and signed by the defendant Gee in his own name. It is clearly shewn by the examinations for discovery and the statements of defence, and was admitted at the trial, that Gee in making the purchase was the duly authorised agent of the defendant Reeder and acted for him and on his behalf. The agreement is, therefore, binding upon Reeder according to its terms: *Cave* v. *Mackenzie* (1877), 46 L.J.N.S. Ch. 564; *Heard* v. *Pilley* (1869), L.R. 4 Ch. 548; Fry on Specific Performance, 5th ed., Canadian Notes, p. 171; Halsbury's Laws of England, vol. 7, p. 379; para. 782. It is none the less binding upon him, if it is a fact, as alleged, that Gee failed to follow the specific instructions of his principal: *Duke of Beaufort* v. *Neeld* (1845), 12 Cl. & F. 248, 273.

The plaintiff does not press for judgment against the defendant Gee. It is, therefore, unnecessary to consider whether the action could be maintained against both. In the uncertainty as to the party liable, until after discovery at all events, it was not improper to join him as a defendant: Rule 67. The trial costs have not been increased by his name being upon the record. He has set up a counterclaim which he cannot maintain. The action as against this defendant and his counterclaim will be dismissed without costs.

The defence of the defendant Reeder is, that the land in question is subject to a restrictive covenant as to building and occupation contained in the deed under which the plaintiff claims.

The agreement sought to be enforced is in the form of an offer to purchase, signed by the defendant Gee, and an acceptance of the offer by the plaintiff. It was drawn up by Gee without instructions by the plaintiff as to its form, and, in the part containing the offer, has this provision: "The purchaser takes the property subject to any covenants that run with the land." Gee says that he did not know of this provision; but he is a land

ONT.
S. C.
SOBOLOFF
v.
REEDER.
LENNOX, J.

agent, it is the form he regularly used, it was printed by his order, his name is printed on it, he propounded it to the plaintiff as a proper agreement, he handed it to the defendant Reeder immediately it was executed, and Reeder accepted and acted upon it without objection. The contract is of the defendants' making, the language is their language, and neither of them can be heard to object.

It is argued that the plaintiff was bound to disclose specifically the tenure under which she held the property. Too much reliance was placed upon the language of English cases founded upon conditions which do not exist here under our system of registered titles; and, in addition to all this, Reeder and his agent were the only persons alive to the probability, perhaps having actual knowledge, of there being embarrassing building and occupation restrictions.

It is objected in the pleadings that a proper deed was not tendered. This objection is not open to the defendant Reeder. The deed was prepared by his solicitors, executed by the plaintiff, left in the solicitors' possession, and subsequently returned to the plaintiff—the defendant Reeder refusing to carry out the purchase. The deed is not fair to the plaintiff; and, to avoid the expense of a reference, I direct that it be amended by inserting a special restrictive covenant similar to that contained in the deed from the Robins Realty Company Limited to the plaintiff, dated the 10th May, 1910, and registered as No. 65906F, West Toronto, and that it be executed by the defendant Reeder.

The title has been accepted and adjustments made. If there is need for later adjustments which the parties cannot agree upon, or for any cause they think a reference is necessary, I may be spoken to.

There will be judgment for specific performance by the defendant Reeder of the agreement in the pleadings mentioned, with costs of this action, but not including costs to the plaintiff occasioned by the joinder of the defendant Gee, and the usual judgment as to sale of the property and payment of the deficiency, if any, by the defendant Reeder.

This defendant's counterclaim will be dismissed with costs.

Judgment accordingly.

SMITH v. HUMBERVALE CEMETERY CO.

ONT.

S.C.

Ontario Supreme Court, Falconbridge, C.J.K.B., Riddell, Latchford, and Kelly, JJ. March 22, 1915.

1. CORPORATIONS AND COMPANIES (§ IV D—60)—CEMETERY COMPANY—CORPORATE POWERS—DISPOSITION OF LOTS FOR NON-BURIAL PURPOSES—ULTRA VIRES.

Land held by a company incorporated under the Cemetery Companies Act R.S.O. 1887, ch. 175, for burial purposes cannot be disposed of for any other purposes, which powers of disposition cannot be enlarged by subsequent re-incorporation; and any attempted disposition by the corporation of any part of such land for purposes foreign to its original powers is an act *ultra vires* which may be enjoined by any shareholder.

Statement

APPEAL from the judgment of BRITTON, J.

E. F. B. Johnston, K.C., and *D. Inglis Grant*, for appellants.

G. H. Watson, K.C., for defendants, respondents.

Riddell, J.

RIDDELL, J.:—Some time before 1893, a number of persons, including the plaintiff Smith, formed themselves into a company under the provisions of R.S.O. 1887, ch. 175, sec. 1. Acquiring a suitable piece of land, some 50 acres in extent, outside of the city, they signed a certificate, in the form prescribed by sec. 3 of the Act just mentioned, and registered it in the proper registry office on the 14th April, 1893. The company took the name (in the certificate) of the Humbervale Cemetery Company; it sold a large number of burial sites, and many interments took place in the cemetery.

Apparently the land, which in 1893 was best adapted for a burial-ground, in the lapse of time became valuable for other purposes, and the "members" or some of them became desirous of selling the land yet unused or a considerable part of it. One Dr. Winter desired to purchase, and acquired by purchase the shares of a majority of the members. On the 15th January, 1912, after a dividend of one per cent. had been directed to be paid, the board of directors instructed the president to sell the "cemetery lands and the interest of the said cemetery company at the rate of 50 per cent. of the par value of the stock," and an amount sufficient to pay expenses "that the company may be put to in getting power to sell;" his own commission he was to get from the vendee.

On the 8th April, an offer made by Dr. Winter was laid

ONT.

S. C.

SMITH v. HUMBERVALE CEMETERY CO.

Riddell, J.

before the board, and not dealt with. On the 4th September, 1912, the matter being under consideration, the board decided to apply for letters patent re-incorporating the company under the name of the Humbervale Cemetery Company Limited, and passed a by-law to that effect. This was approved at a meeting of shareholders on the 19th September, 1912. A petition was accordingly filed with the Provincial Secretary asking letters patent, and setting out that "the object for which incorporation is sought is to carry on business as a cemetery company, and for that purpose to hold the lands now owned by the Humbervale Cemetery Company, and, if deemed necessary or expedient, to purchase or otherwise acquire and hold any additional lands for the purposes of the company, and with power to sell, alienate, and convey any of the said lands now held by the . . . company, and any other lands not required for the purposes of the company, if deemed necessary or expedient." The name of the re-incorporated company to be the Humbervale Cemetery Company Limited. It would appear that the real purpose of the re-incorporation was to obtain power to sell the land not theretofore used for burial, or part of it; but I do not think this material. On the 18th October, 1912, the Provincial Secretary gave a re-incorporating charter with the power as requested.

The directors of the old company thereupon transferred all its assets to the new company, and shortly thereafter the new company gave a deed of part of the land to Dr. Winter.

The plaintiff Smith was, as has been said, one of the original incorporators of the cemetery company, and became a shareholder in the new company. Barlow is the owner of a burial lot. These two, with one Robertson—as to whom there is no evidence—began this action, on the 24th July, 1913, against the two companies, Paterson the president, and Fraser, the secretary, of the new company, and Dr. Winter, alleging in effect that the new company had no power to convey the land to Winter, and claiming consequent relief. Pending action, an application was made to the Provincial Secretary, and an order in council was issued, on the 22nd September, 1914, that all the powers of the new company, save and except those possessed by the old company, should be as from the date of the re-incorporating charter suspended until further order.

No proceedings in the nature of a *sci. fa.* have been taken. The Attorney-General is not a party, and has not been asked, nor has he agreed, to lend his name to these proceedings.

The case came down for trial before Mr. Justice Britton without a jury at Toronto, and that learned Judge dismissed the action with costs. The plaintiffs now appeal.

The plaintiffs suing not only for themselves but for all others in their class, it has been decided more than once, both in England and Ontario, that that fact should appear in the style of cause: see Rule 5 (1). But this may and should be amended.

The *locus standi* of the plaintiffs is attacked. Smith seems to have taken part in the movement to obtain the new charter; and, if the act of the new company here complained of were the obtaining of the new charter, there might be reason in holding Smith to be estopped. But the participation in one improper act of the company is no bar to a shareholder objecting to another, even of the same kind. He may undoubtedly object if the second is claimed to be *ultra vires*: *Mosely* v. *Koffyfontein Mines Limited*, [1911] 1 Ch. 73; *Koffyfontein Mines Limited* v. *Mosely*, [1911] A.C. 409. And here the act is wholly different from that in which it is said Smith took part.

Where the act is *ultra vires* in the strict sense, one shareholder may sue: *Simpson* v. *Westminster Palace Hotel Co.* (1860), 8 H.L.C. 712; and may of course sue for others in his class as well: *Russell* v. *Wakefield Waterworks Co.* (1875), L.R. 20 Eq. 474; *Burland* v. *Earle*, [1902] A.C. 83, and cases cited.

The plaintiff Barlow bought a lot before the granting of the new charter, but I do not decide as to his position, that of Smith being ample to support this action.

Nor do I proceed upon any supposed sacredness of the cemetery. What the company propose to do is wholly repugnant to my sense of propriety, but it is their legal right we must investigate—not their good taste and regard for the feelings of others.

The law in England as to graveyards I disregard. The parish graveyard has its own law, but this cemetery is a pure creation of the statutes, and we must look to the statutes for the law applicable.

The company, being formed under sec. 1 of R.S.O. 1887, ch.

ONT.
S. C.
SMITH
v.
HUMBERVALE CEMETERY CO.
Riddell, J.

175, could do what it pleased with its land by the unanimous consent of its members; it was not a corporation, but an ordinary company or partnership. But, when the certificate mentioned in secs. 2 (*b*) and 3 was registered, a very great change took place: "The company shall thenceforth become and be a body corporate," with a corporate existence. Any debts thereafter incurred were not chargeable against the individual members; the "company" is vested with powers of compulsory expropriation (conditionally): sec. 32; and receives the benefit of the Winding-up Act if it desire to be wound up. But the land also changes its character: before registration it is the property of the company to do with as it pleases, but thereafter the company "may take, hold and convey the land to be used exclusively as a cemetery or place for the burial of the dead" only (sec. 2); the land can "be freed . . . from . . . trusts arising on account of its having been held for the purposes of a cemetery or cemetery company," by being sold in a winding-up proceeding: sec. 33; but not otherwise.

And the land is not wholly in the company's control even as to who shall be buried in it: "strangers and . . . the poor of all denominations" must be furnished with a grave "free of charge:" sec. 12. The land may be sold for burial sites, and the money employed in repaying to any member who does not desire to take land to the full extent of his stock, interest or paid-up stock, not exceeding eight per cent. per annum, and also repay the paid-up stock: sec. 17(1); but, "except as aforesaid, no dividend or profit of any kind shall be paid by the company to any member thereof:" sec. 17 (3).

The land—all the land and not a part of it—is held in trust for the benefit of the stranger and the poor, as well as those who may desire to buy a place for their dead to sleep. All this is wholly inconsistent with a power to sell (except for burial sites sold to individual proprietors.)

The next question is the effect of the re-incorporation, which was under 2 Geo. V. ch. 31—for convenience I refer to the R.S.O. 1914, ch. 178, which is a consolidation of that statute without change of terminology.

Section 11 enables the company to make an application to the

Lieutenant-Governor, and the Lieutenant-Governor (or the Provincial Secretary—sec. 4) to grant letters patent; by sec. 12 the power of the corporation may be limited or extended to such other objects as the petitioner may desire. I shall assume that the power to sell the land to Dr. Winter was intended to be asked for, and that the Provincial Secretary intended by his charter to grant the power. I think, however, that this is not justified by the words of the section, and that the Legislature could not have intended, by such general words, to enable an officer of the Crown to give power to trustees to sell lands they have in trust and put the proceeds in their own pockets, or the pockets of the shareholders; the proper execution of the trust requiring the trustees to hold the land. This becomes clear when we read the next section.

Section 13 seems to me to prevent such a power being exerciseable: "All debts, contracts, liabilities and duties of such corporation shall thenceforth attach to the new . . . corporation, and may be enforced against it to the same extent as if such debts, contracts, liabilities and duties had been incurred or contracted by it."

That it was the plain duty of the former corporation to hold this land upon the trusts declared by the statute is clear; and I think that this duty attaches to the new corporation, and may be enforced against it as though it had itself incurred this duty *ab origine*.

The marginal note is referred to as against this interpretation. A marginal note is no part of a statute: 3 & 4 Geo. V. ch. 2 (an Act respecting the Revision and Consolidation of the Statutes of Ontario), sec. 9 (4); *Duke of Devonshire* v. *O'Connor* (1890), 24 Q.B.D. 468; *Sutton* v. *Sutton* (1882), 22 Ch. D. 511; though it may sometimes be of some assistance to shew the drift of a section: *Bushell* v. *Hammond* (1904), 73 L.J.K.B. 1005; *Nicholson* v. *Fields* (1862), 31 L.J. Ex. 233, 7 H. & N. 810.

It would, in my view, be giving too narrow an interpretation of this section to limit it to the claims of creditors.

This section was not brought to the attention of my brother Britton, as it should have been, and it is upon it that I would base my opinion. It is common ground that the powers of the Provincial Secretary are limited strictly by the statute.

ONT.
S. C.
SMITH
v.
HUMBERVALE CEMETERY CO.
Latchford, J.

I would allow the appeal, and give judgment for the plaintiffs, with costs throughout. The exact form of the order may be spoken to if necessary.

FALCONBRIDGE, C.J.K.B.:—I agree.

LATCHFORD, J.:—The whole 50 acres, and not merely that part of it in which lots were sold and interments made, constituted "the cemetery" which the original company was bound to use "exclusively as a place for the burial of the dead." But limited dividends were to be paid out of the proceeds of the sale of lots; and any surplus was to be devoted to "preserving and embellishing the land as a cemetery:" R.S.O. 1887, ch. 175, sec. 2 (*d*) and sec. 18. Graves were to be furnished gratis for strangers and the poor: sec. 12.

For 20 years the company conducted the cemetery in accordance with the Act under which it became incorporated. Burial-lots were, however, sold but in a small area of about 6 acres. By 1912 the demand for suburban property for building or speculative purposes had given the unsold part of the cemetery an enormously enhanced value. Dr. Winter, by acquiring a majority of the shares, obtained control of the company, and on the 8th April, 1912, made an offer to purchase part of the company's lands. The company, however, had no power to sell except for burial purposes. What it could and did do in October, 1912, was to apply for and procure re-incorporation under sec. 11 of the Ontario Companies Act, 2 Geo. V. ch. 31, now R.S.O. 1914, ch. 178. As re-incorporated, the company seemed all that Dr. Winter could desire. The loathsome obligations which clung to it in its former state of existence had, it was thought, been put aside. The new being stood endowed with ample powers, and proceeded to display them. The offer to purchase made to the old company was accepted, and all resolutions, by-laws, and agreements thought necessary to make valid the transaction were made by the directors and ratified and confirmed by the shareholders, *quorum magna pars* was the doctor himself.

Notwithstanding the general words contained in sec. 12, enabling the Lieutenant-Governor by the letters patent to extend

ONT.

S. C.

SMITH v. HUMBERVALE CEMETERY CO.

Latchford, J.

the powers of the company "to such other objects . . . as the applicant desires," it is, I think, clear that such powers cannot be extended so as to conflict with obligations imposed on the company by statute. Section 13 of the Act (now sec. 13 of R.S.O. 1914, ch. 178) provides that "all . . . liabilities and duties of such" (in this case the original) "corporations shall . . . attach to the new or re-incorporated corporation and may be enforced against it to the same extent as if such . . . liabilities and duties had been incurred . . . by it."

The liabilities and duties imposed by statute on the former company remain; and one at least of the plaintiffs has established a status to insist that the new company shall continue to discharge them.

I would therefore allow this appeal with costs.

Kelly, J.

KELLY, J.:—The defendants rely upon the powers assumed to be given the Humbervale Cemetery Company Limited in the letters patent of re-incorporation, to support the position that that company has the right to effect the sale of the lands now in question.

When the incorporators of the original company, the Humbervale Cemetery Company, complied with the requirements of sec. 2 of R.S.O. 1887, ch. 175, then in force, as to subscription for stock, payment on account of the stock subscriptions, and the execution and registration of the required instrument, they became a body corporate with power to "take, hold and convey the land to be used exclusively as a cemetery, or place for the burial of the dead." That corporation did acquire land—part of which is the land now in question—and sold from it burial plots, many of which were actually used for burial purposes. There came a time, however, when it was thought desirable to sell outright, and not for burial purposes, the remaining lands, or perhaps a part of them; and it seems to have been recognised that the powers then possessed did not go so far as to authorise a sale such as the corporation desired to make. Application was then made for re-incorporation under the provisions of 2 Geo. V. ch. 31 (the Ontario Companies Act); and, accordingly, letters patent were issued bearing date the 18th October, 1912, to the

ONT.

S. C.

SMITH v. HUMBERVALE CEMETERY CO.

Kelly, J.

Humbervale Cemetery Company Limited, for the purposes and objects of carrying on business as a cemetery company, and "for that purpose to hold the lands now owned by the Humbervale Cemetery Company, and, if deemed necessary or expedient, to purchase or otherwise acquire and hold any additional lands for the purposes of the company, and with power to sell, alienate, and convey any of the said lands now held by the . . . company, and any other lands not required for the purposes of the company, if deemed necessary or expedient."

Relying on these powers, the new company, to which the lands of the earlier company have been transferred, purported to make a sale, the validity of which is in these proceedings attacked; and as a defence they claim the right to make such sale unaffected by the limitations to which the older company was subject. That company had a restricted right to convey—it could convey land to be used exclusively as a cemetery or place for the burial of the dead. There was also under R.S.O. 1887, ch. 175, a further power of selling the lands free from the trusts arising on account of its having been held as a cemetery, in the event of the winding-up of the company. That, of course, does not apply here.

The letters patent cannot be taken without considering as well the terms of the statute by which their issue is authorised. Section 13 of that statute, 2 Geo. V. ch. 31, provides that "all rights of creditors against the property, rights and assets of a corporation amalgamated or re-incorporated under the provisions of this Act, and all liens upon its property, rights and assets shall be unimpaired by such amalgamation, or re-incorporation, and all debts, contracts, liabilities and duties of such corporations shall thenceforth attach to the new or re-incorporated corporation and may be enforced against it to the same extent as if such debts, contracts, liabilities and duties had been incurred or contracted by it."

The removal of the restriction upon selling which existed under the former incorporation would be a most serious interference with the conditions under which the old company became entitled to hold, and purchasers of burial lots made their purchases; and such removal should not be held to be effected, unless upon the

clearest and most unequivocal language. In the absence of such language, there should be no assumption that the former limitations no longer exist. Not only is such language wanting, but sec. 13 clearly expresses the intention of the Legislature that the re-incorporation should not relieve the new corporation from the liabilities and duties to which the earlier corporation was subject. That being so, the attempted sale cannot be upheld.

It does not appear from his reasons for judgment that this important provision was urged before or brought to the attention of the learned trial Judge.

The status of the plaintiffs with respect to their right to maintain this action is also questioned. The plaintiff Smith was one of the incorporators of the original company, and he is a shareholder of the re-incorporated company. The objection to his right to maintain the action cannot, therefore, be supported.

On the grounds I have so far dealt with, the plaintiffs are entitled to succeed. The other grounds put forward in opposition to the plaintiffs' position are not so established as to constitute a valid defence.

The appeal should be allowed with costs here and below.

Appeal allowed.

COLEMAN v. THE CITY OF HALIFAX.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Longley, and Ritchie, JJ. February 13, 1915.

1. HIGHWAYS (§ IV A 1—120)—REPAIRS—WANT OF—INJURY TO TRAVELLER—LIABILITY OF MUNICIPALITY.

Sec. 532 of the Halifax City Charter does not impose an absolute liability upon the city to keep the streets in good order and repair as under sec. 522, the committee on works is to exercise a discretion as to the expenditure of the money at its disposal for the purpose of street repairs; and mere non-repair, as distinguished from an act of misfeasance, does not give rise to an action on the part of the person injured in consequence thereof.

[*Vancouver* v. *McPhalen*, 45 Can. S.C.R. 194, distinguished.]

Statement

APPEAL from a judgment of Wallace, Co. C.J.

F. H. Bell, K.C., for appellant.

W. J. O'Hearn, K.C., for respondent.

N. S.

S. C.

COLEMAN v. CITY OF HALIFAX.

Ritchie, J.

The judgment of the Court was delivered by

RITCHIE, J.:—This action is brought to recover damages against the city in respect of injuries sustained by the female plaintiff. In August last Mrs. Coleman was walking on Cunard street, and in consequence of a hollow or rut in the earth sidewalk, she fell and was injured. This is not a case of faulty construction, but purely a question of non-repair, from which under the authorities it follows that the city is not liable, unless an absolute statutory obligation is thrown upon it to keep the streets in good repair. Mr. O'Hearn, for the plaintiff, very properly rested his case upon the alleged breach of statutory duty. The question for adjudication is as to the construction of the statutory enactments relative to the maintenance in good repair of the streets. Sec. 532 of the City Charter is relied upon. It is as follows:—

> The committee on works shall, so far as the funds at its disposal will permit, keep clean and in good order and repair every street, the legal title to which is vested in the city and no other, and the cost of so doing shall be defrayed out of the general revenue of the city.

The committee on works by sec. 522 has (among other things) the "charge and management of the city streets and all works connected therewith."

The city engineer performs "such duties as are prescribed by the Act, or by the council or by the committee on work," and he is responsible for the mode and manner of constructing any public works of the city."

It is contended for the plaintiffs that for every accident which may happen, in consequence of non-repair, the city is liable, provided funds at the time are at the disposal of the committee on works.

To give this construction to sec. 532 would mean that when and as soon as funds are at the disposal of the committee, the engineer is to go over all the streets in the city, and if the streets are not in good repair spend perhaps every dollar of the appropriation at once, without giving any consideration as to what may be most urgently required before the end of the year.

If this is the true construction then the committee on works is not to have the charge and management of the streets and all works connected therewith, and is not to exercise any discretion or judgment, but is simply to expend the money at once. The

construction asked for, it is obvious, puts an end to management or the exercise of discretion by the committee or the engineer. I think it is very clear that this could not have been the intention of the legislature when it gave in express terms to the committee the charge and management of the streets and the works connected therewith.

If the words of the statute were clear and explicit I would have to give effect to them without regard to consequences, but I cannot find any words, which drive me into adopting a construction which in my opinion is in opposition to the intention of the legislature in regard to the charge and management of the streets, and which would I think defeat the objects sought to be attained, namely, the proper maintenance of the streets so far as the appropriation will allow.

In the interests of the streets nothing would be more unwise than to expend the whole appropritaion in the summer, and leave nothing for the autumn and winter. The insufficiency of the amount at the disposal of the committee must make it necessary that allotments be made for the different streets or sections of the city, consequently the committee is called upon at the start to exercise discretion. It is all the streets of the city that are to be kept in repair so far as funds will permit.

Sec. 532 recognizes that the appropriation is not, or may not, be sufficient (as a matter of fact it is not sufficient), and, therefore, does not impose an absolute liability upon the city to keep the streets in good order and repair. As to how and when the money is to be expended, that is left by sec. 522 under the charge and management of the committee on works which means that the committee is to exercise discretion and good judgment in that regard.

The case of the *City of Vancouver* v. *McPhalen*, 45 Can. S.C.R. 194, is clearly distinguishable. In that case, there was an absolute and unqualified duty imposed upon the city to keep the streets in repair, and it is upon this ground that the judgment is based.

Sir Louis Davies said:—

> The absolute duty to keep the streets in repair is imposed upon the corporation. Provisions are inserted giving adequate means to enable the corporation to discharge its duty.

N. S.
S. C.
COLEMAN v. CITY OF HALIFAX.
Ritchie, J.

There being in that case a breach of absolute statutory duty resting upon the city, which resulted in injury to the plaintiff he was held to be entitled to recover, but in this case, as I have pointed out, there was no absolute duty, but only so far as funds would permit, and there was a committee which was given the charge and management of the expenditure to be made on the streets, and which, therefore, had discretion as to how and when the expenditure should be made, having regard to the object sought to be attained, namely, the keeping of the street during the year in the best repair that the appropriation admitted of.

Since the argument Mr. O'Hearn has referred the Court to Maxwell on Statutes, 5th ed., p. 388, and to *The City of New York* v. *Furze*, 3 Hill. 615.

The principle to be deduced from these authorities is stated by Chief Justice Nelson in *City of New York* v. *Furze*, as follows:

> The inference deducible from the various cases on the subject seems to be, that when a public body or officer has been clothed by statute with power to do an act which concerns the public interest or the rights of third persons, the execution of the power may be insisted on as a duty, though the phraseology of the statute is permissive merely and not peremptory.

I am in entire accord with this statement of the law, but I am unable to see what bearing it has upon the present case.

There is no doubt that a duty rests upon the committee. That duty is to keep the streets in good repair so far as the funds at its disposal will permit. All I have attempted to shew is that the committee has a discretion as to the best mode of performing the duty which the legislature has cast upon it.

The appeal in my opinion should be allowed with costs and the action dismissed with costs.

Appeal allowed.

ONT.
S. C.

KEECH v. SANDWICH, WINDSOR AND AMHERSTBURG R. CO.

Ontario Supreme Court, Meredith, C.J.O., Garrow, Maclaren, Magee, and Hodgins, JJ.A. March 15, 1915.

1. NEGLIGENCE (§ I C 2—50)—DANGEROUS PREMISES—DUTY TO INVITEE — VOLUNTARY ASSUMPTION OF RISK.

The owner or occupant of premises owes to an invitee a duty not to expose him to any unexpected danger without warning him of it; but where the danger is patent to everyone and the invitee knows of it he must be taken to have voluntarily assumed the risk.

[*Lucy* v. *Bawden*, [1914] 2 K.B. 318, followed.]

ONT.

S. C.

KEECH v. SANDWICH, WINDSOR AND AMHERSTBURG R. CO.

Meredith, C.J.O.

APPEAL by the defendant from the judgment of the Senior Judge of the County of Essex.

D. L. McCarthy, K.C., for appellant company.

H. E. Rose, K.C., for plaintiff, respondent.

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—The appellant company is a dealer in gravel and sand, and its business premises abut on Sandwich street west, in the city of Windsor. The ascent from them to the street is very steep, so steep that a pair of horses cannot draw up it a loaded waggon, and the company has provided, as a means for pulling loaded waggons up the hill, a cable which is operated by means of a steam engine on the level ground; the modus operandi being that the cable is hooked on to the reach of the waggon, which is then pulled up the hill by the cable being wound up. The horses walk one on each side of the cable, and at a short distance from the crest of the hill the power is shut off, and the cable then becomes automatically detached from the reach. At this point there is a pulley around which the cable passes, placed at the distance of 19 feet from the nearest rail of the track of the defendant railway company. The length of a waggon and horses is said to be about 22 feet; and, when the cable drops from the reach, the horses' heads, if they are not turned, are a little over that rail. From the pulley to the street the ground rises a little, and the horses have there "a little stiff pull." This appliance was provided for the purpose of the appellant's business, but persons who purchased sand or gravel from the appellant were permitted to use it for hauling their laden vehicles up the hill.

On the 15th June, 1914, the respondent was employed by a purchaser of gravel to haul it from the appellant's premises, and the purchaser employed a teamster named Lesperance to drive the horses while engaged in that work. Lesperance had been engaged all that summer in hauling gravel from the appellant's premises, and was well acquainted with the locality and the local conditions and the way in which the cable was operated in pulling waggons up the hill. He had already drawn five loads on that day, and had gone for the sixth at between half-

ONT.
S. C.
KEECH
v.
SANDWICH, WINDSOR AND AMHERSTBURG R. CO.
Meredith, C.J.O.

past four and a quarter to five o'clock in the afternoon. The waggon having been loaded, the cable was attached to the reach of it, and the waggon was pulled up the hill. The account given by Lesperance . . . at the trial was: that the horses came up the hill on a trot; that looking to the east there was nothing to obstruct his view, but that the view to the west was obstructed . . .; that he was watching his horses and looking out to the east for the street cars, and saw none coming from that direction; that when he got to the top of the hill he saw a street car coming from the west, and endeavoured to make a short turn, but, as he said, "the car got" him "before" he "made the hill;" that, when the cable dropped off the back of the waggon, his horses were "right on the street car track;" that he had partly succeeded in turning his horses when one of them was struck by the car; that, if he had seen the car sooner, he could not have stopped his horses, on account of the rate at which he was being "shoved;" that when he saw the car it was about 100 feet away and was coming "quite fast;" that he had never met with an accident before, although the cable on all previous occasions had been operated as it was being operated at the time of the accident; that sixty or seventy other teams were drawing out sand or gravel on the day of the accident, and that some of them were pulled up the hill while he was waiting for his turn to come.

The action is brought to recover damages for injury done to the horse by the street car colliding with it; and in his pleadings the respondent alleges that his waggon was drawn "swiftly up the incline," and that the collision occurred through the negligence of the railway company in not stopping the car in time to avoid the collision, and through the negligence of the appellant or its servants in operating the engine and cable.

The jury found, in answer to questions, that the accident happened by reason of the negligence of the appellant; that its negligence consisted "in not having a watchman at the top of the hill;" and that the respondent did not, by reason of his own negligence, contribute to the accident. Upon these answers the learned trial Judge directed that judgment should be entered for the respondent against the appellant for the damages as-

sessed by the jury ($192) and costs, and dismissing the action as against the railway company, with costs if exacted.

As I understand the respondent's pleadings, what the jury has found to have been the negligence of the appellant is not alleged as the negligence which caused the accident, but its cause is alleged to have been the improper manner in which the appliance for pulling the waggon up the hill was operated; and that ground of negligence is negatived by the finding of the jury.

Lesperance was, no doubt, not a mere licensee, but was in the position of an invitee; and, though the appellant would have been liable if the accident had been caused by the negligent manner in which the appliance Lesperance was making use of was operated, the appellant owed no duty to him except the duty not to expose him to any unexpected danger without warning him of it.

Putting the respondent's case on the highest ground upon which it can be put, his complaint is that, owing to the proximity of the pulley, at or near which the power was shut off, to the railway tracks, the method employed for pulling the waggon up the hill was a dangerous one, at all events in the absence of a watchman stationed at the top of the hill to warn persons coming up it of the approach of street cars.

The answer to this is, I think, that where the danger is patent to every one, and the invitee knows of it, he voluntarily takes upon himself to bear the risk.

The cases dealing with the question of the duty which an owner or occupant of premises owes to an invitee were considered and discussed by Atkin, J., in the recent case of *Lucy* v. *Bawden*, [1914] 2 K.B. 318, and that is the doctrine that he deduced from them, and rightly so, I think.

It is manifest from Lesperance's evidence that he knew of and fully appreciated the danger, if danger there was, from the proximity of the pulley to the street railway tracks, which I doubt; and, if it existed, it was patent to every one who made use of the appliance for the purpose of pulling his waggon up the hill. There was, therefore, nothing in the nature of a trap or hidden danger known to the appellant and not known to Lesperance.

ONT.

S. C.

KEECH v. SANDWICH, WINDSOR AND AMHERSTBURG R. CO.

Meredith, C.J.O

I have no doubt that the accident which happened was occasioned by the unusual manner in which the street cars were being run . . . of which Lesperance testified he was not aware; but, if he was not aware of it, there is nothing to shew that the appellant or its servant knew of it, if that would have made any difference as to the extent of the duty owed to Lesperance.

In my opinion, the respondent's case entirely failed, and his action should have been dismissed.

If I entertained a different view as to the duty which the appellant owed to Lesperance, I should have been of opinion that the findings of the jury ought not to be allowed to stand. . . . The injustice of fixing liability upon the appellant for an act of negligence which was not charged against it, and as to which it had no opportunity of presenting its case to the jury, is manifest.

I would allow the appeal, and substitute for the judgment . . . against the appellant, a judgment dismissing the action against it, the whole with costs.

Appeal allowed.

B. C.

C. A.

ROBINSON v. BURNABY.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. May 14, 1915.

1. CONTRACTS (§ IV D—360)—BUILDING CONTRACT—MUNICIPAL IMPROVEMENTS—CERTIFICATE OF PERFORMANCE.

Where the question of proper work and of due diligence in proceeding with the work to be done for a municipal corporation in making road improvements is left to the decision of the construction engineer under the contract, and upon the contractor's default and due notification of the engineer's decision in respect thereof, the municipality takes the work out of the contractor's hands under a condition of the contract empowering it so to do, the contractor may still be liable to the municipality for the loss incurred by the latter through the failure of the contractor to fulfil his contract, if the option given by the contract for terminating the contractor's work expressly reserves any right of action to which the contractor may be subject from any neglect in not proceeding with the work in accordance with the specifications.

[See Annotation on Engineer's Decisions under Construction Contracts, 16 D.L.R. 441; *British Glanzstoff Mfg. Co. v. General Accident etc. Corporation*, [1912] S.C. 591; *Marshall v. Mackintosh* (1898), 78 L.T. 750, referred to.]

Statement

APPEAL from judgment of Morrison, J.

Deacon, for appellant.

McQuarrie, for respondent.

MACDONALD, C.J.A., agrees that appeal should be dismissed.

IRVING, J.A.:—I think the evidence supports the conclusion of the learned trial Judge. I would dismiss the appeal.

MARTIN, J.A., agrees that the appeal should be dismissed.

GALLIHER, J.A.:—I agree in dismissing this appeal.

Galliher, J.A.

McPHILLIPS, J.A.:—The appeal is from the judgment at the trial pronounced by Mr. Justice Morrison in an action by the plaintiff, the contractor, with the defendants, a municipal corporation, for the carrying out of certain road work, consisting in the main of some 15,000 yards of earth excavation. The contract was entered into on May 20, 1912, to be completed on June 15, 1912, but the evidence shews that there was great delay in the carrying on of the work—only some 3,000 yards of excavation done when the work was taken over by the corporation about the middle of June, 1912.

McPhillips, J.A.

The plaintiff would not appear to have given that attention which he was called upon to give to the work, nor did he employ apparently workmen capable of doing the work in an expeditious manner, and late in the day—*i.e.*, on May 29, 1912—made an attempt to get the work completed by employing one John Rundgren—the letter to Rundgren (A.B. ex. 13, p. 238) fully indicates the plaintiff's then vain effort to get the work completed. On June 7 the corporation served notice on the plaintiff, in pursuance of clause 16 of the contract, requiring him to forthwith proceed with the proper execution of the work contracted to be performed, and in case of any further delay after the lapse of seven days to proceed with the execution of the works to the satisfaction of the engineer, that the corporation would suspend the further execution of the works by the plaintiff and take possession of the plant and employ other contractors. This notice was given under the hand of the construction engineer, Hugh L. Thompson.

The evidence is that the plaintiff did not proceed with expedition after the receipt of this notice; in fact, it may be said that the notice was ignored, and on June 17, 1912, the corporation, at a meeting of the municipal council, acting upon a report from the construction engineer, passed a resolution that the work be placed in the hands of the construction engineer.

B. C.

C. A.

ROBINSON v. BURNABY.

McPhillips, J.A.

Following this action upon the part of the corporation, the plaintiff would not appear to have in any way made any real attempt to cope with the situation thus created, and the corporation, on June 26, 1912, through their solicitors, advised the United States Fidelity and Guarantee Company, the surety for the due completion of the plaintiff's contract, of what had been done, the letter concluding as follows:—

The contractor has failed to comply with the terms of the said notice and the corporation has taken possession of the said works and propose to complete the said contract unless you his surety desire to undertake the completion thereof immediately to the satisfaction of the engineer.

You might kindly advise us by return of post as to whether you desire the municipality to complete the contract or whether you will do it yourselves.

The answer of the surety company was as follows:—

UNITED STATES FIDELITY AND GUARANTEE COMPANY,
BALTIMORE, MD.
Vancouver, B.C., Can., June 27, 1912.

HUGH THOMPSON, ESQ.,
Municipal Engineer, Edmonds, B.C.

Dear Sir,— *Re* L. G. ROBINSON.

We endeavoured to get you on the telephone this evening about five o'clock in reference to the above matter, but were unable to raise the Municipal Hall. It would appear that Mr. Geo. H. Webster has expressed a willingness to assist Mr. Robinson in the carrying out of contract under which he is in default. We have therefore, to request that you do nothing in the matter of awarding the contract to other contractors until the writer has had an opportunity of conferring with you. The writer leaves for Victoria on to-morrow afternoon's steamer, so try, if possible, to get him on the telephone Friday a.m.

Yours tryly,
WRIGHT, CANNON & CO., LTD.
Per L. M. General Agents.

Later it would seem that nothing came of the project that the plaintiff was to be assisted by Mr. Geo. H. Webster in the carrying out of the work, and on July 8, 1912, the municipal council met and passed the following resolution:—

July 8th, 1912. Fo. 132/21.

The Construction Engineer reported that Mr. L. G. Robinson's bondsmen had decided to complete the contract on Pole Line and Johnston Roads, but have since altered this arrangement and left the contract in the hands of the council. He recommended that the offer of N. Cosco to complete the work for 80 cents per cu. yd. be accepted.

Moved by Cr. Fau Vel, seconded by the Reeve:

That the recommendation of the Engineer be adopted.—Carried unanimously.

The plaintiff apparently abandoned all idea of making any further overtures to the corporation, and the surety company as well, and the corporation had the work completed.

Some question arose between the plaintiff and the corporation as to the amount of work actually done by him, and the plaintiff wrote the following letter to the construction engineer, under date July 19, 1912:—

G. L. ROBINSON,
Consulting Engineer and General Contractor,
Holden Building, 16 Hastings Street East,
VANCOUVER, B.C.

19th July, 1912.

HUGH L. THOMPSON, ESQ.,
Construction Engineer,
Municipal Hall, Edmonds, B.C.

Dear Sir,— *Re* POLE LINE ROAD CONTRACT, BURNABY.

I beg to acknowledge receipt of your letter of the 12th instant, which has remained unanswered until now owing to the fact that I have been out of town for several days.

I have had an independent survey made of the earth removed by me under the above contract up to the 18th June last and cannot admit your figure of 3325 yards as correct.

Very truly yours,
L. G. ROBINSON.

Not until August 5, 1912, does the plaintiff take any further step. He upon that date serves a notice of action on the corporation, the construction engineer, the contractor who went on with the work, and the members of the municipal council, advising them that he would commence an action for damages against them, in consequence of what had taken place, and on September 14 the writ issued in this action.

In my opinion, it is unnecessary to enter into or with greater detail enlarge upon all the facts and circumstances attendant upon the entry into the contract with the plaintiff and the plaintiff's plain default under its terms—a clearer case could hardly be demonstrated of the right in the corporation to intervene (*Sumpter* v. *Hedges* (1898), 67 L.J.Q.B. (C.A.) 545)—and clause 16 of the contract—the agreement of the parties in case of default—gives a code for the determination of all questions of account as between the parties; and the learned trial Judge has, in his judgment, arrived at the right conclusion. Clause 16 reads as follows:—

16. IMPROPER MATERIALS: If at any time it shall appear to the

B. C.

C. A.

ROBINSON v. BURNABY.

McPhillips, J.A.

Engineer that the works, or any part thereof, are not being executed in a sound and workmanlike manner, or that the contractor is not proceeding with diligence or regularity, or if he shall neglect or refuse, or if he shall not proceed with all proper diligence to comply with all orders of the Engineer, it shall then be lawful for the corporation to give the contractor, in writing, a notice signed by the Engineer requiring him forthwith to proceed with the due and proper execution of the works, and in case the contractor shall delay after the lapse of seven days from the service of such notice given to the Foreman or to the contractor or left at his registered office, to proceed with the execution of the works to the satisfaction of the engineer, or if the contractor shall be declared insolvent, file a petition for liquidation or compensation with, or make an assignment for the benefit of his creditors, it shall be lawful for the corporation to suspend the further execution of the works by the contractor and to take possession of all plant, implements and materials upon the works belonging to the contractor and to employ any other contractor, workmen or persons to complete the work by measure, value or day work and to provide all necessary materials or otherwise to proceed with and complete said works, and the contract in whole, or in part, at the option of the corporation, may be taken out of the contractor's hands and become void, but without prejudice to any right of action to which the contractor may be subject from any neglect in not proceeding with the works in accordance with the specifications, and money shall be retained by the corporation until the whole works are completed and the corporation may deduct all such additional cost, charges and expenses together with the cost of the reparation of the works or property damages during the progress of the works, as the Engineer shall certify to have been incurred in consequence of the default of the contractor, or if such additional costs and expenses exceed the amount so due to the contractor, the amount due in excess shall be recoverable from the contractor or his sureties or Bond.

Under this clause 16 the construction engineer was to determine the question of proper work, due diligence, and as further provided, and these questions were not to be the subject of further inquiry or submission to arbitrators. It, therefore, followed that the plaintiff was bound by the decision of the engineer. In *Foster and Dickson v. Mayor, etc., of Hastings* (1902), 29 T.L.R. 204, Farwell, J., at p. 206, said:—

> There could be no doubt that if the parties to a contract chose to agree that the engineer shall be the sole judge the court would not interfere with the judgment of the engineer except in the case of corruption or the nature of the contract itself might be such that the court could not interfere by injunction.

There can be no question that, upon the facts of the present case, the corporation were entitled to suspend the further execution of the works by the plaintiff and to engage another person to do the work, and the plaintiff is unquestionably liable to the corporation for the loss incurred by them through the failure

of the plaintiff to fulfil his contract: *Marshall* v. *Mackintosh* (1898), 78 L.T. 750; *British Glanzstoff Manufacturing Co.* v. *General Accident Fire and Life Assurance Corporation* [1912] S.C. 591, Ct. of Sess.

I would, therefore, dismiss the appeal.

Appeal dismissed.

B. C.
C. A.
ROBINSON
v.
BURNABY.
McPhillips, J.A.

KIRK v. INGRAHAM.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Russell, Longley and Ritchie, JJ. March 9, 1915.

N. S.
S. C.

1. PARTNERSHIP (§ III—14)—PARTNER INDEBTED PERSONALLY—FIRM ALSO INDEBTED—PARTNERSHIP MONEY USED—MUST BE APPLIED ON PARTNERSHIP ACCOUNT.

If a partner is indebted on his own account to a person to whom the firm is also indebted, and that partner with the moneys of the firm makes a payment to the creditor without specifying the account to which it is to be paid, the payment must be taken to have been made on the partnership account and must be applied accordingly.

[*Thompson* v. *Brown*, 1 M. & M. 40, applied.]

Statement

APPEAL from the judgment of McGillivray, Co.C.J.

H. Mellish, K.C., for appellant.

W. Chisholm, K.C., and *J. L. Ralston*, K.C., for respondent.

Ritchie, J.

RITCHIE, J.:—In this case the plaintiff seeks to hold the defendant Ingraham liable as a partner of the defendant McDonald. The action was tried before Judge McGillivray, of the County Court, sitting as a Referee. The defendant McDonald was a contractor engaged in the construction of public works for the Government of Canada. Judgment has been given against the defendant, Ingraham, for $2,300.38, and from that judgment this appeal is asserted.

Two points are taken by Mr. Mellish, K.C., on behalf of the defendant Ingraham:—

1. That on the evidence, having due regard to the proper appropriation of payments, the plaintiff's claim against the partnership has been paid in full.

2. That there was no partnership between McDonald and Ingraham.

I deal first with the question of payment, which is the order in which the case was argued. Assuming for the present that

N. S.

S. C.

KIRK v. INGRAHAM.

Ritchie, J.

there was a partnership, it commenced on October 1, 1896. The Judge adjusts the accounts as follows:—

1909				
April	9.	To	Balance account settled	$4,098.78
June	2.		Cash	358.00
	15.		Exchange of freight	125.00
Aug.	3.		Paid E. M. McDonald	200.00
	10.		William Chisholm	100.00
Sept.	21.		For coal	45.00
Aug.	29.		Balance interest	463.50
				$5,266.53

CR.

1909				
June	15	By	Cash Dept. Works	$2,500.00
	29.		Cash	313.65
July	13.		Cash	40.00
Sept.	21.		Freight	112.50
				$2,966.15
				$2,300.38

There is a finding that McDonald's indebtedness to the plaintiff at the time of the formation of the partnership was $2,026.25. McDonald was also indebted to Kirk and Whitman in the sum of $358.32. These two sums, amounting to $2,385.27, were debts due by McDonald alone. The $2,026.95 is part of the $4,098.78. The Judge says:—

> Should there be a finding as to these outstanding balances I find that the payments subsequently made, particularly the $2,500 received on June 15, 1909, should be appropriated first and foremost to payment and wiping out of these outstanding balances amounting to $2,385.27, and I direct, if necessary, that such payment be so appropriated.

I confess that this startles me. The credits were partnership credits, and yet the Judge says he *first and foremost* appropriates them to old debts of McDonald's in which Ingraham has no interest. On the contrary, I say *first and foremost* apply credits from the partnership to the payment of partnership debts.

In Lindley on Partnership (8th ed.), p. 271, it is said:—

> If a partner is indebted on his own account to a person to whom the firm is also indebted and that partner with the moneys of the firm makes a payment to the creditor without specifying the account to which it is to be paid, the payment must be taken to have been made on the partnership account and must be applied accordingly.

It seems hardly necessary to quote authority for the proposition that the money of one man cannot be appropriated to the

payment of another man's debt, but the decision of Chief Justice Abbott in *Thompson* v. *Brown*, 1 M. & M. 40, is so directly in point and is expressed in such terse and clear terms that I am tempted to quote. He says:—

> The general rule certainly is that when money is paid generally without any appropriation it ought to be applied to the first items in the account, but the rule is subject to this qualification, that where there are distinct demands, one against persons in partnership, and another against only one of the partners, if the money paid be the money of the partners the creditor is not at liberty to apply it to the payment of the debt of the individual; that would be allowing the creditor to pay the debt of one person with the money of others.

The Judge puts his appropriation upon the ground that general payments go to the first items in an account, entirely disregarding the fact that he is appropriating partnership money to the payment of McDonald's old debt.

It is contended that Ingraham is a dormant partner, and that the plaintiff had the right—*no special appropriation having been made by McDonald*—to appropriate the money, notwithstanding that it came from the partnership, to the debt of McDonald. The answer made by Mr. Mellish, from which, in my opinion, there is no escape, is that as a matter of fact the plaintiff did not attempt to make the appropriation before the trial, and that when the attempt was made the plaintiff had full knowledge that the money which he was so seeking to appropriate to the payment of McDonald's individual debt belonged to the partnership. The Judge also had this knowledge from the evidence.

The action is brought (among other things) for the price of creosoted timber. Of this timber a part, amounting in value to $554.88, was returned to the plaintiff. This was not credited to the partnership; it clearly should have been. I cannot understand the principle upon which, when a partnership is sued for articles supplied and a part of those articles is received back by the plaintiff, the credit is to go, not to the partnership, but to one of the partners. It is not necessary to consider whether the partnership is entitled to further credits, because, deducting the old debt of McDonald, $2,026.95; the Kirk and Whitman note, $358.32; the credit for the timber returned, $554.88; amounting to $2,940.15, the amount due from the partnership to the plaintiff is overpaid by $639.77. Upon this ground the judgment must be reversed and the appeal allowed with costs. The concluding

N. S.
S. C.
KIRK
v.
INGRAHAM.
Ritchie, J.

paragraph of the judgment seems to put the plaintiff's case on the ground of estoppel. Counsel did not attempt to support the judgment on this ground, and it is perhaps enough for me to say that there is nothing in the case in the nature of estoppel.

In the view which I take of the question of appropriation of payments, I do not see that any useful purpose will be served by dealing with the question as to whether there was or was not a partnership.

Graham, E.J.
Russell, J.

GRAHAM, E.J., and RUSSELL, J., concurred.

Longley, J. (dissenting)

LONGLEY, J., dissented.

Appeal allowed.

ONT.
S. C.

CRICHTON v. TOWNSHIP OF CHAPLEAU.

Ontario Supreme Court, Lennox, J. March 8, 1915.

1. INJUNCTION (§ I G—60)—ULTRA VIRES ACT OF MUNICIPALITY—CARRYING ON MOVING PICTURE BUSINESS—INTEREST OF RATEPAYERS.

An injunction will be granted at the instance of a ratepayer having a special interest as a competitor in the moving picture business, who sues on behalf of himself and all other ratepayers, to restrain a a municipal corporation from carrying on a moving picture business in the township hall under the guise of a lease to the township's agent made with the intention of evading the law; and the action may be maintained without first quashing the township by-law under which the illegal lease purported to be made.

Statement

ACTION to restrain the exhibiting of moving pictures.

G. E. Buchanan, for plaintiff.

H. E. Rose, K.C., for defendant.

Lennox, J.

LENNOX, J.:—The defendant corporation is engaged in a business in which it has no right to engage. The defendant Dexter is the agent of the corporation for the purpose of enabling it to carry on a show business, and as a cloak to cover up the real nature of the corporate operations. The by-law and so-called lease, purporting to be made under it, are palpable shams for the purpose of evading the law. A perusal of these documents is sufficient to convince me of this, and it is put beyond argument by the evidence at the trial.

The plaintiff is a ratepayer of the municipality, and sues upon behalf of all other ratepayers as well as upon his own behalf. Loss to the municipality is quite a probable result of the

business the defendant corporation is carrying on. The taxes and the revenue from the town hall are being imperilled, and the defendant Dexter and his daughter and others are engaged at wages, so far as they relate to the picture show, to the payment of which the defendant corporation cannot lawfully apply the revenues of the municipality. If the municipality emerges from the transaction without a scandal and serious loss, it will be attributable to good luck, if there is such a thing, or the honesty of Dexter, not to the good management or the proper discharge of its duties by the municipal council. In a sense the council may have acted in good faith, but with a manifest intention of evading the law. This is one side of the case—the starting-point.

The plaintiff is not only a ratepayer, interested in preventing an improper diversion of the municipal revenues, or the taking on of unlawful obligations, but he has a special and peculiar individual interest in this matter as well. He is engaged in the moving picture business, for which he has to pay taxes and license fees. He must submit to rivalry and lawful competition of course, but he is not bound, I think, to submit to the special handicap of a People's Theatre unlawfully carried on by the defendants, and special and captivating appeals such as: "*Citizens of Chapleau*, Patronise the *Town Hall Show*, and in doing this *Look* after *Your Own Interests*." This is *unlawful* and therefore unfair competition. In the circumstances of this case, I think that the plaintiff can maintain this action, without quashing the by-law, and without joining the Attorney-General: *Hope* v. *Hamilton Park Commissioners* (1901), 1 O.L.R. 477; *Standly* v. *Perry* (1876-9), 23 Gr. 507, 2 A.R. 195, 3 S.C.R. 356; *McDonald* v. *Lancaster Separate School Trustees* (1914), 31 O.L.R. 360; *Alexander* v. *Township of Howard* (1887), 14 O.R. 22, at p. 44; *Ottawa Electric Light Co.* v. *City of Ottawa* (1906), 12 O.L.R. 290; *Township of Kinloss* v. *Stauffer* (1858), 15 U.C.R. 414; *Rose* v. *Township of West Wawanosh* (1890), 19 O.R. 294; *Holt* v. *Township of Medonte* (1892), 22 O.R. 302; Biggar's Municipal Manual, pp. 379, 511. And it does not matter that the transaction may be beneficial to the municipality: Jones v. Town of Port Arthur (1888), 16 O.R. 474.

ONT.
S. C.
CRICHTON v. TOWNSHIP OF CHAPLEAU.
LENNOX, J.

It is not so clear that the plaintiff has the right to join Dexter, but authority is rather in favour of it: Halsbury's Laws of England, vol. 8, p. 356, para. 812; *Holt* v. *Township of Medonte*, *supra*; and some other cases referred to.

I do not think that the purchase of the piano was illegal or improper. If the town hall is to be made available for entertainments from time to time, and revenue-producing, it may be part of necessary equipment, just as seating and lighting is necessary. Whether the picture machine is of this class was not shewn, and I cannot judge. It was not purchased with this object; but, beyond this, I make no finding as to it.

There will be an injunction restraining the defendant the corporation from carrying on a moving picture business in the town hall or elsewhere, and from employing the defendant Dexter as its manager for this purpose, and from investing or applying the revenues of the municipality in any enterprise of this character, and restraining the defendant Dexter from carrying on any business or enterprise of this character, with full costs against the municipality, including the examination of Dexter for discovery, and without costs to or against Dexter.

Order accordingly.

ONT.
S. C.

Re CHATHAM GLEBE TRUST.

Ontario Supreme Court, Sutherland, J. March 16, 1915.

1. CHARITIES AND CHURCHES (§ I D—39)—CROWN GRANT OF LAND TO USE OF CLERGYMEN—DISTRIBUTION OF PROCEEDS—DISCRETION AS TO APPORTIONMENT.

On a Crown grant of land to trustees their heirs and assigns to be held to and for a glebe for the use and benefit of the ministers and congregations of the Church of England in a certain town or city, the income of the trust is to be divided in aliquot parts according to the number of the churches of that denomination existing from time to time in the city; the minister and congregation of each church may properly be treated as a single entity and payment may be made to the rector and church wardens, leaving it to them to apportion the distribution as between the minister and congregation.

[*Dumoulin* v. *Langtry*, 13 Can. S.C.R. 258; *Re Hislop*, 22 D.L.R. 710, 8 O.W.N. 53, referred to.]

Statement

MOTION by originating notice for an order declaring the true construction of a trust in a grant of land.

The lands were sold, and the trustees had in hand the sum of $13,200. See the Ontario statute 3 & 4 Geo. V. ch. 150.

ONT.

S. C.

RE CHATHAM GLEBE TRUST.

Statement

The applicants were the present trustees, and they asked the opinion and advice of the Court in respect of the following questions:—

1. It having been decided by arbitration that Christ Church, Chatham, and Holy Trinity Church, Chatham, being the only two churches of the Established Church of England at present in existence in the city of Chatham, are entitled to participate in the uses and benefits of the said trust, in what shares and proportions should the trustees pay the income of the trust to the two churches?

2. Under the wording of the trust, in the event of other churches of the Church of England being established in the future in the said city of Chatham, would the ministers and congregations of such new churches be entitled to participate in the uses and benefits of the trust?

3. Under the wording of the trust, would ministers of the Established Church of England, residing in the said city of Chatham, but not having charge of churches or congregations of the Church of England, nor having the performance of definite clerical duties assigned to them in connection with such churches and congregations, be entitled to participate in the uses and benefits of the trust?

4. Under the wording of the trust, (a) would it be necessary for the trustees to deal with the ministers and the congregations of Church of England churches in the city of Chatham as separate entities and to pay so much of the income of the trust to the minister and so much to or for the benefit of the congregation, or would the minister and congregation of any such church be properly treated by the trustees as a single entity so that payment to the Rector and Wardens as the governing body of such church would satisfy the obligations of the trustees in that behalf; and (b), if the minister and the congregation should be treated as separate entities, in what shares or proportions should the shares of income payable in respect of any particular church be distributed between or among them?

5. In the event of there being at any time in the future more ministers or clergymen attached to and performing clerical duties in connection with any church of the Church of England in the city of Chatham, would each of such clergymen be entitled to participate individually in the said income, and if so in what shares and proportions?

F. P. Betts, K.C., for trustees.

O. L. Lewis, K.C., for Christ Church.

T. Scullard, for Holy Trinity Church.

SUTHERLAND, J. (after setting out the facts at length):—It is contended on behalf of Christ Church and congregation that, they being the direct successors and practically a continuation of the original S. Paul's church, and the trust being "to hold the same to and for a glebe" etc., and "glebe" meaning a portion of land attached to an ecclesiastical benefice as part of its endowment, the whole of the fund should in strictness be used

Sutherland, J.

ONT.

S. C.

RE CHATHAM GLEBE TRUST.

Sutherland, J.

for its minister and congregation. The further words of the trust are, however, "for the use and benefit of the ministers and congregations" etc., and they would seem to contemplate more than one minister and congregation for whose use the glebe and its revenue should be used and applied. . . . It is also conceded that the arbitration had settled this in so far as the two now existing congregations and their ministers are concerned, and that both are to share.

It is, however contended that, while this may be so, it does not necessarily imply that each should get one half of the revenue, or that if, at a later date, additional congregations are formed, they and their ministers should share in the fund.

It is contended on behalf of Christ Church that, as it was the successor of the original congregation and in receipt of the whole revenue for a time, it should be dealt with in a different way from that in which Holy Trinity Church should be dealt with, and that a portion of the revenue should first be set apart for it, and only the balance thereof divided in some appropriate and equitable way between the two.

It is further contended that, in default of a disposition of the matter in the manner just suggested, the revenue should be divided between the two existing congregations on the basis of the number of their respective members: *Attorney-General* v. *Grasett* (1856-7), 5 Gr. 412, 6 Gr. 200; *Langtry* v. *Dumoulin* (1884-5), 7 O.R. 644, 11 A.R. 544; *Dumoulin* v. *Langtry* (1886), 13 S.C.R. 258.

As the membership of the existing congregations will be fluctuating from time to time, this does not appear to be a very satisfactory or equitable adjustment, and if in time another congregation or other congregations and their ministers will be entitled to share, the matter will become yet more complicated and difficult. It would seem to me, however, that the language in which the terms of the trust are couched would imply that all congregations then existing or thereafter to be formed in the town of Chatham, and their respective ministers, were intended to have the advantage of the glebe land and its revenue, and that this will apply in the future in case further congregations are formed therein over which other ministers will be called to preside.

ONT.

S. C.

RE CHATHAM GLEBE TRUST.

Sutherland, J.

I do not think that there is anything in the language used to indicate that any preference should be given to one congregation as compared to another, where there happens to be a difference in territorial area or in the number of members, nor that, if there is to be a division, the shares should be other than equal shares.

I think also that the language used, "for the use and benefit of the ministers and congregations," seems to imply that it is only ministers in active oversight of congregations who are intended to be recipients of the benefits, and who, with their congregations, should share in the benefit of the trust.

I see nothing in the language used to indicate that the trustees are called upon to apportion the amounts paid between the ministers and their congregations. I cannot see how a better principle can be applied in this case than that expressed in the maxim that "equality is equity:" Lewin's Law of Trusts, 12th ed., p. 1277; Jarman on Wills, 5th ed., pp. 175, 176; *Williams v. Roy* (1885), 9 O.R. 534; *Re Hislop* (1915), 22 D.L.R. 710, 7 O.W.N. 614, 8 O.W.N. 53.

I would, therefore, answer the questions propounded . . . as follows:—

1. Half to each. 2. Yes. 3. No.

4. (a) The minister and congregation of each church may properly be treated as a single entity and payment properly made to the Rector and Wardens thereof.

(b) The minister and congregation may be left to apportion as they may decide.

5. Yes; and the amount which they and the congregation shall agree upon as payable to such ministers may be equally divided between them if there be but two, or among them if there be more.

The costs of all parties will be out of the fund.

Judgment accordingly.

YAGER AND WESTERN TRUST CO. v. CORPORATION OF SWIFT CURRENT.

SASK.

S. C.

Saskatchewan Supreme Court, Haultain, C.J. January 4, 1915.

1. APPEAL (§ I A—2)—RIGHT TO—EXPROPRIATION AWARD.

No appeal lies from an award made under the expropriation clauses of the City Act, Sask., nor does the "Act respecting Judges' Orders in matters not in Court," R.S.S. ch. 55, apply to an award made by a district Judge acting as arbitrator under the City Act.

SASK.

S. C.

YAGER AND WESTERN TRUST CO. v. CORPORATION OF SWIFT CURRENT.

Haultain, C.J.

APPLICATION for leave to appeal from an order of a District Court Judge.

Taylor, K.C., for respondent.

W. E. Knowles, K.C., for claimants.

HAULTAIN, C.J.:—This is an application for leave to appeal from an order and award made by his Honour W. O. Smyth, Judge of the District Court of the Judicial District of Swift Current, made under the provisions of section 253 of the City Act.

In my opinion, there is no appeal from an award made under the expropriation clauses of the City Act. The Act makes no provision for an appeal and consequently "An Act respecting Judge's Orders in matters not in Court" (ch. 55, R.S. Sask.) does not apply (see sec. 6). In any event the award made in this case is not an order within the meaning of that Act. *Re Humberstone & Edmonton*, 14 W.L.R. 492. The fact that the City Act provides for a reference to either "a Judge or a barrister to be appointed by him" is a sufficient reason in itself for holding that ch. 55, R.S.S. does not apply. *Re Humberstone & Edmonton*, above cited, also holds, under similar legislative provisions that the arbitration does not apply to matters of this kind.

The application must therefore be refused with costs.

Application refused.

N. S.

S. C.

McSORLEY v. THE DOM. COAL CO.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Graham, E.J., Russell, and Drysdale, JJ. March 9, 1915.

1. MASTER AND SERVANT (§ II B 7—175)—MINES—SAFETY APPLIANCES — MINOR EMPLOYEE—VIOLATION OF WARNINGS.

The employment of a boy of 14 years of age to attend to the wire rope at the revolving drum of a hoisting gear of a mine is not such as to call for special supervision or special instruction where the drum was properly guarded and the work was properly boy's work if done by him where he was directed to do it outside of the guards, particularly where he had been specially warned of the danger of attempting to work inside the guards and was injured by doing so in spite of the warning.

Statement

ACTION for injuries causing death.

T. J. N. Meagher, for appellant.

H. Mellish, K.C., for respondent.

N. S.

S. C.

McSORLEY v. DOM. COAL CO.

Drysdale, J.

The judgment of the Court was delivered by

DRYSDALE, J.:—The action is by the father and administrator of one Anthony McSorley, deceased, for injuries causing the death of said Anthony McSorley in the works of the defendant company. Anthony McSorley, the boy killed, it seems, was under 14 years of age and was employed to attend the rope that coils on a hoisting drum. He had been on the job for some time and got entangled by the rope and was killed by the revolving drum. The allegation is negligence on the part of the company in connection with the operation of the machinery. It would seem from the evidence that the drum was reasonably protected by a guard or fence, and that the operation of attending to the coiling rope was not, if properly done, a hazardous proceeding, and the accident arose, no doubt, by reason of the boy getting inside the fence or guard and guiding the rope from a position not intended for use in such operation.

It would appear that the boy had been seen by an employee, Walker, guiding the rope from, what he states, was a dangerous position, namely, from a place inside the fence or bars, and, in the presence of the donkey engine man, warned McSorley of the danger in so placing himself. This, it seems, was a day or two before the accident, and it seemed to be common ground on the argument before us that the boy met his death by getting inside the bars and attempting to do his work therefrom. He had been warned of the danger in attempting to work inside the guards and it seems reasonably certain he brought the injury upon himself.

The action was tried with a jury before Mr. Justice Longley and the verdict of the jury was against negligence. Objection was taken to the charge of the learned Judge on the trial, but unless there was reasonable proof of negligence on some allegation against defendants this objection will not avail the plaintiff. I ask myself what is disclosed to make a case of absence or want of due care on the part of the defendant, and what could be submitted to a jury in that connection? The mine was well equipped, the machinery in order and the drums apparently properly protected, and in my opinion nothing proved in the case to

N. S.

S. C.

McSORLEY v. DOM. COAL CO.

Drysdale, J.

suggest negligence on the part of the company. It was urged that the employment of a boy of about 14 at the work in question called for special supervision or special instruction, and that the absence of such special supervision or instruction involved negligence on the part of the company that ought to be submitted to a jury. But a consideration of the evidence convinces me that this point is not well taken. The work was boy's work, and had been performed by the boy, McSorley, for some time. He had been specially warned as to the danger involved in attempting to work inside the guards and I do not think any further or special supervision by the company was called for.

I am of opinion the appeal fails.

Appeal dismissed.

ONT.

S. C.

MITCHELL v. GRAND TRUNK R. CO.

Ontario Supreme Court, Mulock, C.J.Ex. March 11, 1915.

1. RAILWAYS (§ III—50)—ACCIDENTS AT CROSSINGS—SIGNALS AND WARNINGS—INCOMPETENT BRAKEMAN.

The statutory duty under sec. 276 of the Railway Act, Can., to warn persons crossing or about to cross the track of the approach of a train backing up across the street is one for the non-observance of which the railway company may be liable in damages for an accident resulting from the failure of the brakeman to give sufficient warning with the air whistle at the rear of the train; the placing in charge of the rear end of the train when moving reversely upon level crossings in a town of a brakeman unacquainted with the conditions existing near the crossing which would interfere with persons seeing the approaching train and without knowledge of where the crossing was, is in itself negligence for which the company is liable.

2. RAILWAYS (§ IV 2—98)—ACCIDENT AT CROSSING — CONTRIBUTORY NEGLIGENCE—RIDING WITH ANOTHER.

Contributory negligence of the person who had hired the vehicle and was himself driving it is not attributable to the passenger who is riding with him in the vehicle and who has no control over same, in answer to the latter's action for damages against the railway, under the Fatal Accidents Act, Ont., where the passenger jumped from the vehicle when a collision seemed imminent and was killed and the accident was due to the company's neglect of its statutory duty under sec. 276 of the Railway Act, Can., to give warning of the approach of the train moving reversely over a level crossing.

Statement

ACTION under the Fatal Accidents Act.

T. J. Agar, for plaintiff.

S. F. Washington, K.C., for defendants.

Mulock, C.J.Ex.

MULOCK, C.J.Ex.:—On the morning of the 25th December, 1914, the deceased was proceeding westerly along Union street, in the town of Simcoe, in a cutter drawn by one horse. There

were two other occupants of the cutter, namely, one Glenn, the driver (who had hired the horse and cutter), and one Snelgrove, who was sitting at the left side of the cutter with Glenn on his lap, the deceased being at his right. The defendant company's line of railway crosses Union street at rail level at right angles. A few hundred feet south of the intersection of the railway track and Union street is the company's station, and the train in question was standing there. It consisted of the engine, tender, baggage car, and passenger car, and backed northerly across Union street, the passenger car being in front. The horse and cutter with the occupants, Glenn and Snelgrove, crossed the track in safety at a distance of about from 4 to 7 feet in front of the backing train. The deceased, however, jumped from the cutter, falling on the track, where he was fatally injured.

The plaintiff alleges that the accident was caused by the defendant company's negligence and by their failure to comply with the requirements of sec. 276 of the Railway Act.

The case was tried by a jury, and their findings are as follows:—

1. Were the defendants guilty of any negligence which caused the accident? A. Guilty of contributory negligence.

2. If so, in what did such negligence consist? A. In not equipping train running transversely with a properly equipped flagman.

3. Was Glenn guilty of any negligence which caused or contributed to the accident? A. Yes.

4. If so, in what did such negligence consist? A. In driving too fast in approaching what he knew as a dangerous crossing.

5. Was the deceased guilty of any negligence which caused or contributed to the accident? A. No.

6. If so, in what did such negligence consist? (No answer).

7. What damages, if any, do you award the plaintiff? A. $1,000.

When the jury brought in their answers, the following took place, as reported by the Court stenographer.

The Chief Justice:—What do you mean by saying that the defendants were guilty of contributory negligence?

The Foreman: I think, my Lord, the feeling of the jury was

ONT.

S. C.

MITCHELL v. GRAND TRUNK R. CO.

Mulock, C.J.Ex.

that they hadn't equipped the train with the proper signalling appliances in order to avoid collision with teams passing on that crossing. They neglect to do that. They neglect to supply the proper flagman in his proper position on the fore end of that car. We considered it in that light.

The Chief Justice: That is not the meaning of contributory negligence. Contributory negligence is one negligence plus another negligence.

The Foreman: I think the meaning of the jury, as far as the contributory negligence was concerned, was that neglect in not having had this contributed towards the accident.

The Chief Justice: That is not enough. You must find out what was the cause of the accident.

The Foreman: In our finding we coupled the negligence of the company with the negligence of the driver in driving too fast.

The Chief Justice: Well, driving too fast, unless he got on the track, would not play any part.

The Foreman: Approaching the crossing, knowing it to be a dangerous crossing.

The Chief Justice: This is your verdict, is it?

The Foreman: That is the verdict as the jury have found it.

The Chief Justice: You all adhere to this, do you?

The Foreman: We do.

The Chief Justice: I speak to all the rest of the jury. You have heard the discussion which has taken place between the foreman and myself; you have heard my questions and you have heard his answers; are his answers your answers? Do you all agree with that? (Jury agree). Because his answers given verbally here will form part of the general finding of the jury, and save you the trouble of retiring.

The meaning of the jury's answers is somewhat obscure, but I think it is to the effect that the accident was caused by the negligence of the company and of the driver, and that the company's negligence consisted in not giving the warning required by the statute, and that such failure to warn arose (a) by reason of no competent man being stationed on what was for the moment the foremost end of the backing car, and (b) by reason

ONT.

S. C.

MITCHELL v. GRAND TRUNK R. Co.

Mulock, C.J.Ex.

of the car not being equipped with signalling appliances sufficiently powerful to be heard at such a distance from the car as to serve as an effective warning to persons about to cross the track; the jury in effect finding that, if it had been so equipped, the occupants of the cutter would have heard the earlier warning given by Price when about 250 feet from the crossing in ample time to avoid the accident.

Section 276 of the Railway Act is as follows: "Whenever in any city, town or village, any train is passing over or along a highway at rail level, and is not headed by an engine moving forward in the ordinary manner, the company shall station on that part of the train, or of the fender, if that is in front, which is then foremost, a person who shall warn persons standing on, or crossing, or about to cross the track of such railway."

The car at its "foremost" end was equipped with an air whistle appliance, and by moving a valve this appliance, if in working order, would serve as an emergency brake. For some reason not shewn, the emergency brake had been rendered non-effective, and in lieu thereof the train was equipped with a cord, whereby the man stationed at the "foremost" end of the moving train could signal to the engineer, who, according to his evidence, would be able to stop the train more quickly by the engine than would be possible by the emergency brake. It seems to me, however, that the jury in speaking of signalling appliances meant appliances for warning persons about to cross the railway, and not appliances for communicating with the engineer, for in this case the evidence of Price, the brakesman, who was the person stationed at the foremost end of the car, is to the effect that he did not attempt to stop the train until after the deceased had been run over, but he did, by means of the air whistle, endeavour to warn the occupants of the cutter. . . .

There was a conflict of evidence as to whether the engine whistle was sounded and the bell rung; but, even if both of these things were done, the company would not thereby be relieved from their statutory duty to give the warning contemplated by sec. 276. The language of that section is mandatory. The person standing on the foremost platform of a train not headed by an engine, etc., "shall warn persons standing on or

ONT.

S. C.

MITCHELL v. GRAND TRUNK R. CO.

Mulock, C.J.Ex.

crossing or about to cross the track," etc.; and the question here is whether such statutory warning was given. Glenn, according to his evidence, did not hear the first air whistle, but only the one sounded when he was within 29 feet of the east rail of the track, and at the same moment he saw the approaching train, the north end being at a point which he fixes as about 60 or 70 feet south of the place of the accident. He was then travelling at the rate of from 8 to 10 miles an hour, and was within a couple of lengths of the horse and cutter from the track. He had but an instant in which to determine upon his course of action. The thought came to him that if he were to continue he would run into the train and he pulled on the reins; at the same moment the deceased grabbed them in front of Glenn's hands, bringing the horse almost on its haunches on the track. Glenn then recovered and loosened the reins, and the horse jumped forward clearing the track, and about at the same time the deceased jumped out of the cutter, alighting upon the track, when in a moment he was fatally injured.

Each occupant of the cutter was entitled to the benefit of the statutory provision in question. The only evidence of the deceased having heard the warning of the air whistle is that furnished by his act of seizing the reins. This was at some point at most not 30 feet from the track.

The jury's finding in effect is, that the statutory warning contemplated by the section was not given, and there is evidence to support that view. Apparently they accept Glenn's evidence that he did not hear any earlier whistle, and conclude that a warning given when a collision was imminent and practically unavoidable was not a warning within the meaning of the statute.

With regard to the finding as to the brakesman's incompetence; it seems that this was only the second occasion that Price had been with this train in Simcoe, and it does not appear that he had any definite idea where the crossing was, or that there were buildings on the south side of the highway which would interfere with persons on the highway seeing the approaching train or his seeing persons about to cross the track. The company should not, I think, have placed in the responsible posi-

ONT.

S. C.

MITCHELL v. GRAND TRUNK R. CO.

Mulock, C.J.Ex.

tion where Price was on that day a person quite unacquainted with the conditions existing near the crossing. He acted according to the best of his judgment, and the moral as well as the legal blame for the accident rests with the company for having required Price to perform duties with the nature of which he was not familiar.

There is no dispute that after Price blew the air whistle at a point about 250 feet from the crossing, he did not again blow it until too late, namely, when the accident was unavoidable. Whether the signalling appliances referred to by the jury were, or were not, adequate, the evidence shews that Price did not give such warning as is contemplated by the statute, and, if it were open to me as trial Judge, I would so find; but sec. 27 of the Judicature Act does not empower the trial Judge but only the Court of Appeal so to deal with the case.

The jury exonerated the deceased from negligence. He was a passenger only; and, therefore, the plaintiff's rights are not affected by Glenn's negligence.

Judgment will be entered for the plaintiff for $1,000, with costs of action.

Judgment for plaintiff.

TOM GUNG v. FONG LEE.

N. S.

S. C.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Longley and Drysdale, JJ. January 2, 1915.

1. RECORDS AND REGISTRY LAWS (§ III C—21)—EFFECT OF REGISTRY—NOTICE—RIGHTS OF SUBSEQUENT PURCHASERS.

To disentitle a party from insisting in equity on a legal priority acquired under a registry law, actual notice is required; after such notice it would be a fraud for the party who had bought with notice to claim the benefit of the registry law as against the unregistered claim of which he had notice.

[*Ross* v. *Hunter*, 7 Can. S.C.R. 289, followed.]

APPEAL from the order of Russell, J. Statement

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

H. Mellish, K.C., for respondent.

The judgment of the Court was delivered by

SIR CHARLES TOWNSHEND, C.J.:—The learned trial Judge was undoubtedly right in holding that the subsequent registered deed from Theakstone to Campbell rendered ineffectual as Sir Charles Townshend, C.J.

N. S.

S. C.

TOM GUNG v. FONG LEE.

Sir Charles Townshend, C.J.

against him and his grantees the previous lease from Theakstone to defendant which had not been registered. This result is expressly enacted by the Registry Act, ch. 137, R.S.N.S., sec. 20. There is no evidence to shew that Campbell had knowledge of defendant's lease, or rather the terms of it, further than that it was for years only, which would expire in the May following the purchase and so the Judge has found. This leaves open the one question, that is to say, the nature of defendant's tenancy after May 1, 1913. Did he become a yearly tenant or a monthly tenant only? This depends on the action of Campbell after he became owner and the plaintiffs who purchased from him. The deed from Theakstone to Campbell was made November 30, 1912, and registered on December 4, 1912, from which date defendant's lease was void as against Campbell. The rent according to the terms of defendant's lease was $11 payable monthly, and was so paid to Theakstone while owner. Although dated May 1, it is proved that the tenancy actually commenced on May 9, and the rent was paid every month on the 9th or the day after. When Campbell became owner he collected the rent on the 9th as before and the plaintiffs, Tom Gung, Tom Ging and Charlie Coui, through their solicitors, in writing, demanded the rent from defendant as due on the 9th of each month. Their last notice was dated on April 9, 1914, demanding the rent as due and payable on that day. From these facts, in my view, the defendant became a monthly tenant to the plaintiff and was entitled to a month's notice expiring on the 9th of the month in which he was required to give up possession. The writ in this action to eject the defendant was issued on April 22, 1913. At that date he was rightfully in possession as a monthly tenant and could not be ejected without one month's previous notice expiring on the day his rent became due. Defendant's contention that non-payment of rent is no ground of forfeiture unless there is an express proviso or condition to that effect is no doubt correct. Reference to Woodfall's Landlord and Tenant, p. 371, and the authorities there cited makes this clear.

I think the learned Judge was right in holding that actual notice of the terms of the lease must be shewn. In *Ross* v. *Hunter*, 7 Can. S.C.R. 289, at 321, Strong, J., says:—

It is well settled that nothing short of actual notice, such notice as makes it a fraud on the part of a purchaser to insist on the registry laws, is sufficient to disentitle a party to insist in equity on a legal priority acquired under the statute.

There is no pretence here that Campbell and the plaintiffs at the time of purchase had actual notice of the term of defendant's lease. They were, as I have said, led to suppose it was for 3 years only expiring in the May following.

I am of opinion that this appeal should be allowed and the action dismissed with costs.

Appeal allowed.

KAULBACH v. WOODWORTH.

Nova Scotia Supreme Court, Graham, E.J., Russell, Drysdale, and Ritchie, JJ. April 5, 1915.

1. JUDGMENT (§ VI A—255)—EXECUTION ON—MOTION FOR—COUNTY COURT—TITLE TO LAND—SUPREME COURT—REFERENCE TO.

Under the County Court Act, N.S., secs. 44 and 45, a motion for leave to issue execution on a judgment of the County Court may properly be referred to the Supreme Court *en banc* where a question of title to land *bona fide* comes into question by reason of the judgment being for purchase money of land and of an objection being raised in good faith of want of title and that the description of the land offered to be conveyed was of a different property.

Statement.

APPEAL from a ruling of a County Court Judge.

V. J. Paton, K.C., and *R. C. S. Kaulbach*, for appellant.

D. F. Matheson, K.C., for respondent.

The judgment of the Court was delivered by

Ritchie, J.

RITCHIE, J.:—An application was made under Order 40, rule 22, by the executor of the late C. Edwin Kaulbach to the Judge of the County Court for District No. 2 for leave to issue execution on two judgments, one of which was recovered by the late Mr. Kaulbach on March 2, 1883, as executor of John H. Kaulbach, and the other was recovered by Mr. Kaulbach on June 24, 1893. Both judgments were taken by confession, the second judgment being taken to recover interest due on the first judgment. Certain objections were raised in the County Court against the application, and issues of fact in regard to them were ordered to be tried and were tried with a jury. The findings of the jury as to these questions were against the defendant.

N. S.
S. C.
KAULBACH
v.
WOODWORTH.
Ritchie, J.

The defendant then raised a new objection in the County Court. On February 28, 1883, Mr. C. Edwin Kaulbach agreed to sell to the defendant a certain farm. There was a memorandum in writing in regard to the sale of this farm, signed by Mr. Kaulbach. It is as follows:—

28th February, 1883. This is to certify that the property or farm lately occupied by David Frausel of Waterloo and purchased by me at sheriff's sale, I have this day sold to Isaac Woodworth of Waterloo for the sum of two hundred and fifty dollars. He is to have a deed of the same on payment of said amount with interest from this date.

The consideration for which the confession upon which the first judgment was entered was given, was the sale and conveyance to the defendant of the farm mentioned in the memorandum which I have quoted. The farm was purchased by Mr. Kaulbach at sheriff's sale, and a deed was made to him by the sheriff. The executor of Kaulbach is willing to deliver to the defendant a deed containing the same description as that in the sheriff's deed to his testator, upon payment of an amount agreed to be due, but the objection of the defendant was and is that this description does not cover the farm referred to in the memorandum, but covers another and different property and that, therefore, leave to issue execution ought not to be granted.

Upon this contention being made the County Court Judge properly, I think, held that the title to land *bonâ fide* came into question and that consequently he had no jurisdiction.

The Judge has stayed the proceedings and certified his reasons as provided by statute, and the clerk has accordingly transferred the record to this Court.

It is urged that the words of sec. 44 and sec. 45 of the County Court Act, authorizing the transmission of an action from the County Court do not cover this case. They are not apt words for this case, but it was, I think, clearly the intention of the Legislature that whenever the title to land came in question the transmission should be made, and the language is, I think, fairly susceptible of a construction which will give the remedy which the legislature intended should be given. I quote from Maxwell on Statutes at p. 109:—

It is said to be the duty of the Judge to make such construction of a statute as shall suppress the mischief and advance the remedy. Even where

the usual meaning of the language falls short of the full object of the legislature a more extended meaning may be attributed to it if fairly susceptible of it.

It was also contended that the defendant's proper remedy is to bring an action for an injunction to stay proceedings on the judgment, but sub-sec. 5, of sec. 18, of the Judicature Act prohibits this course. It was passed to provide a summary and less expensive remedy. In this connection I cite *Wright* v. *Bedgrove*, 11 Ch. D. 24, referred to by my brother Graham at the argument.

There will be a reference. Counsel will frame and submit an issue. The substance of it will be:—

Is the land described in the sheriff's deed to C. Edwin Kaulbach, dated February 12, 1883, the same property or farm mentioned in the memorandum in writing, dated February 28, 1883, and signed by C. Edwin Kaulbach? If so, has the plaintiff a good title to it?

Costs will be reserved and leave is granted to either party to apply to the Court or a Judge for further directions.

Judgment accordingly.

OGDEN LTD. v. CAN. EXPANSION BOLT CO.

Ontario Supreme Court, Boyd, C. April 26, 1915.

1. TRADE-MARK (§ IV—18)—NAME OF EXPANSION BOLTS—FIRM INITIALS—DISTINCTIVENESS.

The word "Cebcol" used as a trade-mark on expansion bolts representing the initials of the name of its company, while phonetically alike, is unconfusingly distinctive from the trade-mark "Sebco," packed in dissimilar cartons, and constitutes no infringement as ground for injunction.

2. EVIDENCE (§ XII K—978)—WEIGHT AND SUFFICIENCY—INFRINGEMENT OF TRADE-MARK—CONFUSION—TRAP WITNESS.

A person sent as a "trap-witness" to purchase an article of a certain brand claimed to be imitated, and who knew the distinctive character of the various brands, does not establish confusion as an element of proof in an action for injunction for the infringement of a trade-mark.

Statement

ACTION to restrain the defendant company from using the word "Cebcol" in connection with the sale of its goods, and for damages and an account of profits.

J. F. Edgar, for the plaintiff company.

N. W. Rowell, K.C., for the defendant company.

ONT.

S. C.

J. EDWARD OGDEN CO. LIMITED v. CANADIAN EXPANSION BOLT CO. LIMITED.

Boyd, C.

April 26. BOYD, C.:—The companies (plaintiff and defendant) deal in "expansion bolts," under which term are comprised three classes of products: (a) closed back machine shields; (b) expansion tag shields; and (c) screw anchors.

The first product forms the largest part of the defendant's business, and is not dealt in at all by the plaintiff. The other two products, *expansion shields* (made of malleable iron for use in stone and cement walls) and *screw anchors* (made of lead and used in wooden structures) are dealt in by both companies, and in both the screw anchor forms the smallest part of their trade.

The plaintiff company may be said to be derived from a United States corporation called The Star Expansion Bolt Company, who used as a trade mark for their goods, about 1903, the word "Sebco;" and their goods, under two descriptions, "Star" and "Sebco," were advertised and sold in the United States and in Canada prior to the incorporation of the plaintiff. Mr. Ogden, president of the United States company, took steps to organise the plaintiff in July, 1914; and, using his own name, it was incorporated as the J. Edward Ogden Company Limited. The plaintiff is spoken of and treated as the successor in Canada of the Star Expansion Bolt Company of the United States. The American company and Mr. Ogden both assigned to the plaintiff all their right, title, and interest in and to the trade mark "Sebco," which had been registered by the American company in the Department of Agriculture at Ottawa on the 10th July, 1910. It was assigned to the plaintiff company on the 16th September, 1914; and the action was brought on the 22nd October, 1914. This action proceeds on two grounds: first, that the defendant has applied the word "Cebcol" to its goods, which is claimed to be "a fraudulent imitation of the plaintiff's trade mark" (para. 15 of claim); and, secondly, that the defendant sells and passes off its goods in a deceptive manner so as to induce purchasers to believe that the goods are those of the plaintiff (para. 14 of claim).

The plaintiff sets forth that the company and its predecessors have adopted a form of label, coloured yellow, having at its top

in large letters "SEBCO," in the centre the representation of a screw anchor lying horizontally, and underneath the words "Screw Anchors," and then figures indicating the screw number and size of drill required and quantity in the package (para. 6 of claim); and the complaint is, that the defendant (para. 14) has sold and offered for sale screw anchors etc. with marks and labels in simulation and imitation of the plaintiff's marks and labels, and "the entire appearance and get-up of the defendant's label is so similar to the plaintiff's label as to deceive the public."

It is to be noted that the deception complained of is confined to the yellow label and its get-up, and does not extend to the package in which the label is placed. The pasteboard box is called "carton" by American usage; and, though some suggestion of injury on this score appears, it is not put forward as a factor in the gravamen of the complaint.

The genesis of the word used as a trade mark by the plaintiff is obvious: it is made up of the initials of the name "Star Expansion Bolt Company," and it was suggested to that company by the practice of their customers to write only the initials of the company in sending in orders for its products. This is indeed a very common plan of expediting oral and written intercourse—dropping the full names of corporations and using only the initial letters; and, if these happen to form any sort of vocable, that easily suggests itself as a good trade mark.

The American predecessor of the defendant was the United States Expansion Bolt Company, and that company availed itself of the first three words to form a trade mark "USE," which was regarded as an admirable stroke of business. Following this well-recognised practice, when the representative of the United States Expansion Bolt Company, who had been doing business in Canada for that company, projected an offshoot company for this country, he decided on a name of the same geographical import as the American company, and had it incorporated as the Canadian Expansion Bolt Company, in March, 1914. It was easily the next step to take the initials of

ONT.

S.C.

J. EDWARD OGDEN CO. LIMITED v. CANADIAN EXPANSION BOLT CO. LIMITED.

Boyd, C.

the company's name for the purpose of identifying the products with the company dealing in them, viz., C. E. B. Co. L., or CEBCOL, the word complained of.

Looking at the genesis of both trade words, and giving credence to the organiser of the defendant that he was not aware of the use in Canada of the word SEBCO when he put forth the initials of his company as a trade mark, I find myself unable to say that what was done was anything more than an honest and fair use of the initials of this company's own name to call the attention of the public interested in the output of this company's trade as being expansion bolts made or furnished by the defendant, and not the output or product of any other concern. Eliminating, therefore, any intention to practise unfair and dishonest competition, how are the facts of the case to be regarded?

Dealing with the question of the trade marks *per se*, and applying the test suggested by some Judges, when the two are not absolutely identical but similar—that is, place the words side by side and test by inspection of the eye whether one is an obvious imitation of the other—so far as the view goes, I would not conclude, in the absence of evidence, that an ordinary dealer in these goods or an ordinary purchaser of them would be confused: one has five letters, the other six, the first and last letters are different (C-L and S-O).

Tested phonetically, there is more likelihood of confusion, unless regard is had to the origin and the "C" is given the hard sound which is heard in "Canadian." This is indeed the way in which the defendant's mark was pronounced by the man in Aikenhead's, who largely dealt in the defendant's bolts; and if it be called "Kebcol," none but the stupid or careless man who always blunders would be likely to confound the words.

Regard must be had to another aspect of the case, *i.e.*, the origins of both. I question whether the plaintiff's trade mark would now be registered, as a valid and distinctive name, in view of the recent decisions in *In re R. J. Lea Limited's Application*, [1913] 1 Ch. 446, 452, and *Registrar of Trade Marks* v. *W. & G. DuCros Limited*, [1913] A.C. 624, 632. The precise

point is touched by Lord Shaw: "I do not think that any right which is substantially by way of monopoly should be granted to one particular trader, to use, under the guise of a trade mark and for himself alone, initials which may be of general use in trade." As pointed out by Farwell, L.J., in *In re Applications of W. & G. DuCros Limited*, [1912] 1 Ch. 644, 661, "it is the common practice of tradesmen and manufacturers to put the initials of their firms on their goods, their invoices, and letter paper, and to use such initials in various modes." And the meaning of the statutory word "distinctive" is "adapted to distinguish the goods of the proprietor of the trade mark from those of other persons . . . not only persons at present in the trade, but also persons who may in the future embark in the trade:" *per* Cozens-Hardy, M.R., in *In re Applications of W. & G. DuCros Limited*, [1912] 1 Ch. at p. 652. And in *In re R. J. Lea Limited's Application*, [1913] 1 Ch. at p. 464, Hamilton, L.J., says: "As a distinctive mark the proprietor's surname is adapted to distinguish the goods of the proprietor of the mark from those of persons who do not bear or use that name, but only to confuse them with the goods of other persons who do bear that name." See also *Slazengers Limited's Application* (1914), 31 R.P.C. 501, 507.

There were, when the plaintiff's trade mark was registered, dozens of companies using the descriptive words "expansion bolts" in the corporate names of their firms, such as Cinch Expansion Bolt Company and Standard Expansion Bolt Company, and of these at least three were disposing of their goods in Canada—the Star Expansion Bolt Company, the Diamond Expansion Bolt Company, and the United States Expansion Bolt Company. To all these companies the controlling initials EBCO were common property as indicative of the business they were engaged in. By the use of these public letters, with the "S" for "Star" prefixed, the plaintiff claims to have secured a monopoly in its favour, as against other possible prefixes and initial letters of the various firms who were then making and dealing in or might hereafter deal in expansion bolts.

Assuming that the trade mark of the plaintiff is to be treated

ONT.

S. C.

J. EDWARD OGDEN CO. LIMITED v. CANADIAN EXPANSION BOLT CO. LIMITED.

Boyd, C.

as valid, then the trade mark registered by the defendant, pending action, of CEBCOL, should also be treated as valid, though I have my doubts as to the worth of either. Upon this part of the case, and generally as to other issues, I would cite *Coombe* v. *Mendit Ld.* (1913), 30 R.P.C. 709, also *Pope Electric Lamp Co. Limited's Application* (1911), 28 R.P.C. 629, and *In re Horsburgh* (1878), 53 L.J. Ch. 237, note (Jessel, M.R.)

But it is not needful to pass upon this point in order to determine the present controversy.

As a matter of fact, the defendant has not used the word attacked apart from explanatory context. The use complained of is on labels where the word CEBCOL no doubt appears in the same position relatively as on the plaintiff's label, but the key to its import and significance is plainly printed in easily legible small-sized capital letters:—

"CANADIAN EXPANSION BOLT CO. LTD.
"TORONTO, CANADA."

The evidence convinces me that this company was desirous to point out the meaning of the trade mark used, and to distinguish it from the rival company. The evidence further shews that the cartons in the market at the time were of green colour, readily distinguishable from the brown or greyish brown box in which the defendant's goods were packed. It is not proved that there is anything special or unusual in the cartons used by both as to shape and cover. The defendant says that it ordered boxes from an ordinary box-maker, and he furnished those of common and cheap character of his own motion. Nothing was in evidence to derogate from this statement.

There is but a limited public interested in and using these goods—chiefly, if not exclusively, hardware houses, contractors, builders, electricians, plumbers, and such like—very few customers indeed who buy the articles singly; and, when they do, the evidence is that the particular article is asked for by name, and supplied by its being taken out of one of the cartons opened or kept open for the purpose. The sale is usually, however, in the boxes containing 100, of which complaint is made in the pleadings.

The public interested is an intelligent one—not likely to be deceived as to what is ordered or what is received, and it is of great significance that no single one of this constituency is called upon to give evidence or to prove actual mistake or misleading or confusion. In the case of honest traders accused of passing off their goods as the goods of the rival complainant, the rule of the Courts is, that it lies upon the plaintiff to make out beyond all question that the goods are so got up as to be calculated to deceive, and that is a matter of proof by witnesses: *Payton & Co.* v. *Snelling Lampard & Co.*, [1901] A.C. 308, 310; *Claudius Ash Sons & Co. Ld.* v. *Invicta Manufacturing Co. Limited* (1912), 29 R.P.C. 465 (H. of L.).

I am quite in accord with the language of Ritchie, Eq. J., in *Johnson* v. *Parr* (1873), Russell Eq. Dec. (N.S.) 98, 100, referring to the get-up of goods and imitation labels: "A Court will not interfere when ordinary attention would enable a purchaser to discriminate. It is not enough that a careless, inattentive, or illiterate purchaser might be deceived by the resemblance, but the Court would inquire whether a person paying ordinary attention would be likely to be deceived."

At the last moment before action, a piece of what is called "trap-evidence" was procured by the plaintiff; but that single exceptional example emphasises the lack of any of the usual evidence given to prove deception in passing-off cases. The existence of such a scrap of evidence does not prevent the Court from dismissing with costs an action not otherwise supported: *Rutter & Co.* v. *Smith* (1900), 18 R.P.C. 49. I have no doubt that the explanation of the sale is that it was a blunder. As said by Esher, M.R., in *Turton* v. *Turton* (1889), 42 Ch.D. 128, 135, names may be so alike that careless people may not notice the difference, and the similarity may occasion such blunders; "but they are the blunders of the people who make the blunders."

Here are the facts of this one instance of mistake. For the purpose of getting evidence in the suit, on the 3rd October, one Tyndall was sent by the plaintiff to Aikenhead's hardware store with a written order for 25 Sebco screw anchors, and obtained two dozen, which he paid for, got an invoice, and brought back

ONT.
S. C.
J. EDWARD OGDEN CO. LIMITED v. CANADIAN EXPANSION BOLT CO. LIMITED.
Boyd, C.

order and invoice to the plaintiff. The Aikenhead invoice was for "2 dozen Sebco screw anchors." The clerk took the screws out of a yellow box on a shelf, labelled "Cebcol." The purchaser knew that the anchors were taken out of the wrong box, and that they were anchors dealt in by the defendant, but did not call the boy's attention to the mistake. This is the sole and only evidence of any confusion by witnesses, and this proves that the boy who sold the goods, and who was a raw hand taken from working the elevator at the noon hour, had made a mistake. It is proof of one blunder which does not implicate any one but the blunderer. Next, the same messenger was sent to order verbally 100 Cebcol screw anchors from the same firm, and there was procured a box with yellow label marked Cebcol, containing 100, with an invoice calling them "100 only lead screw anchors." This was on the 20th October, and the writ issued two days after, without any warning letter being sent to the defendant.

Another dealing is reported on the part of a clerk of McIntosh & Co., who are the exclusive Canadian agents for sale of the goods of the plaintiff and of the Star company, its predecessor—which does not appear to be of importance. The Canadian Electric Company on the 24th November, 1914, order 200 screw anchors from McIntosh, to be furnished according to sample. The sample sent was of "Cebcol" goods. McIntosh sent "Sebco" goods, and part were returned as being too small and not suitable, and then the said witness bought sufficient Cebcol goods to fill the order. The witness knows both kinds of goods made by the parties, and would not mistake one for the other. He tells of the way the trade is conducted: the traveller that first goes round gets the order for expansion bolts of the kind he is selling unless the purchaser orders a particular kind. Mostly all the plaintiff's customers are in touch with the plaintiff's goods and ask for them as "Sebco," and most of their orders come in marked "Sebco."

McIntosh also says that hardware men handling the samples would not mistake the goods of the plaintiff for those of the defendant.

ONT.

S. C.

J. EDWARD OGDEN CO. LIMITED v. CANADIAN EXPANSION BOLT CO. LIMITED.

Boyd, C.

The plaintiff makes use of advertisements in workers' and trade journals to reach the public, and in these its goods are referred to as "Star" and "Sebco," and reference is made to the Star Expansion Bolt Company as serving to explain the trade names. The defendant does not advertise in journals, but by samples in bags distributed and delivered to the trade dealers, contractors, and electricians, and by circulars all stamped with the name and referring to the Canadian Expansion Bolt Company.

Adverting to the three kinds of articles known as expansion bolts, no question arises as to closed back machine shells, which are not dealt in by the plaintiff.

As to the second class, expansion shields, they are put up by both parties in boxes of wood of quite different shape and appearance. Branded into the wood of the front end of the plaintiff's is the word SEBCO, with the print of a star underneath, all in black; whereas on the defendant's is the usual yellow label with the name of the defendant company printed at length. There can be no complaint as to this branch of the business.

As an instance of confusion, McIntosh, exclusive agent for the plaintiff, says that on the 3rd July, 1914, the Aikenhead Company addressed an order to the defendant, Canadian Expansion Bolt Company, for 1,000 "Sebco" screw anchors, and that by mistake it came to the witness, who filled it with "Sebco" goods. This of itself does not indicate confusion as to the goods or as to the companies. How the mistake occurred is not shewn, nor does it appear how the order came to the hands of McIntosh.

The whole stress of the conflict centres around the sale of a comparatively small part of the plaintiff's business, *i.e.*, the screw anchors, and, I think, the attack made fails.

As to impeaching the plaintiff's trade mark in this action by the defendant, that is permissible.

The law is settled, on the existing statutes as to trade marks, that it is open for the defendant to impeach directly by his defence the validity or efficiency of the registered trade mark;

ONT.

S. C.

J. EDWARD OGDEN CO. LIMITED v. CANADIAN EXPANSION BOLT CO. LIMITED.

Boyd, C.

and the whole situation was fully dealt with by Moss, J.A., in *Provident Chemical Works* v. *Canada Chemical Manufacturing Co.* (1902), 4 O.L.R. 545, 546. This decision was approved and followed by Burbidge, J., in the Exchequer Court of Canada, in *Spilling* v. *O'Kelly* (1904), 8 Can. Ex. C.R. 426.

Upon the whole contention, my judgment is against the plaintiff, and the action should be dismissed with costs.

Action dismissed.

MAN.

C. A.

MAPLE LEAF MILLING CO. LTD. v. COLONIAL ASSURANCE CO.

Manitoba Court of King's Bench, Macdonald, J. January 16, 1915.

1. INSURANCE (§ VI A—240)—LOSS BY FIRE—REMEDIES OF ASSURED—EXCESSIVE CLAIM.

Where an excessive and exaggerated claim is made by a policy holder, and resisted by a fire insurance company, such a claim will not preclude the policy holder from recovering the real value of the goods burnt and damaged unless the claim is fraudulently made by the policy holder in the sense of endeavouring to obtain from the company money he has no right to.

[*Norton* v. *Royal Fire & Life Assurance Co.*, 1 Times L.R. 469, referred to.]

Statement

ACTION on a fire insurance policy.

Edward Anderson, K.C., and *R. D. Guy*, for plaintiff.

M. G. Macneil and *W. L. McLaws*, for defendant.

Macdonald, J.

MACDONALD, J.:—This action is founded on a policy of fire insurance issued by the defendant company to one W. Denby, for the sum of $1,500, covering stock of merchandise at Burks' Falls, in the Province of Ontario, the stock having been damaged and in part destroyed by fire; the said policy and all benefits and interest therein having been assigned by the said Denby to the plaintiff company for the benefit of his creditors.

The defendant company alleges that there never was such a person as "W. Denby," and from the evidence it appears that the name is an assumed one, and that the real name of the assured is "W. Denemburg," but for many years he has been known and has carried on business as W. Denby. Davidovitch, who is married to his daughter, and Finkelstein, who married his granddaughter, the daughter of Davidovitch, both say they knew him by no other name. Leonard Gowing, a merchant of Burks' Falls, knew him for five years, and did not know him by any other name.

It is suggested that the name assumed concealed his nationality, which his real name would have revealed, and that had his nationality been known the insurance contract would not have been entered into. In view of the fact, however, that he had for years been known as Denby, I cannot conceive that his intention was to deceive, and, furthermore, he did not solicit the insurance, but, on the contrary, he was solicited for it.

The policy was issued on May 23, 1912, although by error dated 1913; the fire occurred on August 17, 1912, and proofs of loss were duly made on September 25, 1912.

There are several grounds of defence to the action, but they are reduced to a few outstanding features, and the main contentions are fraudulent representation inducing the contract and a fraudulent claim of loss.

Incendiarism through the wilful act of the insured has been urged, but the evidence does not, to my mind, justify a finding in favour of that contention. There may be suspicious circumstances surrounding the entire transaction, but that is all. If the act of the insured amounts to a crime, and payment is resisted on that ground, it is necessary to adduce such evidence as would justify a conviction on a criminal charge for the same offence.

The contract for the insurance was negotiated in Ontario, but was completed in Manitoba by the acceptance of the risk and the issue of the policy. The goods insured were also situate in Ontario.

The Fire Insurance Policy Act, ch. 103, R.S.M., provides that the conditions set forth in the schedule to the Act shall, as against insurers, be deemed to be part of every policy of fire insurance entered into or renewed or otherwise in force in Manitoba with respect to any property therein. Now, the property insured was not within Manitoba, and the endorsement of the conditions on the policy was not intended as conditions of the company to which the insured was assenting. Condition 8, for example, could not possibly be so intended, as it applies to property in the city of Winnipeg and other parts of Manitoba, and to no other part of Canada.

Ch. 183 of the Ontario Insurance Act, sec. 194, provides that the conditions set forth in this section shall, as against the insurer, be deemed to be part of every contract in

MAN.

K. B.

MAPLE LEAF MILLING CO. LTD. v. COLONIAL ASSURANCE CO.

Macdonald, J.

force in Ontario with respect to any property therein; and such conditions shall be printed on every policy with the heading "Statutory Conditions." The policy here has not the statutory conditions printed on it as required by the statute; but the effect of such omission and the penalty therefor is that the policy becomes subject to the statutory conditions only: *Citizens Insurance Co.* v. *Parsons*, L.R. 7 A.C. 96.

Now, the Ontario conditions forming part of this policy, wherein is there a breach of any of these conditions? The following is the most material (sec. 18, sub-sec. c): "The person making claim shall furnish a statutory declaration declaring (*inter alia*) that the account is just and true," and sec. 20 provides that "any fraud or false statement in any statutory declaration shall vitiate the claim of the person making the declaration."

The business, as already stated, was managed by Davidovitch, and all matters connected with proof of loss was prepared by him, but Denby must be held responsible for the actions of his manager, and it must further be held that the claim of the plaintiffs is no stronger than would be that of Denby were he the plaintiff.

Now, what are the fraudulent representations inducing the contract? The insurance, as has been already observed, was solicited by a firm of brokers in Toronto. In his application the assured certifies that after diligent effort he has been unable to procure the amount of insurance required to protect his property in insurance companies duly registered to transact business of fire insurance in the Province of Ontario, and that he has offered to pay the insurers the rate of premium stated, and yet the insurers complain that they have been deceived in the character of the risk. The application is for $6,000 insurance, and the stock and fixtures are valued at $11,000. It is contended by the defence that this is a false and fraudulent representation, and that the value was grossly exaggerated. A stock book is produced shewing stock-taking in the months of January and September, 1911, and June, 1912, and unless these lists are padded the value placed by the assured upon his stock at the date of his application for insurance is within the mark. It is, however, a matter of comment that on August 17, 1912, the date of the fire, the stock on hand amounted to but $5,314.

There was a special summer sale by which the stock, it is

claimed, was greatly reduced, but Davidovitch, the manager of the business, says that at the date of the fire the stock was $2,000 less than it was at the last stock-taking. This would make the value at the date of the fire about $9,000, assuming the fixtures to be a negligible quantity; but only $5,300 worth of stock can be accounted for at date of fire, and this is explained by Davidovitch claiming a total extinguishment of goods, leaving no residue to make up the difference. Taking into consideration the character of the goods claimed to have been totally consumed, together with the evidence bearing upon this phase of the case, I have no hesitation in holding that no such quantity of goods was totally burnt up. The evidence on this point is conflicting, but there is no doubt that this estimate is entirely out of proportion to the actual loss.

The proof of loss makes claim to a total loss of $6,186.35; but included in this amount is $2,000, estimated goods destroyed leaving no remnants, that is, goods totally destroyed without any trace of them being left. Davidovitch says that the loss of goods totally destroyed was greatly in excess of $2,000—as it would have to be to bear out his figures—but that it was considered unnecessary to make this loss any greater as the insurance would not cover any greater amount.

It appears by the evidence that insurance to the extent of $6,000 was effected, but there is nothing to shew that any of it was paid. $1,500 is the amount to which the defendant gave its indemnity, and this is all that is sought to be recovered in this action; and the loss far exceeds that amount.

Where an excessive and exaggerated claim is made by a policy holder, and resisted by a fire insurance company, such a claim will not preclude the policy holder from recovering the real value of the goods burnt and damaged unless the claim is fraudulently made by the policy holder in the sense of endeavouring to obtain from the company money he has no right to: *Norton* v. *The Royal Fire & Life Assurance Co.*, 1 T.L.R. 469.

Now, does the statement in the statutory declaration claiming goods destroyed and no remnants to the value of $2,000 vitiate the claim? Had the claim been for $6,000 I think it would, but it seems to me that the statement must be material to the claim, and I cannot see how a claim for $1,500 on an ascertained loss of over $4,000, even if loss estimated at $6,000, can have such an effect.

MAN.

K. B.

MAPLE LEAF MILLING CO. LTD. v. COLONIAL ASSURANCE CO.

Macdonald, J.

If the assured had recovered other insurance, and to the extent of $4,500, I would consider that he had been almost, if not altogether, fully indemnified for his loss, but there is no evidence that such is the case.

With some hesitation, I have come to the conclusion that the plaintiffs are entitled to judgment for $1,500 with costs.

Judgment for plaintiff.

B. C.

C. A.

RAMSAY v. WEST VANCOUVER

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. May 14, 1915.

1. EMINENT DOMAIN (§ III C 1—143)—DIVERSION OF HIGHWAY—COMPENSATION TO ABUTTING OWNERS.

Where a municipal by-law closes a portion of the width of a highway required for the construction of a railway and does not merely authorize the railway company to construct the railway along the street, a property owner whose access to his property abutting upon such highway is thereby interfered with is entitled to compensation from the municipality as for damages occasioned by "altering" the highway under the Municipal Act, R.S.B.C. 1911, ch. 170, sec. 52, sub-sec. 176.

[*Baskerville* v. *Ottawa*, 20 A.R. (Ont.) 108; *Re Tate and Toronto*, 10 O.L.R. 651; *Re Medler and Toronto*, 4 Can. Ry. Cas. 13, referred to.]

Statement

APPEAL from an order of Clement, J.

R. M. Macdonald, for appellant.

Harvey, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The appellant, a municipal corporation, entered into an agreement with the Pacific Great Eastern Railway Company, giving the company liberty to carry its line of railway along a public highway within the boundaries of the municipality, together with the exclusive right of possession of a strip of the highway 46 feet wide, which strip the appellant by by-law closed to public traffic. This left still open to traffic a strip of 20 feet in width of the original road allowance, along the northerly side of the portion which had been so closed.

The railway company, on its part, agreed to purchase and dedicate as a highway a strip of land 20 feet wide on the southerly side of the said closed strip, so that the result of the by-law and agreement combined was that highways 20 feet in width were provided for traffic on each side of that portion of the original highway which was stopped up as aforesaid.

The appellant also agreed with the railway company to in-

demnify it against all actions and demands for damages or compensation by the owners of the abutting lands.

By sec. 52, sub-sec. 176, of the Municipal Act, power is given to municipal corporations to pass by-laws "for establishing, opening, making, preserving, improving, repairing, widening, altering, diverting, or stopping up" public highways. The owners of land injuriously affected by the exercise of such powers are given the right to compensation for injury to their lands, and to have the amount thereof determined by arbitration: sec. 394 *et seq.* The respondent's land abuts on the said 20 feet of the original road allowance not closed, and he is endeavouring to proceed to arbitration under the said provisions of the Municipal Act, and in this connection obtain the order for the appointment of arbitrators, which is the subject of this appeal.

The appellant's counsel contended that, because the Provincial Railway Act enables the railway company, with the approval of the Minister of Railways and the consent of the municipality, to run its line along a public highway, such approval having in this instance been obtained, the effect of the by-law and agreement aforesaid should be held to be merely the consent of the municipality to the railway company's occupying said strip, but not exclusively. In view of the terms of the by-law and agreement, I think this contention cannot be given effect to. Had the railway company proceeded in accordance with the provisions of the Railway Act alone, the strip of the highway in question could not have been closed to public traffic. It could be closed only, if at all, under the provisions of said sub-sec. 176.

The appellant's counsel then took, in the alternative, the position that the by-law and agreement were *ultra vires* of the appellant, basing this contention on the one ground alone, *viz.*, that, while it had power to stop up a highway, it had no power to narrow it by stopping up part of its width.

I am not concerned with the powers of the corporation to enter into the agreement in question in all its parts. The appellant may or may not have exceeded its powers in some of the terms of the agreement. In this connection the one above stated is the only one argued before us, and I shall confine myself to it.

B. C.

C. A.

RAMSAY v. WEST VANCOUVER.

Macdonald, C.J.A.

I think the powers vested in the corporation by said sub-sec. 176, read in the light of sub-sec. 193 of same section, are sufficient to authorize the closing to traffic of the said strip of the highway. It is true that power is expressly given to widen highways, and nothing is said as to narrowing them, but power to close them up altogether or to alter them implies, in my opinion, power to close part of the width.

The appeal should be dismissed.

Irving, J.A.

IRVING, J.A.:—I would dismiss this appeal. *Baskerville* v. *Ottawa*, 20 A.R. 108, seems in point.

Martin, J.A.

MARTIN, J.A., agrees that the appeal should be dismissed.

Galliher, J.A.

GALLIHER, J.A.:—While it was necessary for the municipality to pass a by-law granting permission to the railway company to construct their line along a public highway, the by-law itself went further, and stopped up a portion of the highway, thereby limiting the width of the highway along which vehicles could travel, and in that sense bringing the act authorised within the meaning of the word "altering" in the second line of sub-sec. 176 of sec. 52, ch. 170, R.S.B.C. 1911.

This interferes with the right of ingress and egress which the plaintiff had to and from his property which abutted upon the highway, and I think his claim for compensation against the municipality is properly launched.

I would dismiss the appeal.

McPhillips, J.A.

MCPHILLIPS, J.A.:—This is an appeal from the order of Mr. Justice Clement, of date October 2, 1914, made upon the hearing of an originating summons appointing arbitrators, under the provisions of the Municipal Act, to determine compensation for any damages caused by injuriously affecting lands of the claimant, owing to the stopping up of a certain highway, known as Bellevue street, the by-law being No. 38, passed on October 14, 1913.

The whole of the street has not been stopped up, but, in my opinion, the statutory authority admits of a portion of the street being stopped up (sec. 53, sub-sec. 176, ch. 170, R.S.B.C. 1911).

The corporation having stopped up a portion of the street, it necessarily follows that there may be damages by way of injurious affection of abutting lands, and there is the right to

have any such damages assessed by arbitrators (sec. 394, ch. 170, R.S.B.C. 1911), the compensation being provided for under statutory provisions: *Metropolitan Board of Works* v. *McCarthy* (1867), L.R. 7 H.L. 243; *In re Tate and City of Toronto* (1905), 10 O.L.R. 651.

The corporation in the present case did not merely confer upon the Pacific Great Eastern Railway Company the right to carry its line along the street in question (sec. 53, sub-sec. 197, ch. 170, R.S.B.C. 1911), but in the by-law it is provided, *it is to the extent there set forth* STOPPED UP AND CLOSED, clause 1 of the by-law reading as follows:—

> 1. The most southerly forty-six (46) feet of the said highway bounded as aforesaid being a strip of land forty-six (46) feet in width, thirty (30) feet on the north side and sixteen (16) feet on the south side of the centre line of the proposed right of way through said highway as shown on the said plan, *is hereby stopped up and closed from traffic as a highway*, save and except such portions thereof as are crossed by streets running across said highway.

The situation would possibly have been different if there had been in the present case merely the authorization to the railway company to construct the railway along the street; then it might be that no damages could be assessed against the corporation: *In re Medler & Arnot and Toronto* (1902), 4 Can. Ry. Cas. (C.A.) 13 and pp. 33-35. The question of damages (if any) in such a case might be assessable only under the provisions of the Railway Act. However, as this is a point not necessary of decision in the present case, I withhold the expression of any positive opinion thereon.

The Arbitration Act (ch. 11, R.S.B.C. 1911) applies to arbitrations under the Municipal Act, and there is the power in the arbitrators to at any time state a special case for the opinion of the Court upon any question of law arising in the course of the reference, and the Court or a Judge may so direct in a proper case (secs. 10 (*b*) and 22).

It follows that, in my opinion, the order of the learned Judge was right, and the appeal should be dismissed.

Appeal dismissed.

ONT.

S. C.

Re ROURKE.

Ontario Supreme Court, Middleton, J. April 15, 1915.

1. INCOMPETENT PERSONS (§ I—6)—LUNATICS—RESTORATION TO CAPACITY —EFFECT UPON IN EVENT OF DEATH.

Where a person was by an order of court adjudged a lunatic and his affairs and estate placed in charge of a committee, the court has no jurisdiction, after the death of the lunatic, to enter by virtue of sec. 10 of the Lunacy Act, R.S.O. 1914, ch. 68, upon an inquiry with a view of ascertaining whether the lunatic had in fact, some years before his death, become of sound mind and capable of managing his own affairs, and that certain payments, in the nature of gifts, made by the committee out of the lunatic's property, with his knowledge and approval, might be validated.

2. INCOMPETENT PERSONS (§ VI—30)—LUNATIC'S ESTATE—POWERS OF COMMITTEE—INVESTMENTS.

The property of persons not *sui juris* should not be left for private investment, but should be paid into or lodged in Court and become subject to the general system of administration, by which the interest is punctually paid and the corpus is always forthcoming when needed.

Statement

MOTION by Christine Holford, executrix of the will of Dennis Rourke, who was committee of the person and estate of James Rourke, declared a lunatic, by way of appeal from the ruling of the Local Master at Sandwich.

E. A. Cleary, for Christine Holford.

A. C. Heighington, for some of the persons interested in the estate of James Rourke.

Middleton, J.

April 15. MIDDLETON, J.:—On the 16th day of June, 1908, on the petition of Dennis Rourke, brother of the lunatic, insanity was declared, and it was referred to the Master at Windsor to appoint a committee, the committee being by the order required to pass his accounts annually and pay into Court balances found in his hands. The Master was directed to propound and report a scheme for the maintenance of the lunatic.

Pursuant to this order, on the 5th December, 1908, the Master reported that he had appointed the brother committee of the person and estate. He also reported the value of the real estate as $23,487, and the value of the personal estate as $18,167. The lunatic was confined in the Provincial Asylum.

The Master did not report, as required, any scheme for the maintenance of the lunatic, but he did do that which he was not required or authorised to do—he recommended that, after

paying the necessary asylum dues, the committee might invest and keep invested the principal moneys and accumulation of income, passing his accounts once a year. On the 18th December, 1908, an order was obtained in Chambers confirming this report of the Master, directing payment of specific sums for the maintenance of the lunatic, and directing that the scheme for the management of the lunatic's estate propounded by the Master should be approved.

In *Re Norris* and *Re Drope* (1902), 5 O.L.R. 99, my Lord the Chancellor laid it down as an invariable rule that the property of persons not *sui juris* should not be left for private investment, but should be paid into Court and become subject to the general system of administration, by which the interest is punctually paid and the corpus is always forthcoming when needed; and it is pointed out that this settled policy has been for many years embodied in the form of order invariably used (and it was used in the case in hand). My Lord further adds that much injury and loss has resulted in past times from the careless handling of the property of persons not *sui juris*, and that experience has shewn that no preponderance of advantage is gained by reason of any increased earnings of funds left in the hands of private individuals, to countervail the absolute security of the fund when in Court.

This policy, not then announced for the first time, received legislative sanction and approval on the revision of the Lunacy Act in 1909. By 9 Edw. VII. ch. 37, sec. 11 (*d*), the committee is required to give security, not only for the due accounting for the lunatic's estate, but for the payment into Court of the balances in his hands upon such accounting forthwith after the same shall have been ascertained or otherwise as the Court may direct.

The accounts of the committee were passed on the 18th December, 1909, shewing that the amount coming to the hands of the committee in cash was then $15,093, and that a little over $800 had been paid out in due course of administration; $6,762 was invested in municipal debentures, and $7,499 was in hand as cash uninvested. The committee was allowed $400 for his services.

ONT.
S. C.
RE ROURKE.
Middleton, J.

The lunatic, having apparently improved mentally, was discharged from the asylum on the 1st March, 1910, and he then went to live at the House of Providence, conducted by the Sisters of St. Joseph, at London, Ontario, where he resided until the time of his death on the 11th November, 1913.

No proceedings were taken to supersede the order declaring lunacy, and the property remained in the custody and control of the committee until he died on the 4th July, 1913.

In August, 1912, the committee, owing to the feeble condition of his health, handed over the management of the affairs of the committeeship to his son-in-law, Ignatius Holford.

Christine Holford, the wife of Ignatius, has taken out letters probate to the estate of the committee, and Ignatius has taken out letters of administration to the estate of the lunatic.

Without obtaining any order authorising a reference, and in assumed pursuance of the obligation to pass accounts contained in the original order, the husband and wife proceeded to pass the accounts before the Local Master. In the accounts brought in before the Master, the wife, as representing the committee, seeks to have allowed to her $2,450 said to have been paid to J. R. Rourke, one of the sons of the committee, as a donation. She also seeks to have allowed the sum of $2,500, $2,400 of which was paid on the 17th September, 1912, to her sister Mary McBride, also as a donation, and three sums aggregating $350 paid to the House of Providence as a donation.

Between the husband and wife, in their respective capacities, there is no lack of harmony, but the Local Master somewhat disturbed this state of felicity by directing notice to be given to some of those beneficially interested in the lunatic's estate; and, not unnaturally, objection is being taken to the allowance of these sums.

The learned Local Master was invited to go into an inquiry with a view of ascertaining whether the lunatic had in fact become of sound mind and capable of managing his own affairs, so that these payments, said to have been made with his full knowledge and approval, would constitute full and valid gifts. Those opposed to the allowing of these payments denied the

Master's jurisdiction to enter on this tempting field of inquiry, and the Master certified that in his view he had no jurisdiction.

From this ruling an appeal is now had by the executrix of the committee.

I think it is clear that the learned Master is quite right, and that he had no jurisdiction to enter upon this inquiry; in fact, it also appears reasonably clear that the learned Master has no jurisdiction to enter upon any inquiry, as the order under which he is acting contemplated the passing of the accounts of the living committee of a living lunatic. The practice has been well established that, upon the death of the lunatic, a special reference is made to pass the accounts of the committee, those beneficially interested in the accounts being then represented by the administrator or executor of the lunatic. There is no provision in such orders in ordinary cases for notice being given to those beneficially interested in the estate.

In the alternative the applicant now asks for an order referring to the Master to inquire into and determine the competency of the late James Rourke to make the gifts, and the validity of the gifts. I do not think that this is an inquiry that should be entered into in this way. The real issue is one between the donees on the one side and those beneficially interested in the estate on the other; and I do not think that any good purpose would be served, even if there is jurisdiction to make the order sought, and the order should otherwise be deemed appropriate, by directing an inquiry in which these really interested on either side are not adequately and properly represented.

As a further alternative, I was asked now to make an order declaring that James Rourke become of sound mind and capable of managing his own affairs upon discharge from the asylum in December, 1909. I do not think that any order superseding lunacy can be made after the death of the lunatic. Section 10 of the Lunacy Act, R.S.O. 1914, ch. 68, contemplates the superseding order only for the purpose of restoring the person to the management of his own affairs.

Beyond this, the material filed is entirely inadequate. Christine Holford made an affidavit which does not state anything

ONT.

S. C.

RE ROURKE.

Middleton, J.

concerning her uncle's mental condition. A certificate from the Inspector of Prisons and Charities is produced, in which it is stated that it has been certified to him that James Rourke has become of sound mind. An affidavit is produced from Catherine O'Connell, known in religion as Sister Scholastica, who was in charge of the ward in the House of Providence at London, in which she states that Mr. Rourke was competent. This is altogether inadequate, having regard to what is laid down in all the books as necessary upon a motion of this kind.

It appeared to me exceedingly desirable that the real issues should be tried out between those concerned, and I suggested that the present matter should remain in abeyance until such issues could be tried, but in a way that would be free from all technical advantage or disadvantage to either party. Each side appeared confident of some advantage from the present unsatisfactory position of affairs, and insisted upon the matter being dealt with on the basis of strict rights. This being so, no course is open to me save to dismiss this motion with costs to be paid by the applicant to the respondents, leaving the parties to work their way as best they can out of the chaos in which they have involved themselves.

Motion dismissed.

EWING v McGILL.

ALTA.

S. C.

Alberta Supreme Court, Scott, Stuart, Beck, and Walsh, JJ.
January 26, 1915.

1. MOTIONS AND ORDERS (§ I—4)—AFFIDAVITS—CROSS-EXAMINATION—DISCRETION OF COURT.

The discretionary power given to a judge under rules of court to order a cross-examination on an affidavit used on a motion is to be judicially exercised and where it appears that the discretion in refusing a cross-examination was not exercised upon a proper ground, the appellate court will reverse the order.

[*Goodchild* v. *Bethel*, 19 D.L.R. 161, referred to.]

Statement

ACTION to recover the amount of the first of the deferred instalments of purchase money and interest under an agreement for the sale by plaintiff to the defendants of certain land, the agreement containing the usual covenant by the purchasers to pay.

O. M. Biggar, K.C., for defendants.

A. M. Sinclair, for plaintiff.

The judgment of the Court was delivered by

WALSH, J.:—It is a purely personal judgment which is sought no other relief being claimed. Simmons, J., on an application to him, under old rule 103, ordered that the defendants' appearance should be struck out, and that the plaintiff should be at liberty to enter up final judgment for the amount claimed with costs. From this order the defendants appeal, by leave of the learned Judge who made it. The only ground of appeal argued before us was that, on the hearing of the application upon which the order was made, the defendants were improperly refused the right to cross-examine the plaintiff on his second affidavit filed in support of the motion.

The summons was issued on June 5, 1914, on an affidavit of the plaintiff, which, after proving the agreement and the defendants' default, contains the following paragraph:—

4. I am able, ready and willing to give a transfer of the lands mentioned in the said agreement to the defendant on payment of the total sums due by them under the agreement.

The agreement, which was made an exhibit to this affidavit, contains a covenant on the part of the plaintiff that he would, on payment of the purchase money and interest, transfer the lands to the defendants, "subject to the conditions and reservations in the original grant thereof from the Crown." The defendants, before the return of the summons, delivered their statement of defence and counterclaim, containing the following paragraphs:

6. In the alternative, the defendants state that the plaintiff agreed to transfer to the defendants, upon payment of all sums due on the said agreement, the said lands by good and sufficient transfer free and discharged from all encumbrances but subject to the conditions and reservations in the original agreement from the Crown.

7. The plaintiff is not registered owner of the said lands free and discharged from all encumbrances subject only to the conditions and reservations in the original grant from the Crown.

8. The original grant from the Crown contained the coal rights under the said lands and the plaintiff is not the owner of the coal rights under the said lands.

The counterclaim simply repeats paragraph 6 of the statement of defence, and asks for cancellation of the agreement and repayment to the defendants of the money paid by them under it, with interest. The defendants, on the return of the summons,

ALTA.

S. C.

EWING v. MCGILL.

Walsh, J.

brought into Chambers an abstract of the title to the lands in question "reserving all mines and minerals to Sherbrooke Land Company," shewing that, on its date, June 18, 1914, the same stood in the plaintiff's name. After some enlargements, the motion finally came before my brother Simmons on July 7, when a further affidavit of the plaintiff, sworn on July 4, was filed, which, after setting out that the plaintiff is the registered owner of the lands in question, "including the mines and minerals upon and under such lands," contains the following paragraph:—

> 3. That I am and have always been since the 13th day of November, 1911, ready, able and willing to give to the defendants clear title to the said lands, including the mines and minerals, in and under the same, in compliance with the terms of the agreement of sale sued upon herein upon payment by the defendants of the sums due or accruing due under the said agreement of sale.

It was upon the statements contained in this third paragraph and particularly as to the date when he acquired the title to the mines and minerals that the cross-examination of the plaintiff was sought. The learned Judge's reasons for his refusal of this application do not appear before us, as he disposed of the matter orally on the spot, but it was stated before us in argument and without contradiction that he refused it because, as it appeared that the plaintiff then had the whole title to the lands, including the mines and minerals, the date upon which he acquired the title to the mines and minerals was immaterial.

The contention for the defendants is that the paragraphs of their statement of defence above set out and their counterclaim constitute a repudiation of the contract, on the ground that the plaintiff then had neither the title nor the right to call for the title to a material part of the subject matter of the contract; that if the plaintiff, as a matter of fact, at the date of the delivery of this defence, had neither the title to the mines and minerals nor the right to call for it, the repudiation of the contract thereby made entitled them to be relieved of further liability under it and that their liability could not be revived by a subsequent acquiring by the plaintiff of such title or right to call for it. For this reason they say that they should have been allowed to cross-examine the plaintiff, particularly as to the statement in his affidavit that he had been since November 13, 1911, ready, able, and willing to make this title.

ALTA.

S. C.

EWING v. MCGILL.

Walsh, J.

I think there can be no doubt but that, if the defendants' pleading amounts to a repudiation, and if the fact is that at the date of its delivery the plaintiff could not make title to the mines and minerals, this repudiation would have the result contended for by the defendants, always assuming, of course, that the defendants had not, by something which occurred after the discovery by them of this lack of title, done something to disentitle them to so repudiate. The recent decision of this Court in *Goodchild* v. *Bethel*, 19 D.L.R. 161, makes that sufficiently clear. It is contended, however, for the plaintiff that the defendants' pleading, which is admittedly the only thing that the defendants can rely upon for that purpose, does not amount to a repudiation. It is said that the counterclaim, which asks for a cancellation of the agreement and a return of the money paid under it, is based entirely upon the allegations of paragraph 6 of the statement of defence, and that these allegations, standing alone, are not sufficient to entitle the defendants to the relief prayed for by the counterclaim. I think, however, that it is to the statement of defence and not to the counterclaim we must look for the purpose of determining whether or not the pleading amounts to a repudiation. The defendants, so far as this application is concerned, are simply resisting the claim which the plaintiff makes against them for the payment of this money, and their reasons for resisting it must be found in their statement of defence rather than in their counterclaim, which is practically their statement of claim in a cross-action for the return of the money already paid. I think, therefore, that we must read paragraphs 6, 7, and 8 of the statement of defence for the purpose of reaching a conclusion as to whether or not the pleading does amount to repudiation. I am of the opinion that it does, even though neither the word "repudiate" nor any equivalent of it appears in it. The defendants, by their pleading, tell the Court and the plaintiff the reasons why they should not be ordered to pay the amount sued for. The reason disclosed by the paragraphs in question is that the plaintiff is not the owner of the coal rights. What meaning can be drawn from this other than that, because of the facts alleged, the contract is not binding upon the defendants, which is as practical a way of repudiating it as can well be imagined? If, in answer to a letter from the plaintiff demanding payment, the defendants had replied that

ALTA.
S. C.
EWING
v.
MCGILL.
Walsh, J.

they would not pay because of the facts which they now plead in these paragraphs, I do not see how any argument could be made that they did not thereby repudiate the contract, and so I think we must treat this pleading as a repudiation.

The question, then, is whether or not the cross-examination of the plaintiff should have been permitted. It is urged that there was no right to cross-examine, inasmuch as under old rule 105, which was then in force, the defendants could only shew cause against the application "by affidavit of himself or someone who can swear positively to the facts or by offering to bring into Court the amount claimed in the action." Under rule 103, however, the defendants were entitled to shew *by affidavit or otherwise* that they have a good defence to the action, and I do not think that this right is limited or taken away by the language of rule 105.

The shewing of a good defence by the cross-examination of the plaintiff upon his affidavit is shewing it otherwise than by affidavit, and so is strictly within the rule. The fairness of this construction could not be better exemplified than by this case. If the defendants have any defence at all to this action, it s founded upon facts which are peculiarly within the knowledge of the plaintiff and which they, the defendants, are unable to prove by their own affidavits. Unless, therefore, they can get at them by this method, they cannot get at them at all, and they must quietly submit to a judgment against them which the plaintiff might not be entitled to if they were able to get these facts from him under cross-examination. I am sure that no one will attribute to me the slightest intention of impeaching, even by suggestion, the entire accuracy of the statement sworn to by the plaintiff. I am simply endeavouring to shew the injustice that might arise from placing upon these rules a construction that would make it impossible to use a plaintiff's cross-examination in answer to such a motion.

The rule providing for such a cross-examination under the old practice is 293:—

> Upon any motion, petition or summons evidence may be given by affidavit; but the Court or judge may on the application of either party order the attendance for cross-examination of the persons making such affidavit and may make such interim order or otherwise as appears necessary to meet the justice of the case.

It is said that the power given to the Judge under this rule

ALTA.

S. C.

EWING v. McGILL.

Walsh, J.

is discretionary. That is so, but the discretion so given must be judicially exercised, and, if it is not, an appeal will lie. It is quite apparent that leave to cross-examine was refused in this case because of the opinion of the learned Judge that the plaintiff was entitled to succeed by reason of the admitted fact that he then was in a position to make title to all of the land, and that it would avail the defendants nothing to shew that the title to the minerals or the right to call for it had first been acquired by him after their repudiation of the contract. Being in error as to this, his discretion was not exercised upon a proper ground, and this Court not only can, but should, set the matter right.

Upon the argument the suggestion was made that rule 103 does not apply to this action, as the money sued for is not a debt or a liquidated demand. This point was not raised by the notice of appeal, and Mr. Biggar disclaimed any idea of raising it now. He, in fact, expressed his willingness to submit to it as a term of allowing the appeal that this question should not be raised when the motion comes before a Judge again, and I think this term should be imposed. The question is now of but academic interest, in view of the fact that the new rule 287, which takes the place of former rule 103, applies to any action in which a defence has been filed.

I would allow the appeal with costs and set aside the order for judgment and the judgment entered under it, and direct the plaintiff to attend before the clerk for cross-examination on his affidavit of July 4, at a time and place to be appointed by him, after the completion of which the motion for judgment may be brought on again by the plaintiff on two clear days' notice. The defendants must not delay this cross-examination. Unless excused by the default or delay or absence or illness of the plaintiff, it must be had within ten days from the delivery of this judgment, failing which the plaintiff shall be entitled to move for judgment as hereinbefore provided. The defendants, upon the hearing of the motion, are not to be at liberty to raise the point that this case is not within old rule 103. Any directions with reference to such cross-examination or motion which may be necessary to meet any contingency not herein provided for may be given by a Master in Chambers or a Judge.

Appeal allowed.

ONT.

S. C.

PARKS v. SIMPSON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. March 19, 1915.

1. JUDGMENT (§ VI A—255)—ACTION ON—RIGHT TO DAMAGES FOR NON-COMPLIANCE WITH—NATURE AND REQUISITES AS BASIS OF ACTION.

To be available as a cause of action, a judgment must be definitive and personal for the payment of money, of a character as would support an action of debt under the old forms of procedure; but no action will lie to recover damages for the breach of directions of a judgment for the return of certain bees and honey, the detention of which resulted in the destruction of that property.

Statement

APPEAL by the plaintiff from the judgment of the Senior Judge of the County of Hastings.

F. E. O'Flynn, for appellant.

E. G. Porter, K.C., for defendant, 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 of the County Court of the County of Hastings, dated December 17, 1914, which was directed to be entered by the Senior Judge of that Court, after the trial before him, sitting without a jury, on the 12th of that month.

The amount of litigation in which the parties have indulged over a comparatively trifling matter is little less than shocking. The original dispute was as to whether the price at which the appellant purchased from the respondent's testator 53 skips or hives of bees was $200 or $110, which was further complicated by a claim by the appellant for damages for the detention of some boxes and other articles which he had brought to the deceased's farm for the purpose of his taking care of the bees and the honey they made until the time arrived when they were to be taken by the appellant, and which, as he alleged, the deceased had prevented him from doing.

Two actions were brought, one by the deceased for the recovery of the balance which he claimed to be due to him on the purchase, and to enforce, by sale of the bees, a lien which he claimed upon them for this balance; and the other by the appellant, alleging that he had purchased the bees for $110, and that the property in them had passed to him, and claiming $50 damages for his services in "caring, nursing, and attending to" the

bees, and a return of the articles he had brought to the deceased's farm, or their value, and $50 as damages for their detention, and in the appellant's action he alleged that the deceased had repudiated and cancelled the sale of the bees and the bargain he had made in connection with them.

Besides bringing his own action, the appellant counterclaimed in the deceased's action for the return of his goods and chattels, or for the value of them, and "damages for their conversion and detention."

The two actions were tried together before the Senior Judge, sitting without a jury, on the 11th June, 1912, and by the judgment which he pronounced on the 19th of that month it was ordered and adjudged that the appellant "was entitled to a return of all his bees and honey and other chattels brought upon the" deceased's "property for the purpose of working the hives and caring for the honey" and $25 damages for their detention; that the deceased was entitled to $165, "balance of the purchase-money," with interest thereon at five per cent. from the 15th day of May, 1911, until judgment; that the appellant should pay into Court that sum and interest, less the $25 damages, "whereupon" he should "be permitted to remove from the premises" of the deceased his goods and chattels which are enumerated, "together with the bees and honey bought by him from the" deceased; and that, immediately after such removal, the money paid into Court should be paid to the respondent; and each party was left to bear his own costs.

From this judgment the appellant appealed to a Divisional Court of the High Court of Justice, and on the 29th November, 1912, his appeal was dismissed with costs, the Court being of opinion that the Court below had done substantial justice: *Parks* v. *Simpson, Simpson* v. *Parks* (1912), 4 O.W.N. 422.

A motion was made by the respondent to the Divisional Court to vary the minutes of its judgment, and was dismissed without costs on the 8th February, 1913: *ib.* (1913), 4 O.W.N. 829. The report does not shew the nature of the motion, but it was probably for the same relief that was subsequently obtained from the Senior Judge, when, upon the petition of the

ONT.
S. C.
PARKS
v.
SIMPSON.
Meredith, C.J.O.

respondent, and on the 30th August, 1913, an order was made amending the judgment by providing that, if the appellant did not pay into Court the money he was ordered to pay in, within 30 days from the 30th August, 1913, the respondent might issue execution for the amount against the goods and lands of the appellant, and the appellant was ordered to pay the costs of the application.

This application was opposed by the appellant, who filed, among other affidavits, an affidavit of his own, in which it was stated that on a visit to the farm of the deceased on the 13th August, 1913, he found only 3 colonies of bees alive out of the 53 that he had bargained for, and that the rest were dead.

The appellant paid the money into Court on the 13th or 15th September, 1913, and on the following 11th November, it was paid out to the respondent, on her application, supported by her affidavit sworn on the 10th November, 1913, in which she deposed that the appellant had taken away from her premises all the articles which he had brought there, and "all the property and goods purchased by him" from the deceased or made by the bees "except 50 boxes which the appellant then examined and would not take away, saying they were no use to him."

The present action is brought, as the reply and joinder of issue states, to recover "damages for non-performance of the judgment pronounced by the Court" (i.e., in the former actions) "and for failure of the defendant to carry out the same."

It appears from the reasons for judgment of the learned Senior Judge that his view was that there was no new evidence which might not have been given at the former trial, and that the appellant had "no rights in this action as to any damages accruing before the 19th June, 1912, which were not adjudicated upon in that trial and settled by that judgment;" and that, as to any damage since that date, the appellant "had the right under that judgment to remove his goods and chattels immediately upon payment by him of the amount found owing to Simpson;" and that, "if he suffered any damage by reason of the goods and chattels remaining in the possession of Simpson after that date, it was his own fault;" and the action was therefore dismissed with costs.

It appears from the testimony of the appellant in this action that he has got back all the goods and chattels which he brought to the deceased's farm, except 5 top boxes, and that his claim is for damages for the loss of the bees, which, as he alleges, came to their death owing to the negligence of the deceased, and for the loss of some of the honey which they had made, which had "candied" on the deceased's farm and had become practically valueless.

The evidence as to the 5 top boxes which the appellant testified he had not got back was not satisfactory, and the proper conclusion is, I think, that he was not prevented by the respondent from taking them away, and that if he did not get them it was his own fault.

The extent of the appellant's right as to the bees and honey is to be measured by the judgment in the former actions, and is that, upon payment into Court of the $165, and interest, less the $25 damages awarded to him, he was to be permitted to remove them from the premises of the deceased; and all other questions are, in my opinion, concluded by the judgment.

It is unnecessary, in the view I take, to express any opinion as to whether the loss occasioned by the death of the bees and the spoiling of the honey falls upon the appellant or upon the respondent. The rights, if any, which the appellant may have must be sought and obtained in the Court by which the judgment was pronounced.

It is only a judgment for the payment of money upon which an action may be brought; that, to be available as a cause of action, a judgment must be a definitive personal judgment for the payment of money, final in its character, and not merely interlocutory, remaining unsatisfied and capable of immediate enforcement, is settled law. Cyc., vol. 23, pp. 1503-4, and the authorities there cited, support this statement of the law. See also *Seligman* v. *Kalkman* (1860), 17 Cal. 153; *Smith* v. *Kauder* (1894), 58 Mo. App. 61.

The theory upon which it was held that an action of debt might be brought upon a judgment was that, upon its being shewn that a judgment is "still in force and yet unsatisfied, the law immediately implies that by the original contract of society

ONT.
S. C.
PARKS
v.
SIMPSON.
Meredith, C.J.O.

the defendant hath contracted a debt, and is bound to pay it:" Blackstone's Commentaries, Lewis's ed., book 3, pp. 159, 160.

A debt which is properly enforceable by an action of debt must be a sum of money due by certain and express agreement where the amount is fixed and specific, and does not depend upon any subsequent valuation to settle it; and, if the contract is to be discharged by the delivery of stock, merchandise, or other articles of trade or value, the action cannot be maintained: Cyc., vol. 13, pp. 403, 407, 409; and, although forms of action have been abolished, it is still necessary to found an action upon a judgment that the judgment be of a character which would have supported an action of debt under the old forms of procedure.

The judgment upon which the appellant sues is not a judgment for the payment of a sum of money, either certain or uncertain, but the action is in reality an action to recover damages for an alleged breach by the respondent of the directions of the judgment in not permitting the appellant to remove his bees and honey; and such an action does not lie.

It may not be amiss to point out that, even where the action lies, it was said more than 150 years ago in *Bowen* v. *Barnett* (1754), Sayer 160, 161: "As there is a degree of vexation in bringing an action of debt upon a judgment, such an action ought not to be favoured." And Blackstone says: "Wherefore, since the disuse of those real actions, actions of debt upon judgment in personal suits have been pretty much discountenanced by the Courts, as being generally vexatious and oppressive, by harassing the defendant with the costs of two actions instead of one:" Blackstone's Commentaries, Lewis's ed., book 3, p. 160. And as late as 1899 a very eminent Judge said: "But, although an action will lie, still if the person who has obtained a garnishee order brings an action upon it without any necessity he will run the risk of having it stayed as an abuse of the process of the Court, and probably have to pay the costs:" *per* Lindley, M.R., in *Pritchett* v. *English and Colonial Syndicate*, [1899] 2 Q.B. 428, 435.

In my opinion, the appeal should be dismissed with costs.

Appeal dismissed.

STEWART v. CUNNINGHAM.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and McPhillips, JJ.A. April 6, 1915.

1. VENDOR AND PURCHASER (§ I B—5)—ACTION FOR PURCHASE MONEY—DEFENCES—MISREPRESENTATIONS—WAIVER.

An election to affirm the contract to buy a block of land notwithstanding alleged misrepresentations as to its suitability for building lots may be predicated from the fact that the purchaser himself subdivided the property and undertook to offer it to the public as suitable for building lots and did not advance his objection until sued for purchase money after the lapse of a year from the making of the contract.

2. VENDOR AND PURCHASER (§ I E—25)—RESCISSION OF CONTRACT—MISREPRESENTATION.

To justify rescission of a contract for sale of land on the ground of misrepresentation there must have been a definite assertion of alleged fact as distinguished from a vague affirmance of the excellence of the property. (Per Irving, J.A.).

Statement

APPEAL by plaintiff from judgment of Macdonald, J.

S. S. Taylor, K.C., for appellant.

H. W. C. Burke, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would allow the appeal. The facts and circumstances of this case are not, in my opinion, such as ought to lead to the intervention of a Court of equity in favour of the defendants. The transaction is a good sample of the manner in which speculators do business on a highly inflated real estate market. The plaintiff, to my mind, was the only person connected with the sale, and what followed, who was not guilty of want of reasonable care and attention to the business in hand. McCready was a friend of at least one of the defendants. He knew or suspected that the defendants were open to purchase a parcel of land for the speculative purpose of subdividing it into lots and offering them to the public. He ascertained the fact that the plaintiff was the owner of block 4 in a district survey in the municipality of North Vancouver. He told her he had a "client" who would purchase the block. She was induced to "list" it with him, whereupon he sold it to the defendants, and was immediately employed by them to procure its subdivision into lots and to offer them to the public. The block was surveyed by defendant's surveyor into 49 lots. The streets did not conform to the lines of the block, but angled across it, indicating plainly the precipitous nature of the ground. It was also known to all the parties, who were familiar with North Vancouver, that the property was situated on a mountain-side.

B. C.

C. A.

STEWART v. CUNNINGHAM.

Macdonald, C.J.A.

The defendants fixed varying prices for the lots, influenced, no doubt, by the situation and topography of the land. A prospectus was issued, in which, amongst other laudatory statements, the view was said to be superb. For a year or more following the said subdivision the defendants or their agent McCready were endeavouring to sell lots, but the real estate market reacted and became inert. In November, 1913, more than a year after the agreement, defendants made default in the payment of one of the instalments of purchase money, and in February, 1914, when the plaintiff was pressing for payment, the defendants made excuses for non-payment.

The plaintiff finally sued for the instalment, and the defendants resisted on the ground that the block had been falsely represented to them, by McCready, as being good level land suitable for building lots, whereas it was not such. This was their sole defence and sole ground for rescission up to the opening of the trial, when they applied to amend by setting up that McCready had represented the land to be in a certain locality, which he pointed out to them from the window of their offices, a distance of 2½ miles, with directions for their guidance for reaching it for inspection; that by reason of these directions, which were misleading, the defendants, before concluding the purchase, had inspected the wrong property, and had not seen block 4 until about the time the action was commenced. This appears to be the ground upon which the judgment below is founded. The learned Judge rather severely criticises the plaintiff for not having called McCready as her witness. With great respect, I cannot concur in that criticism. McCready was, no doubt, the agent of the plaintiff in making the sale to the defendants, having got his commission from her. Nevertheless, he was otherwise a stranger to her while he was the friend and, subsequent to the purchase, the agent of the defendants. They had a good opinion of him even at the time of the trial, when they gave their evidence, and did not doubt his honesty. Then why did they not avail themselves of their opportunity to call him as their witness? At all events, it is, in my opinion, not open to adverse comment that the plaintiff did not do so.

In view of the fact that, after the alleged misrepresentations by McCready that the land was good level land suitable for

building lots, defendants sent their surveyor there, saw the result of his work, undertook to offer the property to the public as suitable for building lots, made no complaint for more than a year, and then only as a defence to a suit for purchase money, they have, in my opinion, not made out their case as at first pleaded.

It, therefore, only remains to consider whether they ought to have succeeded on the case set up for the first time at the trial. Now, there was no uncertainty as to the subject matter concerning which the parties were negotiating. It was a surveyed block of land, shown on a plan which, I think, the fair inference from the evidence is, defendants saw before they signed the agreement, and before they attempted to inspect the land. It was situate in a locality surveyed into blocks, with streets between, some of them well-known streets, with which defendants were not unfamiliar. Defendants say that a mill was pointed out, but it appears there were two mills. Some green timber was also mentioned and a stream. Doubtless McCready, in undertaking to direct them generally where to find the land, would mention objects of the kind, but, as the land was surveyed and the posts could have been seen, McCready could not have intended his directions as more than a general indication of the locality of the land, nor could the defendants properly regard them as anything but such. If they were misled, they were, in my opinion, not misled in a way which entitled them to a rescission of the contract.

I cannot regard McCready's directions as representations material to the contract.

The plaintiff should have judgment in the action for the moneys due under the contract, with costs, as well as the costs of this appeal.

IRVING, J.A.:—In my view the dates are of the greatest importance. The representations as to the land being suitable for subdivision purposes, this we call a representation as to its quality, and the directions for its identification by the intending purchasers, were made early in May, 1912.

The defendants then went to North Vancouver, to hunt the property up, and failed to find it.

On May 27, 1912, the agreement for sale was made and $1,500

B. C.

C. A.

STEWART v. CUNNINGHAM.

Irving, J.A.

paid down. In June, 1912, the property was surveyed and subdivided by the purchasers' agents. Plans were made and prices fixed. This denotes a knowledge by the defendants of the quality and characteristics of the land. On November 27, 1912, the first instalment of the deferred payments fell due. It was not paid till January, 1913—six months after the subdivision. On May 27, 1913, the second instalment fell due, and one-half of it was paid in June, 1913, one year after the subdivision. On November 27, 1913, a third instalment fell due, and was not paid, and in this month Cunningham asked for time to make the payments then in default—sixteen months after the subdivision. On January 22, 1914, the vendor brought her action for the amount due, and in February, 1914, when the statement of defence was about due, the purchasers made the discovery (on which they now rely)that they had, by mistake, examined a piece of land different from that which they had bought, and that which they had bought did not have the qualities which the vendor's agent had represented it to have.

Mr. Taylor asks us not to believe the story told by them that this was their first visit to the land, but I do not think that course is open to us. The findings of the learned Judge must be respected, and he must have thought these witnesses truthful. I think the case can be disposed of on the ground that they had elected to affirm the contract after they had notice through their agents, Hewitt, the surveyor, and McCready, their subdivider and salesman, of the true quality of the ground.

When the subdivision plan was made in June, 1912, the unusual zigzag roads were plainly shown, and Mr. Sprott inquired what was the reason for their being drawn that way, and was told that this was necessary by reason of the grades. Sprott must then have known that this subdivided land could not have been the place he and Cunningham had gone to, and his agents, Sprott and McCready, already knew that the land was like the roof of a house.

In my opinion, this establishes clearly the intention of the defendants to accept the property, notwithstanding its defects, and an election on their part not to repudiate the bargain on discovery of the misrepresentation: *Campbell* v. *Fleming*, 1 A. & Ex. 40, 3 L.J.K.B. 136.

In *Oliphant* v. *Alexander* (decided by this Court on December 1, 1913), where the misrepresentation was that the ground was level, we upheld the Judge's decision and rescinded the agreement. In the present case we are asked to reverse the trial Judge, who has granted rescission. In both cases the purchaser went to examine the land he was about to buy, and in both cases he got on other ground.

In the *Oliphant* case the purchaser was led to buy by being expressly directed by the vendor to a piece of land which was not the land for sale.

In this case the purchasers were given a description of the land, a description of its suitability for subdivision purposes, and also a description of its situation. They sought it out alone.

In the *Oliphant* case the direction was precise and given close to the land, and there could be no doubt he was misled. In this case the directions to find the land were given in the city of Vancouver, from the window in a high building there, several miles from the land; and with reference to a mill—either a shingle mill or planing mill—in such a case, as mills are constantly moved, they could easily mislead themselves. As a matter of fact, they did not find the property when they went out to inspect it, but examined property much closer to town; the surveyor employed to subdivide it had no difficulty in doing so, nor did they, when pressed by the necessity for putting in a defence.

The learned Judge was much concerned with the point, the serious point for his consideration he thought, as to whether or not the visit of inspection of these two gentlemen alone was not negligence on their part of such a character as to disentitle them to relief, but he finally came to the conclusion that they acted in a reasonable manner and granted them rescission.

In *Redgrave* v. *Hurd* (1881), 20 Ch.D. 1, it was laid down that the effect of false representations cannot be got rid of by shewing that the person deceived was guilty of negligence. That was the sale of a solicitor's business represented to be worth £300 a year, and the negligence relied on was that the vendor's books were produced, but the purchaser did not take the trouble to look at them. But is that rule of law, which is designed, no doubt, to protect a man who has been lulled to sleep, applicable

B. C.

C. A.

STEWART v. CUNNINGHAM.

Irving, J.A.

to a case of this kind, where the gist of the representation was as to the suitability of the land for subdivision? A matter which depends so much on opinion and judgment. I cannot think so.

Lord Halsbury, L.C., in the House of Lords, referred with approval to the familiar canon that one must read a judgment, however general in terms, as having reference to the particular facts with which the judgment is dealing: *Russell* v. *Russell* [1897], A.C. at 424. I do not think the point in *Redgrave* v. *Hurd* should prevent us from holding that it was the purchaser's own want of care which led them into this difficulty—more particularly as they do not suggest that McCready was guilty of misleading them; they have the utmost confidence in him they say. Nor can I agree with the learned Judge that there was any duty on the vendor's agent to take precautions that the intending buyer is made aware of the character of the property that he intends to purchase.

If the learned Judge thought the question of negligence was the turning point of the case, he, in my opinion, misdirected himself. The real point was as to their intention to abide by the contract.

Then (continuing to deal with the quality of the property), what was it the plaintiffs' agent said on that point more than an expression of his belief, having regard to the character of the surrounding land, the class of stuff that was being sold and the condition of the market? There must, to justify rescission, be a definite assertion of fact distinguished from a vague affirmance of the excellence of the property. *Dimmock* v. *Hallet*, L.R. 2 Ch. 21, is instructive on what will justify rescission, but, on the ground that the purchasers, having notice through their agents of the true qualities of the ground in June, 1913, and continuing to make payments on account, I would allow the appeal.

M. Phillips, J.A.

MCPHILLIPS, J.A.:—This is an appeal from the judgment of Macdonald, J., delivered at the close of a trial had before him without a jury, the action being one for instalments of principal and interest due upon an agreement for sale of the east half of the west half of block 4, subdivision of district lot 882, group 1, Vancouver district, lying and being in the municipality of North Vancouver, in area 10 acres, sold by the plaintiff to the

defendants for $6,000, the agreement for sale entered into by the plaintiffs with the defendants being May 27, 1912.

It is clear upon the facts that the defendants became the purchasers in a highly speculative way, when the real estate market was, perhaps, at its highest pitch, and when the instalments went into arrears it may well be said that the boom or real estate inflation had broken, and the lands were—and were, perhaps, for some time previously to the payments falling into arrears—unsalable. The defendants set up by way of defence fraudulent representations made by the plaintiff, *i.e.*, that the land was good level land and suitable for building lots, whilst the lands were on a precipitous slope and valueless, and counterclaim for rescission of the agreement for sale, return of purchase money and damages.

With the greatest of deference and respect for the learned trial Judge, I am unable to agree with the conclusion at which he arrived, which was, granting rescission and an order for the return of the purchase money already paid by the defendants, viz., $3,275.

It is patent on the evidence that the defendants entered into the purchase recklessly and carelessly, and were only desirous of subdividing the property and placing it upon the market with a florid description of its beauties and potentialities, desiring to reap therefrom handsome returns from the sale prices fixed and relied wholly upon an agent by the name of McCready, in whom they placed great trust and still believe to be an honourable man, and permitted McCready, along with Palmer, Burmeister and Von Graevenitz, Ltd., to place the property upon the market, the land not selling really, perhaps, solely because the market was too replete with like outlying subdivisions or more probably because of the fact that the boom was on the wane. The defendants then cast about for some defence, and the defence alleged is set up.

Can it be that the law will support this course of conduct of recklessness and carelessness, and then absolve these defendants from obligations solemnly undertaken under an agreement for sale?

In my opinion, upon the facts of the present case, the law will not excuse, but hold, the defendants to the obligations undertaken by them.

B. C.

C. A.

STEWART v. CUNNINGHAM.

McPhillips, J.A.

The learned trial Judge arrived at the conclusion that McCready was the agent for the plaintiff in effecting the sale. With this finding of fact I cannot agree. In my opinion, he was the agent for the defendants. The plaintiff had never seen the property, and had bought it some four years before the sale to the defendants, and was not overly anxious to sell the land, and McCready opened matters with the plaintiff and said he had a client looking for land in that neighbourhood, and all that the plaintiff said was he might sell it for $6,000, and McCready paid down, about a week afterwards, the sum of $25 on account of a purchase of the land at $6,000. McCready was unknown to the plaintiff before this.

Therefore, there was no representation whatever made by the plaintiff. It is contended, however, by the defendants that representations were made by McCready to them and directions as to where the property was upon the ground, and that, in following these directions, they went upon the ground, but got upon the wrong property.

From the evidence the strongest statement sworn to as to the property being level is given in the defendant Cunningham's evidence.

It may be taken, I think, upon the evidence as common ground that there is no such thing as level land in North Vancouver. It is all ascending land, practically foot hills to the mountains beyond.

The defendants did not proceed as reasonable men should have and could have. Had they done so, it was quite an easy matter to identify the land purchased by them.

The truth is that it would look as if the defendants were almost willing to delude themselves into the belief that the property they were buying was the most desirable of the immediate neighbourhood, although they were buying the land at $600 an acre, as against about $1,500 an acre prevailing in the near neighbourhood.

The singular happening is this, that, apparently with no further information obtained than at first they swear they were apprised of, the defendants go out, in February, 1914, after action commenced and instalments are in arrears, and then do find the property—why did they not find it at the outset?

No satisfactory explanation of this is forthcoming or can be borne in upon my mind. It was the case of seeking for some line of defence, and one that, in my opinion, is absolutely untenable upon the surrounding facts and circumstances of this case.

If there was misrepresentation and fraud, it is plain that the misrepresentation and fraud could only be that of McCready, as there is no suggestion that the plaintiff was in any way chargeable with any misrepresentation or fraud; and what do the defendants say of McCready? When the defendant Sprott is under examination by his own counsel the following takes place:—

[The learned judge here reviewed the evidence at length.]

The evidence is that the defendants, in about a month or six weeks after the purchase of the property, had it subdivided, it being surveyed by Mr. Marvin W. Hewitt, a duly qualified British Columbia land surveyor.

It was incumbent upon the defendants to make out and substantiate their defence. It was in no way part of the plaintiff's case, in my opinion, to call McCready—McCready was the agent of the defendants, but, even if the case were to be viewed differently, and it could be at all contended that McCready was the agent of the plaintiff and entitled to make representations upon her behalf, the defendants, having apparently unbounded faith in McCready, could have safely called him. However, it must be left to counsel to conduct the cases of their clients; it only remains for the Court to determine the facts and apply the law thereto.

That which the defendants were called upon to prove and in which they failed, in my opinion, is well defined in *United Shoe Manufacturing Co.* v. *Brunet*, [1909] A.C. 330. Lord Atkinson, at p. 338, said:—

> The respondents on September 30, 1905, filed their plea to this declaration. It is very voluminous and somewhat involved. In effect it amounts to this:—
>
> (1) That the appellants by falsely representing to the respondents that they, the appellants, were the patantees of the machines mentioned in the "leases sued on", induced them to take the said leases and enter into the covenants contained in them, and (2) that, by reason of the practical monopoly which the appellants had acquired in Canada in the manufacture and supply of shoemaking machinery, the covenants contained in the "leases sued on" were in restraint of trade, and, therefore, illegal and void as

B. C.

C. A.

STEWART v. CUNNINGHAM.

M. Phillips, J.A.

against public policy. On these pleadings issues, twenty-two in number were ultimately framed by the Court with the assistance of counsel representing the parties; and on application of the respondents the case was ordered to be tried before a judge and jury.

It will in the first instance be convenient to consider these two defences separately.

To maintain the first, the burden rested on the respondents of establishing, either by the admission of the appellants or by the findings of the jury, the following conclusions of fact; (1) that the representations complained of were made by the appellants to the respondents; (2) that these representations were false in fact; (3) that the appellants, when they made them, either knew they were false or made them recklessly without knowing whether they were false or true; (4) that the respondents were thereby induced to enter into the covenants contained in the leases; and (5) that immediately on, or at least within a reasonable time after their discovery of the fraud which had been practised upon them they elected to avoid the leases and accordingly repudiated them.

Of these the last is the most vital, in the sense that it is the condition precedent which must be fulfilled before the respondents can escape from the obligations of the contracts they have entered into, however fraudulent those contracts may be.

A contract into which a person may have been induced to enter by false and fraudulent representations is not void, but merely voidable, at the election of the person defrauded, after he has had notice of the fraud. Unless and until he makes his election, and by word or act repudiates the contract, or expresses his determination not to be bound by it (which is but a form of repudiation) the contract remains as valid and binding as if it had not been tainted with fraud at all; *Clough* v. *London and North-Western Ry. Co.* (1871) L.R. 7 Ex. 26, approved by Lord Blackburn in *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, at pp. 1277-1278, and by Lords Watson and Davey in *Aaron's Reefs* v. *Twiss* [1896], A.C. at pp. 290 and 294. In the first mentioned case Mellor, J., says, L.R. 7 Ex. at p. 34:—

"The principle is precisely the same as that on which it is held that the landlord may elect to avoid a lease and bring ejectment, when his tenant has committed a forfeiture. If with knowledge of the forfeiture he, by the receipt of rent or other unequivocal act, shews his intention to treat the lease as subsisting, he has determined his election for ever, and can no longer avoid the lease."

It is to be remembered that this is not an action for specific performance, but one for instalments due, and the defence is rescission, and it requires stronger evidence to be adduced, because it has been laid down that misrepresentation, though in a slight degree, is an objection to specific performance, there is a distinction when the contract is asked to be rescinded: *Cadman* v. *Horner*, 18 Ves. 10-12, 11 R.R. 135; *Re Banister-Broad* v. *Munton*, 13 Ch.D. 131, 142.

There has been long delay in the present case, but it is said the defence now set up was not even discovered until after the

B. C.
C. A.
STEWART v. CUNNINGHAM.
McPhillips, J.A.

commencement of action. This is a circumstance, though, that weighs strongly with me in not giving credence to the defence as set up.

How impossible is it to believe that this question of gradient was unknown to the defendants. The survey is made within one month or six weeks of the purchase; the surveyor goes upon the ground, makes the survey, plants the stakes, makes the plan and blue prints are struck off; the prices are fixed upon the lots varying with location; printed matter, with plan, is distributed to the public, all under the direct supervision and control of the agents for the defendants, and yet it is contended that this question of gradient known to the surveyor and the agents of the defendants—if not known to the defendants—is at this late date such a defence as will entitle rescission to be granted.

As pointed out by the surveyor, the gradient does not exceed that present in a well-settled portion of the city of Vancouver, and it is a matter of common knowledge that in the large cities of the Pacific Coast the grade in question would not be deemed to be at all prohibitive or ever greatly affect the salable value. That which destroyed the salable value of the property in question was not the gradient, but the collapse of the boom.

In my opinion, the defendants failed to establish a defence which would admit of rescission being directed. In my opinion, therefore, the appeal should be allowed, the plaintiff being entitled to judgment for the amount claimed and due under the agreement for sale; the counterclaim to be dismissed; the plaintiff to have the costs in the Court below and of this appeal.

Appeal allowed.

RORAY v. HOWE SOUND.

B. C.
C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. May 14, 1915.

1. CORPORATIONS AND COMPANIES (§ IV G3—120)—DIRECTORS—COMPENSATION TO—AUTHORIZATION.

Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of the company's assets, unless authorized so to do by the instrument which regulates the company or by the shareholders at a properly convened meeting.

[*Re G. Newman & Co.*, [1895] 1 Ch. 674, referred to.]

Statement

APPEAL from the judgment of Clement, J.

E. C. Mayers, for appellant.

J. G. L. Abbott, for respondent.

B. C.

C. A.

RORAY v. HOWE SOUND.

Irving, J.

MACDONALD, C.J.A., would allow appeal.

IRVING, J.A.:—The services rendered by Roray were such as might fairly be regarded as incidental to his office as director, which office he held, and to have been undertaken by him in virtue of his office. For such services a director has no right to look for payment unless authority is to be found in the articles or given by the shareholders.

I would allow the appeal.

Martin, J.A.

MARTIN, J.A., agrees that appeal should be allowed.

Galliher, J.A.

GALLIHER, J.A.:—Assuming that Davis, one of the directors, agreed to pay the plaintiff a commission on the sale of the mill, that alone could not bind the company, nor do I find anything in the acts of the other directors or of the president, Taylor, that would in any way aid the plaintiff. They claim they knew nothing of any commission to be paid, and, when suggested to them by the plaintiff, they repudiated same. On the whole, I think there was no contract for commission, either express or implied.

McPhillips, J.A.

MCPHILLIPS, J.A.:—In my opinion, this appeal is entitled to succeed. The plaintiff was, upon the facts, a director in the defendant company, and I do not understand that the learned trial Judge has held otherwise, but I cannot, with all respect, agree with the learned trial Judge in the language used by him in the course of his judgment, *i.e.*:—

> I also find on this evidence that, while perhaps plaintiff remained legally a director—as to that I express no decided opinion—but, assuming he was a director, then practically, as between himself and these other three gentlemen, he was not a director. He was allowed no voice whatever in the conduct of the business of the company of any description after that meeting of October.

The plaintiff, being a director, must be held accountable as such, and cannot escape from the discharge of his duty and liability as such or not be deemed such because of the action of his fellow directors in excluding him from their councils. It is idle contention to advance any such argument. Therefore, the case must be approached with the premise that the plaintiff, then being a director of the defendant company, brings about the sale of a certain shingle mill plant and appurtenances, the property of the company, the sale price being $20,000, and claims to be

entitled to a 5% commission thereon, and the learned trial Judge has held that the plaintiff is entitled to recover, and the appeal is from the judgment allowing the plaintiff this sum, viz., $1,000.

It is well settled that, unless the articles admit of directors entering into contracts with the company of which they are directors, practically no contractual relationship is admitted, save as to taking up shares subscribed for debentures, etc. There can be no conflict of duty, and all secret benefits by way of commission or otherwise are matters that call for accounting to the company: *Bray* v. *Ford*, [1896] A.C. 44, 65 L.J.Q.B. 213.

It is also well settled that directors are not *primâ facie* entitled to remuneration for their services, but, as a matter of fact, the articles, as a rule, do make provision for remuneration, and it is a matter of internal management: *Burland* v. *Earle*, [1902] A.C. 83.

The contention is that there was an agreement upon the part of the directors—or an agreement by one of them, R. L. Davis—that the plaintiff was to receive 5% commission upon the sale if effected by the plaintiff, and it was effected.

It is to be noticed, though, that, quite apart from whether this would be in any way legally binding upon the company—Davis positively denies making any such agreement, it is true—Davis wrote the following letter to the plaintiff, but, apart from this letter, it cannot be said that there is any evidence upon which any agreement to pay commission may be founded:—

Mount Vernon State Bank,
Mount Vernon, Wash.,
December 19th, 1913.

C. S. Roray, Jr.,
Lotus Hotel, Bellingham, Wash.

Friend Roray,—I have received your letter and had a short talk with Taylor, who said he would call and see you last night. I also talked with Shrauger, and believe, if your parties are ready to do business at once, that a deal can be made for the $20,000. You should, however, have asked $21,000, so you could get the commission out of it.

They should pay half cash or at any rate not string out payments so long. I would not be willing for them to have the mill six months, with only $5,000 paid, without they put up additional security besides the mill. Am not very strong on selling at this price any way.

Yours very truly,
R. L. DAVIS.

Even if it had been the case of $21,000 being asked and the sale going through at that price, the plaintiff would have had to

B. C.

C. A.

RORAY v. HOWE SOUND.

McPhillips, J.A.

account to the company for the $21,000, and would not have been admitted to retain the $1,000 as commission unless it were that the company could be said to be legally liable therefor.

To determine whether, upon the facts of the present case there can be any liability upon the part of the company to the plaintiff, it becomes necessary to examine the articles of association. Clauses 85 and 102 of the articles appear to me to be the only clauses in this regard that need be referred to, and they are in the following terms:—

85. The directors shall be paid all their travelling and other expenses properly and necessarily expended by them in connection with the company, and they shall also be entitled to receive out of the funds of the company, by way of remuneration for their services, such sum as the company in general meeting may, from time to time, determine.

DISQUALIFICATION OF DIRECTORS.

86. The office of director shall be vacated:

If he ceases to be a member of the company.

If he becomes bankrupt, insolvent or compounds with his creditors.

If he be declared lunatic or becomes of unsound mind.

If by notice in writing to the company he resigns his office.

102. Any director may, notwithstanding any rule of law or equity to the contrary, be appointed to any office under the directors, with or without remuneration; but he shall not vote upon any question connected with the appointment or remuneration of such office. No director shall be disqualified by his office from contracting with the company either as vendor, purchaser, or otherwise, nor shall any such contract, or any contract or arrangement entered into by or on behalf of the company in which any director shall be in any way interested, be voided, nor shall any director so contracting or being so interested be liable to account to the company for any profit realised by any such contract or arrangement by reason of such director holding that office or of the fiduciary relation thereby established, but it is declared that the nature of his interest must be disclosed by him at the meeting of the directors at which the contract or arrangement is determined on, if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interest, and that no director shall as a director vote in respect of any contract or arrangement in which he is so interested as aforesaid; and if he do so vote, his vote shall not be counted, but this prohibition shall not apply to any contract by or on behalf of the company to give to the directors, or any of them, any security by way of indemnity, and it may at any time or times be suspended or released to any extent by a general meeting.

Construing these two clauses of the articles, it is apparent, upon the facts, that the plaintiff does not make out a case entitling him to recover this commission. No remuneration by way of commission upon the sale was determined at any general meeting of the company, nor was there any agreement come to,

at any meeting of the directors, to pay him any such commission, nor was there any disclosure made at any meeting that he was to receive any such commission, nor was there at any later time any such disclosure or notification of any agreement which the plaintiff can invoke to in any way substantiate the claim made. See *Imperial Mercantile Credit* v. *Coleman*, L.R. 6 H.L. 189.

It is attempted to establish a liability, upon the special facts of the present case, that there was individual assent of the directors. This, though, I do not consider was proved, and, even if proved, in my opinion would be ineffective to fix liability upon the company. Directors cannot pay themselves or one of themselves for services rendered unless authorized so to do by the articles governing them, and then only in conformity therewith; not acting individually, but in a directors' meeting or authority therefor is given at a duly convened shareholders' meeting. Lindley, L.J., *In re G. Newman & Co.*, [1895] 1 Ch. 674, at 686, said:—

> Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of the company's assets, unless authorized so to do by the instrument which regulates the company or by the shareholders at a properly convened meeting. The shareholders, at a meeting duly convened for the purpose, can, if they think proper, remunerate directors for their trouble or make presents to them for their services out of assets properly divisible amongst the shareholders themselves. Further, if the company is a going concern, the majority can bind the minority in such a matter as this. But to make presents out of profits is one thing and to make them out of capital or out of money borrowed by the company is a very different matter. Such money cannot be lawfully divided amongst the shareholders themselves, nor can it be given away by them for nothing to their directors, so as to bind the company in its corporate capacity. But, even if the shareholders, in general meeting, could have sanctioned the making of these presents, no general meeting to consider the subject was ever held. It may be true, and probably is true, that a meeting, if held, would have done anything which Mr. George Newman desired; but this is pure speculation, and the liquidator, as representing the company in its corporate capacity, is entitled to insist upon and to have the benefit of the fact that, even if a general meeting could have sanctioned what was done, such sanction was never obtained. Individual assents given separately may preclude those who give them from complaining of what they have sanctioned; but, for the purpose of binding a company in its corporate capacity, individual assents given separately are not equivalent to the assent of a meeting. The company is entitled to the protection afforded by a duly convened meeting, and by a resolution properly considered and carried and duly recorded.

B. C.

C. A.

RORAY v. HOWE SOUND.

McPhillips, J.A.

Also see *Young* v. *Naval, Military and Civil Service*, [1905] 1 K.B. 687, 74 L.J.K.B. 302; and *Transvaal Lands Co.* v. *New Belgium (Transvaal) Land and Development Co.*, [1914] 2 Ch. 488 at 502.

It, therefore, follows that, in my opinion, upon the facts of the present case the plaintiff cannot be admitted to have made out such a case as would warrant the company—the defendants—being held liable to pay the claimed commission. The conditions precedent to the creation of liability upon the company have not been proved, *i.e.*, the procedure as authorised by the company's articles were not followed. In fact, there is an entire absence of all that which was requisite and imperatively necessary to waive the rules and settled law upon the subject.

I would allow the appeal, the action to be dismissed, the appellants to have the costs here and in the Court below.

Appeal allowed.

MAN.

K. B.

CHAPMAN v. PURTELL.

Manitoba King's Bench, Mathers, C.J. January 19, 1915.

1. MORATORIUM (§ I—1)—WORD "INSTRUMENT"—REGISTERED JUDGMENT—SUSPENSION OF LIEN.

The word "instrument" as used in sec. 2 of the Moratorium Act, Man., does not include a registered judgment for the payment of money so as to suspend or take away the judgment creditor's right of action for a declaration of lien in respect of the certificate of judgment registered in the Land Titles office and enforcement of same by a judicial sale.

Statement

MOTION for final judgment.

E. A. Deacon, for plaintiff.

No one for defendant.

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—This is a motion for final judgment in an action brought to sell land under a judgment recovered in the County Court on July 16, 1913, amounting to $526.25. On August 16, 1913, a certificate of the judgment was registered in the Winnipeg Land Titles office, in which district the lands sought to be sold are situate, and this action was begun on October 30, 1914. The relief prayed is that the judgment be declared a lien and charge upon the lands and that they may be sold to satisfy it.

The plaintiffs are entitled to the relief claimed unless their right is taken away or suspended by the Act, familiarly known as the Moratorium Act.

The Act is not a model of perspicuous legislation, and I am not surprised that Judges have differed as to its meaning. Thus I find that my brother Galt, on November 5 last, in *Ledoux* v. *Cameron*, 21 D.L.R. 864, decided that a judgment when registered under the provisions of the County Courts Act respecting the registration of judgments is an "instrument charging land with the payment of money" within the meaning of section two. He consequently held that the learned Master was right in refusing to settle an advertisement for sale of lands pursuant to a final order for sale thereof made on May 28, 1914, several months before the Act was passed, in an action brought to sell the lands charged by a judgment recovered and registered in March, 1913.

On the other hand, my brother Curran, on October 30 last, in *Knight* v. *Farrell* (unreported), refused upon motion of the defendant to restrain the plaintiff from proceeding to a sale of the lands bound by a County Court judgment under exactly analogous circumstances.

These two decisions are directly in conflict. I have therefore, no alternative but to examine the matter for myself and to follow the decision which appears to me to be the sounder in principle.

I entirely agree with the opinion expressed by my brother Galt in *Fisher* v. *Ross*, 19 D.L.R. 69, 24 Man. L.R. 773, that this Act does encroach on the rights of the subject and ought therefore to be construed in such a manner as not to interfere to any greater extent than is expressly, or by necessary implication, provided.

If the plaintiff's right of action is stayed, the inhibition must be contained in the first part of sec. 2. That section says:—

> Notwithstanding any provision in any mortgage of land or agreement to purchase land or in any other instrument charging land with the payment of money, not including liens under the Mechanics' & Wage Earners' Lien Act, no proceedings for the sale of any land under any power of sale contained in any such instrument or otherwise existing for default in

MAN.

K. B.

CHAPMAN v. PURTELL.

Mathers, C.J.K.B.

payment of any such moneys shall be taken by or on behalf of the mortgagee, vendor, or other person to whom such money may be payable until after the lapse of six months from the 1st day of August, 1914, if such default took place on or before that date, etc.

In the present case the default manifestly took place before August 1 last, and, if the Act applies, the plaintiffs' motion for judgment must be refused.

It is now settled law that the title of a statute is an important part of the Act itself and may be referred to for the purpose of ascertaining its general scope: Maxwell on Statutes, 67. This Act is intituled, "An Act respecting contracts relating to land." In an Act so intituled one would not expect to find provisions dealing with the statutory lien upon lands which a judgment creditor has acquired by registering his judgment; because, although a judgment is spoken of as a contract of record, it is not a contract at all in the sense in which that term is ordinarily used and understood, much less is a judgment for the recovery of money a "contract relating to land." Such a judgment in no way relates to land.

Then do the provisions of the Act extend beyond its scope as indicated by its title? If an action to sell land under a registered judgment is stayed by the first part of section 2, it must be because such a judgment is either a "mortgage of land" or an "agreement to purchase land" or another "instrument charging land with the payment of money."

Obviously, I think, a registered judgment is not a "mortgage of land" or "an agreement to purchase land" within the meaning of the Act. If covered by the Act at all it must be because it comes within the words "other instrument." The general rule of construction is that a general word which follows particular and specific words of the same nature as itself takes its meaning from them and is presumed to be restricted to the same genus as those words; or, in other words, as comprehending only things of the same kind as those designated by them, unless, of course, there is something to shew that a wider sense was intended: Maxwell on Statutes, 5th ed. 538. A judgment in its widest sense is an "instrument;" but is it an instrument of the same genus as a mortgage of land or an agreement to

purchase land? Both of those instruments come into existence by agreement of the parties; but that is not the case with a judgment, which comes into existence by the action of a Court and, in the great majority of cases, contrary to the will of one of the parties at least. But it may be said that when a certificate of the judgment is registered, from that time the judgment binds and forms a lien and charge upon the lands of the judgment debtor "the same as though charged in writing by the judgment debtor under his hand and seal." The "instrument" referred to in section two is one which by virtue of a "provision" contained in it forms a charge upon land. A judgment for the payment of money contains no such provision, neither does the certificate which is registered. The charge arises not because of any provision in either the judgment, the certificate or the memorandum of registration made by the registrar, but by virtue of the artificial effect which the statute gives the judgment in consequence of the registration of the certificate. Without the statute the registration of a certificate of the judgment would be ineffectual to create a charge upon the debtor's lands. It requires the concurrence of the three things, the judgment, the certificate and its registration, plus the statute to obtain that result.

An involuntary charge upon land which comes into existence in this way and is indebted for its effect and operation to such a combination of circumstances, is, to my mind, not an "instrument" at all, much less is it an instrument of the same kind as a mortgage of land or agreement to purchase land as these terms are used in section two of the Act.

Then again, the object of the section is to restrain the exercise of the power of sale contained in an instrument charging land with the payment of money or otherwise existing "for default in payment of any such moneys." That language implies that a time for payment has been fixed by the instrument creating the charge. In the case of a judgment the default must necessarily have occurred before the judgment was recovered. The subsequent registration of a certificate of judgment is merely the pursuit by the creditor of one of the remedies

MAN.
K. B.
CHAPMAN v. PURTELL.
Mathers, C.J.K.B.

which the law provides for the default in payment which took place prior to the recovery of the judgment.

It seems to me that the whole scope of this Act, including its title, indicates that the Legislature was dealing with mortgages, agreements and other instruments creating rights against land by the act of the parties themselves and not with rights which owe their existence to operation of law alone. To interpret the Act otherwise would, in my opinion, be giving it a very wide, and not a strict, construction, as the law requires. Every part of the section can be given full effect by interpreting it in the sense I have indicated. The words "or any instrument charging land with the payment of money" may well have been inserted to include a document that was neither a mortgage in the strict sense, nor an agreement to purchase land; but which created a lien upon land to secure the payment of money. There might not be in such a document a power of sale, but the Act refers to a power of sale contained in the instrument or "otherwise existing." These latter words would include the inherent power of the Court to order a sale of the land to realize such a lien.

There is nothing, it appears to me, in section 4 of the Act that stands in the plaintiff's way. The first part of that section prohibits the bringing of an action "to enforce a covenant or agreement to pay money contained in any such instrument;" that is, contained in such an instrument as is referred to in section 2. It is clear that a judgment does not contain a covenant or agreement to pay in the sense in which the terms are used here. But, even if it did, the prohibition is against bringing an action until the lapse of six months after the happening of default. In this case the default in payment had occurred considerably more than six months before action. The remaining part of the section says—

> and proceedings to enforce payment by writ of execution or registration of certificate of judgment "in any such action" now pending, wherein final judgment has not been entered before the 1st of August, 1914, are hereby stayed for a period of six months from the coming into force of this Act, if the judgment recovered include the principal money secured by such instrument or any portion thereof.

The words "any such action" manifestly refer to the action

mentioned in the first part of the section, namely, an action brought to enforce a covenant or agreement to pay money contained in any such instrument. The plaintiff's action is not an action brought to enforce a covenant or agreement to pay money contained in any such instrument.

With the greatest deference for the opinion expressed by so careful and painstaking a Judge as my brother Galt, I am of opinion that the word "instrument" as used in section 2 of this Act does not refer to a registered judgment for the payment of money, and that, therefore, there is nothing to stay the plaintiff's action, and he is entitled to judgment as prayed, with costs.

Sec. 3 only applies to actions upon such "instruments" as are referred to in sec. 2. It follows that the time hitherto allowed for redemption in an action such as the plaintiff's is unaffected by the Act.

Judgment for plaintiff.

Annotation—Moratorium—Postponement of Payment Acts—Construction and application of. Annotation

Etymologically, the word Moratorium is derived from the Latin word *moratorius*, denoting delay and, in the legal sense, it signifies the legal title to delay in making due payment, or a legislative authorization of suspension of payment. In England they are termed as the Postponement of Payment Acts.

A moratorium is either minor or major: a minor moratorium only applies to bills of exchange; a major moratorium includes all other debts except such as may be expressly reserved. In the Franco-Prussian war of 1870, the moratorium declared in France continued until the end of the war. There has been no moratorium in England for over a hundred years, but one has to go back to Napoleon's times to find a parallel for the present emergency. The British moratorium in the present war, as will be noted, may be classed as a major moratorium, since it practically applies to all payments, save those expressly excepted: 33 L.N. 257, 69 L.J. 475.

Moratory laws are an encroachment on vested rights and they should be subject to a strict construction: *Fisher* v. *Ross*, 19 D.L.R. 69, 72; 24 Man. L.R. 773, 778. They should, therefore, be construed as not to interfere with such rights to any greater extent than is expressly, or by necessary implication, provided: *Chapman* v. *Purtell*, *supra*, 25 Man. L.R. 76.

Discussing the Effect of War and Moratorium, Mr. Schuster, in his 2nd ed., 1914, at pp. 58, 59, says: "War is not carried on exclusively by the armed forces, and is not exclusively directed against the enemy state as such. The interference with commerce is a weapon which is not less

MAN.

Annotation

Annotation *(continued)*—Moratorium — Postponement of Payment Acts — Construction and application of.

deadly than the bullet or the shell. To injure all subjects of the enemy state, to dry up the springs of their prosperity, to raise the price of their food, and to impede their trade and their intercourse with the world is just as much a patriotic duty as to join in the actual fighting. Justice and equity are to be considered only in so far as the principal object, the infliction of the utmost possible injury to the inhabitants of the enemy country, is not impaired thereby. The Statutes, Orders and Proclamations issued since the outbreak of war do not override the common law rules giving effect to this principle, but are merely intended to make some undecided points clearer, and to fill up some obvious gaps. They certainly do not in any way attempt to mitigate the serious injustice to individuals which some of the rules on the subject entail."

The efficacy of the moratorium was clearly established during the Franco-Prussian War of 1870-71, when the French government from time to time introduced moratory laws and thus maintained the system of French credit unimpaired during the time of grave national emergency. The working of the system is fully set out in the case of *Roquette* v. *Overman*, L.R. 10 Q.B. 525. A moratorium enacted by the edict of the Emperor of the French had been extended from time to time by the National Assembly, and provided for a postponement of the date of the maturity of bills of exchange accepted and payable in Paris until some months after the conclusion of the war. The delay in making presentment was excused, and the international validity of the moratory enactments was recognized by the English Courts. It was laid down that the obligations of the acceptor and the indorser must equally be determined by the *lex loci* of performance—that is, the French law: 137 L.T. 376.

The British Parliament by the Postponement of Payment Act, 1914, 4-5 Geo. V, ch. 11, authorizes the postponement of payments of any negotiable instrument or any other payment in pursuance of any contract, by Royal proclamation, and confirms the moratorium of August 3rd, 1914, relating to the postponement of payment of bills of exchange. The effect of the moratorium which is in operation by virtue of the Imperial statute known as the Postponement of Payments Act, 1914, and the various proclamations issued thereunder, may be summarized as follows: It postpones for various periods all payments in respect of any bill of exchange, re-acceptance or negotiable instrument, or to payments due under any contract, excepting—Wages and Salaries; Payments by governmental departments, including payments under the Old Age Pension Acts, the National Insurance Acts, and the Workmen's Compensation Acts; the payments of bank notes; the payments of dividends and interest on trustee securities; payments in respect of maritime freight; payments in respect of rent; payments to or by retail traders in respect of their business. Liabilities when incurred did not exceed five pounds in amount; rates and taxes; debts due from any person, firm or company resident outside of the British Isles; payments in respect of withdrawal of deposits in a savings bank.

MAN.

Annotation

Annotation *(continued)*—**Moratorium — Postponement of Payment Acts — Construction and application of.**

The Courts Emergency Powers Act, 1914, and the rules thereunder, are intended for the relief of debtors who for the time being are unable to discharge their debts "by reason of circumstances attributable, directly or indirectly, to the present war." Except as to alien enemies the relief applies:—

(*a*) To the enforcement of judgments and orders for the payment of money.

(*b*) To the operation of certain remedies which under normal conditions are open to creditors without the intervention of Court, *e.g.*, distress in case of non-payment of rent, resumption of possession of property, exercise of powers of sale on the part of mortgagees not being mortgagees in possession, forfeiture of a deposit in the case of the purchaser's default in the completion of a sale, forfeiture of an insurance policy in the case of the non-payment of a premium.

(*c*) To certain proceedings in the Courts by which a creditor under normal conditions may obtain an order affecting the debtor's property (*e.g.*, ejectment on the part of the lessor, foreclosure on the part of a mortgagee), and to bankruptcy petitions.

The moratorium proclaimed under the Postponement of Payments Act, 1914, does not extend to contracts made after August 4, 1914: *Softlaw* v. *Morgan*, 31 T.L.R. 54.

In *Leving* v. *Advertiser's Mfg. Co.*, 69 L.J. 678, it appeared that the plaintiff in May sold the defendant company certain goods, of which delivery could be taken by the defendant, up to September 12, 1914. Some of the goods were delivered in July, but as a dispute arose, no further delivery was made. The terms as to payment had been agreed as 2½ per cent., discount for cash in seven days. On September 21, the plaintiff finally commenced action for the goods sold. It was contended that the moratoria did not apply to debts which became due after the date of the first moratorium in August. It was held by the Recorder of London in the Mayor's Court, that the first moratorium postponed all existing liability in respect of contracts up to September 4, 1914, and that the subsequent moratorium postponed liability for payment to October 4, 1914.

In the case of *Happe* v. *Maunasch*, 31 T.L.R. 305, it was held that the moratorium proclamation does not apply to a c.i.f. contract; namely a sale of goods subject to cash payment against documents upon arrival of steamer. In that case it involved a sale of several chests of opium, shipment from Calcutta, subject to cash payment against documents upon the arrival of the steamer in London. When the steamer arrived the seller, apparently apprehending the effect of the moratorium meanwhile declared, refused to tender the documents of shipment unless payment was first made. It was held that the moratorium did not apply to the payment in question, and that it was incumbent upon the seller as condition precedent to the performance of the contract on his part to tender the shipping documents to the purchaser, and his failure to do so will render him liable for the difference of the contract price the purchaser is obliged to pay.

MAN.

Annotation

Annotation *(continued)*—Moratorium—Postponement of Payment Acts—Construction and application of.

The effect of the proclamations made under the Postponement of Payments Act, 1914, was to give a statutory credit for the period mentioned therein, so that during such period no action was maintainable in respect of a debt coming within the proclamations. If, during the suspensory period, a writ has been issued, the plaintiff is not entitled to judgment, although no appearance has been entered; and the Court, on the facts being brought to its notice, will of its own motion either dismiss the action or remove the writ from the files of the Court. If judgment has been inadvertently allowed to be signed, it will be set aside by the Court when brought to its notice without requiring the defendant to institute a motion for the purpose: *Gramaphone Co.* v. *King* (1914), 2 Ir. R. 535.

When, after money has become due, a writ has been issued in an action to recover the amount, the fact that after the issue of the writ a statutory moratorium temporarily suspended the plaintiff's remedy, is not a defence, if, before the trial of the action, the temporary moratorium has ceased to apply to the plaintiff's claim: *Glaskie* v. *Petry*, 59 S.J. 92, 31 T.L.R. 40.

By a proclamation made under the Postponement of Payments Act, 1914, a moratorium was decreed in respect of certain payments, but it was provided that the proclamation should not apply to "any payment in respect of a liability which, when incurred, did not exceed £5 in amount."

In *Jupp* v. *Whittaker*, 69 L.J. 536, an action was brought to recover the payment of a sum of £20 6s. 2d. on a running account for meat supplied at different dates, consisting of small sums, none exceeding £5. It was contended that the moratorium does not apply to any payment in respect of a liability which when incurred did not exceed £5 in amount. It was held by the County Court, that, when a debt is contracted, being made up of a series of items in one running account, each item as it is incurred becomes so connected with the previous item as to constitute one debt, and there is an implied promise on the part of the debtor to pay that debt. The case is therefore not within the exception, but is subject to the Moratorium Act.

In the case of *Auster* v. *London Motor Coach Works*, 59 L.J. 24, 31 T.L.R. 26, it appeared that during the currency of the moratorium the plaintiffs issued a writ specially indorsed with a statement of claim for the price of goods sold and delivered, some of the items being less, and some more, than £5. It was held, that as the proclamation did not provide that the Moratorium should "apply to a liability exceeding £5, being an aggregate of a number of liabilities, each of which when incurred was less than £5," the defendants were not entitled to have the writ set aside or the statement of claim struck out, and the action must proceed, but as to the items which were over £5 they could plead the moratorium.

A call upon shares which is payable on a date falling within the moratorium proclaimed under the Postponement of Payments Act, 1914, is a debt within the moratorium, and consequently a resolution of the directors of the company purporting to forfeit the shares for non-payment of the call during the currency of the moratorium, is invalid. Such a resolution

MAN.

Annotation

Annotation *(continued)*—**Moratorium — Postponement of Payment Acts — Construction and application of.**

is also an attempt without the leave of the Court to take possession of property within the meaning of section 1 (1) (*b*) of the Courts (Emergency Powers) Act, 1914: *Burgess* v. *O.H.N. Gases, Lim.*, 59 S.J. 90, 31 T.L.R. 59.

By sec. 1 (1) of the Postponement of Payment Act, 1914, and a proclamation issued in pursuance thereof, the payment of any sum due and payable before the date of the proclamation in respect of a contract made before that time was postponed to a specified date. It was held, that rent due and payable before the date of the proclamation could not be recovered in an action in which the writ was issued after the proclamation and before the specified date, because not due and payable at the date of the writ; and that as the right, given by the agreement of tenancy, to re-enter for non-payment was only a security for the rent, it followed that the right also did not exist at the date of the writ and could not be enforced in the action: *Durrell* v. *Gread*, 84 L.J. (K.B.) 130; [1914] W.N. 382.

It was held in *Shottland* v. *Cabins*, 31 T.L.R. 297, that though a landlord who had levied a distress for rent before the date of the proclamation of a moratorium under the Postponement of Payments Act, 1914, but who had not sold the goods before that date, was not entitled to sell the goods during the currency of the moratorium, yet he was entitled to remove the goods from the demised premises for the purpose of securing his possession of the goods.

The moratorium proclamation in force August 6th, 1914, declared that payments which were postponed, if not otherwise carrying interest, should, if specific demand was made for payment and payment was refused, carry interest at the Bank of England rate current on August 7, 1914; that rate was six per cent. It was held, that a demand by a stockbroker for payment for shares of stock sold for the mid-August account, the settlement of which had subsequently been postponed by the Stock Exchange Committee at a future date, comes within the moratorium proclamation so as to make interest payable on demand for payment at the date of account for which they were sold; and, that the broker was entitled, upon the refusal to take the shares, to sell them without applying to the Court under the Courts Emergency Powers Act, 1914, as the scrip which the purchaser received was not a "security" within the meaning of sec. 1, sub-sec. 1 (*b*) of that Act: *Barnard* v. *Foster*, 31 T.L.R. 307, [1915] W.N. 136.

A deposit of money subject to an agreed rate of interest will not, upon a demand for re-payment, subject the amount to the rate of interest current at the Bank of England at the time of the proclamation of the moratorium, but will be governed by the rate fixed by the agreement: *Coats* v. *Direction Der Disconto-Gesellschaft*, 31 T.L.R. 446, [1915] W.N. 224.

The intervention of the moratorium during the period allowed by a bank for the payment of an overdraft will postpone the date of payment of

MAN.

Annotation

Annotation *(continued)*—Moratorium — Postponement of Payment Acts — Construction and application of.

the overdraft for the morated term, and the bank has no right to refuse payment on cheques drawn meanwhile: *Allen* v. *London County, etc., Bank*, 31 T.L.R. 210.

On August 6, 1914, a moratorium proclamation was issued, providing that all payments not less than £5 due and payable before August 6 or on any day before September 4, in respect of any cheque drawn before August 4, or in respect of any contract made before that time, should be payable one month after the original due date or on September 4. A cheque was drawn on a bank August 5 and presented for payment on August 10, which was returned by the bank. It was held that the bank was protected by the moratorium, as the case was one of payment in respect of a contract made before August 4: *Flach* v. *London & South Western Bank*, 31 T.L.R. 334.

Where a debt does not become due by virtue of the proclamations under the moratorium until some date after an act of bankruptcy already committed, there is nevertheless a debt within sec. 6, sub-sec. 1 (*b*), of the Bankruptcy Act, 1883, and the debtor can commit an act of bankruptcy: *Re Sahler*, 112 L.T. 133, [1914] W.N. 439.

The Dominion Parliament authorizes a moratorium. By virtue of sec. 4 (*e*) of the Finance Act, 1914, ch. 3 (Can.), in case of war, invasion, riot or insurrection, real or apprehended, and in case of any real or apprehended financial crisis, the Governor in Council may, by proclamation published in the *Canada Gazette*, authorize, in so far as the same may be within the legislative authority of the Parliament of Canada, the postponement of the payment of all or any debts, liabilities and obligations however arising, to such extent, for such time and upon and subject to such terms, conditions, limitations and provisions as may be specified in the proclamation.

In Ontario, under the Mortgagor's and Purchaser's Relief Act, 1915, ch. 22, sec. 5, in cases of foreclosure of mortgages or agreements for the purchase of lands, no action can be taken without leave of Court, and in such cases the Judge, if he is of opinion that time should be given to the person unable to make any payment by reason of circumstances attributable directly or indirectly to the present war, may, in his absolute discretion, by order, refuse to permit the exercise of any right or remedy, or may stay execution or postpone any forfeiture or extend the time for the expenditure of any money, for such time and subject to such conditions as he thinks fit.

The Manitoba Moratorium Act does not apply to the enforcement of an agreement for the sale of lands situate in another province: *Stanley* v. *Struthers*, 22 D.L.R. 60.

Section 5 of the Moratorium Act, 1914, Man., which stays actions "for the recovery of possession of the land charged" until after the lapse of a six months' period, does not limit the recovery of a personal judgment for the amount due under a sale agreement for principal and interest, and where an action which was pending when the Act was passed had not pro-

MAN.

Annotation

Annotation *(continued)*—**Moratorium — Postponement of Payment Acts — Construction and application of.**

ceeded to the entry of final judgment before August 1st, 1914, the limitation of sec. 4 as to actions to enforce a covenant or agreement in respect of lands does not prevent the subsequent entering up of judgment, although it stays proceedings to enforce payment by writ of execution or by registration of the judgment: *Fisher* v. *Ross*, 19 D.L.R. 69, 24 Man. L.R. 773.

In the case of *Ledoux* v. *Cameron*, 21 D.L.R. 864, 25 Man. L.R. 71, it was held, affirming the Master's decision, that a registered judgment was an instrument charging land with the payment of money within the meaning of sec. 2 of the said Act, and no proceedings for sale could be taken until after the lapse of 6 months from August 1, 1914.

The same view was taken in the case of *Slobodian* v. *Harris*, 21 D.L.R. 75, 25 Man. L.R. 74, and it was further held that where the judgment is registered after July 31, 1914, it is a "contract" within the exception of sec. 6, and by virtue of secs. 215-16 of the County Courts Act, so that the restrictions of the Moratorium Act do not apply to prevent an order for sale being made thereunder within the six months' period: *Slobodian* v. *Harris*, 21 D.L.R. 75, 25 Man. L.R. 74.

But in *Chapman* v. *Purtell*, *supra*, 25 Man. L.R. 76, it was held that a registered judgment is not an "instrument charging land with the payment of money," within the meaning of that expression as used in section 2 of the Act; and, although a judgment for the payment of money is spoken of as a contract of record, it is not a contract at all in the ordinary meaning of that word, much less a contract relating to land, and the title of the Act would indicate that it was not intended to affect judgments for the payment of money in any way. In construing the words in section 2, "Notwithstanding any provision in any mortgage of land or agreement to purchase land or in any other instrument charging land with the payment of money," it is proper to apply the *ejusdem generis* rule and to hold that the words "other instrument" do not extend to a registered judgment which is not of the same genus as a mortgage or agreement of purchase.

A foreclosure decree as to the purchaser's interest under a land purchase agreement will, since the Moratorium Act, 1914, be conditional upon the non-payment of the principal, interest and costs within one year from the taxing officer's certificate, together with subsequent interest to the date of payment: *Maxwell* v. *Cameron*, 20 D.L.R. 71.

On motion for judgment in an undefended action for foreclosure of an agreement for sale, the plaintiff is not entitled to claim that the Moratorium Act does not apply because of an abandonment of the land by the defendant, as provided in sec. 7, unless there is in the statement of claim an appropriate allegation to that effect: *Armstrong* v. *Sichels*, 24 Man. L.R. 782.

In an action, commenced before the coming into force of the Moratorium Act, and not defended, the vendors claimed specific performance of an agreement of sale of land and in default, rescission and immediate possession, also that, in default of payment, the lands might be sold to realize the unpaid purchase money, interest and costs. It was held, that, so far

MAN.

Annotation

Annotation *(continued)*—Moratorium — Postponement of Payment Acts — Construction and application of.

as regards the relief by sale, the vendors were entitled to a sale at the expiration of a year from the fixing of the time for payment: *United Investors* v. *Gaynor*, 24 Man. L.R. 781.

An agreement for sale of land whereby the purchaser is to pay the proceeds of one half of the wheat crop yearly until the purchase money and interest is fully paid, is within the exception of sec. 4 (*b*) of the Moratorium Act, Man., although the agreement is not for delivery of part of the crop itself; but sec. 3 of the Act applies to extend for one year the time fixed for redemption under the Master's report made before the Act came into force: *Haight* v. *Davies*, 22 D.L.R. 507.

For a recent case on Manitoba moratorium see *Re Real Property Act*, infra.

It was held by the Master of Titles at Saskatchewan, that the registration of a transfer subsequent to the issue of the Moratorium Proclamation is not forbidden thereby. Accordingly, where the property in land has passed in default of payment within the time specified in an order *nisi* for private sale to a specific purchaser, prior to the proclamation taking effect, the transfer to such person may be registered: *Re Moratorium Proclamation* (Sask.), 7 W.W.R. 795.

Finally, it might be well to conclude with the words of 137 L.T. 427, that "having now discussed these various points arising out of the positions as affected by the moratorium, it only remains to draw the reader's attention once more to the King's request of September 1, 1914, that 'all persons who can discharge their liabilities should do so without delay'—advice which we feel confident will be acted on by everyone who has the good of his country at heart."

I. F.

ONT.

S. C.

DOYLE v. FOLEY-O'BRIEN LTD.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee, and Hodgins, JJ.A. April 26, 1915.

1. MASTER AND SERVANT (§ II A 4—75)—SAFETY AS TO PLACE—MINES—HOLE CHARGED WITH DYNAMITE—WARNINGS.

An unexploded hole charged with dynamite left in a mine by the night shift without any report or warning as required by Rule 14 of sec. 164 of the Mining Act R.S.O. 1914, ch. 32, whereby a worker of the following shift, while engaged in his ordinary work, struck a protruding ledge of rock, causing an explosion, will render the master liable for the injuries he sustained thereby.

2. CONTINUANCE AND ADJOURNMENT (§ II—5)—GROUNDS FOR—EXPERT TESTIMONY—FUNCTION OF DYNAMITE—CAUSE OF EXPLOSION.

It is a proper exercise of discretion in refusing to adjourn a trial for the purpose of enabling a defendant, who had been unaware of the turning point in a case as to the cause of an explosion, to obtain expert testimony as to the action of dynamite, where the evidence at the trial shews that the injuries were caused by contact with an unexploded hole, in contravention of statutory regulations, and not with loose powder in the muck.

ONT.

S. C.

DOYLE v. FOLEY-O'BRIEN LIMITED.

3. MASTER AND SERVANT (§ II C 1—191)—CONTRIBUTORY NEGLIGENCE—UNEXPLODED HOLE IN MINE—FAILURE TO LOOK.

The fact that an employee in a mine did not look to see whether or not a hole charged with dynamite was unexploded, does not establish contributory negligence in bar of his action for personal injuries, where there were no warnings leading him to such inquiry.

4. DAMAGES (§ III I 4—193)—AMOUNTS—LOSS OF EYE—IMPAIRMENT OF SIGHT.

An award of $5,200 damages in favour of a man 29 years old for the loss of an eye and the impairment of sight in the other, caused by explosion in a mine, while liberal, is not excessive.

APPEAL from a judgment of Clute, J., in favour of the plaintiff for $5,200. Statement

F. J. Foley, for plaintiff, respondent.

H. E. Rose, K.C., and *G. H. Sedgewick*, for appellants.

The judgment of the Court was delivered by

GARROW, J.A.:—Appeal by the defendants from the judgment of Clute, J., at the trial before him without a jury, in favour of the plaintiff. Garrow, J.A.

The action was brought by the plaintiff, a workman in the service of the defendants, to recover damages alleged to have been sustained by him owing to the negligence of the defendants.

The learned Judge found that negligence on the part of the defendants, in a failure to follow the provisions of the Mining Act and the rules therein contained for the safety of the miner, had been established; and with that conclusion I agree.

There were apparently two shifts of men employed, a day and a night; and in each shift there were four men in addition to the engineer. There was no foreman or overseer or other person in charge to whom the report called for by rule 14 of sec. 164 of the Mining Act in the case of an unexploded hole could be made. A blackboard to contain such a report had, however, been recently installed, but no chalk with which to write the report had been supplied, with the result that there was no notification of the unexploded hole by the shift going off work after the blast on Saturday night to the succeeding shift, as the statute clearly intends there shall be. The excuse offered is that the staff of operatives was so small as not to require such officers as a mine captain and shift bosses—which is an excuse perhaps, but not, in my opinion, an answer. The Act does not prescribe a minimum

ONT.

S. C.

DOYLE v. FOLEY-O'BRIEN LIMITED.

GARROW, J.A.

of employees; the mine-owner may employ as many or as few as he pleases; but, whether he employs many or few, he must carry on his operations in conformity with the provisions of the Act designed for the safety of the miner, which are as applicable to the case of four employees as of four hundred. The essential thing to be accomplished is to give to the incoming shift due warning of the danger from unexploded holes, and the giving of such warning cannot be avoided by a failure to appoint the officers through whom, under the rules, such warning is intended to be given. If there are no such officers, then other provision for giving the necessary warning must be made in order that the provision of the Act may, at least substantially, be complied with. Here, as the evidence shews, the warning would have been effectually given if placed upon the blackboard, which would have been done if the necessary chalk had been supplied, a trifling, but as it turns out an all-important, omission.

On the argument before us, counsel for the defendants, in addition to contesting the defendants' negligence in failing to give warning, also contended: (1) that the adjournment asked for at the trial should have been granted; (2) the evidence discloses that the plaintiff's injury could not have been caused by striking an unexploded hole, but was caused by striking loose powder, for which the defendants were not responsible; (3) the plaintiff was guilty of contributory negligence; and (4) the damages are excessive.

The adjournment asked for was, as stated by counsel at the trial, for the purpose of obtaining the evidence of experts as to the action of dynamite; and the reason given for not having come to trial prepared with such evidence was because the defendants had not observed or become aware until the trial that the unexploded hole was found after the explosion which injured the plaintiff still to contain a quantity of unexploded powder —a circumstance which, it was argued, was entirely inconsistent with the plaintiff's contention.

Clute, J., dealt with the application to adjourn, which was only made at the close of the plaintiff's case, thus: "I think it would be wholly unfair to enlarge this case. Your clients do not seem to have taken sufficient interest in it even to attend.

The accident occurred on the 16th November, 1913. The writ was issued in May, 1914. There was discovery by examination of the plaintiff; and, remembering that your clients have the control of the premises, and knew or ought to have known the cause of the accident so far as it could be ascertained, it is too late now to ask the Court to adjourn the case on the possibility of something turning up that might be favourable to your clients." Under the circumstances thus stated by the learned Judge, it appears to me that he exercised a wise discretion in refusing the application, with which we ought not to interfere.

The expert evidence, to obtain which the adjournment was asked, was, of course, intended to bear upon the second objection; but, even without such evidence, the learned counsel for the defendants contended with great earnestness that, upon the evidence which was given, the accident could not have happened as described by the plaintiff. The point of his contention was apparently that the explosion would, in the ordinary course, have consumed the whole of the explosive. Such a contention, however, implies a constancy in the action of the explosive, dynamite, which was being used, which is not consistent with the evidence. There is not very much of it, it is true, and none of it what might be called strictly "expert," but it is the evidence of working men of actual experience in the work of mining, and none the less valuable because of that. Campbell, the deckman, said that the usual mode of exploding in such situations, and the one followed in the present instance, was by means of a cap and fuse connected with the hole containing the explosive, which, when everything is ready, is lit; and that he had often seen partial explosions, and powder left in the hole. A similar statement was made by Carey, a mucker, who added that he had found whole sticks of unexploded dynamite among the muck after a blast.

Immediately after the plaintiff had been injured, the hole was examined by both Campbell and Carey. They both agree that there had been a partial explosion either on the occasion when the plaintiff was injured or prior thereto. Ten holes in all had been drilled and filled with explosive, and the blast set off on Saturday night, and only nine explosions were heard. That is not

ONT.
S. C.
DOYLE
v.
FOLEY-O'BRIEN LIMITED.
Garrow, J.A.

disputed. When then on the evidence did the partial explosion of the remaining hole where the plaintiff was working take place? This seems to be the vital question upon this branch of the case; and the matter seems to me to be really determined in the plaintiff's favour by the evidence of Geroux, also a mucker, who says that, after the plaintiff's injury, he found a part of a fuse and an *unexploded* cap in the immediate vicinity of the hole in question. Its presence there is wholly unaccounted for unless it is that in some way it had become unattached or was originally insufficiently attached to the hole in question which it was intended to explode, thus accounting for the missing explosion on Saturday night. And, if there was no explosion then —which seems to be established—certainly none subsequently, but prior to the plaintiff's injury, is shewn, with the result that the inference is strong—satisfactorily strong, it seems to me—that it was with that hole, and not with loose powder in the muck, that the plaintiff came in contact on the occasion in question, and that this partial explosion which the witnesses describe was the result of such contact.

Not much need be said upon the third question. The only negligence on the plaintiff's part suggested by counsel really is that he did not see the hole and that it was unexploded. This takes little account of the surroundings, it seems to me. The explosion of Saturday night had left the floor covered deep with débris, or muck, as it is called. The only light in the drift was derived from three or four candles. Assuming that every one was doing as the plaintiff was—his duty—he had no reason to apprehend the danger which overtook him. He had looked at the blackboard before descending, and had found all clear there. He did not actually see the hole. It may have been, and indeed probably was, covered over with the dust or small débris of the Saturday's explosion. Altogether, the circumstances do not suggest to me any evidence of negligence on the plaintiff's part.

Nor does the question of the amount of damages call for lengthened remark. The plaintiff is a young man, 29 years of age. He was earning a good wage, and had his life practically all before him. As the result of this injury, caused by the defendants' negligence, he has been put to expense and made to

suffer much pain, has lost one eye and had the sight of the other impaired. His career is thus practically ended, for there are not many satisfactory occupations open to one so handicapped. All things considered, I am not at all convinced that the amount awarded, while liberal, perhaps, as verdicts go, is excessive.

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

Appeal dismissed.

ONT.
S. C.
DOYLE v. FOLEY-O'BRIEN LIMITED.
Garrow, J.A.

McQUAID v. PRUDENTIAL TRUST CO.

ALTA.
S. C.

Alberta Supreme Court, Harvey, C.J. January 26, 1915.

1. DEPOSITIONS (§ I—4b)—COMMISSION TO TAKE EVIDENCE—OFFICERS OF COMPANIES.

An order to take evidence of officers of the applicant company *ex juris* upon commission should not be made without proof of facts showing that the taking of the evidence in that way is "necessary for the purposes of justice" (Alta. Rule 395); and where it is sought on a motion for directions leave should be given to both parties to file affidavits.

[*Park* v. *Schneider*, 6 D.L.R. 451, 5 A.L.R. 423, explained.]

APPEAL from an order to take evidence on commission. Statement.

A. U. G. Bury, for appellant.

S. W. Field, for respondent.

HARVEY, C.J.:—On motion for directions the defendant, whose head office is in Montreal, asked to have the evidence of some of its officers then taken on commission. The plaintiff objected, and there was no material before the Master to shew the necessity for the order asked for. The Master made the order, but provided that the evidence so taken should not be read at the trial without leave of a Judge. Harvey, C.J.

It is true that the plaintiff is furnished some protection by this proviso, but I think he should not be called on to meet an examination at an outside place until some reasonable ground of necessity is shewn.

Rule 395 provides that evidence for use at trial may be taken by commission "When it appears necessary for the purposes of justice," while rule 225 provides that no affidavit shall be used on a motion for directions except by leave.

There is no doubt that in a great many cases directions even for commission can be given without any objection, and, therefore, without the necessity of any affidavit, and it is quite evident

ALTA.
S. C.
McQUAID v. PRUDENTIAL TRUST CO.
Harvey, C.J.

that, where the witness to be examined is one over whom the party has no control, counsel might offer no objection, while he might object when the application is to take the evidence of a party or its employees.

The case of *Park* v. *Schneider* (1912), 6 D.L.R. 451, 5 A.L.R. 423, and the authorities therein cited, clearly establish the need to make out a strong case to enable a party to give the evidence of himself or those under his control when the opposite party has ground for requiring their presence in Court.

It does not appear from the report, but it is a fact that in that case the order which was made by me authorizing an examination of the plaintiff for discovery, with leave to the plaintiff to use such examination at the trial by leave of the trial Judge, was the best order the plaintiff could get on a second application for a commission, the first having been refused.

Before a proper discretion can be exercised, the circumstances of the case must be disclosed, and I am of opinion that the Master should have declined to make the order asked for until the defendant disclosed such facts as would satisfy him that it was "necessary for the purposes of justice," giving leave to both parties to file affidavits as on an ordinary motion. I will, therefore, allow the appeal, but, as it is a comparatively new point of practice, the costs will be costs in the cause.

Appeal allowed.

ONT.
S. C.

Re ONTARIO AND MINNESOTA POWER CO. AND TOWN OF FORT FRANCES.

Ontario Supreme Court, Falconbridge, C.J.K.B., Riddell, Latchford, and Kelly, JJ. March 23, 1915.

1. TAXES (§ III D—136)—EXCESSIVE ASSESSMENT—APPEAL FROM—REDUCTION.

On an appeal by a public utility company to the Ontario Railway and Municipal Board against the company's assessment if the appellants prove that the amount assessed for buildings was excessive the onus is not upon them to prove that the total was likewise excessive; a reduction of the total assessment should be made in respect of the excess in the building valuation unless the question of increase of the assessment under the other heads is before the Board on the evidence or upon an inspection of the property.

Statement

AN appeal by the company (by leave) from a decision of the Ontario Railway and Municipal Board.

The assessment of the company for the year 1914 by the assessor of the municipality was as follows: land, $100,000; buildings, $415,142; business assessment, $122,500; total, $637,642. These figures were altered by the Court of Revision: land, $95,000; buildings, $705,000; business assessment, $200,000; total, $1,000,000. This was confirmed on appeal to the District Court Judge. There was a further appeal to the Board, and the Board's variations left the assessment: land, $550,000; buildings, $250,000; business assessment, $480,000; total, $1,280,000.

Statement

The appeal of the company was on two grounds: (1) that under the law and the facts the assessment of $550,000 on the land exclusive of buildings could not be sustained; (2) that under the law and the facts the assessment of $480,000 as a business assessment could not be sustained.

Glyn Osler, for appellant company.

G. H. Watson, K.C., and *A. G. Murray*, for respondent town corporation.

Riddell, J.

Riddell, J. (after setting out the facts at length):—From a perusal of the reasons given by the Board for their judgment, it appears that, on the evidence before them, they fixed the value of the buildings at $250,000. This is not complained of, and I see no reason for doubting its substantial accuracy. This appears in clause 2 of the order now appealed from.

The method of arriving at the value of the "land exclusive of buildings thereon," as set out in clause 1, is as follows:—

The finding of the District Judge "affirms that the actual value of the company's lands, with business assessment added, is $1,000,000. On this appeal the validity of that judgment is questioned by the company on the ground of overvaluation. The appellants can succeed only by adducing proof that the actual value of these lands, including any increment accruing from the development of this water power, is less than the amount at which they are assessed. The president of the company, the most likely of all men to know, asked upon the witness-stand as to the value of the water power development, which the Board conceives to be the determining factor in fixing the value of these lands, declines to give an estimate, alleging as his reason the difficulties in the way. It may well be a matter of extreme difficulty to form such an estimate, involving as it must, where an en-

ONT.

S. C.

RE ONTARIO AND MINNESOTA POWER CO. AND TOWN OF FORT FRANCES.

Riddell, J.

terprise of such magnitude and extent is concerned, a synthesis of many elements of conjectural value. But, whatever the difficulties in the way of the appellants, in default of satisfactory proof of overvaluation, which can best be made by shewing the property's actual value, there is no other course open to the Board but to dismiss the appeal and confirm the assessment, but this should be subjected to the following modifications, which are in part matters of form.

"Without disturbing in other respects the aggregate amount of the assessment, exclusive of the business assessment, namely, $800,000, the Board is of opinion that it should be otherwise apportioned as between land and buildings. The readjustment proposed will respect the evident intention of the Court of Revision and District Court Judge, while bringing the assessment into harmony with the Board's holding as to the devolution of the value created by the development of this water power."

This seems to me, with great respect, to involve a complete misunderstanding of the situation. The District Court Judge did not assess the value of the land and buildings in a lump at $800,000 and then divide the amount between land and buildings. He valued the land at $95,000 and the buildings at $705,000. It is precisely such a case as though the plaintiff had sued for damages in a collision and obtained a verdict for a certain sum for personal injuries and another sum for injury to property. In an appeal on the ground of excessive damages the defendant would succeed if he proved an excessive amount on one head; it would not be necessary for him to prove that, taken altogether, the amount was excessive. If the plaintiff desired to hold the verdict for the full amount, i.e., for the sum of the two assessments, he must prove affirmatively that the other amount should be increased. This is a question of onus, and therefore a question of law, and is properly appealable to this Court.

I think the Board erred in holding, as they did, that, having proved that the amount assessed for buildings was excessive, the appellants were bound to go on and prove that the total was excessive, that is, that the assessment on the other head should not be increased by the same amount as the former was diminished.

If we could see that the value was arrived at by the inspection of the Board, the case might be different; but nothing of

the kind appears. The whole decision is based upon the supposed onus on the appellants. I do not express any opinion on the true method of arriving at the "actual value" of the land; but I am not to be taken as acceding in the least to Mr. Osler's argument. The appeal should be allowed on this head.

The other branch of the appeal depends on a pure question of fact. That fact is to be determined upon the evidence, and the evidence is at least ambiguous. The Board have taken one view of the evidence, and the appellants press another view. The Board saw and heard the witnesses, and I am unable to say that their view is clearly wrong. If any error has crept in, it is the fault of the appellants in not making their evidence quite clear, and they cannot complain. I think this branch of the appeal fails.

Success being divided, there should be no costs.

Falconbridge, C.J.K.B., agreed with Riddell, J. Falconbridge, C.J.K.B.

Kelly, J., agreed in the result, for reasons stated in writing. Kelly, J.

Latchford, J., agreed with Kelly, J. Latchford, J.

Order accordingly.

Re ONTARIO AND MINNESOTA POWER CO. AND TOWN OF FORT FRANCES.

ONT.
S. C.

Ontario Supreme Court, Falconbridge, C.J.K.B., Riddell, Latchford and Kelly, JJ. April 19, 1915.

1. Taxes (§ III D—138)—Assessment—Appeal—Review of law.

On an appeal to the appellate division of the Supreme Court of Ontario from the Ontario Railway and Municipal Board, in respect of the assessment of the property of a public utility company, the question determined is one of law that the Board should, on the facts as found, fix the value of the property at a particular figure; the appellate division does not decide as a matter of fact that such is the value of the property but to save any question as to the effect of the opinion of the appellate division, its certificate may contain a statement that in the opinion of the court it would have no effect as *res judicata* in any future assessment.

[*Re Ontario and Minnesota Power Co. and Fort Frances*, 8 O.W.N. 216, 22 D.L.R. 878, referred to.]

Statement

Motion by the Corporation of the Town of Fort Frances to vary the "minutes of judgment" as settled. The reasons for the opinion of the Court are noted *ante* 878.

G. H. Watson, K.C., for applicant corporation.

Glyn Osler, for company.

ONT.

S. C.

RE ONTARIO AND MINNESOTA POWER CO. AND TOWN OF FORT FRANCES.

Riddell, J.

The judgment of the Court was delivered by

RIDDELL, J.:—The ground taken is that the only appeal given being on a question of law, the form of the judgment (or opinion) is wrong.

(1) The Board had fixed the "actual value" of the land assessed at $1,000,000, and the only question of law (Assessment Act, R.S.O. 1914 ch. 195, sec. 80(6)) in respect of the land which was in question was, whether the Board should have fixed the "actual value" at $550,000 or $95,000. On the facts as disclosed we held, as a matter of law, that the "actual value" for the purpose of the assessment was $95,000. (On settling the minutes $5,000 was added by consent, as this amount had been omitted by mistake.) We did not determine as a matter of fact that that was the value; what we did determine was a matter of law, i.e., that upon the Board's own premises they should have "fixed" the value at the lower sum.

(2) The second matter of appeal before us upon the appeal from the Board was this. As a matter of law, should the Board have followed the principle they did and fixed the assessment they did? Or should they have followed another principle and fixed a smaller sum? We decided that they were right as a matter of law in fixing the larger sum.

The parties on settling the minutes before me agreed that what this Court should do was to "certify its opinion to the Board" under the Ontario Railway and Municipal Board Act, R.S.O. 1914 ch. 186, sec. 48(3): and I acceded to their request to certify our opinion. It may be very doubtful whether the general provisions in the section just referred to apply in view of the express provision that in an appeal of this nature "the practice and procedure on the appeal to a Divisional Court shall be the same . . . as upon an appeal from a County Court:" R.S.O. 1914 ch. 195, sec. 80(6), (7). But I do not raise this objection in view of the position and request of the parties.

The form of the "opinion" as settled was as follows:—

"This is to certify that upon the motion made unto this Court on the 3rd and 4th days of March, 1915, by counsel on behalf of the appellant, in presence of counsel for the respond-

ent, by way of appeal from the judgment pronounced herein by the Ontario Railway and Municipal Board on Saturday the 21st day of November, 1914, upon the grounds mentioned in the notice of motion filed, upon hearing read the evidence adduced before the said Ontario Railway and Municipal Board, the order herein of this Court dated the 14th day of January, 1915, and the proceedings herein, and the said order appealed from, and upon hearing what was alleged by counsel aforesaid, this Court was pleased to direct that the said motion do stand over for its opinion, and the same coming on this day for its opinion:—

"1. This Court was of opinion that the actual value of the lands assessed should be fixed at $100,000.

"2. And this Court was further of opinion that the amount of business assessment of the appellant should be fixed at the sum of $210,000.

"3. And this Court did not see fit to make any order as to costs."

I think the form is right—there is no necessity for and no sense in setting out the facts and principles upon which we arrived at our result, any more than in the ordinary case of appeal; our conclusions are conclusions of law and not of fact. We do not say that as a matter of fact the value of the land, etc., is so much: but as a matter of law the Board should on the facts as found fix the value, etc., at so much.

Mr. Watson asked us to add the following: "This order shall not be deemed to operate as an adjudication or estoppel between the parties hereto upon the question of actual value for the purpose of assessment, under the Act, of the property of the appellant company."

Had this been suggested upon the "settling of the minutes," it would probably have been inserted, and Mr. Osler does not object to its being inserted now. But on mature consideration I think it should not be made part of the "opinion." We are passing upon matters of law arising in the appeal, and not on questions of fact. We are certifying to the Board our opinion on these matters of law, and we should not in such opinion add what the effect may or may not be. There can be no objection, however, to our saying here that the "opinion" has, in our view,

ONT.
S. C.
Riddell, J.

no effect as a res adjudicata in any future assessment: nor do we express any opinion as to the actual value of the land or as to the amount at which the value would or should have been fixed had the proceedings taken a different course.

Motion dismissed with costs.

ONT.
S. C.

TOWN OF FORT FRANCES v. ONTARIO AND MINNESOTA POWER CO.

Ontario Supreme Court, Clute, J., in Chambers. August 20, 1915.

1. STAY OF PROCEEDINGS (§ I—30)—STAY PENDING APPEAL—ASSESSMENT FOR SCHOOL TAXES.

Statement.

Motion by the defendant company to stay execution of the judgment in this action pending an application to be made by the defendant company for leave to appeal to the King in his Privy Council from the judgment of the Supreme Court of Canada of the 23rd June, 1915.

The action was brought on the 6th March, 1914, to recover the taxes due by the defendant company to the plaintiff town corporation for the years 1911 and 1912. Two months after the commencement of the action, the defendant company paid the taxes for 1911. The question involved in the proposed appeal was only as to the liability of the defendant company for school taxes. The judgment of the trial Judge in favour of the plaintiff corporation had been unanimously affirmed by a Divisional Court of the Appellate Division of the Supreme Court of Ontario and by the Supreme Court of Canada.

Glyn Osler, for defendant company.

Grayson Smith, for plaintiff corporation.

Clute, J.

CLUTE, J., said that an objection to the jurisdiction of the Supreme Court of Ontario to stay proceedings pending an application to the Privy Council for leave to appeal could not be successfully maintained: *Thompson* v. *Equity Fire Insurance Co.* (1909), 1 O.W.N. 137; *Hughes* v. *Cordova Mines Limited* (1915), 8 O.W.N. 372.

The question in the action was purely one of fact, and there was nothing of any magnitude or of any public interest or importance involved; it was not probable that an appeal to the Privy Council would be permitted. There was no doubtful question of law of such general importance as to call for extraordinary interference: *Tabb* v. *Grand Trunk R.W. Co.* (1904), 8 O.L.R. 514.

ONT.

S. C.

TOWN OF FORT FRANCES v. ONTARIO AND MINNESOTA POWER CO.

Clute, J.

The following decisions of the Judicial Committee were referred to: *Johnston* v. *Minister and Trustees of St. Andrew's Church Montreal* (1877), 3 App. Cas. 159; *Valin* v. *Langlois* (1879), 5 App. Cas. 115; *Prince* v. *Gagnon* (1882), 8 App. Cas. 103; *City of Montreal* v. *Les Ecclésiastiques du Séminaire de St. Sulpice de Montréal* (1889), 14 App. Cas. 660; *Daily Telegraph Newspaper Co.* v. *McLaughlin*, [1904] A.C. 776; *Wilfley Ore Concentrator Syndicate Limited* v. *N. Guthridge Limited*, [1906] A.C. 545, 550.

Motion dismissed with costs.

Re ONTARIO AND MINNESOTA POWER CO. AND TOWN OF FORT FRANCES.

ONT.

S. C.

Ontario Supreme Court, Magee, J.A., in Chambers. August 28, 1915.

1. APPEAL (§ II C 4—65)—JURISDICTIONAL AMOUNT — APPEAL FROM TAX ASSESSMENT.

Statement

MOTION by the company for approval of the security lodged by them upon a proposed appeal to His Majesty in His Privy Council from the decision of a Divisional Court, 22 D.L.R., *ante*.

Magee, J.A.

MAGEE, J.A., said that, whether or not anything but questions of fact was involved, and whether or not an appeal on questions of assessment was intended to be allowed, the matter in controversy for the purposes of an appeal from the decision of the Divisional Court was not shewn to exceed $4,000.

Reference was made to *City of Toronto* v. *Toronto Electric Light Co.* (1906), 11 O.L.R. 310; *Canadian Pacific R.W. Co.* v. *City of Toronto* (1909), 19 O.L.R. 663; *Beardmore* v. *City of Toronto* (1910), 2 O.W.N. 479; *Fréchette* v. *Simoneau* (1900), 31 S.C.R. 12.

Application refused.

CAMPBELL v. THE NOVA SCOTIA STEEL AND COAL CO. LTD.

N. S.

S. C.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Russell, and Longley, JJ. March 9, 1915.

1. RAILWAYS (§ III—51)—OPERATION — SIGNALS AND FLAGMEN — YARD TRAIN.

Sec. 251 of the Railway Act, Can., under which a man must be stationed on the last car to give warning of the train's approach when it is moving reversely in a city, town or village, applies to a work train operating on the surface wholly within the plant of a company subject to the Railway Act, situate in a city, town or village as well as to cases where the streets of the municipality are crossed by the train moving backwards.

[*McMullin* v. *N.S. Steel Co.*, 39 Can. S.C.R. 593, applied.]

N. S.

S. C.

CAMPBELL v. NOVA SCOTIA STEEL AND COAL CO. LTD.

Graham, E.J.

APPEAL from a judgment of Ritchie, J.

W. A. Henry, K.C., for appellant.

T. J. W. Meagher, for respondent.

The judgment of the Court was delivered by

GRAHAM, E.J.:—This is an action under the Fatal Injuries Act to recover damages in respect to a deceased employee of the defendant company who, it is alleged, was killed by its negligence. Within the company's works a locomotive is used to draw two pots on wheels filled with molten metal from the blast furnace to the open hearth. There is a flat car between the locomotive and the first pot, I suppose because it is hot and might splash. The locomotive backs down to the loaded pots, then goes ahead up to the scales to be weighed, where there is a switch or "Y," then backs in to the shed, the pots ahead, where by means of an overhead crane and locomotive the metal is put into what is called the mixer. The evidence shews that backing into the shed is a better arrangement than the opposite course. The pots are about 15 or 20 feet in diameter and the flat car about 30 or 35 feet long. The flat car on each side protrudes in width beyond the track about four inches and beyond the space the pots take up 2 feet beyond the track itself. This operation is performed every 3 hours. On the occasion in question the locomotive signalled as usual by giving two short blasts, and this signal meant to those in the shed that the hot metal was coming, more particularly to the crane man to get ready to deal with it. It also was ringing its bell as it was backing down to announce its coming. Several witnesses proved this fact. In charge was a driver, fireman and brakeman. The rate of speed was about as fast as a man could walk. The duty of the deceased in this shed was to shovel up on the side of the track slag and refuse into pans. When the pots entered the building he was standing about 25 ft. within the entrance and about 4 ft. from the track with his back to the pots. He appears to have turned a bit and moved towards the track and he was struck in the back by the corner of the flat car, the pots having passed him. He was thrown down and his legs broken, from which injury he died.

The learned Judge was of opinion that sec. 251 of the Railway Act applied to this train.

It was held to apply in the case of *McMullin* v. *N.S. Steel*, 39 Can. S.C.R. 593, the case of a man who was shovelling snow being run over by a working train in the company's use.

That provision of the Act is as follows:—

> Whenever any train of cars is moving reversely in any city, town or village, the locomotive and tender being in the rear of such train the company shall station on the last car in the train a person who shall warn persons standing on or crossing the track of such railway of the approach of such engine, tender and train.

Then follows the penalty.

The learned Judge holds that this track operating wholly within the company's plant and free from thoroughfares is moving in a "city, town or village" and I think there is support for that in the *McMullin* case. Possibly if it were one of the trains in their mines operating in unlighted areas a different case might be presented.

To the argument that a man could not be stationed on the path of molten metal the learned Judge answers that the company must put on an additional car for the carrying of a look-out man and enlarge the works to make room for that car both where the metal is taken in, which would not be convenient, and where it is discharged. The learned Judge finds that the want of the man caused the accident to the deceased. He says: "I draw the inference of fact that he would have got out of the way and escaped if the man had been there."

It is difficult to say why the deceased stood so near the track approaching rather than retreating from it. One would have thought that the heat of the molten metal passing before he was struck would have aroused him to consciousness or the vibration caused by 50 tons' weight of each laden pot as it passed. I would have had some doubt when an appeal such as he had to all five senses except perhaps that of taste was ignored whether the man on the look-out would surely have prevented the accident. He may at the age of 70 have become dizzy or confused. However, that is the finding.

Then the learned Judge finds that there was no contributory negligence. First, as to the ringing of the bell he says, "Hopkins

N. S.
S. C.
CAMPBELL
v.
NOVA SCOTIA STEEL AND COAL CO. LTD.
Graham, E.J.

did not hear the bell and I draw the inference that Campbell did not hear it." But Hopkins was in a different place above the level of the train and in the midst of his own noisy machinery. It undoubtedly was ringing.

The learned Judge also gives as one reason that Campbell did not hear the bell, because, "It certainly does not seem probable that a man with notice from the bell that the train was right on him would remain where he might be struck." I think with deference these reasons do not advance the argument. And Hopkins, called by the plaintiff, says he thinks it likely that the deceased could hear the bell on that occasion. Also, that he would have heard it "if he had been looking particularly for the bell." The learned Judge finds that he heard the air whistles, the signal of its coming. Angus Campbell, the foreman of the yard, was talking with the deceased at the time that the train left the weighing scales, and whistled the two blasts. He says:—

Q. Did you hear the signal of the train? A. Yes, it was after the whistle blew that I left him. It was from the time the locomotive left the scale-house where they weigh the metal, from that time to the time the pot metal came in that I was walking out. . . . Q. What made you break off the conversation with him? A. I saw this metal coming after leaving the scale-house and there was a crane standing at the door, and I was on the way out to tell them to go away with it, but in the meantime they had left before I got there.

The object of the whistle, he says, was

To clear the road and tell the overhead crane man it was coming, and the ladle man. This whistle was to give everybody warning that the metal was coming.

At p. 39 he had said:—

Q. When you were talking to him he was standing near the track? A. Yes, probably four feet. . . . He would have cleared the train if he had stayed where he was then.

And at p. 38:—

Q. He must have moved in closer to the track? A. Yes, he must have. He could not have been hit where I saw him. Q. If he was in any further in the building it was due to the blow he got? A. He was practically standing in the same neighbourhood but nearer the track? A. That is all the difference.

Then the learned Judge finds that even if the deceased was guilty of contributory negligence yet the result of it could have

been avoided by the fireman telling the driver to stop the train when he first saw the deceased. When he first saw him the deceased was four feet away from the track and in a place of safety. And then he did not see him from the time the metal pots passed until he was struck, although he was looking in that direction. It is obvious that the deceased had moved towards the track. All of the witnesses prove that. In fact, he would not have been struck if he had remained where he was. Now the fireman had the right to presume that the deceased was going to act with ordinary care until he had some notice to the contrary. When he did see him again he told the driver to stop, but it was too late. The point that the fireman did not tell the driver to stop in sufficient time is not raised in the pleading, but perhaps that is not material. A man four feet away from the track not shewing any trace of being absorbed or of being inattentive to his surroundings was not a matter to excite attention. He was in perfect safety. Angus Campbell, who says that he was standing probably 4 feet from the track, answers:—

Q. Perfectly safe where he was standing? A. Yes, when I saw him.

It was the unexpected reduction of that distance, of which there is no explanation, which caused the accident.

The learned Judge finds:—

I find that the fireman became aware sometime before the car struck Cambpell that if he continued standing where he was, risk of being struck by the end of the car.

Now this is what the fireman, whom the plaintiff called, said about it:—

Q. You can't say? A. I am not positive which side I saw first when backing in. Q. Did you have your eyes on him all the time? A. I did not see him all the time.

By the Court:—

Q. When he was struck he was not in the same place as when you saw him? A. Yes, as when I saw him when backing in. Q. That was 4 feet away from the track? A. No, he was not 4 feet from track when he was struck. Q. He had moved? A. Yes, but he was in the same place from the door where I first saw him standing. Q. He had come nearer the track? A. He came nearer the track. Q. How far off the track was he when he was struck? A. He was right at the end of the flat car. That would be about 2 feet from the track. The end of the flat car would project about two feet over the end of the rail. Q. Do I understand you, you lost sight of him from the first time you saw him

N. S.

S. C.

CAMPBELL v. NOVA SCOTIA STEEL AND COAL CO. LTD.

Graham, E.J.

until he struck the flat car? A. I did not see him from the time that the hot mixer pots passed until he was struck by the flat car. Q. How was that that you lost sight of him? A. I can't explain it just right. Q. Were you looking; what was the reason? A. I was looking in the direction all the time. Q. Where had he disappeared to in the meantime? A. I might have cast down my eyes. Q. Tell when you saw him struck? A. When he was struck by the flat car he was standing. He was struck on the right side. He apparently turned around and the end of the flat car struck him. Q. The hot metal pots had passed him? A. Yes.

I have read the evidence over carefully and I must confess that on the question of contributory negligence I would, I think, have come to a different conclusion. But I believe this does not justify a Judge in all cases in reversing a judgment when the question is one of fact, although in this case there is no material conflict in the evidence.

Therefore, I dismiss the appeal and with costs.

Appeal dismissed with costs.

B. C.

C. A.

SCOTTISH CANADIAN CANNING CO. v. DICKIE.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. May 6, 1915.

1. CORPORATIONS AND COMPANIES (§ IV G2—116*a*)—MANAGING DIRECTOR—POWERS OF—LEASE.

The managing director of a company incorporated in England under the Companies Consolidation Act, 1908, to whom the company has given power of attorney to do all acts, execute all deeds and instruments as, in his opinion, may be necessary, convenient or expedient in relation to the property and business of the company, has authority to lease the company's salmon cannery and business as a going concern.

Statement

APPEAL from a judgment of Clement, J.

Ritchie, K.C., for appellant, defendant.

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

Macdonald, C.J.A. (dissenting)

MACDONALD, C.J.A., dissented.

Irving, J.A.

IRVING, J.A.:—The appeal is brought by the defendant Dickie only, who had obtained from Sherman (the other defendant) a lease of the company's cannery. The learned Judge came to the conclusion that although Sherman was to be allowed to remain in control under the agreement of April 7, 1914, it did not authorise him to make a lease of the property to Dickie, as the granting of such a lease would render it impossible for Sherman to hand over the company's property. Having placed that con-

B. C.

C. A.

SCOTTISH CANADIAN CANNING CO. v. DICKIE.

Irving, J.A.

struction on the agreement, he holds the company can attack the lease as against Sherman, and he therefore holds that as Dickie was an intimate acquaintance of Sherman, he, Dickie, is bound by the implied provision that the learned Judge reads into it.

As I read the learned Judge's reasons, that was the only ground on which he gave judgment against Dickie.

He did not find that Dickie was guilty of any fraud, or that the lease was a sham transaction. The basis of his judgment was that the action of Sherman in entering into the lease for the season of 1914 was of such a destructive character to the company's credit that the Court was justified in seeking the interposition of the Court to have him removed and the lease cancelled.

At present we are but indirectly concerned with Sherman. He has been attacked, and some things he has done seem ill-advised, but I am not able to say that Dickie has been guilty of fraud. To reach that conclusion you must be able to feel that you have looked into his mind and that evidence satisfies you of his guilt.

The power of attorney of October 6, 1911 (p. 319), authorises Sherman

> to do all such acts, matters or things and to execute all such deeds and instruments as, in the opinion of the attorney, may be necessary, convenient or expedient in relation to the property and business of the company.

This, in my opinion, would authorise a lease of the cannery and business as a going concern. The 14th article reads (p. 321 A.B.):

> To enter into, make, sign, seal, and deliver all such contracts, receipts, agreements, payments, assignments, sales, transfers, mortgages, assurances, instruments, and things as may, in the opinion of the said attorney be necessary, convenient, or expedient in relation to the property or business of the company in the said Dominion, and to act as a committee of the board of directors of the company for any of the purposes of this clause.

The 17th article is peculiarly strong. It is as follows:—

> And it is hereby declared that the said attorney, in exercising the powers hereby conferred upon him, shall conform to the regulations and directions for the time being imposed on or given to him by the company, and may sub-delegate to any person or persons any of the powers hereby conferred upon such terms and conditions as may seem expedient, and may at any time revoke any such sub-delegation, provided always that no person dealing with the said attorney or any such sub-delegate shall be concerned or entitled to see or enquire whether the said attorney or sub-delegate is or is not acting in accordance with such regulations or directions, and, notwithstanding any breach of such regulations or directions com-

B. C.

C. A.

SCOTTISH CANADIAN CANNING CO. v. DICKIE.

Irving, J.A.

mitted by the said attorney or sub-delegate in regard to any act, deed, instrument, or thing, the same shall, as between the company and the person or persons dealing with such attorney or sub-delegate, be valid and binding on the company to all intents and purposes.

The position of the managing director in May and June must have been one of great anxiety. The company had placed him in control, and had not nominated anyone with whom it was his duty to confer. Mr. Windsor's appointment was conditional, and the conditions had not been satisfied, and the season for organisation of the cannery was already at hand.

I would allow the appeal.

Martin, J.A.

MARTIN, J.A.:—I would allow the appeal.

Galliher, J.A. (dissenting)

GALLIHER, J.A., dissented.

[MARTIN and GALLIHER, JJ.A., did not give written reasons.]

McPhillips, J.A.

MCPHILLIPS, J.A. (after setting out the facts):—It is apparent that at the time of the entry into the Memorandum of Terms there was recognition by the company that the defendant Sherman was still clothed with the authority as previously set forth and as contained in the power of attorney and agreements with the company, that is, was still the managing director and in control.

This is all the more accentuated when clause 5 of the Memorandum of Terms is perused, considered, and given its true and proper construction:—

5. Until the provisions of Clause 4 becomes operative, Mr. Sherman to remain in control, but, provided the company makes the necessary financial arrangements, he will re-start and carry on the business of the company in Canada in consultation with any person nominated by the company for that purpose. It is understood that Mr. Sherman will not enter into any contract on behalf of the company without the consent of the said person nominated by the company, and that whilst he remains in control he will act as a loyal servant of the company and do his best to further its interests.

In my opinion the conditions precedent necessary to be performed to divest the defendant Sherman of the control vested in him of the company's property and business affairs were not performed; therefore the defendant Sherman stood in the position he stood in on October 6, 1911—at the time of the trial of this action—and was rightly entitled to justify all that he had done, as being the exercise of powers conferred upon him by the power of attorney and the agreement, each bearing date October 6, 1911.

B. C.

C. A.

SCOTTISH CANADIAN CANNING CO. v. DICKIE.

McPhillips, J.A.

With respect to one of the conditions precedent, that is, "the settlement under Messrs. Buttar & Chiene's certificates shall have taken place and any money due thereunder is paid to Mr. Sherman," the certificates had not issued or the award made at the time of the commencement of the action, namely, July 7, 1914, and although apparently an award was later made by Messrs. Buttar & Chiene—that is, on July 21, 1914—it was by the order of Mr. Justice Clement, under date September 29, 1914 (the learned trial Judge who tried this action), set aside; therefore it is plain that one of the events provided for was not performed—in fact, was impossible of performance.

Therefore, following out the construction I have put upon clause 5—that is, that upon the facts clause 4 did not become operative—then it is a matter for enquiry as to whether, the defendant remaining in control, the further contingency happened, *i.e.*, the company making the necessary financial arrangements, the defendant Sherman should re-start and carry on the business in consultation with any person nominated by the company for that purpose. As to this I fail to see upon the evidence that the company did make the necessary financial arrangements, nor was there any person nominated by the company with whom the defendant Sherman was to consult.

The learned counsel for the respondents strongly argued that the latter part of clause 5 was an inhibition upon the defendant Sherman and prevented him entering into any contracts or instruments on behalf of the company, save only with the consent of the person nominated by the company, and that that nominated person was J. W. Windsor. With deference, I cannot agree with this contention, as the evidence, in my opinion, does not support any nomination being made, and most certainly there is an entire absence of evidence that the financial arrangements were made.

Finally, with regard to the construction to be placed on clause 5, my opinion is that the position of the defendant Sherman upon the facts remained unaltered, and he was in control; and further, as provided by clause 5, being still in control, he was under compulsion to "act as a loyal servant of the company and do his best to further its interests."

The season of 1914 drew on, and it is apparent upon the

B. C.

C. A.

SCOTTISH CANADIAN CANNING CO. v. DICKIE.

McPhillips, J.A.

evidence that the defendant Sherman was anxious—in fact, alarmed—at the dilatoriness of the company in not making the proper financial and other arrangements to enter upon the season's work.

It is to be remembered that the defendant Sherman was still the managing director of the company, and answerable not only to his colleagues upon the board of directors but to the shareholders for the due discharge of the duty imposed upon him, and it was his bounden duty to exercise the powers conferred upon him, the exercise of which he had undertaken, and being still in control was it not reasonable—in fact, was it not incumbent upon him—to exercise his best judgment, placed as he was? I am convinced that it was his duty to take all such steps as in accordance with his best judgment were necessary to conserve the interests of the company. That being the case, who is to be entitled to question his conduct or acts and deeds in the carrying out of that which in his judgment would best advance the interests of the company? In answer it may be said that assuredly the company would be entitled to do this. Did the company, though, intervene? The answer upon the evidence is, No. It left the defendant Sherman in control, and entitled to, and, in my opinion, bound to act in the exercise of the powers conferred under the power of attorney and agreement of date October 6, 1911. In clause 17 of the power of attorney, it is true, the defendant Sherman was called upon to "conform to the regulations and directions for the time being imposed on or given to him by the company." The company upon the evidence left him in control, and that control he was rightly, in my opinion, entitled to exercise.

Now, to deal specifically with the judgment of the learned trial Judge, with which with all respect I entirely disagree.

There is first the injunction restraining the defendant Dickie from all right of entry upon the premises leased to him or the enjoyment thereof, the cancellation of the lease, and the imposition of damages against both defendants by reason of the possession taken by the defendant Dickie and the granting of the lease.

Now, with respect to this portion of the judgment, in what way can it be sustained? The defendant Sherman was—and I think it can be said to be admittedly—in control. In any case

B. C.

C. A.

SCOTTISH CANADIAN CANNING CO. v. DICKIE.

McPhillips, J.A.

it can be said that the learned trial Judge was of the opinion that he was in control. When referring to the Memorandum of Terms the learned trial Judge uses this language:—

> That agreement provides for the necessary transfer of stock, the issue of certificates, and so on; for a reference to a firm of accountants in Vancouver to audit the company's accounts and certify as to how the balance stood, and in the meantime the defendant Sherman was to "remain in control." That is the expression used in the agreement. Whatever that may mean, I do not think it authorized Sherman to take such a step as granting the lease to Dickie, which would render it impossible for Sherman to carry out the terms of the agreement.

It is to be remembered that the business of the plaintiffs was a cannery business, the canning of salmon, and the season to be taken advantage of is well known—*i.e.*, the *salmon run* season—and the arrangements to take advantage of the annual salmon run must be always made in the springtime of each year, if not before. This is a matter of common knowledge in British Columbia, and it is to be noted that not until June 6, 1914, did the defendant Sherman act, then absolutely despairing, as I read the evidence, of anything possible being done in the way of the company carrying on the season's work; and not until then did he take the step he did of leasing to the defendant Dickie. To have remained idle and done nothing would have been in my opinion a serious dereliction of duty upon his part. The policy or impolicy of what he did is not for the Court, but if I were to express my opinion, which may be said to be, of course, extra-judicial, he did a prudent act in the interests of the plaintiffs in executing the lease, and it was an act plainly within the scope of the authority vested in him and in the due exercise of the duty imposed upon him.

The evidence shews that to maintain a cannery business in good standing, *i.e.*, to preserve the good will and keep it a going concern, is vital; and this means continuous operation and the keeping together of the fishermen attached to its operation; and this means advances to the fishermen and continuation of employment to reimburse the company for not only present advances but for past due advances.

The Japanese fishermen presented a petition outlining the situation of affairs under date June 3, 1914 (see A.B. p. 396A), and in that petition is to be noted this language:—

> If you cannot protect us, we will be forced to go elsewhere, as we cannot afford to lose the only work we depend on for our living. Last winter

B. C.

C. A.

SCOTTISH CANADIAN CANNING CO. v. DICKIE.

McPhillips, J.A.

was a very hard one on us, as we had not much work. And we cannot live on promise much longer, as our friends at other cannery have received their wants long ago, whereas our position looks very hopeless if we continue to wait. Please accept this statement, for when other canneries hear we are leaving in a body they willingly receive us, and would be hard to get the men back again. Hoping you will give this your immediate consideration.

Independent of the lease granted to the defendant Dickie, an agreement was entered into between the plaintiffs and the defendant Dickie of date June 6, 1914, and from a recital therein it is seen that the Japanese fishermen were indebted to the plaintiffs, and the arrangement made was to have the defendant Dickie get in these moneys, which could only be accomplished by the carrying on of the business during the season of 1914. In fact the transaction was one throughout, in my opinion, conceived with the honest intention of safeguarding the interests of the plaintiffs in every way. To enter into the details and the matters of account would be a task that in my opinion is not cast upon the Court in this appeal.

The defendant Dickie was, as the evidence shews, to pay for all stock in hand and taken over, and to indicate that he at once undertook the burden of matters to keep the business intact and as a going concern it is only necessary to refer to the statement of the cash paid out commencing with June 6 and ending with July 8, 1914, as contained in the statement thereof (see A.B., pp. 440, 441, 442), in the whole $9,575.73. Included in this amount is the sum of $500 on account of the rent, which was $3,000 for the term leased, namely, until December 31, 1914.

The defendant Sherman, according to my view of the evidence, made a truthful disclosure of all that he did in his letter to W. E. Holland, the secretary for the plaintiffs, being of date June 8, 1914 (see A.B., pp. 413-415), and it is to be remembered that the defendant Sherman was acting under the power of attorney and agreement entered into with him, and was the managing director with the power to act as a committee of the board of directors, and in my opinion all that he did was binding upon the plaintiff, and in my opinion it is idle argument to contend otherwise.

When the defendant Dickie was considering the proposition that he should lease the property of the plaintiffs and carry on the cannery for the season of 1914, he proceeded, in my opinion, in the manner a careful and prudent man would under the circum-

stances, and amongst other things he took legal advice as to the authority in the defendant Sherman to make the lease and the other business arrangements, and was advised that the defendant Sherman could make the lease—and in fact the defendant Dickie himself saw the power of attorney. In view of these facts, and in particular of clause 18 in the power of attorney, reading as follows:—

> 18. And it is hereby declared that the said attorney, in exercising the powers hereby conferred upon him, shall conform to the regulations and directions for the time being imposed on or given to him by the board of directors of the company, and may sub-delegate to any person or persons any of the powers hereby conferred on him upon such terms and conditions as may seem expedient, and may at any time revoke any such sub-delegation, provided always that no person dealing with the said attorney or any such sub-delegate shall be concerned or entitled to see or enquire whether the said attorney or sub-delegate is or is not acting in accordance with such regulations or directions, and, notwithstanding any breach of such regulations or directions committed by the said attorney or sub-delegate in regard to any act, deed, instrument or thing, the same shall, as between the company and the person or persons dealing with such attorney or sub-delegate, be valid and binding on the company to all intents and purposes.

Can it be contended with any possibility of success that the lease is not good and sufficient and of legal effect, even if the defendant Sherman were acting not in accordance with regulations and directions imposed upon him or given to him by the board of directors? It would seem to me that upon the facts it can only be said that the lease is unassailable and is binding upon the plaintiffs. As a matter of sequence it then follows that in my opinion the lease was a good and subsisting lease and the learned Judge was in error in setting the same aside and declaring it null and void and in declaring that the defendant Dickie was a trespasser and in granting an injunction against him and in finding damages by reason thereof against both of the defendants, and that the judgment should be reversed.

There is still to be considered the remaining portions of the judgment—setting aside the bill of sale of May 26, 1914, the real estate mortgage of the same date, and the mortgage of the leasehold property, also of the same date, made by the plaintiffs to the defendant Sherman, and the injunction against the defendant Sherman. The learned trial Judge erred, in my opinion, in this as well. It would seem to me that these securities were

B. C.
C. A.
SCOTTISH CANADIAN CANNING CO. v. DICKIE.
McPhillips, J.A.

contemplated in the memorandum of terms. It is there set out that there is to be a mortgage in the defendant Sherman's favour for £3,500 as security for any balance found to be due to him, and it would appear that the security was to be given before the taking of the accounts and the making of the certificates. The giving of the several instruments, namely, bill of sale, real estate mortgage, and mortgage of leasehold property, was merely a matter of conveyancing—convenient and perhaps necessary—and it will be noted all securities were for the same amount, $17,033.33—the presumed equivalent of £3,500—and it is apparent all three instruments were securing only the one sum of $17,033.33.

With regard to the injunction against the defendant Sherman exercising any control and acting as the agent of the plaintiffs in any way, I fail to see upon what evidence the learned trial Judge proceeded, and with all respect in my opinion there was no warrant for any such holding or authority to make any such declaration.

It therefore follows that in my opinion the whole judgment should be reversed, the action dismissed, the appeal to this Court being allowed, the appellants to have the costs here and in the Court below.

Appeal allowed.

ONT.
S. C.

GOODERHAM v. TORONTO R. CO.

Ontario Supreme Court, Falconbridge, C.J.K.B., Riddell, Latchford, and Kelly, JJ. March 2, 1915.

1. STREET RAILWAYS (§ III B—27)—DUTY AND CARE—COLLISION WITH AUTOMOBILE—WANT OF NEGLIGENCE.

An action for injury to an automobile by a collision with a street car on turning a corner cannot be maintained against the electric railway if there was no evidence to warrant the jury in finding that the motorman by exercising reasonable care could have stopped his car and have avoided the collision after he had become aware or ought to have become aware that danger was imminent.

Statement

APPEAL by the defendants from the judgment of the County Court in an action for damages.

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

T. P. Galt, K.C., for plaintiff, respondent.

Latchford, J.

The judgment of the Court was delivered by LATCHFORD, J.:—The evidence discloses nothing to warrant the finding of the jury that the motorman, by exercising reasonable care, could

ONT.

S. C.

GOODERHAM v. TORONTO R. CO.

Latchford, J.

have stopped his car, and thus have avoided the collision, after he became aware or ought to have become aware that danger was imminent.

No signal indicating an intention to turn eastward was given from the automobile. The motorman had not the slightest reason for apprehending that the chauffeur would change his course and turn eastward around the corner.

As there is no evidence on which the finding of negligence can be based, the action fails.

The appeal should be allowed with costs here and below.

Appeal allowed.

BARISINO v. CURTIS & HARVEY LTD.

ONT.

S. C.

Ontario Supreme Court, Falconbridge, C.J.K.B., Riddell, Latchford, and Kelly, JJ. February 16, 1915.

1. ESTOPPEL (§ III J 3—130)—ACTS IN JUDICIAL PROCEEDINGS—DEPOSING AS PLAINTIFF TO EXAMINATION FOR DISCOVERY.

A person who upon being served with an appointment for examination for discovery appears before the examiner and swears that he is the plaintiff will be estopped from denying after the claim has been dismissed with costs that he was the real plaintiff, where the defendants proceeded to trial on the assumption that he was the plaintiff notwithstanding a slight difference in name.

Statement

APPEAL by the defendants from an order of a Judge of a District Court.

This action was begun in that District Court in the name of "Barisino" as plaintiff. There being no one of that name, one Bardessano, who had a claim against the defendants, was served with an appointment for examination for discovery, at the instance of the defendants. He appeared, with a solicitor, before the examiner, and swore that he was the plaintiff, gave particulars of his claim, etc. The action proceeded on that basis, and at the trial evidence was given on behalf of the plaintiff. Judgment went for the defendants, who taxed their costs. Upon the Sheriff attempting to seize the goods of Bardessano, on a writ of fieri facias for these costs, Bardessano denied that he was the plaintiff. The defendants applied ex parte to the District Court Judge, who made an order on the 26th October, 1914, directing that the judgment and writ of fieri facias should be amended by inserting in the style of cause, as plaintiff, the name of Bardessano in place of Barisino. Bardessano moved before the Dis-

ONT.
S. C.
BARISINO
v.
CURTIS & HARVEY LTD.

trict Court Judge to set aside the order of the 26th October, and on the 21st December, 1914, the Judge made an order setting aside the said order of the 26th October.

R. McKay, K.C., and *J. M. Hall*, for the defendants, appellants.

L. Duncan, for Bardessano, respondent.

THE COURT held that, although the District Court Judge had jurisdiction, under Rule 217, to entertain the motion to set aside his own ex parte order, he should not have set it aside, upon the facts. Bardessano, by representing himself as the plaintiff, a representation upon which the defendants acted, was estopped from saying that he was not the real plaintiff.

Appeal allowed with costs here and below.

Appeal allowed.

B. C.
C. A.

SLEUTER v. SCOTT.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and McPhillips, JJ.A. April 6, 1915.

1. CONTRACTS (§ VIII—435)—WRONGFUL INTERFERENCE WITH—ACTIONABILITY.

An intentional violation of the plaintiff's legal right by an interference with his contractual relations without sufficient justification, founds a good cause of action and damages are recoverable therefor.

[*Sleuter* v. *Scott*, 16 D.L.R. 659, affirmed; *Quinn* v. *Leathem* [1901] A.C. 495, 70 L.J.P.C. 77; *Giblan* v. *National*, [1903] 2 K.B. 608, 72 L.J.K.B. 907, referred to.]

Statement

APPEAL by defendants from judgment of Murphy, J., 16 D.L.R. 659.

Alfred Bull, for appellant.

J. W. de B. Farris, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The appeal should be dismissed. There was only one point pressed upon us by appellants' counsel—namely, that the penalty imposed by the defendants upon the plaintiff was not for an assault upon their business agent Hampton, which penalty would be unauthorised by defendant association's constitution and rules, but as a punishment for breach of a rule of defendant association in connection with his work as a foreman plasterer.

The minutes of the defendant association are against this con-

tention, the finding of the learned trial Judge is against it, and with that finding I agree.

The facts being thus decided against the appellants, there is no difficulty in applying the law, and, in my opinion, the learned Judge has applied it correctly.

IRVING, J.A.:—I would dismiss the appeal. The punishment inflicted was for an assault. This is absolutely plain from the minute book, p. 187.

The plaintiff had a cause of action in that there was an intentional violation of a legal right by an interference with his contractual relations without sufficient justification.

In *Quinn* v. *Leatham*, [1901] A.C. 495, 70 L.J.P.C. 77, the cause of action was that the defendants did attempt to ruin the plaintiff's business by coercing his customers. The cause of action was complete without the conspiracy—what was done there was done in spite.

In *Giblan* v. *National*, [1903] 2 K.B. 608, 72 L.J.K.B. 907, the cause of action was that the defendants, in order to compel plaintiff to pay his dues, induced other people to break their contracts with him.

In *Perrault* v. *Gauthier* (1898), 28 S.C.R. 241, the man left voluntarily, or rather in a spirit of loyalty to his employer.

Graham v. *Knott* (1908), 14 B.C.R. 97, may be right according to the facts of that case, but, on the authority of the two first cases above cited, I would support the judgment.

MCPHILLIPS, J.A.:—In my judgment, the judgment of Mr. Justice Murphy was right and ought to be affirmed.

I am, therefore, of the opinion that the appeal should be dismissed.

Appeal dismissed.

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases decided by local or district Judges, Masters and Referees.

QUE.

C. R.

SIMPCHECHEN v. MONTREAL TRAMWAYS CO.

Quebec Court of Review, Sir Charles P. Davidson, C.J., Archibald and Greenshields, JJ.

[*Simpchechen* v. *Montreal Tramways Co.*, 46 Que. S.C. 77, corrected.]

APPEAL (§ VII L 2—476)—*Review of verdict—Principle applicable in Appellate Court.*]—Appeal from the judgment of the Superior Court in favour of the plaintiff for $1,930 damages.

Trihey & Co., for plaintiff.

Perron & Co., for defendant.

THE COURT (GREENSHIELDS, J., dissenting) affirmed the judgment appealed from. The principle to be applied is that the verdict must stand if it be one which the jury as reasonable men might find upon the evidence, although the trial Judge or the Appellate Court may be of opinion that a different finding would have been more satisfactory.

NOTE.—The opinion of GREENSHIELDS, J., published 46 Que. S.C. 77, was the dissenting judgment and not the opinion of the majority.

Judgment confirmed.

B. C.

C. A.

VOGEL v. McLEOD.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and McPhillips, JJ.A. February 26, 1915.

ACCOUNTING (§ I—1)—*Division of interests in syndicate property—Advances by one member of syndicate.*]—Appeal by defendant from judgment of Murphy, J., confirming a report of the District Registrar on an accounting.

Douglas Armour, for appellant.

J. E. Bird, for plaintiff, respondent.

THE COURT held on the facts that there was an error in the report and reduced the amount of the judgment accordingly.

Appeal allowed.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. MOORE. ONT.

S. C.

Ontario Supreme Court, Kelly, J. May 27, 1915.

JUDGMENT (§ I G—55)—*Correction—Power of Court where judgment as issued does not conform to judgment as pronounced.*]—Motion by the plaintiffs for an order correcting the judgment of KELLY, J., after the trial of this action, as drawn up and issued, so as to conform to the judgment as pronounced. The judgment bore date October 25, 1913. The reasons are noted in 5 O.W.N. 183. The judgment was in the plaintiffs' favour, with a reference to the Master in Ordinary to calculate interest, etc. An appeal was taken to the Appellate Division, and the judgment, with one variation, was affirmed: see 16 D.L.R. 871. The reference then proceeded, and the Master calculated interest, compounded, on several items found in favour of the plaintiffs. An appeal by the defendant from the Master's report came before KELLY, J., who dismissed it: see 7 O.W.N. 684. From the order dismissing the appeal, the defendant appealed to the Appellate Division; and that appeal was pending and undisposed of when the present application was made.

A. B. Cunningham and *J. J. Maclennan*, for plaintiffs.

A. J. Russell Snow, K.C., for defendant.

KELLY, J., said that the judgment of October 25, 1913, in the form in which it was settled and issued, did not correctly express the judgment which he pronounced, or which at the time he intended to pronounce.

Where the judgment as issued fails to express the judgment as pronounced it may be corrected: *Laurie* v. *Lees* (1881), 7 App. Cas. 19, 34; *In re Swire* (1885), 30 Ch. D. 239, 243, 245, 247; *Hatton* v. *Harris*, [1892] A.C. 547; *Milson* v. *Carter*, [1893] A.C. 638; *Preston Banking Co.* v. *William Allsup & Sons*, [1895] 1 Ch. 141, 143.

If the effect of the decision of the Appellate Division upon the appeal from the judgment now sought to be corrected is to declare that the interest chargeable against the defendant is to be computed by a different method and on a different principle from that which the learned Judge intended to apply when he pronounced judgment, it would be beyond his power—

ONT.
S. C.

in fact it would be useless—now to attempt to amend the judgment. Had he the power to do so, he would now amend the judgment; but, as the judgment had been in review before the Appellate Court, he could not interfere.

Motion refused without costs.

[June 1, 1915. Appeal to Appellate Court. Appeal dismissed.]

TORONTO GENERAL TRUSTS CO. v. GORDON, MACKAY & CO.

Ontario Supreme Court, Appellate Division, Maclaren, J.A., Riddell, Latchford, and Kelly, JJ. May 15, 1915.

[*Toronto General Trusts v. Gordon, Mackay & Co.*, 21 D.L.R. 394, reversed.]

CONTRACTS (§ II A—128)—*Construction—Sale of stock and assets of commercial company—Ascertainment of amount payable—Ambiguity—Subsequent correspondence between solicitors—Modification—Estoppel.*]—Appeal from the judgment of MIDDLETON, J., 21 D.L.R. 394, 33 O.L.R. 183.

C. J. Holman, K.C., and *J. D. Bissett*, for appellants.

I. F. Hellmuth, K.C., and *J. H. Fraser*, for defendants.

The judgment of the Court was delivered by

RIDDELL, J.—The late Joseph Mickleborough, on February 16, 1912, made an agreement with the defendants. He died on November 26, 1912, and the plaintiffs are the executors of his last will and testament.

The sole question at issue in this action is the true interpretation of clause No. 5 of the agreement, as follows:—

5. The said Gordon Mackay & Company Limited will pay the said Joseph Mickleborough for the said shares an amount equal to the value of the said goods, wares and merchandise and fixtures ascertained as herein provided as follows: $20,000 by converting 200 of the said shares into first preference shares bearing dividends to be guaranteed by Gordon Mackay & Company Limited, at the rate of 6 per cent. per annum payable half-yearly, computed from the 1st day of March, 1912, such shares to be redeemable at par within five years from the 1st day of March, 1912, and the purchaser shall be bound to redeem such shares not later than five years and not to carry any voting power or such voting power to be exercised by Gordon Mackay & Company Limited, as they may elect; $20,000 in cash and balance in monthly sums of $1 000 each, with interest on the balances remaining unpaid at 6 per cent. per annum payable half-yearly, computed from said date.

ONT.
S. C.

Admittedly the "basis" of the agreement, as referred to in the second recital, is existent—there was $50,000 paid of stock and more than $50,000 worth of assets.

I do not think it at all doubtful or ambiguous what the meaning of clause No. 5 is—the stock in trade is to be taken and valued, 85 per cent. of that valuation is taken as part of the amount to be paid: add to that the $5,000 at which the fixtures are to be valued under clause No. 2 and the amount found under clause No. 9. The sum of these is the purchase-price: payable $20,000 in stock guaranteed by the defendants, $20,000 cash, and the remainder $1,000 per month.

I am unable to see how the subsequent correspondence between the solicitors or the transactions in or by the company can be said to modify this plain contract or to substitute a new contract in its place. If for no other reason, Mr. Glenn is not shewn to have had authority to modify the contract or make a new one.

Nor is there anything upon which an estoppel can be founded.

I am of opinion that the appeal should be allowed and judgment entered for the plaintiffs with costs here and below.

Appeal allowed.

TORONTO GENERAL TRUSTS CO. v. RITCHIE.

Ontario Supreme Court, Hodgins, J.A. April 24, 1915.

MORTGAGE (§ VI G—100)—*Mortgagors and Purchasers Relief Act—Leave to continue sale—Mortgagor failing to pay interest, taxes or insurance—Application unnecessary.*]—Motion by the plaintiffs for leave to continue mortgage sale proceedings.

T. S. Elmore, for plaintiffs.

N. D. Maclean, for defendants.

HODGINS, J.A.:—The defendants object that the motion is unnecessary, as default was made in payment of interest, which continued until the proceedings were begun. The plaintiffs rely upon the language of sec. 2, sub-sec. (*a*), of the Mortgagors and Purchasers Relief Act, 1915, which provides that "no person shall take or continue proceedings by way of foreclosure, sale,

ONT.
S. C.

or otherwise . . . for the recovery of principal money secured by any mortgage of land, or any interest therein, made or executed prior to the 4th August, 1914, except by leave of a Judge granted upon application as hereinafter provided."

In my opinion, that section of the Act contains the general rule, but it is subject to the exceptions found in the later sections of the statute. By sub-sec. 3 of sec. 4 thereof, it is provided that where default is made in payment of interest, rent, taxes, insurance or other disbursements which the mortgagor has covenanted or undertaken to pay, the mortgagee shall have the same remedies, and may exercise them to the same extent, and the consequences of such default shall in all respects be the same, as if this Act had not been passed.

This leaves the mortgagee untrammelled where such a default has occurred. The mortgagor, however, can pay into Court or tender to the mortgagee the interest, rent, taxes, or other disbursements in question; and, if he does this, the mortgagee's proceedings must cease until he obtains an order under sec. 2.

The Act seems to be intended to render an application unnecessary where a mortgagor fails to pay his interest, taxes, insurance, etc., and to permit realisation as before the Act of both principal and interest and other charges; but where he pays interest, etc., it is designed to protect him from proceedings to compel payment of principal, unless by leave of the Court.

In this case, in view of the fact that there was interest in arrear when the proceedings were taken, it was not incumbent on the mortgagees to make any motion under the Act, and the application will be dismissed.

As the point arises for the first time, as I understand, and on a new statute, there will be no costs of the application to either party.

ALTA.
S. C.

FOSTER v. HOPE.

Alberta Supreme Court, Beck, J. June 30, 1915.

APPEAL (§ I C—25)—*Police magistrate—Order made under Masters and Servants Ordinance—Right of appeal—Summary convictions.*]—Motion for prohibition in each of these two cases—to prohibit proceedings in appeal. Orders were made by the

ALTA.
S. C.

Police Magistrate, Edmonton, for the payment of wages under the Masters and Servants Ordinance (C.O. 1898, ch. 50, amended 1909, ch. 4, sec. 4; 1911, 12 ch. 4, sec. 11; 1915, ch. 2, sec. 12), and the sole question I have to decide is whether there is a right of appeal.

Byers, for Foster.
McCaffry, for Snider.
Day, for Hope.
Winkler, for Saviloff.

BECK, J.:—The answer depends upon the Act respecting Police Magistrates and Justices of the Peace (1906, ch. 13; amended 1907, ch. 5, sec. 9; 1908, ch. 20, sec. 10; 1909, ch. 4, sec. 8; 1911-12, ch. 14), or rather upon sec. 8 of that Act which, under the sub-title "Procedure," reads as follows:—

8. Except it is otherwise specially provided, all the provisions of Part XV. of chapter 146 of the Revised Statutes of Canada 1906, being an Act of the Parliament of Canada known as the Criminal Code, and the Acts already passed or which may be hereafter passed amending the same shall apply to all proceedings before Police Magistrates and Justices of the Peace under or by virtue of any law in force in the province (or municipal by-laws, and to appeals from convictions or orders made therein.)

The words in brackets were introduced by ch. 8 of 1900, sec. 1. There is also the provision of the Interpretation Act (1906, ch. 3), which, as amended by ch. 9 of 1913, sec. 11, reads as follows: (Sec. 7, clause 49):—

Unless otherwise therein specially provided, proceedings for the imposition of punishment by fine, penalty or imprisonment for enforcing any provincial statute or municipal by-law may be brought summarily before a justice of the peace under the provisions of Part XV. of the Criminal Code and amendments thereto; and the words "on summary conviction" whenever they occur in any Act shall refer to and mean under and by virtue of Part XV. aforesaid.

(See also clause 51 as amended by the same sec. of the Act of 1913.)

On the part of the applicants it is urged that, there being no right of appeal from the decision of a Police Magistrate or of a Justice of the Peace unless such right is give by statute, the provisions of sec. 8 of the Act respecting Police Magistrates and Justices of the Peace respecting appeals must be taken to apply

ALTA.
S. C.

as a mere matter of procedure where the right of appeal is otherwise expressly given. It may be that the provision is ambiguous, but after consideration I think the section must be taken as sufficiently expressing the intention to give a right of appeal in all cases of summary conviction or summary order under provincial statute or municipal by-law.

On a casual examination of many ordinances and statutes of the province, I find none where a right of appeal is expressly given, with the result that, unless the provision under consideration gives the right of appeal, none exists in the case of a conviction or order made under probably any provincial statute or municipal by-law.

Against a conclusion with such a result we have the continued assumption by the former Supreme Court of the North West Territories and the Courts of the province that the right of appeal does exist; and we have furthermore legislative recognition of the existence of that right. I find such legislative recognition in the Liquor License Ordinance, C.O. 1898, ch. 89. There is, so far as I have found, no express provision for appeal from any summary conviction under that Ordinance; yet, by Ordinance (1900, ch. 32, sec. 22; amended 1901, ch. 33, sec. 21) it is provided that no appeal shall lie unless within a limited time an affidavit to a certain effect is filed. It is to be noted too, that if there is no appeal there is no right to have a case stated for that is a form of appeal and is so designated in several sections of Part XV.

For these reasons I must refuse the motion for prohibition. The question of costs may be spoken to after the hearing of the appeals. I take the liberty of adding that in my opinion it would be well if the Provincial Legislature would take away the right of appeal, except by way of a stated case, from the decisions of Police Magistrates in cities of a certain population and thus assimilate the rule in cases under provincial statutes to that under the Criminal Code in respect of certain indictable offences dealt with by such magistrates.

WILSON v. SMITH. ONT.

S. C.

Ontario Supreme Court, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. March 15, 1915.

EASEMENTS (§ IV—45)—*Drainage and water supply—Adjoining tenement—Severance of the property—By-law making it unlawful to drain two tenements by common pipe—Termination of.*]—Appeal by the plaintiff from a judgment dismissing an action.

J. L. Schelter, for appellant.

H. Carpenter, for defendant, respondent.

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—The action is brought to recover damages for the stopping up by the respondent of a drain for carrying off the refuse water and sewage from number 261 Wellington St., in the city of Hamilton, and for his stopping up the water pipe by which the house was supplied with city water; for a declaration that this house "might enjoy the easements of drainage and water supply," by means of this drain and water pipe, through the adjoining property of the respondent, number 263, to the main sewer and water main; and for an injunction restraining the respondent from interfering with these alleged easements.

The respondent was the owner of 50 feet of lot No. 179 on the west side of Wellington street, in John Ferguson's survey of the block bounded by Wellington, Barton, Catheart, and Robert streets, and on the 20th March, 1913, conveyed to the appellant the southerly 25 feet of the lot, which is further described as "being the lands occupied by and used with the premises known as city number 261 Wellington street north;" and the remainder of the lot is known as city number 263, and is still owned by the respondent.

This conveyance is made in pursuance of the Short Forms of Conveyances Act, and it contains no habendum, but does contain covenants and bar of dower in the statutory form.

Both 261 and 263 were, at the time of the sale to the appellant, occupied as "one dwelling-house and one 'lean-to,'" and they were all under one roof. As I understand the evidence, the "lean-to" is No. 261, and about 8 months before the sale of it to the appellant it was let by the respondent to a tenant. The pipe connection with the main sewer was at this time in No. 263 only;

ONT.
S. C.

and, when No. 261 was rented, the respondent made a connection from his connecting pipe to a temporary closet on No. 261. A connection from the water pipe in No. 263 had been made previously for the convenience of a former tenant of No. 261, and that was the position of matters when the conveyance was made to the appellant.

It is contended by the appellant that, by the conveyance, there passed to him the right to have uninterrupted use of the drain leading from house No. 261 through house No. 263 to the drain pipe in it, and the right to have the water conveyed to house No. 261 through the pipe leading to it from house No. 263; and in support of this contention *Israel* v. *Leith* (1890), 20 O.R. 361, and the cases there referred to, were cited and relied upon.

It was argued for the respondent that, in the circumstances of this case, *Israel* v. *Leith* has no application; that the drain and water pipes in question were put in for a merely temporary purpose in connection with the "lean-to," and for the accommodation of the tenants of it, and were not intended to be permanent; that the "lean-to" was a very old building, and it had been the intention of the respondent, if he had not sold it, to pull it down and replace it by another structure; and that Frohman, to whom the respondent appears to have sold the land now owned by the appellant, who acquired Frohman's right, intimated to the respondent, at the time he purchased, that it was his intention to pull down the building and put up another; that, according to the by-laws of the City of Hamilton, it is unlawful to drain two separate tenements by means of a common pipe within either of them, and it is also unlawful for any person, being an occupant or tenant in any house or building, to use or apply the water supplied to it to the use or benefit of others, without permission in writing having been first obtained from the waterworks department; and that, after the conveyance to the appellant, it was not only the right but the duty of the respondent, in order to conform to the provisions of these by-laws, to discontinue the joint system of drainage, and to discontinue to use or apply the water which was supplied by the pipe which led to his building, to the use or benefit of the occupant of the appellant's building without the permission prescribed by the by-law, which had not been obtained.

ONT.

S. C.

The learned County Court Judge gave effect to the latter of these contentions of the respondent; and we cannot say that he erred in so doing. If the respondent had not taken the course he did of cutting off the connections between the pipes on his land and the land of the appellant, he would have been liable to be fined for breaches of the by-laws; and it cannot be, I think, that the appellant had the right to insist upon the unlawful means which were in use for supplying him with water, and to provide an outlet for his drainage being continued; and I am of opinion that, if easements for these purposes had passed by conveyance to the appellant, they came to an end when the use of these means became unlawful. See by-law No. 41, sec. 38, sub-secs. 4 and 5, by-law No. 54, sec. 4, sub-sec 3, and by-law No. 79, sec. 6, as to soil pipes and drains; and by-law No. 1388, sec. 42, as to the water supply.

For these reasons, I would affirm the judgment of the learned Judge, and dismiss the appeal with costs.

Appeal dismissed.

SASKATOON HARDWARE CO. v. PRIEL.

SASK.

S. C.

Saskatchewan Supreme Court, Newlands, Brown, and Elwood, JJ. July 15, 1915.

GARNISHMENT (§ II D—50)—*Payment into Court by garnishee—Defence of—Rights of unpaid vendor of goods—Disposition as to costs.*]—Appeal from District Court.

Morton, for appellant.

No one *contra*.

The judgment of the Court was delivered by

ELWOOD, J.:—This is an action brought by the plaintiff to recover from the defendant the price of certain brick, alleged to have been sold by the plaintiff to the defendant.

The District Court Judge found that the plaintiff had sold to the defendant the brick sued for, and that the sale had been made through the agency of one Black.

It appears that, subsequent to the sale, Black was sued by the Saskatoon Supply Co. and the garnishee summons issued in that suit was served upon the defendant as garnishee, and the defendant, under that garnishee summons, paid the money into

SASK.

S. C.

Court, suggesting that the plaintiff had a claim upon the money. Apparently no disposition has been made of the money so paid into Court.

The learned District Court Judge, while holding that the sale was from the plaintiff to the defendant, further held that the defence of payment into Court under the garnishee proceedings was a good defence; that the plaintiff had the right to bring the action and the defendant had the right to defend, and that the costs of both parties should be paid out of the money in Court, subject to the fact that the money is found not to belong to the Saskatoon Supply Co.

He further stated that he would reserve judgment until such time as the right of the Saskatoon Supply Co. to the money is threshed out.

I am of the opinion that, under the finding of the District Court Judge, that the sale was made by the plaintiff to the defendant, the plaintiff is entitled to judgment for the amount of his claim and costs.

Rule 516 provides that payment made by, or execution levied upon, a garnishee under any such proceedings as aforesaid, shall be a valid discharge to him against the judgment debtor to the amount paid or levied.

It will be observed that it is only a discharge as against the judgment debtor, and the judgment debtor in the action under which the money was paid into Court, was not the plaintiff in this action, but Black; and, therefore, the Rule affords no protection as against the claim of the plaintiff.

The defendant did file a suggestion that the plaintiff was entitled to the money, but apparently took no steps, as I apprehend he should have done, to have that question determined, but simply relied upon his defence of payment into Court.

I cannot understand upon what principle the defendant's costs would be payable out of the money in Court. In my opinion, therefore, the appeal should be allowed, and judgment entered for the plaintiff against the defendant for the amount of the plaintiff's claim and costs and the plaintiff should have its costs of this appeal.

Appeal allowed.

HUNT v. BECK.

ONT.

S. C.

Ontario Supreme Court, Local Judge Stone, Referee, July 22, 1915.

WATERS (§ II C—87)—*Damming water—Interference with river driving operations in lumbering.*]—Trial of action for damages by plaintiffs who are timber operators for the increased cost of river driving due to the closing of the dam erected by the defendants, the upper riparian proprietors and the consequent interference with the natural flow of the water upon which the plaintiffs were dependent to float their logs at the time of the spring freshets.

U. McFadden and *E. V. McMillan*, for plaintiffs.

T. E. Williams and *T. A. Mulligan*, for defendants.

JUDGE STONE, Referee, held that under the Rivers and Streams Act, Ont., the right of plaintiffs to the use of the natural flow of the Thessalon River for the purpose of driving their timber is paramount to the right of defendants to construct dams and impound the waters for their own use: *Rainy River Nav. Co.* v. *Ontario and Minn. Power*, 17 D.L.R. 850, 6 O.W.N. 533; *Rainy River Nav. Co.* v. *Watrous Island Boom Co.*, 6 O.W.N. 537. The plaintiffs are entitled to recover from defendants the amount of their loss arising from the hindrances and delay caused by the action of the defendants in impeding the natural flow of the water. He found the increased cost of the actual drive above that of a normal drive at $1,881.02, to which would be added $330 for the loss of time of the two plaintiffs, which they should recover.

Judgment for plaintiffs.

CLAVIR v. C.N.O. R.W. CO.

Ontario Supreme Court, Falconbridge, C.J.K.B. January 21, 1915.

DAMAGES (§ III L—230)—*Railway—Construction of subway — Injury to property — Action maintainable.*] — Action for damages.

G. H. Kilmer, K.C., and *G. C. McGaughey*, for plaintiff.

A. J. Reid, K.C., for defendants.

ONT.
S. C.

FALCONBRIDGE, C.J.K.B.:—At the request of, and accompanied by, counsel for both parties, I viewed the property. There is a note on the subject at p. 41 of the stenographer's extension of the evidence.

1. As to the closing of Commercial street, there is no object in considering the question of liability, because it is no damage to the plaintiff or his property.

2. The same remark applies to the subsidence of the plaintiff's building. This was not caused by any thing done by the defendants in the construction of their railway, or the excavation made by them for the retaining wall beside their right of way, at the bottom 7 ft. 6 in. from the plaintiff's foundation. That subsidence was due to defects in the plaintiff's own building causing it to settle down in the centre. This is clearly shewn by the evidence of the Devines and other witnesses, and is confirmed by the appearance of the ground, which shews no trace of earth having fallen into the defendants' excavation, which was a clean cut.

3. I allow for two months' loss of rent while the sewer was disconnected $70.00
and for a window or two broken by blasting..... 5.00

$75.00

4. There were no substantial damages proved arising from smoke, noise, and vibration in the operation of the railway, even if such were recoverable.

The defendants did not expropriate any of the plaintiff's land.

5. The evidence shews that the construction of the subway has damaged the property to the extent of $400. With some doubt, I think that item is recoverable in this forum.

Judgment for the plaintiff for $475 and costs.

ALTA.
S. C.

STEPAN v. NATIONAL ELEVATOR CO.

Alberta Supreme Court, Harvey, C.J., Scott, Beck, and Simmons, JJ. February 25, 1915.

NEGLIGENCE (§ II F—120)—*Contributory negligence—Ultimate negligence—Findings of jury.*]—Appeal from judgment of the trial Judge.

ALTA.

S. C.

A. A. McGillivray, for plaintiff.

Jas. Short, K.C., for defendant.

The judgment of the Court was delivered by

HARVEY, C.J.:—We are of opinion that on the findings of the jury, the judgment should be for the plaintiff instead of for the defendant.

The judgment was entered immediately upon the rendering of the verdict without argument, but a careful consideration of the answers seems to lead to the conclusion that it was the negligence of the defendant's servant rather than the negligence of the plaintiff which was the proximate cause of the accident, and that, therefore, the defendant is liable. It is clear that though the first act of negligence of which the jury find the defendant guilty would not have caused the accident if the plaintiff had not himself been guilty of negligence, yet the latter's negligence would equally not have caused the accident but for the subsequent act of negligence of the defendant found by the jury. The only question about which there seemed room for doubt was whether the 5th answer that the defendant's negligence contributed to the accident might possibly refer to the first rather than the second negligence. Having regard to the context of the questions and the order of the trial Judge's charge and the facts of the case, we have no doubt that the answer applies to the second act of negligence.

The appeal is, therefore, allowed with costs and judgment directed to be entered for the plaintiff for $2,000, the amount found by the jury with costs.

Appeal allowed.

GRAND TRUNK R. CO. v. JAMES.

Alberta Supreme Court, Stuart, J. June 30, 1915.

TRADENAME (§ I—9)—*Baggage transfer company—Railway company—Prior use of name—Interim injunction.*]—Application for interim injunction.

George Ross, for the G.T.R. Co.

A. Barrow, for James.

ALTA.
S. C.

STUART, J.:—This is an application by the plaintiff for an interim injunction to restrain the defendant from using the names "Grand Trunk Transfer Company" and "Grand Trunk Baggage Transfer."

It is admitted that the defendant is using these names. It is also admitted by the plaintiffs that the defendant's predecessor in the business carried on by him was using those names at a date prior to the construction of the plaintiffs' line of railway into Calgary.

By statute, 3 Edw. VII. ch. 122, passed in 1903, the plaintiffs, the Grank Trunk Pacific R. Co. were empowered to construct a line of railway all across Canada passing through Winnipeg and Edmonton to the Pacific Coast, and to construct and operate branch lines southerly to Calgary and other places. By the statute 6 Edw. VII. ch. 99, passed in 1906, a company called "The Grand Trunk Pacific Branch Lines Company," one of the plaintiffs, was incorporated with power to construct and operate a railway from a point on the line of the Grand Trunk Pacific R. Co., southward to Calgary. Both of these companies were authorized to build hotels and restaurants and to "carry on business in connection therewith and afford such facilities as may tend to the comfort and convenience of the travelling public."

There is no doubt that this authorized the plaintiff companies to carry on the business of transferring baggage for the travelling public.

I have no doubt that Riddock, who, according to the plaintiffs' affidavits is to be employed in transferring baggage to and from the plaintiffs' station in Calgary is, under the arrangement described to me in his evidence, practically a servant of the plaintiff companies. It is true that he is remunerated at present by the receipt of charges made to the persons whose baggage is carried and not by a salary, but he is bound to do certain things for the company, and its officers for nothing, and the arrangement is determinable by the plaintiffs at any time if his work is unsatisfactory. It is clear that the plaintiffs are carrying on a baggage transfer business by means of this

ALTA.

S. C.

arrangement, and in doing so are merely "affording facilities which may tend to the comfort and convenience of the travelling public," and are acting within the scope of their powers and objects.

The defendant, I think, has taken too narrow a view of the matter in attempting to limit the matter under consideration to the city of Calgary. What he should remember is, that the plaintiff companies are not mere local companies, but are Dominion-wide in their scope, objects and operation. One of the plaintiffs was incorporated in 1903. I should have preferred that the plaintiffs' affidavits had stated formally, though every one knows it to be the fact, that immediately thereafter the Grand Trunk Pacific R. Co. have proceeded to make ready, by prosecuting its enormous enterprise by construction work, to carry on throughout Canada, everywhere where its railway line ran, the business which it was authorized to carry on. Owing to the magnitude of the undertaking it was obviously impossible that they could begin forthwith to carry on a baggage transfer business. Years of construction work had to be done. Can it be said that merely because, owing to the length of time required to get ready, they could not at once commence their business everywhere, any person was at liberty to assume their distinctive name and apply it to a baggage transfer business at some point at which they had announced their intention of constructing their railway line and exercising the powers given them, one of which was that of transferring baggage, and then, on the ground of a prior use of the name, insist that he has at that particular place acquired a prior right? It is quite plain that the defendant or his predecessor did adopt a name which is calculated to mislead the public, and to interfere therefore unfairly with the plaintiffs' business.

But the difficulty I find in granting an injunction upon the material before me, lies in the utter absence of any evidence as to when the defendant, or the persons from whom he bought the business he is carrying on, began to use the words "Grand Trunk" in describing the business. It may be, for all that appears from the material, that they began to use it prior to

ALTA.
S. C.

1903. If that was so, then I think the injunction would be difficult to obtain because the Grand Trunk R. Co. had no authority to build westward, so that there could be no competition, and as to the other plaintiffs, they did not come into existence until after 1903, and the defendant would have a prior right to the use of the name.

The application is dismissed with costs to the defendant in any event on final taxation. But, I think that it is proper to allow the plaintiffs to renew the application on new material.

Application dismissed.

SASK.
S. C.

LACHANCE v. PRICE.

Saskatchewan Supreme Court, Haultain, C.J., Lamont, Brown, and Elwood, JJ. July 15, 1915.

INTERPLEADER (§ I—10)—*Crop of grain—Seed of execution debtor—Land belonging to claimant.*]—Appeal from a judgment for execution debtor.

P. H. Gordon, for appellant.

G. H. Barr, for respondent.

The judgment of the Court was delivered by

ELWOOD, J.:—The learned trial Judge in this matter found that the grain in question was the property of the execution debtor, and not of the claimant, the appellant herein.

The evidence shewed that the land upon which the crop was grown was the property of the claimant; that the seed for the crop in question was furnished by the execution debtor, who put in the crop, harvested it and marketed it.

It was claimed on the part of the appellant that this entire crop belonged to him; that the execution debtor was to receive $600 to $700 for his work, and that this $600 or $700 was to be credited on an indebtedness from the execution debtor to the claimant, and there was some evidence to support this contention. There was also some evidence which, if believed, would go to shew that the grain in question was shipped in the name of the appellant. There was, however, a letter from the company to whom the grain was shipped put on evidence, in which the

execution debtor is referred to as the shipper of the grain, and the bank, in remitting money to the sheriff, referred to this as being on account of the execution debtor. The execution debtor and the claimant are brothers.

It was objected on the part of the appellant that the respondent having called the execution debtor as a witness in his behalf, was bound by the evidence which he gave.

In my opinion, this contention is not correct, and the trial Judge was justified in deciding the case on the whole of the evidence before him. That evidence, in my opinion, was sufficient to justify him in concluding that the alleged agreement between the claimant and the execution debtor, with regard to the crop, was a mere pretext for the purpose of protecting the crop from the creditors of the execution debtor, and that it was never intended that the crop should belong to the claimant, and that, in fact, the crop was the crop of the execution debtor. In my opinion, therefore, the appeal should be dismissed with costs.

Appeal dismissed.

LLOYD v. ASHDOWN.

Saskatchewan Supreme Court, Newlands, Brown, and Elwood, JJ. July 15, 1915.

GARNISHMENT (§ III—68) — *Liquidated demand — Agreement for amount of damages for injuries to animals—Sufficiency of pleading.*]—Appeal from judgment refusing to strike out pleading and to set aside garnishment.

R. Hartney, for appellant.

G. A. Cruise, for respondent.

The judgment of the Court was delivered by

NEWLANDS, J.:—This was an application, under Rule 167, to strike out a paragraph of the plaintiff's statement of claim, on the ground that it tended to embarrass the defendant and delay the fair trial of the action.

The paragraph in question is as follows:—

3. In the alternative the plaintiff says that in or about the month of

SASK.
S. C.

July the defendant caused the death of one black cow by beating her and seriously injured a spotted cow, both belonging to the plaintiff, and the defendant agreed to pay to the plaintiff $85 as the value of the said black cow and $30 on account of the injury to the said spotted cow.

The only ground on which this paragraph could be struck out as embarrassing is, that it does not state the claim sufficiently.

Rule 146 provides that:—

Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party relies for his claim.

Now, does this paragraph state the material facts upon which the plaintiff relies? The defendant says that the consideration for the promise to pay is not set out. The paragraph alleges the promise to pay the plaintiff by the defendant of $85 and $30, and states that the $85 is for the killing of a cow of the plaintiff's by defendant, and the $30 for injuring a cow of the plaintiff's by defendant. The killing of one cow as to one amount, and the injury of another as to the other amount, being the consideration for the agreement to pay. I think the consideration is sufficiently stated and that the paragraph in question sets out a cause of action.

This appeal should therefore be dismissed with costs.

There were two other appeals in this same action which also depend upon the construction put upon para. 3: *Lloyd* v. *Ashdown, and Smith*, garnishee, and *Lloyd* v. *Ashdown and Stuart*, garnishee.

The application in both cases was to set aside a garnishee summons on the ground that the claim was a claim for damages and not a claim for a debt or liquidated demand.

Rule 505 allows the plaintiff in any action for "a debt or liquidated demand" to issue a garnishee summons.

In *Holthy* v. *Hodgson*, 24 Q.B.D. 103, at 108, Lopes, D.J., said:—

What is the test whether a debt is attachable? That it is owing by the garnishee, and that it is a debt of which the judgment debtor can enforce payment if he desire to do so. Applying that test to the present case, there can be no doubt that the damages recovered by the judgment debtor were a debt owing by the garnishee to her of which she could have enforced payment, and that they were an attachable debt within the meaning of Order XLV., r. 1.

SASK.

S. C.

If damages become a debt by a judgment, they become a debt equally by agreement between the parties which fixes the amount, and which amount the defendant agrees to pay.

These appeals should also be dismissed with costs.

Appeals dismissed.

MAN.

K. B.

Re REAL PROPERTY ACT.

Manitoba King's Bench, Prendergast, J. August 19, 1915.

MORATORIUM (§ I—1)—*Extension as vested right—Meaning of foreclosure—Land purchase agreements—Several writings.*]—Appeal by way of petition from the District Registrar.

A. Monkman, for petitioner.

I. Pitblado, K.C., for District Registrar.

PRENDERGAST, J.:—Appeal by way of petition from District Registrar's refusal to register foreclosure order.

1. I fail to see anything in the respondent's conduct which could at all be construed as abandonment under sec. 7 of the first Moratorium Act.

2. The object of the action, whatever the terms of the prayer in the statement of claim, was certainly to have the Court do away with an interest which the defendant had acquired in the land under the agreement, and I take this to be foreclosure in the usual sense and within the meaning of sec. 3 of the same Act.

3. As to whether there is in this case an instrument within sec. 3, and whether as required by the reference in this sec. 3 to sec. 2, the instrument was an agreement to purchase, is a matter of great doubt in my mind. There seems to be an instrument consisting as a whole of the several writings signed by the plaintiff and which would probably constitute a sufficient memorandum to satisfy the statute of frauds in an action brought against him. But whether those writings, none of which are signed by the defendant, constitute an agreement to purchase under said secs. 2 and 3, is a much more difficult and uncertain question.

At the same time, when an agreement for sale is executed by the vendor only, the purchaser although not binding himself in any way, is nevertheless truly and really a party to it. The obligation to sell which the vendor assumes, at once gives rise to a corresponding right which immediately vests in the purchaser. True, as a unilateral contract it binds only one; but it really and

MAN.
K. B.

truly changes the legal status of the purchaser as well as of the vendor, without which it would not be a contract at all. In this sense, it may be said that an agreement for sale implies an agreement to purchase.

This may perhaps appear doubtful and may not commend itself as a warranted departure from the golden rule of interpretation. But to hold a different view in the matter is to be confronted with still greater difficulties; as what appears to be the general scheme of the Act would then be so much disturbed without there appearing any substantial reason why such distinction should have been intended. In short, the spirit of the Act seems to require, in my opinion, that the words "agreement to purchase" should be taken to include an agreement for sale.

It may also be observed, as perhaps of some significance, that the new sec. 2 of the first Moratorium as re-enacted by the last Act, contains the words "agreement to sell or purchase" in lieu of "agreement to purchase" as it stood before.

4. With respect to the second Moratorium. Although this Act was assented to subsequent to the District Registrar's decision, counsel for the latter did not object to its possible effect on the present case being considered. At the same time, even were I inclined towards the petitioner's contention that the second Act repeals the first in such a way as to recall the extension of time held by the District Registrar to exist under the first, I would be loth to act on this appeal as on a distinct application, believing it preferable, considering the nature of the issue, that the petitioner should seek to obtain in the ordinary course, the order which he thinks he is entitled to. I would only say that the extension of time which the defendant derived under the first Act, seems to me to constitute a vested right which the second Act, even in its aspect of a repealing statute, does not do away with. I do not think that *Hough* v. *Windus*, 12 Q.B.D. 224, 230, is applicable here, as there was there a very special saving clause; but *Gwynne* v. *Drewitt*, [1894] 2 Ch. 616, seems to me to be in point.

The application will be refused; but the question being one of general interest on which the District Registrar was represented, there will be no costs.

Application refused.

INDEX

CASES—*continued.*

CASES—*continued.*

CERTIORARI—